

Criminal Procedural Agreements in China and England and Wales

Wei Pei

Criminal Procedural Agreements
in China and England and Wales

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in China en Engeland en Wales

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Promotoren: Prof.mr. F.W. Bleichrodt
Prof.dr. Y. Li

Overige leden: Prof.mr. H. de Doelder
Prof.mr.dr. J.H. Crijns
Prof. J. Hodgson LLB PhD FAcSS

*To my parents,
Pei Chengfu and Li Jialin*

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List of Abbreviations

China

CPC	Chinese Communist Party
MOJ	Ministry of Justice
MPS	Ministry of Public Security
NPC	National People's Congress
PSO	Public Security Organ (police)
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate
SSC	Severe Strike Campaign

England and Wales

ARD	Adult Restoration Disposal
CCRC	Criminal Cases Review Commission
CCSS	Crown Court Sentencing Survey
CID	Criminal Investigation Department
CJSSS	Criminal Justice: Simple, Speedy, Summary
CLRC	Criminal Law Revision Committee
CPA	Criminal Procedural Agreement
CPS	Crown Prosecution Service
CSEW	Crime Survey for England and Wales
DPA	Deferred Prosecution Agreement
DPP	Director of the Public Prosecution
HM	Home Office
KARS	Kettering Adult Reparation Scheme
MPS	Metropolitan Police Service
NAVSS	National Association of Victims Support Schemes
PCMH	Plea and Case Management Hearing
PSR	Probation Service Report
RCPO	Revenue and Customs Prosecutions Office
SGC	Sentence Guideline Council
VOM	Victim-Offender Mediation

List of Main Cases

(Chronically)

China

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- (2010) 渝一中法刑终字第 13 号
- (2011) 西刑一初字第 68 号
- (2012) 浙刑二重字第 1 号
- (2012) 高新刑初字第 407 号
- (2012) 高新刑初字第 407 号
- (2013) 淮刑终字第 00016 号
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- (2013) 南市刑二终字第 188 号
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China

1979 年中华人民共和国刑法 (Revised)

1979 年中华人民共和国民事诉讼法 (Revised)

1982 年全国人民代表大会常务委员会关于严惩严重破坏经济的罪犯的决定 (Abolished)

1988 年全国人大常委会关于惩治贪污罪、贿赂罪的补充规定, 主席令第 63 号 (Abolished)

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1990 年全国人民代表大会常务委员会关于禁毒的决定, 主席令第 38 号 (Abolished)

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1992 年公安部关于修改盗窃案件立案统计办法的通知, 公发[1992]第 12 号 (Abolished)

1993 年中华人民共和国国家安全法, 主席令第 68 号

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2012 年中华人民共和国刑事诉讼法，主席令第 55 号
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2012 年最高人民法院、最高人民检察院、公安部、司法部社区矫正实施办法
2012 年最高人民检察院人民检察院刑事诉讼规则（试行），检释[2012] 第 2 号
2012 年最高人民法院适用《中华人民共和国刑事诉讼法》的解释，法释[2012] 第 21 号
2012 年公安机关办理刑事案件程序规定，公安部令第 127 号
2013 年中华人民共和国行政诉讼法草案
2013 年最高人民法院、最高人民检察院、公安部、司法部关于刑事法律援助工作的规定
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2013 年最高人民法院关于常见犯罪的量刑指导意见，法发[2013] 14 号
2013 年最高人民法院关于人民法院在互联网公布裁判文书的规定，法释[2013] 26 号
2013 年最高人民法院关于建立健全防范刑事冤假错案工作机制的意见，法发[2013] 11 号

England and Wales

Treason Trials Act of 1696
Criminal Law Act 1826
Prisoner’s Counsel Act of 1836
Criminal Law Act 1967 (CLA 1967)
Criminal Justice Act 1972 (CJA 1972)
Police and Criminal Evidence Act 1984 (PACE 1984)
Prosecution of Offences Act 1985 (POA 1985)
Criminal Justice Act 1991 (CJA 1991)
Criminal Justice and Public Order Act 1994 (CJPOA 1994)
Criminal Procedure and Investigations Act 1996 (CPIA 1996)
Crime (Sentences) Act 1997 (CSA 1997)
Powers of Criminal Courts (Sentencing) Act 2000 (PCCA 2000)
Proceeds of Crime Act 2002 (POCA 2002)
Criminal Justice Act 2003 (CJA 2003)
Serious Organized Crime and Police Act 2005 (SOCPA 2005)
Police and Justice Act 2006 (PJA 2006)
Coroners and Justice Act 2009 (CJA 2009)
Code for Crown Prosecutors 2010 (CCP 2010)
Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA 2012)
Crime and Courts Act 2013 (CCA 2013)

Chapter I Introduction

*We cannot sustain a vision of the world in which rights ring out true and clear, unencumbered by the consideration of conflicting claims ... It is the fundamentally compromised nature of social life that interest balancing recognizes and confronts.*¹

1. Development of Agreements in Criminal Procedure

The past decades have witnessed a marked convergence of various practices alongside conventional criminal proceedings containing negotiations and resulting in agreements between suspects or defendants and criminal justice authorities. These agreements, under the heading of ‘criminal procedural agreements’ (CPAs), are the objective of this study. CPA refers to various types of agreement reached between suspects, defendants or offenders (hereinafter ‘offender’ in general) and criminal justice authorities during criminal proceedings where the former agrees to implement certain forms of cooperation in exchange for lenient treatments from the latter.

Before entering into further analysis, two terms need to be clarified: offender, and criminal justice authorities. In this study, ‘offender’ is generally used to describe a person who is accused, charged or convicted of committing certain crimes in criminal proceedings. When it comes to certain stages of the litigation, the corresponding titles such as suspect or defendant would be used. As to ‘criminal justice authorities’, the major authorities in this context are police, public prosecutors, and judges. These authorities may have different official titles in different legal systems, but such differences have little impact as long as the kernel of the tasks and corresponding capacities and responsibilities bestowed to the authorities is the same as for police, public prosecutors and judges.

The cooperation can take the form of an admission of guilt, trading for reduced charges, non-prosecution, or sentence discount; it can be providing intelligence or testifying in court against other criminals or crimes, bargaining for credits in one’s own case; it can also be seeking the forgiveness of the victims by means of an apology, compensation or other activities, or rehabilitating offenders themselves in exchange for lenient treatment. Correspondingly, three major types of CPA are particularly examined: plea agreement, assistance agreement, and restoration agreement.

Under the commonly used name ‘plea bargaining’, plea agreement has a long history in the Anglo-American system and it is a feature of criminal case disposition. Some studies have suggested that the pattern of contemporary plea bargaining has been in existence since the 19th century.² Nowadays mechanisms sharing the essence of plea bargaining have spread to countries with inquisitorial legal traditions like German which was once described as ‘the land without plea bargaining’.³ Assistance agreement has also experienced a similar expansion process and gradually

¹ Jerry L. Mashaw, *Due Process in the Administrative State* (Yale: Yale University Press, 1985), p. 154.

² See Albert W. Alschuler, ‘Plea Bargaining and Its History’, 79 (1) (1979) *Columbia Law Review*, 1-43; Malcolm M. Feeley, ‘Plea Bargaining and the Structure of the Criminal Process’, 7 (1982) *Just. Sys. J.*, 338-354; George Fisher, ‘Plea Bargaining’s Triumph’, 109(5) (2000) *The Yale Law Journal*, 857-1086.

³ In Goldstein’s article he gives a general review on the application of plea bargaining in continental law systems. See Abraham S. Goldstein, ‘Converging Criminal Justice Systems: Guilty Pleas and the Public Interest’, 31 (1997) *Isr. L. Rev.*, 169-182. For single country there are also relative discussions on this issue, see, e.g. John H. Langbein, ‘Land without Plea Bargaining: How the Germans Do It’, 78 (1979) *Mich. L. Rev.*, 204-225; Joachim Herrmann, ‘Bargaining Justice – A Bargain for German Criminal Justice?’, 53 (1992) *U. Pitt. L. Rev.*, 755-776; Markus Dirk Dubber, ‘American Plea Bargains, German Law Judges, and the Crisis of Criminal Procedure’, 49 (1996) *Stan. L. Rev.*, 547-605.

become a common device in many legal systems. As is well documented, the use of assistance agreements can be at least traced back to the eighteenth century.⁴ In common law countries, a series of studies have been conducted to explore the employment of ‘informers’ or ‘informants’ in policing serious crimes like bank robberies.⁵ In the 1990s the use of ‘supergrass’ against terrorist crimes in Northern Ireland became a heated topic.⁶ Later, with the prevalence of such a practice, research gradually covered European countries⁷ and beyond.⁸ The employment of restoration agreement in both accusatorial and inquisitorial systems can be traced back to the period when the boundary of private and public sphere was vague. Its resurgence in modern western society, however, is much a consequence of the rise of restorative justice in the 1970s.⁹ Despite of the worldwide trend of promoting restorative justice, the restoration agreement does not fit in easily with ordinary procedure.¹⁰

The overall expansion of CPAs in adversarial and inquisitorial systems results from the fact that ‘the venerable frontier ... has become increasingly ill-marked, open and transgressed’.¹¹ However,

⁴ See Sir William Holdsworth, *A History of English Law*, Volume XII (London: Methuen & Co Ltd., 1966), p. 514; Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, Volume 2 (London: Stevens & Sons Ltd., 1956), p. 33.

⁵ For research on the use of informers in the American criminal justice, see, e.g., Robert W. Ferguson, chapter 2 of *Nature of Vice Control in the Administration of Justice* (St Paul: West Publishing Co., 1974); David Katz, ‘The Paradoxical Role of Informers Within the Criminal Justice System: A Unique Perspective’, 7(1981) *University of Dayton Law Review*, 51-71; Evan Haglund, ‘Impeaching the Underworld Informant’, 63(1990) *Southern California Law Review*, 1405-1447. For informers in the English system, see, e.g., Eugene O’Scapella, ‘A Study of Informers in England’, March (1980) *Criminal Law Review*, 136-146. For the Australian system, see e.g., Peter Grabosky, ‘Prosecutors, Informants, and the Integrity of the Criminal Justice System’, 4(1992) *Current Issues in Criminal Justice*, 48-63.

⁶ See, e.g., Steven Greer, ‘The Rise and Fall of the Northern Ireland Supergrass System’, Oct.(1987) *Criminal Law Review*, 663-670; *Supergrasses: A Study in Anti-Terrorist Law Enforcement in Northern Ireland* (Oxford: Clarendon Press, 1995);

⁷ See, e.g., Peter Tak, ‘Deals with Criminals: Supergrasses, Crown Witnesses and Pentiti’, 5(1997) *Eur. J. Crime Crim. L. & Crim. Just.*, 2-26.

⁸ See e.g., Nicholas Fyfe and James Sheptycki, ‘International Trends in the Facilitation of Witness Co-Operation in Organized Crime Cases’, 3(2006) *European Journal of Criminology*, 319-355.

⁹ See Randy Barnett, ‘Restitution: A New Paradigm of Criminal Justice’, 87(1977) *Ethics*, 279-301. One pioneer article which motivated high academic interests in restorative mechanisms is Nils Christie, ‘Conflicts as Property’, 17(1977) *British Journal of Criminology*, 1-15. Barnett is considered as one of the earliest scholars using the term ‘restorative justice’. Later this concept was widely researched by scholars such as John Braithwaite and Tony Marshall. See, e.g., John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989); Tony Marshall, ‘The Evolution of Restorative Justice in Britain’, 4(1996) *European Journal on Criminal Policy and Research*, 21-43.

¹⁰ For instance, there was once fierce debate between Philip Pittit and John Braithwaite on the one side, and Andrew von Hirsch and Andrew Ashworth on the other. It began with the former’s book *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: OUP, 1990), which challenged the conventional just deserts theory and proclaimed restorative justice as substitute ideology. Hirsch and Ashworth, two leading retributivists, responding to such an argument, restated the fundamental value of just deserts in criminal justice system, and challenged the fitness of the ‘republican theory’ in the sentencing affairs. See Andrew von Hirsch and Andrew Ashworth, ‘Not Not Just Deserts: A Response to Braithwaite and Pittit’, 12(1992) *Oxford Journal of Legal Studies*, 83-98. Immediately two restorative justice scholars refuted this in Phillip Pettit and John Braithwaite, ‘Not Just Deserts, Even In Sentencing’, 4(1993) *Current Issues Crim. Just.*, 225-239. This debate is still going on, centring the question of whether restorative justice can be coordinated into an existing criminal justice system.

¹¹ Mirjan Damaška, ‘Negotiated Justice in International Criminal Courts’, 2(2004) *Journal of International*

clusters of traits of a given legal system still largely affect the concrete modalities of such agreements as well as their relationship with ordinary procedure.¹² This is particularly apparent when we examine comparatively CPAs in two legal systems that are divergent significantly in social, cultural and political backgrounds.

In China, mechanisms containing legal concessions for cooperating offenders can be traced back to the imperial era. A strong inquisitorial feature overshadowed the old practice, and the rewards for offenders' cooperation expressed mercy in a hierarchical rather than an equal state-citizen relationship. China's current criminal justice system dates back to the resurgence of the legal system in 1979 after ten years of turbulence (1966-1976). During the past decade, China has experienced a swift social transition that has generated new problems such as soaring crime rates and ratcheted up the tensions between citizens and the state apparatus. Cries for justice and a demand for effective crime control not only compelled the government to reform criminal policy from a tendency towards harshness to equilibrium between harshness and leniency, but also stimulated a series of concrete modifications in both substantive law and procedural law. Against this background, devices containing the essence of plea agreement, assistance agreement and restoration agreement have received enhanced attention.

Plea agreement in China is relevant to the mechanisms encouraging offenders' confessions (坦白). During the past ten years, the development of the mutually beneficial exchange based on confession in Chinese criminal proceedings has benefited from several important pieces of legislations. Particularly, Amendment VIII of the 1997 Criminal Law (1997 CL) acknowledged confession as an independent factor for judicial consideration; the 2012 Criminal Procedure Law (2012 CPL) reformed summary procedure to facilitate guilty plea cases; and a series of sentencing guidelines established proportions between confession and judicial concession. In the case of assistance agreements, the cooperation offered by the offender is named 'meritorious service' (立功) in the Chinese legal context. The general framework of encouraging assistance by rewarding concessions from criminal justice agencies has been established in China since the 1979 Criminal Law (1979 CL), and was later further strengthened by relevant sentencing guidelines. Restoration agreements, which emphasize repairing offender-victim relationships, have long been worshipped in Chinese legal traditions under the Confucianism concept of harmony (和). With the establishment of a modernized and professionalized criminal justice system, such mechanisms experienced marginalization during the 1980s and 1990s. However, since the beginning of the 21st century they have re-emerged, been further expanded under the term 'criminal reconciliation' (刑事和解), and gained a legal basis in the 2012 CPL.

Despite the fact that the outlines of all three types of CPAs have been sketched in the current Chinese legal system, the substance of the procedural regulations for each of them still appears to be hollow. Terms like 'agreement' or 'bargaining' are carefully avoided in both policies and legal provisions as they clash with still standing (albeit gradually weakened) inquisitorial traditions.

Criminal Justice, 1018-1039, p. 1019.

¹² About the comparison between accusatorial and inquisitorial modes, see, e.g., Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, (New Haven and London: Yale University Press, 1986); Mireille Delmas-Marty and J. R. Spencer (eds.), *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002); Jacqueline Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial procedure', in Antony Duff *et al* (eds.), *The Trial on Trial, Volume 2: Judgment and Calling to Account* (Portland: Hart Publishing, 2006), pp. 223-242 (in this chapter Hodgson mainly focuses on the comparison between England and Wales and France.); Arie Freiberg, 'Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms', 8(2011) *European Journal of Criminology*, 82-101.

Furthermore, offenders' fundamental procedural rights – the ineluctable prerequisite for CPAs – remain fragile and not integrated into Chinese law. Given the existing legal norms and institutional milieu, the Chinese criminal justice system faces the urgent task of coordinating CPAs and ordinary proceedings.

Compared with China, criminal proceedings in England and Wales have a longer history of implementing agreements between offenders and the criminal justice agencies in various forms. The ingrained accusatorial tradition in the English legal system, as well as its modernization in the criminal proceedings on protecting the offender and restricting the authorities, leads to a relatively equally armed combat between the defense and the prosecution.

The evolution of plea agreement in England and Wales has zigzagged during the past centuries: from being discouraged, to being accepted as a mitigating factor, and then gradually to a fully developed process of negotiation, or, the English version of 'plea bargaining'. This trend has become stronger since the 1990s with a series of revisions in policy, legislation and judicial decisions. As to assistance agreement, the 1970s witnessed its increasing prevalence in the English system as a direct consequence of serious organized crimes, especially bank robberies in and around London.¹³ Its popularity, however, somewhat decreased in the 1980s due to the transferred strategies in criminal gangs, and juries' distrust of policing methods.¹⁴ Nevertheless, doubts about the trade between assistance and legal concessions have been overwhelmed since the 1990s and the assistance agreement gained a statutory basis in the Serious Organized Crime and Police Act 2005 (SOCPA 2005). The rise of the restoration agreement in England and Wales reflects the movement towards restorative justice since the 1970s. It emerged in juvenile cases in an extra-judicial mode with the involvement of victims, relatives and the community. Later, its scope was expanded to adult offenders involved in serious crimes during the post-conviction and pre-sentencing stage, and restorative mechanisms started to be integrated with ordinary proceedings. With the publication of the White Paper *Justice for All* in 2002, the English system initiated a series of experiments to insert restorative schemes into ordinary proceedings, succeeded by several concrete reforms in legislation in the following years.

2. Research Subject

In this study, the research subject is CPA, and clarification is necessary on three issues to avoid confusion around this concept. The first issue is about the choice of the concept. Although similar legal techniques can be identified in different legal systems, they are normally under different titles. This is far more than a linguistic issue as every title may indicate some detailed and specialized traits of a legal regime and reflect further political connotations behind it.¹⁵ For instance, 'criminal reconciliation', the Chinese version of restoration agreement, could hardly be rigidly fixed into an existing English term. Similarly, 'plea bargaining' does not exist in the Chinese or English legal provisions, although is widely referred to in academic research.¹⁶ Therefore, instead of referring to

¹³ Steven Greer, 'Towards a Sociological Model of the Police Informant', 46(3) (1995) *The British Journal of Sociology*, 509-527, p. 520.

¹⁴ Mike Maguire and Tim John, 'Covert and Deceptive Policing in England and Wales: Issues in Regulation and Practice', 4(1996) *European Journal of Crime, Criminal Law and Criminal Justice*, 316-334, p. 330.

¹⁵ Regina Rauxloh, *Plea Bargaining in National and International Law* (Oxon and New York: Routledge, 2012), p. 10.

¹⁶ For instance, John Baldwin and Michael McConville have conducted research on plea bargaining in the English system since the 1970s. See, e.g., John Baldwin and Micheal McConville, *Negotiated Justice: Pressures to Plead Guilty* (London: Martin Robertson, 1977); 'Plea Bargaining and Plea Negotiation in England', 13 (1979) *Law and Society Review*, 287-307; John Baldwin, *Pre-Trial Justice: A Study of Case Settlement in*

existing terminologies in a specific jurisdiction to describe the equivalent legal devices in another, this research adopts ‘criminal procedural agreement’ to cover various types of devices containing mutually beneficial exchange within criminal proceedings.

The second issue is that CPAs are comprehensive procedural arrangements involving not only ‘contractual parties’ but also other stakeholders such as victims. Quite often, the actual roles of these stakeholders in practice depart from those in the legal context and may significantly interfere with the equilibrium between offenders and criminal justice authorities at each end of the scale of negotiation. As Friedman once commented, ‘a living body of law is not a collection of doctrines, rules, terms and phrases. It is not a dictionary, but a culture; and it has to be approached as such’.¹⁷ In this sense, this study makes an effort to examine not only the corpus of written law, but also the ideologies and cultures behind it.

Thirdly, the theoretical categorization facilitates systematic analysis, but in reality plea agreement, assistance agreement and restoration agreement are always interwoven. On the one hand, a guilty plea is quite often a premise for various forms of agreements. The key differences between plea agreement and other forms of CPAs are that in the latter a guilty plea acts only as a basic requirement, and the criminal justice authorities have other major purposes besides efficiency. On the other hand, some legal devices may combine different types of cooperation together through attaching different conditions to the agreement.

To avoid the concept of CPAs becoming all-inclusive and losing most of its relevance, the research scope calls for delicate delineation in two dimensions. To begin with, this study is confined to the coordination between CPAs and ‘ordinary procedure’ that refers to ‘a core of commonly used procedures by which run-of-the-mill offences are invariably dealt with’.¹⁸ Three procedures are accordingly excluded from this study. The first group refers to the special procedures dealing with particular types of crimes. For instance, many legal systems apply a separate judicial system to deal with military offences or offences relevant to terrorism or state security. The second group excluded is the juvenile procedure due to divergent ideologies and approaches. Thirdly, this study is centered on the full-dress first instance proceedings from investigation to sentencing. Other stages such as appealing or execution may be touched upon, but they are not the focus of this research.

In addition, the concept of CPAs can be further clarified by comparing to two relevant concepts. The first is ‘consensual justice’, a model ‘which leaves room, to a greater or lesser extent, for the consent of the parties concerned, whether in a positive form with their acceptance or a negative form in the absence of their refusal’.¹⁹ For CPAs, the consensus on the terms and conditions is a premise of reaching an agreement. In this sense, a CPA falls into the concept of consensual justice. However, these two concepts are also distinguished. One central element of CPAs is the exchange of

Magistrates’ Courts (New York: Basil Blackwell, 1985). In China, research on plea bargaining can be traced back to the 1980s focusing on the American experience. See, e.g., Xu Youjun, 美国刑事诉讼中的辩诉交易 (Plea Bargaining in the American Criminal Litigation), 1 (1987)法学杂志 (*Law Science Magazine*), 36-37; Zhou Yeqian, 美国的司法: 它实际上是如何工作的 (American Judicial System: How Does It Work in Practice), 2(1983) 环球法律评论 (*Global Law Review*), 62-70.

¹⁷ Lawrence M. Friedman, ‘Some Thoughts on Comparative Legal Culture’, in David S. Clark (ed.), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Berlin: Duncker and Humblot, 1990), pp. 49-50.

¹⁸ See John Spencer, ‘Introduction’, in *supra* note 12, Delmas-Marty and Spencer (2002), 1-75.

¹⁹ In Françoise Tulkens and Michel Van de Kerchove, ‘La justice pénale: justice imposée, justice participative, justice consensuelle, justice négociée?’, in Philippe Gérard et al, *Droit négocié, droit imposé ?* (Publications des Facultés universitaires Saint-Louis, 1996), pp. 529-579, cited in Françoise Tulkens, ‘Negotiated Justice’, in *supra* note 12, Delmas-Marty and Spencer (2002), 641-687, p. 644.

benefits between two parties through negotiation. Hence apart from the power to accept or refuse, CPAs further require the capability to conduct reciprocal negotiation and to some extent to influence the terms and conditions of those proposals substantially.

The second relevant concept is 'negotiated justice'. Although quite often used in academic research, 'negotiated justice' has not reached unified connotation yet. In the narrowest sense, 'negotiated justice' and similar concepts such as 'negotiating justice'²⁰ or 'negotiated settlement'²¹ are mainly employed to depict plea bargaining,²² or to refer to the analogous legal apparatus applied in jurisdictions where plea bargaining is rhetorically denied.²³ In a broader sense negotiated justice is sometimes applied to contain the essence of both plea agreement and assistance agreement²⁴. The scope of negotiated justice can even be expanded to restorative justice mechanisms. For instance, Tulkens identified two dimensions of 'negotiated justice': a vertical dimension where the negotiation happens between individuals and criminal justice authorities, and a horizontal dimension between offenders and victims. The former covers both plea agreement and assistance agreement, while the latter mainly refers to victim-offender mediations that are relevant to restoration agreement. From this perspective, the scope of CPA is similar to negotiated justice in the broadest sense.

3. Research Questions

Irrespective of the differences in legal traditions, systematic models and organic structures in criminal justice, China and England and Wales have both developed practices where criminal cases are disposed of by informal, negotiable and mutually beneficial state-citizen cooperation. However, these approaches do not represent ideal solutions to crime but areas of tension where the integrity of the criminal justice system is under challenge. Looking at the overall trend of CPAs and their development in two legal systems, a key question emerges: what is the position of CPAs in criminal justice?

This question remains to date insufficiently answered, but not because of the lack of academic interest in specific types of agreements such as plea agreements. Rather, it is because of a lack of systematic exploration into the common features of these agreements and their dynamic development that old models are transforming whilst new forms are emerging. This research aims to rectify this deficiency by answering three questions. First of all, what is CPA? Secondly, what is the current status of CPAs as well as their relationship with ordinary procedures in China and England and Wales? Thirdly, based on the experience of both legal systems, how and to what extent can the tension areas created by CPAs be coordinated?

To answer these questions, this research compares the historical origins, current legal regimes, motivations and tension areas of each type of CPA in the Chinese and English legal systems in order to identify the important factors that shape and steer the development of CPAs. It does not regard the English system of utilizing CPAs as an ideal model. Rather, the English system is in a dynamic process of adjusting the status of CPAs to serve the purposes of criminal justice. However, there is no doubt that, compared to China, the English system has a longer history of employing CPAs in modern

²⁰ See *supra* note 15, Rauxloh (2012).

²¹ See Thomas W. Church Jr., 'In Defense of "Bargain Justice"', 13(2) (1979) *Law & Society Review*, 509-525.

²² See, e.g., Donald J. Newman and Edgar C. NeMoyer, 'Issues of Propriety of Negotiated Justice', 47(1970) *Denver Law Journal*, 367-407; *supra* note 16, Baldwin and McConville (1977).

²³ See, e.g., Shlomo Giora Shoham *et al* (eds.), *International Handbook of Penology and Criminal Justice*, (Boca Raton: CRC Press, 2008). In this book 'negotiated justice' is used to describe mechanisms which 'bears some resemblance to plea bargaining' in some countries like Germany (p. 545).

²⁴ See *supra* note 11, Damaška (2004). Although the author mainly referred to plea bargaining by using 'negotiated justice', he also included 'crown witnesses' into the discussion.

criminal justice and thus more experience in coordinating CPAs and ordinary procedures. These two premises ensure that mutual learning is possible on the one hand, while China rather than England and Wales would be the main beneficiary of this comparative research on the other hand.

4. Research Methods

A Large part of this study is based on a comparative analysis, and awareness of the difficulties of comparative legal research is necessary. Comparative research requires understanding a foreign legal system, which is 'not a dictionary, but a culture'²⁵ and 'can only be explained from a historical perspective'.²⁶ Precise understanding firstly relies on the linguistic capabilities of the researcher, who is also expected to be culturally fluent.²⁷ It also heavily relies on the capability to translate foreign propositions into one's own language,²⁸ which proved to be a major obstacle in this research. Furthermore, comparative research is strongly affected by the observer's own social and cultural backgrounds. As Legrand once commented, 'objective comparison is impossible, since cultural prejudice can never be overcome'.²⁹ This is particularly true of the present legal study on two time-honored legal systems that have rarely interacted. Lack of familiarity with the observed legal system not only influences the way it is viewed but also shapes the questions of the observer, leading to largely a production rather than pure exploration of answers.³⁰

This study does not intend to muddy the debate on whether 'meaningful comparison' is possible.³¹ Rather, it emphatically bears such challenges in mind to navigate the comparison on the one hand, and reminds the readers of the linguistic defects and cultural prejudices which may affect its findings on the other. Derived from the challenges in comparative legal research are three issues: the aim of the comparison, the sample selection and the comparative methods. Each of these will be discussed below.

Given all those restrictions on the effectiveness of comparative law, the first and most important question relates to the aim of this research. According to Zweigert and Kötz, comparative law mainly serves the following functions:

Comparative law ... extends and enriches the 'supply of solutions' and offers scholar of critical capacity the opportunity of finding the 'better solution' for his time and place ... It dissolves unconsidered national prejudices, and helps us to fathom the different societies and cultures of the world and to further international understanding;

²⁵ *Supra* note 15, Friedman (1990), p. 52.

²⁶ Nils Jansen, 'Comparative Law and Comparative Knowledge', in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford and New York: OUP, 2006), 305-338, p. 339.

²⁷ Mitchel de S.-O.-l'E. Lasser, 'The Question of Understanding', in Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003), 197-239.

²⁸ See Pierre Legrand, 'How to Compare Now', 16(1996) *Legal Studies*, 232-242.

²⁹ Pierre Legrand, 'Comparative Legal Studies and Commitment to Theory', 58 (1995) *The Modern Law Review*, 262-273, p. 266.

³⁰ See Jacqueline Hodgson, 'Comparing Legal Cultures: the Comparativist as Participant Observer', in David Nelken (ed.), *Contrasting Criminal Justice: Getting from Here to There* (Aldershot: Ashgate, 2000), 139-156.

³¹ For the negative arguments, see, e.g., Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Athens and London: University of Georgia Press, 1974). See also Mathias Reimann's analysis on both the progress and failure of comparative law in 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century', 50(2002) *The American Journal of Comparative Law*, 671-700.

*it is extremely useful for law reform in developing countries; and for the development of one's own system the critical attitude it engenders does more than local doctrinal disputes.*³²

This research aims to contribute to the discussion about the relationship between various types of agreements in criminal proceedings and ordinary procedure, and to improve the Chinese criminal justice system by examining a foreign legal system. The functions mentioned previously are particularly valuable for the Chinese legal system. On the one hand, 'comparative legal studies are ... indispensable for countries ... which reconstructed their legal systems'.³³ Following the Cultural Revolution between 1966 and 1976, China has had less than forty years for China to rebuild its criminal justice system. Despite the ingrained legal beliefs rapid social transformation has brought up unprecedented challenges that cannot be solved through traditional and domestic approaches. On the other hand, the lively interaction and exchange on legal topics and the globalization of legal norms and ideologies make legal isolationism 'no longer an option',³⁴ urging China to construct a platform for engaging in international communication.

Searching for 'a supply of solutions' is not necessarily synonymous with searching for superior legal norms and practices. Instead, it means looking for an experienced and well-researched counterpart to provide lessons, either positive or negative, to aid the domestic legislator. This brings us to the second issue: the selection of a comparative sample. In this research the criminal justice system in England and Wales was chosen as a counterpart for the following reasons.

To begin with, as mentioned earlier, the English system has a relatively longer history of implementing various types of agreements between offenders and criminal justice agencies. Using Zweigert and Kötz's words, on this research subject the English law is a 'parent system'.³⁵ Practice as such is accompanied by abundant legislative documents, official and non-official research, numerous judicial decisions, sufficient and consistent databases and deep academic exploration. These advantages undoubtedly facilitate a better understanding of certain fundamental and theoretical issues concerning CPAs, and meanwhile provide a relatively complete reference for the intended comparison.

The second consideration has to do with the dynamic evolution of CPAs in the current legal system. Despite its long history, the criminal justice system in England and Wales is still exploring the proper format for coordinating CPAs and ordinary proceedings. It also constantly generates new modes of agreement in response to phenomena hitherto unknown. The deferred prosecution agreement (DPA) introduced in the Crime and Court Act 2013 (CCA 2013) is a typical example of this. An equivalent dynamic movement also exists in China. A comparison can help legislators in both legal systems to adjust to the contemporary legal and institutional milieu by referring to each other's concerns, methods, experiments and processes.

The third consideration concerns the convergence of accusatorial and inquisitorial characteristics in both systems. Commentators have noticed such convergence in the English criminal

³² Konard Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 2nd Edition (New York: OUP, 1998), p. 15. Scholars may rephrase these functions in various forms but meanwhile share core essence. For instance, Joseph Kamba summarized the functions of comparative legal studies into six groups: (1) academic studies; (2) legislation and law reform; (3) judicial process; (4) unification and harmonization; (5) international law; and (6) international understanding. Walter J. Kamba, 'Comparative Law: A Theoretical Framework', 23(1974) *International and Comparative Law Quarterly*, 485-519, p. 490.

³³ *Ibid*, Zweigert and Kötz (1998), p. 17.

³⁴ Richard S. Frase, 'Main-Streaming Comparative Criminal Justice', 100(1998) *West Virginia Law Review*, 773-798, p. 792.

³⁵ For the rule of thumb in sample selection, see *supra* note 32, Zweigert and Kötz (1998), pp. 38-40.

justice system.³⁶ The trend has become more apparent with the influence of the European Court of Human Rights (ECtHR) that combines traits of both the accusatorial and the inquisitorial system.³⁷ The narrowing of the dichotomy in China became apparent in the 1996 Criminal Procedure Law (1996 CPL) which was deemed a turning point, from the traditional inquisitorial approach to adversarial measures.³⁸

A final issue related to the limitations of comparative legal studies concerns the question as to how to better overcome the observer's bias in this research. To achieve this task, this research does not confine itself to comparing legal doctrines. Rather, it employs complementary approaches to disclose the logic of the development for every agreement in each jurisdiction, as well as semi-structured field studies to clarify certain issues where other materials are not available.

Furthermore, this research does not limit itself to legislative rules or propositions although they are the main object of comparative legal studies. The scope of the materials is largely defined by the fundamental questions of what law is and how to understand law. Again, this research does not focus on the philosophical debate on the ontology of law. Rather, it builds on the footing that 'law is an indissoluble amalgam of historical, social, economic, political, cultural, and psychological data',³⁹ and 'a deep understanding of a legal order, of an experience of law ... is simply not to be found in legislative texts and in judicial decisions'.⁴⁰ Accordingly, the material examined in this research covers not only legal provisions and judicial decisions (mainly in the form of verdicts) but also government policy documents, official data and reports, academic literature and online debates.

5. Structure of the Thesis

In his research Kamba recommended three main phases to conduct comparative legal research: a descriptive phase, an identification phase and an explanatory phase.⁴¹ This research follows this structure with slight modifications. Apart from the introduction and conclusion, the thesis contains four chapters.

Chapter II clarifies the concept of CPA and explores its nature. It begins with the conceptualization of CPA by establishing a pure model for various types of agreements and examining the relevant variants of such a model in criminal procedure. The pure CPA model reveals the kernel of those agreements and sets the premise for a systematic analysis of the relationship between CPAs and ordinary procedure conducted in the following chapters. Based on that model, the concept of CPA is further clarified by categorizing CPAs based on the nature or content of the offender's cooperation, examining the parties participating in and affected by the contractual

³⁶ See e.g., Jacqueline S. Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain', 35(2009) *NCJ Int'l L. & Com. Reg.*, 319-362.

³⁷ See John D. Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes', 68(2005) *The Modern Law Review*, 737-764.

³⁸ See e.g., Mike P.H. Chu, 'Criminal procedure reform in the People's Republic of China', 18(2000) *Pacific Basin Law Journal*, 157-210; Sida Liu and Terence C. Halliday, 'Recursivity in Legal Change', 34(2009) *Law & Society Inquiry*, 911-950 (In this research the authors acknowledged the efforts towards an accusatorial system in legal provisions. Yet these efforts failed to be implemented in practice); Randall Peerenboom, 'What Have Learned About Law and Development? Describing, Predicting and Assessing Legal Reforms in China', 27(2005) *Michigan Journal of International Law*, 823-871 (the author noticed the rapid shift away from an inquisitorial to an adversarial system and considered such transformation to be over-hasty due to the absence of public support).

³⁹ *Supra* note 28, Legrand(1996), p. 236.

⁴⁰ *Ibid*, Legrand (1996), p. 235.

⁴¹ See *supra* note 32, Kamba (1974).

relationship, and exploring the goals of three major types of agreements. Based on the former sections, this chapter further analyzes the conditions for the existence of CPAs from a theoretical perspective with the purpose of revealing the nature of such mutually beneficial cooperation. Three groups of conditions are examined here: possibility – the bargaining power of the state and the offender, necessity – the need for cooperation by state and offender, and feasibility – the relationship between CPAs and ordinary procedures and their coordination.

In the next two chapters the current status of CPAs is examined in the Chinese and English legal systems. Chapter III discusses the legal and institutional frameworks of three types of CPAs in the Chinese criminal justice system. In the first three parts, plea agreement, assistance agreement and restoration agreement are examined respectively from the perspectives of historical evolution, current legal regimes, motivations and potential tension areas. Based on the descriptive analysis, part five moves on to analyze the characteristics of CPAs in the Chinese legal system.

Chapter IV describes the current CPA system in England and Wales, and examines the way in which the English criminal justice system coordinates ordinary criminal proceedings and the three types of CPAs. Each agreement is analyzed from parts two to four in a structure corresponding to Chapter III. Part five examines the overall trend of CPAs concerning their status in criminal justice and responses from criminal justice agencies.

Chapter V moves on to explore how and to what extent the two legal systems can benefit from each other's experience in coordinating CPAs and ordinary procedures. It begins with laying a foundation and setting the boundaries for a mutual learning process by referring to David Garland's 'penal state' theory. Within this framework, the similarities, differences and major tension areas of the three major types of CPAs are examined respectively in the following three parts. Based on these two steps, the last part explores concrete procedural rules for coordinating the tension areas. The coordination is structured in accordance with the objectives that a state expects to achieve through criminal procedures. Conflicts identified in step two are distributed correspondingly to each objective and concrete coordinating measures are proposed.

Based on former Chapters, conclusions are drawn in Chapter VI with respect to the questions of what CPA is and what the status of CPAs in each legal system and comparatively. It further provides policy recommendations with the purpose of improving CPAs in the Chinese criminal justice system.

Chapter II Conceptualizing CPAs: Model, Elements, and Nature

1. Introduction

The expression ‘agreement’ would seem at first sight to be paradoxical as a part of criminal law. Indeed, the state-monopolized operation of criminal law conveys a sense of transcendence. When a crime is detected or reported, and suspicion against certain individual(s) is confirmed, the task of solving crimes is supposed to be carried out by legal professionals following the ‘due process’,¹ and fixed penal consequences would be validated when people fall into certain terms of the commands expressed in criminal law.²

This paradigm reflects the key factors in the administration of criminal justice, such as the power and responsibility of the criminal justice authorities and other participants, the legality of their function, and the safeguards that they offer to society. The monopolized and unilateral model of power operation in turn shapes ‘both the legal principles and legal profession with respect to issues such as the specialization of attorneys, the definition of procedural rules, and the division of authority among courts’.³

Be that as it may, situations occur in criminal procedures whereby penal decisions are delivered in a cooperative and negotiable manner through mutual cooperation and legal concession. By exchanging cooperation and legal concession, agreement, which is a concept more commonly used in a civil rather than a criminal scenario, enters into the territory of criminal law and its process.

This chapter aims to establish the conceptual basis for this study, and to explore the nature of CPA with a particular focus on its relationship with ordinary procedure. Accordingly, the discussion begins with conceptualizing CPA in the criminal justice scenario in order to establish the pure theoretical model of this mechanism and to identify its variants. After that, the concept is further clarified in sections three to five by examining three aspects: categorization, parties and stakeholders, and goals. Section six moves on to explore the nature of CPA by analyzing the theoretical conditions for its very existence with an eye to the public law nature of criminal justice. Three steps are taken to achieve this. Step one identifies the bargaining power of the state and that of the offender. Step two examines the necessities for both parties to conduct the mutually beneficial exchange. Based on the first two steps, the third step examines the particular features of CPAs by making reference to ordinary procedure, and subsequently, explores the feasibility of coordination of the two paradigms.

2. The Pure Model and Its Variants

¹ The term ‘due process’ is one usually contrasting itself with another term ‘crime control’, which are two models of criminal process according to Packer’s category. However, before Packer distinguishes the two terms, ‘due process’ is already used by scholars to describe the proper procedural protection, and the two models are actually indispensable when describing and designing criminal process, and fundamental rules and principles based on ‘due process’ are accepted by, if not all, most of the countries trying to modernize their legal system. See Herbert L. Packer, ‘Two Models of the Criminal Process’, 113(1) (1964) *University of Pennsylvania Law Review*, 1-68; ‘The Aims of the Criminal Law Revisited: A Plea for a New Look at “Substantive Due Process”’, 44 (1970) *Southern California Law Review*, 490-498.

² Henry M. Hart, ‘The Aims of the Criminal Law’, 23 (1958) *Law & Contemp. Probs.*, 401-441, p. 402.

³ Kenneth Mann, ‘Punitive Civil Sanctions: The Middleground between Criminal and Civil Law’, 101(8) (1992) *The Yale Law Journal*, 1795-1873, p. 1797.

To conduct this research, the first task is to clarify the concept ‘criminal procedural agreement’, the context in which it takes place, and its relationship with other similar approaches within the criminal justice system. This concept defines not only the research subject but also the research scope. In this process, relevant variants are included into the research scope, while irrelevant criminal procedural mechanisms are filtered out. In this section the concept of CPA is examined through four steps. The analysis begins with the concept of ‘agreement’ to identify the basic elements of a CPA. Step two situates the concept of an agreement into the criminal justice scenario and examines how such context further modifies the basic elements. The third step identifies some additional conceptual elements by making reference to the concept of ‘contract’. Based on the former three steps, the pure model of CPA and its possible variants that constitute the scope of this study are depicted in step four.

2.1 Basic Elements of An Agreement

To answer the question ‘what is a criminal procedural agreement’, one needs to start from an even more fundamental question: what is an agreement? From a legal linguistic perspective, Black’s Law Dictionary defines an agreement as ‘a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons’.⁴ According to this definition, to be an agreement, three key elements are indispensable. First of all, at least two parties should be involved in such a relationship. Secondly, there should be a ‘mutual understanding’ or ‘mutual assent’ between those parties. Thirdly, the content of such an understanding or assent is the ‘rights and duties’ of these parties that are relevant to their performances.

As an agreement, the concept of CPA should also contain these three key elements. In this mechanism, there are two fundamental parties involved: one is the offender, and the other is the criminal justice authority. A mechanism without any of these parties cannot be deemed as a CPA. It should be noted that this is an ideal framework of CPA, and it does not rule out the possibility that other parties may be also involved in this mechanism or even play a significant role in the negotiation process.

In addition, there should be mutual assent between the parties. It can be understood from two aspects. On the one hand, after the interaction between two parties, there should be assent on some arrangement. On the other hand, such assent is expected to be ‘mutual’. This means that assent should be offered by both parties on the same arrangement. In this sense, mutual assent is more than merely an outcome; more importantly, it is also a process for parties to reach common understanding of the content of the assent. Accordingly, any mechanism without the element of ‘mutual assent’ can hardly be deemed as a CPA. For instance, situations where penalties are imposed independently by criminal justice agencies without referring to the offender’s opinions do not satisfy the definition of CPA.

Furthermore, the subject on which parties mutually agree in a CPA is the distribution of rights and obligations. For offenders, their obligation is to provide cooperation that is specified in the agreement, and their right is to obtain legal concessions, which are also specified in the agreement. For criminal justice agencies, the situation is reversed with obtaining cooperation as a right, and providing legal concessions as an obligation.

2.2 Context in Which CPAs Take Place

⁴ Bryan A. Garner *et al* (eds.), *Black’s Law Dictionary* 9th Edition (Wisconsin: West Publishing, 2009), p. 78.

At this stage, one can already appreciate the similarities between a CPA and a contract, and both of them are sub-concepts of 'agreement'. In fact, the analogy is frequently used in academic studies to describe some criminal law devices, especially in the case of plea bargaining.⁵ Common approaches used in these studies are either blurring the boundary between civil and criminal legal contexts, or expanding the connotation of 'contract' used in a scenario of private transaction. These approaches, however, have received fierce opposition from several directions. For instance, in confronting Posner's broad use of 'contractual freedom' even in the penal field, Alschuler debated that such argument omitted the limitation set by paternalism and was likely to violate the intuition of human beings on justice.⁶ Schulhofer also challenged the analogy, based on the absence of conditions that are necessary for welfare-enhancing transactions such as willingness and fairness.⁷ Furthermore, Lippke argued that contract theorists had not established convincing grounds for parties to 'trade in goods to which they are not morally entitled'.⁸

What can be observed in these debates is that despite the resemblance between the two concepts, a CPA takes place in a quite different legal context. It is not merely an agreement; it is an agreement implemented in a criminal justice scenario and operated correspondingly in a criminal justice way. Within such a context, a CPA has two intrinsic attributes that may distinguish it from a contract in a civil law context. First of all, there is a preset imbalance in power between the two fundamental parties of a CPA, that is, offenders on the one hand, and criminal justice authorities on the other hand. Secondly, whether to charge and how to punish, which are the core issues of criminal justice, are indispensable in the content of a CPA. Based on it, mechanisms that merely focus on non-criminal issues such as financial compensation are excluded.

2.3 Additional Elements by Referring to 'Contract'

The context in which CPAs take place may prevent the direct use of 'contract' especially in legitimizing such a mechanism. But this does not lead to the conclusion that the contractual elements could not be useful in clarifying the concept of CPA. The definition of agreement provides merely basic elements for a CPA, and the concept of contract can offer some additional elements to further clarify CPAs. Atiyah described 'a typical contract' as:

[It] is, first, a bilateral executory agreement. It consists of an exchange of promises; the exchange is deliberately carried through, by the process of offer and acceptance, with the intention of creating a binding deal. When the offer is accepted, the agreement is consummated, and a contract comes into existence before anything is actually done by the parties.⁹

Derived from this description are three additional elements that are crucial to a contract and also indispensable for a CPA: individual autonomy, mutuality, and bargaining.

⁵ Representative works on this issue include Thomas W. Church Jr., 'In Defence of "Bargain Justice"', 13(2) (1979) *Law & Society Review*, 509-525; Frank H. Easterbrook, 'Criminal Procedure as a Market System', 12(2) (1983) *The Journal of Legal Studies*, 289-332; Robert E. Scott and William J. Stuntz, 'Plea Bargaining as Contract', 101(8) (1992) *The Yale Law Journal*, 1909-1968.

⁶ Albert W. Alschuler, 'The Changing Plea Bargaining Debate', 69(3)(1981) *California Law Review*, 652-730, pp. 695-703.

⁷ Stephen J. Schulhofer, 'Plea Bargaining as Disaster', 101(1992) *The Yale Law Journal*, 1979-2010.

⁸ Richard L. Lippke, 'Plea Bargains as Contracts', in *The Ethics of Plea Bargaining* (Oxford: OUP, 2011), pp. 167-190.

⁹ P. S. Atiyah, *Essays on Contract* (Oxford: OUP, 1986), pp. 11-12.

The concept of contract is basically and essentially built on individual autonomy. It focuses on the self-determination in voluntarily entering into legally binding agreements.¹⁰ This element is missing from the definition of an agreement but is crucial for the legality and validity of a CPA, as the mutual assent between the unbalanced parties should be achieved based on their free will, especially the offenders'. However, as it has been acknowledged in contract theories that the freedom is not absolute,¹¹ the individual autonomy in CPAs also has limits which are largely and primarily due to the public law nature of criminal justice. Therefore when talking about individual autonomy in CPA, it is not a question of whether or not it exists, but a question of to what extent it exists.

The next important contractual element for CPA is the exchange of promises, which essentially emphasizes the characteristic of mutuality in such an exchange. In the situation of CPA, both parties involved in the agreement are supposed to make offers to the counterparty. Consent given by a single party without receiving considerations from the other party cannot be deemed as a CPA. For example, when a citizen gives his informed consent to a warrantless police search, this consent does not lead to a CPA since a mutually-beneficial relationship does not exist in this or other similar scenarios.

Thirdly, by emphasizing the process of offer and acceptance, reaching a contract consists of a bargaining process. As Barnett once commented, in this process 'it is not what is bargained for that is important; what solely matters is that each person's promise or performance is induced by the other's'.¹² In this sense, in CPAs there should be some options that are available to the parties, and reasonable opportunities for them to negotiate. Mechanisms providing no alternatives, such as a compensation order imposed by judges, can hardly be included into the concept of CPA even if the defendant gets sentencing reductions.

2.4 Pure Model and Its Variants

Given the elements mentioned above and the context in which CPAs take place, a pure model for various types of agreements in the field of criminal justice can be developed. In this model, a CPA refers to a mutually-beneficial agreement, reached during the administration of criminal justice, mainly between offenders and criminal justice authorities, where the former offers various forms of cooperation in exchange for lenient treatment from the latter.

This model is the core subject of this study. However, the research scope also touches upon mechanisms that feature the mutually beneficial cooperation between offenders and criminal justice authorities but cannot rigidly fit into the pure model. Examination of these mechanisms helps to understand not only the nature of the cooperation in the form of agreement, but also the evolutionary process of the pure model and the logic embedded in such a process. To a large extent, the variants of the pure model are indispensable in this study with respect to the fundamental question of 'what is CPA'.

Variants of the pure CPA model may be touched upon with in this study for three reasons. To begin with, the specific form and functionality of CPAs in a legal system cannot be isolated from the overall institutional environment that is further ingrained in the historical and cultural backgrounds of

¹⁰ Thomas Gutmann, 'Theories of Contract and the Concept of Autonomy', paper presented at the Zvi Meitar Cewnter for Advanced Legal Studies, March 6, 2013, available at http://www.uni-muenster.de/imperia/md/content/kfg-normenbegruendung/intern/publikationen/gutmann/55_gutmann_-_contract_and_autonomy.pdf. Accessed 17 December 2014.

¹¹ For a broad discussion on this issue, see Michael J. Trebilcock, *The Limits of Freedom of Contract* (Massachusetts: Harvard University Press, 1997).

¹² Randy E. Barnett, 'A Consent Theory of Contract', 86(1986) *Colum. L. Rev.*, 269-321, p. 287.

a society. For instance, the distinction between the inquisitorial and adversarial legal traditions may influence the identity, institutional capacity and concerns of the offender and the public prosecutor as well as their interactions. Therefore some modalities of CPAs existing in one legal system may be absent or function differently in another.

Secondly, although the pure model identifies the basic elements of being a CPA, it does not measure the extent to which these elements can be amplified, reduced or altered. Take the bargaining element as an example. The pure model of CPA emphasizes merely the bargaining process rather than the extent and the content of the bargaining. Therefore, at one extreme of a spectrum, a CPA can be transformed into a 'standard form contract' and the bargaining is merely 'take it or leave it'.¹³ A typical situation of such is conditional caution where the offender can hardly bargain with the public prosecutor on the terms and conditions of the arrangement. Another example is that although the pure CPA model recognizes the offender and the criminal justice authorities as two fundamental parties, it does not exclude the possibility that other parties such as victims may also participate in the bargaining process and even have substantial influence on the final consideration given by the criminal justice authorities. From another perspective, this model also does not deny the situation that a party, such as the judge, that is fundamental in one type of CPA or in one legal system, may play a less influential or different role in another.

Furthermore, it is worthy of notice that CPAs are not created in a vacuum. Rather, their development is a dynamic process from the scattered legal practices in individual cases to the gradually formalized legal rules with general binding forces. Especially under the principle of legality, procedural rules for processing criminal cases as well as the substantial consequences of such process should be clear, ascertainable and non-retrospective.¹⁴ Therefore in the case of CPA it is likely that the bargaining process and the terms and conditions of the daily negotiations are gradually substituted by clear and relatively fixed legal rules. In this context, a case-by-case negotiation can be replaced by routines and the direct bargaining process between offenders and criminal justice authorities may appear to be unnecessary.

Given all these three reasons, one needs to always bear in mind three issues. First of all, the pure model of CPAs can have different forms in reality. Secondly, there are intrinsic links between CPAs and other criminal justice mechanisms that emphasize state-citizen cooperation variants. Thirdly, the development of CPAs is a process that consists of different stages. The transformation between CPAs and the variants and between different stages is a continual and dynamic spectrum without clear turning points.

3. Categorization: From the Offender's Perspective

The categorization of various agreements in criminal procedure is to a large extent a personal observation and summary of literature, practice and individual experience, serving the personalized research purposes. Accordingly, different studies adopt different criteria. For instance, Tulkens categorized 'negotiated justice' based on the manner in which two parties are correlated in ordinary procedure: a horizontal negotiation between offenders and victims, and a vertical negotiation between

¹³ See, e.g., Mirjan Damaška, 'Negotiated Justice in International Criminal Courts', 2(2004) *Journal of International Criminal Justice*, 1018-1039. Damaška distinguished the exchange between concessions and offenders' cooperation into two types: one is the 'fixed offers of concessions on "take it or leave it" basis', and the other is 'to negotiate with defendants over benefits'.

¹⁴ For general discussion on the principle of legality in criminal justice field, see Gabriel Hallevy, *The Modern Treaties on the Principle of Legality in Criminal Law* (Heidelberg: Springer, 2010).

offenders and legal authorities.¹⁵ The Chinese scholars Bian Jianlin and Feng Liqiang examined agreements between the public prosecutor and the offender and, based on the reasons of the former to terminate criminal procedure, summarized these agreements into three groups: mercy (宽宥型) for the offender's remorse or rehabilitation, cooperation (合作型) for the offender's collaboration in solving organized crimes, and compromise (妥协型) for the offender's self-incrimination on part of the charges.¹⁶

Categorizations are primarily used to match with the author's findings in selected jurisdictions rather than the other way round. Three implications can be drawn from this premise. To begin with, a categorization that appears to be all-inclusive in one study may not prove to be so in another. For instance, by adding the horizontal dimension, Tulkens' definition of 'negotiated justice' is relatively broader than previous studies.

Secondly, the criteria adopted in one category may appear to be disconnected, inconsistent or overlapping when viewed from another perspective. For instance, in Tulkens' approach, the only nexus between the two dimensions seems to be negotiation. However, the substantial differences between two groups in participants, purposes, functional mechanisms and values make it difficult to systematically analyze the impact of these agreements on the criminal justice system. As to Bian and Feng's approach, the three attitudes of the justice authorities are difficult to identify or distinguish in a specific type of agreement.

Furthermore, categorization is generally based on authors' contemporary observation and personal knowledge. Yet, the criminal justice system is dynamic, and it is likely that new situations will emerge which do not fit existing category. For instance, academic studies in the 1970s rarely incorporated victim-offender reconciliation with the concept of 'negotiated justice' but mainly focused on plea bargaining alone.

Given the above, the categorization in this research is also bound to, and dependent on, personal observations in the selected samples – China and England and Wales – and serves to answer the core research questions. Therefore it is neither exhaustive nor exclusive. Even so, objectivity and consistency are employed as thresholds in selecting criteria for categorization. The major similarity of previous studies on agreements in criminal justice is that the offender is undoubtedly one of the contractual parties. Therefore, consistency can be better guaranteed from the offender's perspective. As to objectivity, a person's act that can be easier observed, recorded and evaluated, and therefore it can satisfy this threshold better than attitudes or purposes which are difficult to perceive, describe or assess. With these considerations, in this study the offender's contractual obligation is used as a criterion, and CPAs are accordingly categorized into three types: plea agreement, assistance agreement, and restoration agreement.

3.1 Plea Agreement

When talking about agreements reached between criminal justice authorities and offenders, the mechanisms involving the exchange of concessions and the admission of guilt constitute one of the most widely researched areas. This is to a large extent the result of the prevalence of plea bargaining in the Anglo-American legal system and its profound impact on legal practice in other parts of the world. In this study, all those mechanisms featuring agreements where the offender offers a guilty

¹⁵ Françoise Tulkens, 'Negotiated Justice', in Mireille Delmas-Marty and J. R. Spencer (eds.), *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002), pp. 641-687, p. 673.

¹⁶ See Bian Jianlin and Feng Liqiang, 构建刑事和解的中国模式 (Constructing the Chinese Version of Criminal Reconciliation), in Bian Jianlin and Wang Li (eds.), 刑事和解与程序分流 (*Criminal Reconciliation and Procedural Diversion*) (Beijing: PHCPPSU, 2010), 1-19.

plea or confession in exchange for concessions from the criminal justice authorities are classified under the first category of CPAs: plea agreement.

The connotation of plea agreement can be illustrated by referring to its sub-concept, that is, plea bargaining. Alschuler describes plea bargaining as an agreement that ‘consists of the exchange of official concessions for a defendant’s act of self-conviction’. These concessions may relate to the sentence imposed by the court or recommended by the prosecutor, the charged, or a variety of other circumstances; they may be explicit or implicit, and they may proceed from any of a number of officials.¹⁷

Alschuler’s description indicates that the modalities of plea agreements are highly diversified. For instance, according to the ‘consideration’ offered by criminal justice agencies, three types of plea agreements can be identified: sentence bargaining, charge bargaining, and fact bargaining.¹⁸ When referring to the criminal justice agencies involved in the bargaining process, plea agreements can also be categorized into ‘judicial plea bargaining’, ‘prosecutorial plea bargaining’, and ‘implicit/tacit plea bargaining’.¹⁹

The plea agreement has long been a subject of controversy. From the proponent’s perspective, plea agreements are primarily deemed to be a product of the ever growing caseload pressure,²⁰ the ‘professionalism’ in criminal justice, or the complexity of criminal procedure.²¹ Meanwhile, ‘social contextualism’ lays the foundation of explanation on a ‘wider context ... from a class-based analysis in which discretion and leniency are utilized in order to secure obeisance to and the authority of a ruling propertied elite to another which points to structural changes in the role and purpose of the courtroom actors and the local state’,²² or the ideology of ‘system transformation/aggregate justice’.²³ Scholars have also attempted to justify plea agreements from contractual theory²⁴ or

¹⁷ See Albert W. Alschuler, ‘Plea Bargaining and Its History’, 79(1) (1979) *Columbia Law Review*, 1-43. Since the 1970s Alschuler have studied several aspects of plea bargaining, especially focusing on the roles and functions of legal professionals in the bargaining process in United States. See, e.g., ‘The Prosecutor’s Role in Plea Bargaining’, 36(1) (1968) *The University of Chicago Law Review*, 50-112; ‘The Supreme Court, the Defense attorney, and the Guilty Plea’, 47 (1975) *U. Colo. L. Rev.*, 1-72; ‘The Defense Attorney’s Role in Plea Bargaining’, 84(6) (1975) *The Yale Law Journal*, 1179-1314; ‘The Trial Judge’s Role in Plea Bargaining’, 76(7) (1976) *Columbia Law Review*, 1059-1154. Some scholar’s definition adds into the element of ‘the defendant relinquishes the right to go to trial’ (see *supra* note 5, Scott and Stuntz (1992), p. 1909.), but this is not necessary when examining the practice in jurisdictions other than the United States, like the England and Wales and German. See Sanders Andrew *et al*, *Criminal Justice*, 4th Edition (Oxford: Oxford University Press, 2010).

¹⁸ *Ibid*, Sanders *et al* (2010); see also Joan Petersilia and Kevin R. Reitz (eds.), *The Oxford Handbook of Sentencing and Corrections* (Oxford: Oxford University Press, 2012).

¹⁹ Matthias Boll, *Plea Bargaining and Agreement in the Criminal Process: A Comparison between Australia, England and Germany* (Hamburg: Diplomica Verlag GmbH, 2009).

²⁰ In his analysis Herrmann draws the conclusion that ‘like American plea bargaining, [German’s plea bargaining] is mainly a consequence of over-burdened criminal justice system’. Joachim Herrmann, ‘Bargaining Justice – A Bargain for German Criminal Justice?’ 53 (1991) *U. Pitt. L. Rev.*, 755-776, p. 755. See also *supra* note 17, Alschuler (1968).

²¹ Representative articles see Malcolm M. Feeley, ‘Plea Bargaining and the Structure of the Criminal Process’, 7 (1982) *Just. Sys. J.*, 338-354; ‘Legal Complexity and the Transformation of the Criminal Process: the Origins of Plea Bargaining’, 31 (1997) *Isr. L. Rev.*, 183-222; George Fisher, ‘Plea Bargaining’s Triumph’, 109(5) (2000) *The Yale Law Journal*, 857-1086.

²² Mike McConville and Chester L. Mirsky, *Jury Trials and Plea Bargaining: A True History* (Oregon: Hart Publishing, 2005), p. 8. This book presents the reader with the two major influential arguments on the explanation of plea bargaining, and argues against both through historical review of the relationship between plea bargaining and jury trial, and proposes a theory of system transformation/aggregate justice.

²³ *Ibid*.

economic analysis.²⁵ For instance, by comparing plea bargaining to ‘voluntary commercial transactions’, Grossman and Katz acknowledged the function of plea bargaining in promoting social welfare in three aspects: conserving economic resources, functioning as an insurance device for innocent defendants and the state, and providing appropriate punishment of the guilty.²⁶ Efforts have also been made to justify plea bargaining as ‘coming to fulfill rather than defeat adversary principles’.²⁷

Despite these justifications, plea agreements have long been criticized for their violation of the public nature of criminal justice,²⁸ the opacity of the process,²⁹ the disregard for the interests of victims and society,³⁰ the seduction for legal professionals, especially lawyers, to act on their own interests,³¹ the space for misuse of judicial discretion,³² the loss of due process and fair trial protections for offenders,³³ the possibility of wrongful conviction of the innocent,³⁴ disproportionate and inconsistent sentencing,³⁵ or the inherent coercion of this legal instrument.³⁶ Nevertheless, no

²⁴ See *supra* note 5, Scott and Stuntz (1992).

²⁵ William M Landes, ‘An Economic Analysis of the Courts’, 14 (1971) *Journal of Law and Economics*, 61-107; Gene M. Grossman and Michael L. Katz, ‘Plea Bargaining and Social Welfare’, 73(4) (1983) *The American Economic Review*, 749-757; Oren Bar-Gil and Oren Gazal, ‘Plea Bargains Only for the Guilty’, (2005) *American Law & Economics Association Annual Meetings*, paper 28.

²⁶ *Ibid*, Grossman and Katz (1983).

²⁷ Mike McConville, ‘Plea Bargaining: Ethics and Politics’, 25(4) (1998) *Journal of Law and Society*, 562-587, p. 562.

²⁸ Crime is traditionally deemed to be an individual’s act against social benefit as whole, which justifies the monopolization of state power on punishment. Nevertheless, the nature of crime is continually discussed and adjusted, and with the merger of civil and criminal territories, the colour of ‘general social interests’ is gradually fading. See Nils Christie, ‘Conflicts as Property’, 17(1) (1977) *The British Journal of Criminology*, 1-15; *supra* note 3, Mann (1982); Susan R. Klein, ‘Redrawing the Criminal-Civil Boundary’, 2(2) (1999) *Buff. Crim. L. Rev.*, 681-723.

²⁹ Kevin C. McMunigal, ‘Disclosure and Accuracy in the Guilty Plea Process’, 40 (1988) *Hastings L. J.*, 957-1030.

³⁰ Stanley A. Cohen, and Anthony N Doob, ‘Public Attitudes to Plea Bargaining’, 32 (1989) *Crim. L. Q.*, 85-109; Helen Fenwick, ‘Charge Bargaining and Sentence Discount: The Victim’s Perspective’, 5(1) (1997) *International Review of Victimology*, 23-36.

³¹ About the lawyer’s role in plea bargaining, Tague researches into their individuals incentive in choosing plea bargaining rather than trials. See Peter W. Tague, ‘Barristers’ Selfish Incentives in Counselling Defendants over the Choice of Plea’, Jan (2007) *Crim. L. R.*, 3-23; ‘Guilty Pleas and Barristers’ Incentives: Lessons from England’, 20 (2007) *Geo. J. Legal Ethics*, 287-320; ‘Guilty Pleas or Trials: Which Does the Barrister Prefer?’, 32 (2008) *Melb. U. L. Rev.*, 242-274. To solve this self-interest motivation, many scholars suggest reform to guarantee a more effective legal assistance. See Steven Zeidman, ‘To Plead or not to Plead: Effective Assistance and Client-Centered Counselling’, 39 (1997) *B. C. L. Rev.*, 841-910; *supra* note 21, Fisher (2000).

³² Donald G. Gifford, ‘Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion’, 1 (1983) *U. Ill. L. Rev.*, 37-98.

³³ Leigh Tinmouth, ‘The Fairness of a Fair Trial: Not Guilty Pleas and the Right to Effective Assistance of Counsel’, 50 (2009) *B. C. L. Rev.*, 1607-[iii]; Jane Campbell Moriarty and Marisa Main, ‘“Waiving” Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation’, 38 (2011) *Hastings Constitutional Law Quarterly*, 1029-1052.

³⁴ Andrew F. Hessick III and Reshma M. Saujani, ‘Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge’, 16 (2001) *BYU J. Pub. L.*, 189-242; Stephen Jones, ‘Under Pressure: Women Who Plead Guilty to Crimes They Have not Committed’, 11(1) (2011) *Criminology and Criminal Justice*, 77-90.

³⁵ Schulhofer’s research on plea bargaining mainly focuses on the relationship between plea bargaining and the sentencing system in the United States, complaining that the former institutionalizes inconsistency when judges

matter how controversial this issue is, in practice, plea agreement has survived, and spread beyond jurisdictions with adversarial traditions, as noted by Scott and Stuntz:

... Most legal scholars oppose plea bargaining, find it both inefficient and unjust. Nevertheless, most participants in the plea bargaining process, including (perhaps especially) the courts, seem remarkably untroubled by it. Not only is the practice widespread, but participants generally approve of it ... [Plea Bargaining] is not some adjunct to the criminal justice system; it is the criminal justice system.³⁷

3.2 Assistance Agreement

The second type of CPA examined in this study is ‘assistance agreement’, which refers to a situation where the offender offers testimony or intelligence regarding other crimes or suspects to the criminal justice authorities, in exchange for their lenient treatment.³⁸ Similar to ‘plea agreement’, the term ‘assistance agreement’ is also a descriptive concept based on observations in various legal systems where similar mechanisms are named differently, such as ‘pentiti’, ‘repentis’, ‘kroongetuige’ and ‘Kronzeuge’.³⁹ In practice, offenders who provide assistance are called by derogatory names such as ‘snitch’,⁴⁰ ‘rat’,⁴¹ or ‘supergrass’.⁴² For the sake of clarity and objectivity, in the following discussion offenders who provide assistance are referred to as ‘assisting offender’, in contrast with the accused person who is targeted by the cooperation.⁴³

apply the law, and ‘serves a seductive but highly problematic normative conception of justice’. See Stephen J. Schulhofer, ‘Confessions and the Court’, 79 (1980) *Mich. L. Rev.*, 865-893; ‘Is Plea Bargaining Inevitable?’, 97.5 (1984) *Harvard Law Review*, 1037-1107; Stephen Schulhofer and Ilene H. Nagel, ‘Negotiated Pleas under the Federal Sentencing Guidelines: The First Fifteen Months’, 27 (1989) *Am. Crim. L. Rev.*, 231-288; *supra* note 7, Schulhofer (1992); Ilene H. Nagel and Schulhofer, ‘A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines’, 66 (1992) *S. Cal. L. Rev.*, 501-566; Schulhofer and Ilene H. Nagel, ‘Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period’, 91 (1996) *Nw. U. L. Rev.*, 1284-1316.

³⁶ John H. Langbein, ‘Torture and Plea Bargaining’, 46(1) (1978) *The University of Chicago Law Review*, 3-22; Mirko Bagaric and Julie Brebner, ‘The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea – “I’m Pleading Guilty only Because of the Discount ...”’, 30(1) (2000) *International Journal of the Sociology of Law*, 51-74; Avishalom Tor *et al.*, ‘Fairness and the Willingness to Accept Plea Bargain Offers’, 70(1) (2010) *Journal of Empirical Legal Studies*, 97-116.

³⁷ *Supra* note 5, Scott and Stuntz (1992), pp. 1909-1912.

³⁸ In some articles it is named as ‘cooperation agreements’, see Spencer Martinez, ‘Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency’, 47 (1999) *Clev. St. L. Rev.*, 141-160. Daniel C. Richman, ‘Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels’, 8(5) (1996) *Federal Sentencing Reporter*, 292-295.

³⁹ See John A. E. Vervaele, ‘Special Procedural Measures and the Protection of Human Rights, General Report’, 5(2) (2009) *Utrecht Law Review*, 66-103, pp. 100-101.

⁴⁰ George C. Harris, ‘Testimony for Sale: The Law and Ethics of Snitches and Experts’, 28 (2000) *Pepp. L. Rev.*, 1-74.

⁴¹ Michael A. Simons, ‘Retribution for Rats: Cooperation, Punishment, and Atonement’, 56(1) (2003) *Vanderbilt Law Review*, 1-54.

⁴² (1987) 9 Cr. App. R. (S.) 155.

⁴³ Notice that some scholars further divides assisting offenders into two types: paid informants, and immunized informants. In this thesis only the latter will be discussed, for the former has no connection to conviction or sentence. See Maria Limbert, ‘Problems Associated with Prosecutorial Control over Filing Substantial Assistance Motions and a Proposal for Substantial Assistance Pre-sentence Hearing’, 27 (2001) *J. Legis.*, 251-268.

When talking about ‘assistants’, ‘cooperators’, or ‘informants’ involved in criminal proceedings, these terms are not necessarily limited to offenders. People who provide assistance can also be ordinary citizens under altruism or legalized duty; they can be victims or witnesses; and they can also be paid ‘insiders’ planted into certain crimes by criminal justice authorities.⁴⁴ The assistance agreement in this research only covers people who are themselves offenders with their own crimes being investigated, prosecuted or trialed. Such a mechanism has two major characteristics. First of all, it is an agreement established after the assisting offender’s criminal acts have been detected and before the litigation against him has ended. Agreements reached before the assisting person transformed into an offender or during the execution of penalties are therefore not covered in this study. Secondly, the assisting offender in this type of agreement has two identities: offender and intelligence provider. There is a special situation when the assistance takes the form of giving testimony in court. In such a context, the offender still has a primary identity as ‘criminal offender’ and a secondary contractual identity as ‘witness’.

The specific forms of assistance agreements are varied. For instance, Eisenstadt categorizes assistance agreements into three sub-types according to offenders’ contractual obligations: (1) a bargain conditioned on truthful testimony; (2) a bargain dependent on future performance; and (3) a bargain conditioned on the outcome of a case.⁴⁵ In this categorization the predictability of the treatment for the assisting offender is gradually reduced. Assistance agreements can also be divided into two groups according to the relationship between the assisting offender and the accused person who is targeted by the agreement: agreements against accomplices or co-offenders, and agreements against suspects in other cases. The rights and duties of the assisting offender are differentiated correspondingly.

Assistance agreements have long been in existence in many legal systems. For instance, in his masterpiece *Dei delitti et delle pene* (1764) Beccaria already noticed that ‘some tribunals offer impunity to an accomplice in a serious crime who will turn in his companions’.⁴⁶ Tak’s research observed an overall trend in European countries to make deals with criminals at the end of the 1970s.⁴⁷ In 2005 the Home Office in the UK issued a report on witness co-operation from a comparative perspective among more than ten jurisdictions in the world, one of the main parts of which focused on using criminal offenders as witnesses.⁴⁸

Despite its widespread use, the assistance agreement also encounters fierce challenges that center on the key issue of reliability. From the assisting offender’s perspective, their role as witness or informant is often considered to have low credibility: ‘criminals are likely to say and do almost anything to get what they want’,⁴⁹ and they also have a strong motivation to commit perjury.⁵⁰ Even

⁴⁴ A brief introduction to these types of ‘informants’ can be seen in Peter N Grabosky, ‘Prosecutors, Informants, and the Integrity of the Criminal Justice System’, 4 (1992) *Current Issues Crim. Just.*, 47-63.

⁴⁵ Neil. B. Eisenstadt, ‘Let’s Make a Deal: A Look at United States v. Dailey and Prosecutor-Witness Cooperation Agreements’, 67 (1987) *B. U. L. Rev.*, 749-782, pp. 456-457.

⁴⁶ Cesare Beccaria, *On Crime and Punishments*, translated by David Young (Indiana: Hackett Publishing Company, Inc., 1986), p. 69.

⁴⁷ Peter J.P. Tak, ‘Deals with Criminals: Supergrasses, Crown Witnesses and Pentiti’, 5(1) (1997) *European Journal of Crime, Criminal Law and Criminal Justice*, 2-26, p.2.

⁴⁸ Home Office, *Facilitating Witness Co-operation in Organized Crime Cases: An International Review*, available at <http://tna.europarchive.org/20100413151441/http://www.homeoffice.gov.uk/rds/pdfs05/rdsolr2705.pdf>. Accessed March 2014.

⁴⁹ Stephen S. Trott, ‘Words of Warning for Prosecutors Using Criminals as Witness’, 47 (1995) *Hastings L. J.*, 1381-1432, p. 1383.

⁵⁰ See *supra* note 38, Martinez (1999).

if the offender fulfills his duty as required by the agreement, ‘ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who “sell out” and become prosecution witness’.⁵¹ From the perspective of criminal justice authorities, the assistance agreement is criticized, for instance, for the coercion imposed explicitly or implicitly by the instrument itself,⁵² the prosecutor’s ‘embellishment’ of the testimony, the loss of sentencing equity, general deterrence,⁵³ and the undermining of the judicial system’s integrity.⁵⁴

3.3 Restoration Agreement

The third type of CPAs is the restoration agreement, which refers to an agreement within criminal proceedings, in fact or in law, reached between offenders and criminal justice authorities where the former agrees to take certain forms of restorative actions, especially reconciliation with victims and making compensation, in exchange for legal concessions from the latter.⁵⁵

The restoration agreement is hardly new to many legal systems, but it has become a heated topic in recent years largely due to the revolutionary ideologies embodied in restorative justice. To some extent, the rise of restoration agreement reflects the interaction between restorative justice and the conventional criminal justice. The term ‘restorative justice’ is generally considered to have been first used by Barnett in 1977,⁵⁶ and it is described as an ‘umbrella concept’, ‘sheltering beneath its spokes a variety of practices’.⁵⁷ For instance, in his research Braithwaite identified several forms of ‘restorative justice’ such as ‘victim-offender mediation, healing circles, family group conferences, restorative probation, reparation boards on the Vermont model, whole school anti-bullying programs, Chinese *Bang Jiao* programs, and exit conferences following Western business regulatory inspections’.⁵⁸

This research adopts Marshall’s definition that restorative justice is ‘a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future’.⁵⁹ Based on this definition, restoration agreement overlaps restorative justice on the part of the offender-victim interaction. In fact, through examining the studies of Tulkens and Bian and Feng, confusion about the relationship between certain restorative mechanisms, especially victim-offender reconciliation/mediation and restoration agreements, can be

⁵¹ *Supra* note 49, Trott (1995), p. 1385.

⁵² Angela J. Davis, ‘The American Prosecutor: Independence, Power, and the Threat of Tyranny’, 86 (2001) *Iowa L. Rev.*, 393-476.

⁵³ See *supra* note 38, Richman (1996).

⁵⁴ See *supra* note 45, Eisenstadt (1987).

⁵⁵ In some studies similar mechanisms are termed ‘alternative dispute resolutions’ (ADR) in criminal justice. See, e.g., Melissa Lewis and Les McCrimmon, ‘The Role of ADR Processes in the Criminal Justice System: A View from Australia’, paper presented ALRAESA Conference, Uganda, 3 September 2005. Available at http://www.lawreform.ie/_fileupload/reports/r98adr.pdf. Accessed 22 October 2014.

⁵⁶ Tony F. Marshall, ‘The Evolution of Restorative Justice in Britain’, 4(4) (1996) *European Journal on Criminal Policy and Research*, 21-43.

⁵⁷ Joanna Shapland *et al.*, ‘Situating Restorative Justice within Criminal Justice’, 10 (2006) *Theoretical Criminology*, 505-532, p. 506.

⁵⁸ John Braithwaite, ‘Restorative Justice: Assessing Optimistic and Pessimistic Accounts’, 25 (1999) *Chicago Journals*, 1-127, p.2. Braithwaite is one of the leading scholars in the field of restorative justice, and he applies theories of shame and integration to analysis the ideology and function of restorative justice. See John Braithwaite, *Crime, Shame, and Reintegration* (Cambridge: Cambridge University Press, 1989); ‘Restorative Justice and Social Justice’, 63(2000) *Saskatchewan Law Review*, 185; *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002).

⁵⁹ *Supra* note 56, Marshall (1996), p.37.

observed. In this study, victim-offender reconciliation and restoration agreement overlap. A restoration agreement under the CPA model only refers to situations where the private reconciliation serves as a condition attached to the agreement between offenders and criminal justice agencies. In the pure model, victims are not a fundamental contractual party to a restoration agreement but a 'third party' or 'beneficiary'. Victim-offender reconciliation, reached outside the process of criminal litigation without any room for the offender-authority negotiation, and having little impact on criminal justice authorities' decisions, does not satisfy the CPA model. It makes no difference here whether such a reconciliation is achieved merely because of contractual obligations or, if detectable, the offender's 'true remorse'.

What is new in restoration agreement is not the mechanism *per se*, but the context in which it functions and interacts with. The rise of the restoration agreement especially in western countries is closely connected with two trends in criminal justice systems: the exploration into more effective crime prevention approaches, and the rediscovery of victims.⁶⁰ Both of them cast doubts on the conventional criminal justice which was criticized by Christie as having 'reduced the victim to a nonentity and the offender to a thing'.⁶¹ But this is not a one-way challenge. From the perspective of ordinary procedures, a restoration agreement 'does raise concerns about impartiality of the decision-maker, the central role of attitude, and "privatization" of the response to criminal wrongdoing'.⁶² In fact, through examining the practice in different legal systems, the key question on restoration agreement is how to situate a privatized, individualized, and informal mechanism into the public, formal and offender-centered ordinary procedure.

4. Fundamental Parties and Other Stakeholders

In the pure model of CPA, offenders and criminal justice agencies are two fundamental parties. Apart from them, other stakeholders may also influence and be affected by the agreement. The following discussion analyzes each fundamental party and the key stakeholders including the victim and the accused person who is targeted in the assistance agreement in order to further clarify the concept of CPA.

4.1 Fundamental Parties: Offender and Criminal Justice Authorities

4.1.1 Offenders

Offenders are essential to CPAs: not only are they a party to every agreement, but they are also a comparatively vulnerable party in negotiations. Whether or not genuine negotiation takes place largely depends on whether or not the offenders' free will is safeguarded. On the one hand, the offenders' free will relies on the protection provided in legal norms, while on the other hand it depends on the actual implementation of safeguards in practice, in particular through legal assistance. It may be argued that it is unlikely for offenders in a legal system that has less respect for human rights protection and a less effective legal assistance system in criminal justice to negotiate with criminal justice agencies; instead, they are compelled to cooperate. This is quite true in an *ex-post* examination of the validity of an agreement. However, it does not affect the establishment of CPAs as long as the constitutive elements of the pure model mentioned earlier are satisfied.

⁶⁰ This can be observed from both academic studies and the aims of some official projects on restorative justice. See *supra* note 58, Braithwaite (2002), pp. 45-72.

⁶¹ *Supra* note 28, Christie (1977), p.5.

⁶² Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: OUP, 2005), p. 129.

4.1.2 Police

At the initial phase of filtering cases, collecting evidence and preparing dossier, police may negotiate with offenders based on their discretionary power either *de jure* or *de facto*. The comparative research of Elsner *et al* in 11 European countries shows that such discretion in terminating criminal proceedings is not rare, although in most of the samples police were obliged to hand over cases for which there was sufficient evidence to the corresponding public prosecution services.⁶³ A similar phenomenon also exists in other legal systems like the US, Japan and South Korea.⁶⁴ The scope of the discretionary power and its concrete modalities – for instance, whether or not conditions are attached – are divergent in these countries.

The police can also become a powerful negotiator in CPAs due to the impact they can have on prosecutorial decisions through making recommendations or preparing dossiers. The actual effect relies on the relationship between the police and public prosecutors. In continental Europe, for instance, the public prosecution services have long been established and generally have the power to instruct police investigations.⁶⁵ In these countries the police and public prosecution service are more integrated, and continuity in their activities can be easily observed. In other countries the connection may be weaker. For instance, in England and Wales the Crown Prosecution Service (CPS) is an independent body which only ‘works closely with the police’. Although the CPS can advise the police during an investigation it is not responsible for the latter’s activities.⁶⁶ China’s situation lies somewhere in-between. On the one hand, the police are independent from the people’s procuratorate and in charge of investigations of the majority of ordinary criminal offences,⁶⁷ while on the other hand the people’s procuratorate can supervise investigation activities mainly by requiring supplementary investigation and approving arrest.

4.1.3 Public Prosecutors

In many studies, the public prosecutor is seen as the direct negotiator in each type of CPA.⁶⁸ The prosecutor’s power in negotiating with offenders is generally influenced by two factors. The first one

⁶³ See Beatrix Elsner *et al*, ‘Police Case-ending Possibilities within Criminal Investigation’, 14(2008) *Eur. J. Crim. Policy Res.*, 191-201.

⁶⁴ For cases ended by police in the USA, Japan and South Korea, see D. H. Choe, ‘Discretion at the Pre-Trial Stage: A Comparative Study’, 20(1) (2014) *European Journal on Criminal Policy and Research*, 101-119.

⁶⁵ See John. R. Spencer, ‘Introduction’, in *supra* note 15, Delmas-Marty and Spencer (2002), 1-80. For detailed information on the relationship between the police and the public prosecutor in Europe, see country reports on Eurojustice, available at http://www.euro-justice.com/member_states/. Accessed 14 August 2014.

⁶⁶ See the introduction on ‘Role of the CPS’, available at <http://webarchive.nationalarchives.gov.uk/20070205205701/http://www.cps.gov.uk/about/role.html>. Accessed 14 August 2014.

⁶⁷ In China the police are in charge of investigating most crimes except for (1) crimes of embezzlement or bribery, malfeasance by civil servants, violation of a citizen’s personal rights, such as false imprisonment, extortion of confession by torture, circumvention for retaliation, or illegal search, and infringement against a citizen’s democratic rights by civil servants by taking advantage of his or her functions (investigated by people’s procuratorates), (2) crimes infringing upon national security (investigated by national security authorities), (3) crimes which happen in prisons (investigated by the prison), and (4) crimes within the armed forces (investigated by the security departments of the armed forces).

⁶⁸ In Bian & Feng’s research only the prosecutor is deemed to be the counter party of all types of agreement in criminal justice. See *supra* note 16, Bian and Feng (2010).

is the discretionary power to dispose of criminal cases at the pre-trial stage. The distinction is mainly drawn between the principle of legality and the principle of opportunity (or the principle of expediency). Public prosecutors in legal systems such as England and Wales, the USA, the Netherlands and France enjoy wide discretion with regard to making decisions to charge suspects. For instance, Stuntz once described the American criminal justice as a ‘working settlement market’ in which the public prosecutors can get whatever meal they want ‘as long as the menu offers it’.⁶⁹ Comparatively, public prosecutors in countries like Germany⁷⁰ follow stricter rules in prosecution and, theoretically, have limited power to divert cases from the flow of criminal proceedings.⁷¹ Nowadays, however, the distinction between the two approaches continues to decrease. For instance, academics have noticed that for German public prosecutors such discretion ‘has increased steadily and is still growing’ since the 1970s.⁷²

The other impact factor is the prosecutor-judge relationship, especially the extent to which the prosecutor can be involved in sentencing. In legal systems such as those in France and Italy in Europe and China in Asia, public prosecutors are considered to have equal status with judges, and terms like ‘judicial system’ (司法机关) in Chinese or ‘*la magistrature*’ in French refer to both judges and public prosecutors.⁷³ Behind these terms is a cooperative relationship between prosecutors and judges in seeking the truth. Therefore compared with other legal systems, it may be more acceptable within such systems for the public prosecution service to intervene in judicial decisions through channels such as sentencing proposals. However, scholars have noticed that in practice the distinction is not that big. For instance, quantitative research in one Californian jurisdiction in the US in 2008 showed a ‘strong association between sentence recommendations and sentences received’, and the question was only ‘to what extent’.⁷⁴ Similarly, Fionda’s comparative research between English, Scottish, Dutch and German criminal justice systems also concluded that public prosecutors do play direct or indirect roles in the sentencing process, and such a role is expanding.⁷⁵

4.1.4 Judges

⁶⁹ William J. Stuntz, ‘Plea Bargaining and Criminal Law’s Disappearing Shadow’, 117(8) (2004) *Harvard Law Review*, 2548-2569, p. 2549.

⁷⁰ The restricted discretionary power of German prosecutors has attracted academic interests and broadly discussed. See, e.g., John H. Langbein, ‘Controlling Prosecutorial Discretion in Germany’, 41(3) (1974) *The University of Chicago Law Review*, 439-467 (in this research the author compared the prosecutor’s discretion between Germany and the USA); Joachim Herrmann, ‘The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany’, 41(3) (1974) *The University of Chicago Law Review*, 468-505;

⁷¹ For comparative research on the prosecutor’s discretion power, see, e.g., Gwladys Gilliéron, *Public Prosecutors in the United States and Europe* (Switzerland: Springer International Publishing, 2014) (The samples are the USA, Switzerland, France and Germany); Yue Ma, ‘Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective’, 12(1) (2002) *International Criminal Justice Review*, 22-52; Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* (Oxford: Clarendon Press, 1995) (The selected samples in this research are Scotland, the Netherlands, England and Wales and Germany).

⁷² *Supra* note 70, Herrmann (1974), p. 505.

⁷³ See Jacqueline Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Oxford and Oregon: Hart Publishing, 2005).

⁷⁴ Denise Leifker, and Lisa L. Sample, ‘Do Judges Follow Sentencing Recommendations, or Do Recommendations Simply Reflect What Judges What to Hear? An Examination of One State Court’, 33(2) (2010) *Journal of Crime and Justice*, 127-151.

⁷⁵ See *supra* note 71, Fionda (1993).

The judges' role is significant in achieving or facilitating negotiations in criminal procedure.⁷⁶ The question is, however, whether judges can be deemed to be a contractual party in CPAs. In conventional criminal justice, the judge plays an impartial and independent role in dealing with criminal cases. The basic presumption is that judges should not participate in or be bound by the negotiations with the offender. Nevertheless, this presumption is continually challenged in practice and has been somewhat diluted into 'a romantic view of criminal law'.⁷⁷

From the discussion on the public prosecutor's negotiating power it can be observed that the judge's role in CPAs is greatly influenced by the prosecutor-judge relationship. As Damaška commented, different understandings on judicial neutrality '[make] it more awkward for the Anglo-American judge than his continental colleague to assume the initiative in negotiations about mutual concessions'.⁷⁸ It implies that in systems that make use of CPAs, the common identity of public prosecutors and judges to some extent facilitates the judiciary's participation in the negotiation as a party. It may be relatively rare for judges to directly negotiate with offenders. Nevertheless, the routine of approving CPAs, either *de jure* or *de facto*, changes the actual position of judges from being 'above the fray' to at least being a 'co-negotiator'.

In fact, the involvement of the judiciary in negotiations between offenders and public prosecutors can hardly be avoided when judicial decisions are used as bargaining chips. This is partly because in addition to justice, certainty is also demanded by both parties. As CPAs are ways of bringing future disposals into present considerations, when engaging in negotiations, it is quite natural for both parties to seek explicit, specific and stable promises that can only be provided by judges. Such promises may be offered through routine practice, a judges' early indication in individual cases, or explicit acknowledgment in sentencing guidelines. However, there is a risk that such an early participation may lead to judges being influenced by incomplete and insufficient evidence, on which they would build a weak case and substantively deprive the offender of their right to a fair trial.⁷⁹ Thus, deciding which place judges should occupy within the CPA negotiation is a challenge for legal systems using CPAs.

How, then to evaluate what is 'proper'? This question is connected to two issues: the content of the sentencing indication provided by the judge, and its validity on the subsequent legal decisions. It is not difficult to understand that a precise and binding indication can serve certainty best. But how to prevent such an indication, based on scattered facts, from deviating from a judgment after the entire set of evidence has been considered comprehensively, is another question.

When talking about plea agreement, it has long been discussed whether it can remain 'in the shadow of trial'⁸⁰ in order to minimize the judicial gap in disposals between plea bargaining and

⁷⁶ For instance, in Tulkens' research the parties of an agreement refer to 'those playing a role in criminal law (police and legal authorities, defendants and victim)'. See *supra* note 13, Tulkens (2002), p. 642. More recently, Mike McConville and Luke Marsh conducted comprehensive research on the court practices in 'inducing' guilty plea in Britain criminal justice system. See Mike McConville and Luke Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Plea in Britain* (Glos and Massachusetts: Edward Elgar Publishing, 2014).

⁷⁷ *Supra* note 34, Hessick III and Saujani (2001), p. 189. The proper role of judges in plea bargaining has long been discussed. See, e.g., William J. Thompson, 'The Judges Responsibility on a Plea of Guilty', 62(3) (1960) *West Virginia Law Review*, 213-222; *supra* note 17, Alschuler (1976); Markus Dirk Dubber, 'American Plea Bargains, German Law Judges, and the Crisis of Criminal Procedure', 49 (1996) *Stanford Law Review*, 547-605.

⁷⁸ *Supra* note 13, Damaška (2004), p. 1026.

⁷⁹ Albert W. Alschuler, 'Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System', 50(2) (1983) *The University of Chicago Law Review*, 931-1050.

⁸⁰ Scholars' opinions are inconsistent on the question of whether a sanction based on plea bargaining can maintain a rough consistency with judgments on similar cases. See, e.g., Robert H. Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: the Case of Divorce', 88 (1979) *Yale Law Journal*, 950-997.

ordinary court trial. Some scholars suggest that judges should be ‘more actively involved in reviewing charges, the evidence for them, and determine appropriate sentences’ in a pre-trial hearing to narrow down the gap.⁸¹ This, however, leads to another question: how complex can pre-trial appraisal be without undermining the high efficiency expected in plea bargaining? The idea of regulating plea negotiations through definite sentencing guidelines has also been explored.⁸² However, such approaches give rise to another challenge, that of defining the proper boundaries of judicial discretion.

In contrast to plea agreement, the major challenge in assistance agreement for the judiciary lies in its remoteness from the prosecutor-dominated agreement. In this type of agreement, it is usually the prosecutor rather than the judge who has ‘the exclusive authority to initiate cooperation rewards and determine whether witnesses have been fully cooperative’.⁸³ Some scholars have suggested that the discretionary power of public prosecutors in assistance agreement should be restricted by requiring them to explain and justify the charge reduction or the proposal for sentence reduction.⁸⁴

Restoration agreement is special because it is linked to a civil agreement involving the offender and the victim. For situations in which the restoration agreement is used as a procedural diversion especially at the pre-trial stage, the function of the judiciary in the negotiation is limited. In cases where the agreements are reached during the trial proceedings, the main challenges for the judiciary are individualization of public decisions and variable criteria when evaluating the effect of cooperation.

4.2 Other Stakeholders

Although the pure model of CPA illustrates a relatively exclusive contractual relationship, other persons still can be involved in the bargaining process or be affected by such an arrangement, or both. This study focuses on individual stakeholders who are not the fundamental contractual parties under the pure CPA model but whose procedural rights and interests are likely to be directly threatened or influenced by the agreement. Two groups of people fall into this category: victims, and the accused person who is targeted in assistance agreement.

4.2.1 Victims

Victims often appear in CPAs. They are deemed as direct or indirect beneficiaries of these agreements. For plea agreements, it has been argued that the accelerated process resulting from a plea agreement can ‘save victims ... from the concern about having to give evidence’.⁸⁵ Assistance agreement can, even if not directly beneficial to the victim of the assisting offender’s crime, help the victims of other crimes that are solved due to the assistance and to protect society in general. In the case of a

In this article the authors explained that in civil cases a bargain could actually reflect the requirements of the law. Jeffrey Standen, ‘Plea Bargaining in the Shadow of the Guidelines’, 81 (1993) *California Law Review*, 1471-1540; Stephanos Bibas, ‘Plea Bargaining outside the Shadow of Trial’, 117(8) (2004) *Harvard Law Review*, 2463-2547; *supra* note 69, Stuntz (2004).

⁸¹ *Supra* note 8, Lippke (2011), p.24.

⁸² See e.g., SGC, *Reduction in Sentence for a Guilty Plea*, available at http://sentencingcouncil.judiciary.gov.uk/docs/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf. Accessed 1 September 2014.

⁸³ Richard L. Lippke, ‘Rewarding Cooperation: The Moral Complexities of Procuring Accomplice Testimony’, 13 (2010) *New Crim. L. Rev.*, 90-118, p. 115.

⁸⁴ *Ibid.*

⁸⁵ *Supra* note 82, SGC (2007).

restoration agreement, the victim benefits even more directly from the conditions attached to the agreement. However, critiques have also been raised that victims are deprived of their procedural right to participate in the proceedings, making them more likely to feel that they have not received justice.⁸⁶

Nevertheless, all these controversies around victims are insufficient to raise their status in the pure CPA model from beneficiary to contractual party. In the case of plea agreement and assistance agreement this argument is less debatable. The key question lies in the restoration agreement in which the preliminary image is of interaction between victims and offenders. However, it should be noted that reconciliation between victims and offenders is generally restricted to the aftermath of the crime such as restitution and reparation. The reconciliation may be taken into consideration by criminal justice authorities, but it is not determinate in legal decisions with respect to conviction and sentencing. Private reconciliation that occurs during criminal proceedings and appears to influence the legal decisions only functions as a premise for the cooperation between the offender and criminal justice authorities.

Starting from this premise, the debates on CPAs' impact on victims, either positive or negative, raise two questions. Firstly, will CPAs reduce the victim's status more than the ordinary procedure? And secondly, how does one define the victim's status in CPAs?

The key point of the first question is whether a CPA by its very nature deprives the victim of rights that are guaranteed in ordinary procedure. These rights fit roughly into three categories: the right to be informed, the right to be heard, and the right to restitution. CPAs reached at pre-trial stage may lack publicity and transparency. However, the victim's involvement at this stage of ordinary procedure is also limited. At the court hearing stage of the procedure, victims are not deprived the procedural rights provided in ordinary procedure such as delivering 'victim impact statements' in court.⁸⁷ Therefore, from the procedural perspective, the use of CPAs does not necessarily worsen the victim's status in criminal proceedings.

The second question concerns whether or not victims should be provided with extra rights or protection in the event of CPAs. This question seems easier to answer in the case of a restoration agreement, as victims are usually a party to a civil settlement and they can either actively participate in the process, or refuse to cooperate. For the other two agreements the victim's opinions can be ascertained. However, the key point rests on the validity of his or her opinion rather than the procedure itself. Fierce controversies have emerged concerning this point. Take plea agreement for example. Scholars such as Fletcher have suggested that victims should be given the right of veto in the bargaining process.⁸⁸ This suggestion, however, has been challenged for its 'subordination of public to private interests' and for practical difficulties concerning implementation.⁸⁹ Similar critiques have been made of restorative justice amid fears that a victim-centered negotiation process may reduce 'horizontal equity requirements' and aggregate the 'privatization problem' by shifting the focus from what has been done to who has suffered.⁹⁰ In this sense, the question of how to situate

⁸⁶ See, e.g., Michael M. O'Hear, 'Plea Bargaining and Victims: From Consultation to Guidelines', 91 (2007) *Marquette Law Review*, 323-347;

⁸⁷ See *ibid.* According to O'Hear's study on plea bargaining in the US, he noticed that the debate was not about whether or not the victim's procedural rights to participate were deprived, but the actual impact of such participation on the final legal decisions. For discussion from the perspective of the latter, see Edna Erez and Linda Rogers, 'Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals', 39(2) (1999) *Brit. J. Criminol.*, 216-239.

⁸⁸ George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (Boston: Addison-Wesley Publishing, 1995).

⁸⁹ *Supra* note 86, O'Hear (2007), p. 323.

⁹⁰ Andrew von Hirsch *et al.*, 'Specifying Aims and Limits for Restorative Justice: A "Making Amends Model"?'

victims into CPAs actually originated from the fundamental question of how to situate them into the conventional criminal justice.

4.2.2 The Accused Person Targeted in Assistance Agreement

The accused person who is the target of an assistance agreement is an important stakeholder because there are potential conflicts between him and the offender who provides the assistance both substantively and procedurally. From the substantive perspective, the interests of the accused can be infringed if the testimony or intelligence offered by the assisting offender is unreliable.

From the procedural perspective, the use of assistance agreement may invoke challenges against the right of the accused to a fair trial. Such challenges are mainly due to the fact that the protections provided to assisting offenders may ‘withhold potentially helpful evidence from its opponent or to deprive the latter of the opportunity of cross-examining someone with material information’.⁹¹ For instance, ‘public interest immunity’, which refers to ‘the rule of evidence which prevents the disclosure of documents in legal proceedings where the public interest in their confidentiality outweighs the public interest in their disclosure’,⁹² is one of the powerful justifications for offering such protection. Though acknowledged in Article 6 of ECHR, the public interest immunity is quite vague as to whether it may, in practice, be in conflict with the right of the accused to challenge the prosecution witness, either *audi alteram partem*, or *nemo iudex in parte sua*, or both. This conflict may be more apparent in an adversarial system in which the judge plays a comparatively negative role and relies more heavily on the oral confrontation of the defence and the prosecution.

Therefore, in the case of assistance agreement, protection for the assisting offender may mean the opposite of that for the accused who is targeted, and one type of public interests is in conflict with another. Solving this conflict in the assistance agreement requires comprehensive procedural design. Judicial review may be helpful. Even so, the risk still remains, and it is therefore necessary to take a more cautious attitude towards statements given by the assistance offender, and sets limits regarding the extent to which it is applied.

5. Goals for CPAs

5.1 Goal for Plea Agreement

The goal for plea agreement has been stated in many legal systems. The US Supreme Court, for instance, held in the *Santobello* case that ‘the disposition of criminal charges by ... “plea bargaining” is an essential component of the administration of justice’.⁹³ The Sentencing Guidelines Council (SGC) in the UK praised plea agreement as an instrument that ‘shortens the gap between charge and sentence, saves considerable cost, and ... saves victims and witnesses from the concern about having to give evidence’.⁹⁴ Turner’s empirical research with German judges showed that the major motivation for using plea agreement is to ‘save time and resources as their (judges and prosecutors)

in Andrew von Hirsch *et al*, *Restorative Justice & Criminal Justice: Competing or Reconcilable Paradigms?* (Oregon: Hart Publishing, 2003), pp. 21-42.

⁹¹ Roderick Munday, *Evidence*, 7th Edition (Oxford: OUP, 2013), p. 125.

⁹² Andrea Gull, ‘Public Interest Immunity and the Right to a Fair Trial’, 2 (1997) *J. C. L.*, 5-29, p. 5. See also Chris Taylor, ‘In the Public Interest: Public Interest Immunity and Police Informants’, 65 (2001) *The Journal of Criminal Law*, 435-447.

⁹³ *Santobello v. New York*, 404 U.S. 257 (1971), cited in George W. Pugh, ‘Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived from a Study of the French System’, 36 (1975) *Louisianan Law Review*, 947-971.

⁹⁴ See *supra* note 82, SGC (2007).

caseloads grew and became more complex'.⁹⁵ In Italy plea agreement has emerged since 1989, and its application was further expanded in 2003 so that the defendant is entitled to ask for a sentence with at most five years' imprisonment based on a plea agreement with the prosecutor.⁹⁶ Behind this reform was the 'adversarial reform' in Italy in 1980s when greater demands would be made on already scarce judicial resources.⁹⁷

These arguments reveal the unequivocal goal for plea agreement: to speed up the administration of criminal justice with the purpose of saving judicial resources. It aims to guarantee the smooth and swift running of the judicial process through 'waiver rewards' – 'the charge or sentence reductions that might be earned by defendants who waive their right to trial and plead guilty'.⁹⁸

5.2 Goal for Assistance Agreement

Assisting offenders have been used in many legal systems in the investigation, prosecution and conviction, serving a unanimous and pragmatic goal for assistance agreement: to obtain information/evidence about criminal activities which would otherwise not be available,⁹⁹ or not be 'equally effective from eyewitnesses, victims, documents, and other "untainted" sources'.¹⁰⁰ This type of CPAs is mostly used to deal with increasingly sophisticated criminals and complex crimes, such as drug crimes, corruption, and organized crime,¹⁰¹ or cases involving 'secretive conduct and no available victim'.¹⁰² This is mainly because in serious and complex cases like organized crimes, 'the most culpable and dangerous individuals rarely do the dirty work'.¹⁰³ In such cases, the fact that it is difficult to collect evidence against the principal criminals through normal investigative approaches, necessitates the use of accomplice testimony or intelligence.

5.3 Goal for Restoration Agreement

Through examining the legal regimes in different jurisdictions, two key words emerge in the rise of restoration agreement: juvenile, and victim. It is common that this type of agreement was at first used in juvenile cases with the intention to rehabilitate the offender. The general trend is an expansion towards adult offenders, while goals such as the rehabilitation of offenders and the reduction of re-offending still remain.¹⁰⁴ From another perspective, a restoration agreement, especially those based

⁹⁵ Jenia I. Turner, 'Judicial Participation in Plea Negotiations: A Comparative View', 54 (2006) *The American Journal of Comparative Law*, 199-267, p. 217.

⁹⁶ Ennio Amodio, 'The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy', 52 (2004) *The American Journal of Comparative Law*, 489-500, p. 491.

⁹⁷ Ralph Henham and Grazia Mannozi, 'Victim Participation and Sentencing in England and Italy: A Legal and Policy Analysis', 11(3) (2003) *European Journal of Crime, Criminal Law and Criminal Justice*, 278-317, p. 310.

⁹⁸ *Supra* note 8, Lippke (2011), p.12. In his research Lippke examined the essence of plea bargaining, 'waiver rewards', and its inter-reactions with some fundamental principles and factors in sentencing.

⁹⁹ (1988) 87 Cr. App. R. 407.

¹⁰⁰ See *supra* note 38, Richman (1996).

¹⁰¹ See *supra* note 45, Eisenstadt (1987).

¹⁰² *Supra* note 38, Richman (1996), p.292.

¹⁰³ John C. Jeffries, JR., and Honorable John Gleeson, 'The Federalization of Organized Crime: Advantages of Federal Prosecution', 46 (1995) *Hastings Law Journal*, 1095-1126, p. 1104.

¹⁰⁴ See e.g., Inge Vanfraechem *et al* (eds.), *Restorative Justice Realities: Empirical Research in a European Context* (Hague: Eleven International Publishing, 2010).

on a victim-offender reconciliation model, is frequently expected to change the status of the ‘nonentity’ of victims in conventional criminal justice¹⁰⁵ and serve their needs.

In this sense, two major goals can be observed in different jurisdictions: one is to rehabilitate offenders, and the other is to restore victims. The former expects the offender to achieve repentance through measures such as meeting victims or taking rehabilitation treatment. The latter requires him to bear the responsibility of ‘taking care of victims’ which, even though can be solved through civil litigation or compensation order, cannot be fulfilled directly through ordinary procedure.

5.4 Common Ideology behind Goals

At first sight it would seem that the goals for CPAs are diversified: plea agreement aims to enhance procedural efficiency, assistance agreement aims to achieve a higher rate of detection, and restoration agreement serves the purposes of rehabilitating offenders and restoring victims. However, commonality can be detected with deeper exploration: to achieve these goals, the active and willing participation of the offenders is indispensable. In other words, the goals for CPAs are fulfilled through offenders’ making extra efforts that are normally not required in ordinary proceedings. For instance, most of the modernized legal systems protect the offender’s right against self-incrimination. Therefore, the main extra obligation required by plea agreement and sometimes in assistance agreement and restoration agreement is a waiver of this right. Similarly, in criminal procedure it is the public prosecutor and police rather than the offender who are obliged to conduct the investigation and to collect evidence. This obligation is immutable regardless of the assisting offender’s cooperation. Rehabilitating offenders and compensating victims can hardly be deemed as the core tasks of ordinary criminal procedures.

To conclude, what makes CPAs special is that they allocate extra tasks to offenders within a system where such tasks are supposed to be achieved by criminal justice authorities. The allocation process is supposed to be operated in accordance with the offender’s personal will rather than be under pressure from the state’s power. In addition, the extra obligations are distributed based on the corresponding legal concessions from criminal justice authorities. These features further differentiate CPAs from the top-down rewards for cooperation in traditional criminal proceedings.

One thing that needs to be clarified here is that, although some obligations on offenders are legally prescribed, such as testifying in most jurisdictions and confession in Chinese Criminal Procedure Law, in practice they do not always function as designed. The gap between law in books and law in action creates demands from criminal justice authorities to obtain cooperation. For instance, in assistance agreement it seems difficult to explain why rewards are still given to assisting offenders who bear the obligation of giving testimony and meanwhile do not need to incriminate themselves. This is mainly because punishing the uncooperative offenders without obtaining the useful information is not desirable for the administration of criminal justice.

6. Nature of CPAs: Possibility, Necessity and Feasibility

After describing what a CPA is, the next question is why CPAs can exist and be legitimized at all when one considers the intrinsically public law nature of criminal justice. In other words, what is the nature of CPAs? Answers to this question require a further exploration into the criminal law context that has been touched upon in earlier discussion. For that purpose, three steps are taken in this section. The first step examines the possibility of CPA, aiming to identify the indispensable premises for the

¹⁰⁵ See *supra* note 61, Christie (1977).

existence of CPAs; the second step moves on to the necessity of CPA, focusing on the demands from both parties; and the third step analyses the feasibility of coordinating CPAs and ordinary procedure.

6.1 Possibility: Bargaining Power of Parties

The first step is to examine the possibility of CPAs with the focus on two factors: one is the state's power in making penal decisions based on factors apart from the seriousness of an offence and the culpability of an offender; and the other is the offender's capability in negotiating and making free choice in criminal procedure. These two factors define the content and form of the bargaining power of both parties in CPAs.

6.1.1 State's Bargaining Power

The modality and scope of the state's bargaining chips depend on its discretion in operating penal power. More specifically, it is the question of on what basis and to what extent a decision maker in a penal process is allowed to depart from the equilibrium between the severity of a sanction and the reprehensibility of an offence. The range for departure relies on the role of the state in criminal justice. In other words, it is a question of 'why establishing and operating the institution of the criminal sanction is a proper role for the state'.¹⁰⁶ Answers to this question normally start from a straightforward proposition that the transaction of sanction power from private persons to the state aims to prevent individuals mistreating each other.¹⁰⁷ Arguments as such reveal the defects of the private operation of penal power, but further exploration is needed to uncover the special capacity of the state to act as the main, if not sole, censoring agency for criminal activities.

The state's ability to punish certain conducts is, as Lamond stated, not because that conduct wrongs the public or the state, but the state is 'the appropriate body to bring proceedings and impose punishment'.¹⁰⁸ This means that on the one hand, the state's penal power is restricted and bound to follow some over-arching principles in operating penal power, while on the other hand, given these constraints, such power is supposed to be manipulated with some flexibility so that the multiple purposes of sanction can be better fulfilled.

The subsequent question is what purposes are in the process of matching criminal sanctions with certain undesirable behavior. To answer this question, one needs to start with the competing penal rationales. It has long been debated whether the punishment of criminal offenders should be based primarily on retributivism, or on consequentialist rationales such as crime prevention or deterrence, rehabilitation of offenders or restoration of social order.¹⁰⁹ Retributivism requires the

¹⁰⁶ *Supra* note 62, von Hirsch and Ashworth (2005), p. 27.

¹⁰⁷ This is a fundamental proposition adopted by the social contract theory. The concept of the social contract can be traced back to Socrates and Plato, and was developed over the course of the seventeenth century by Thomas Hobbes, John Locke, Jean-Jacques Rousseau, and other scholars. Later this theory was re-explained by John Rawls, David Gauthier, and Philip Pettit.

¹⁰⁸ Grant Lamond, 'What is a Crime?', 27(4) (2007) *Oxford Journal of Legal Studies*, 609-632, p. 621.

¹⁰⁹ This study adopts David Dolinko's categorization on penal theories, see David Dolinko, 'Punishment', in John Deigh and David Dolinko (eds.), *The Oxford Handbook of Philosophy of Criminal Law* (New York: OUP, 2011), pp. 403-440. There are theories, such as the communication theory, that are deemed as combining retributive and consequentialist features. For studies in this group, see e.g., Herbert Morries, 'A Paternalistic Theory of Punishment', 18 (1981) *American Philosophical Quarterly*, 263-271; Jean Hampton, 'The Moral Education Theory of Punishment', 13(3) (1984) *Philosophy & Public Affairs*, 208-238; R. A. Duff, *Punishment, Communication, and Community* (New York: OUP, 2001). Some scholars also argue that these two theories are actually answering different questions. See Anthony Quinton, 'On Punishment', 14 (1954) *Analysis*, 133-143.

maintenance of proportionality both ordinally and cardinally between the severity of criminal sanctions and the seriousness of the offence.¹¹⁰ The latter is generally evaluated on the basis of the culpability of the offender and the harm caused by the offence. It concentrates on specific criminal conduct, deems offenders as moral agents and mainly adopts a retrospective viewpoint. Comparatively, the consequentialist's arguments may justify further departures away from the baseline of responsiveness. Their focus lies more on the offender as well as other stakeholders rather than the offence in a future-focused perspective.¹¹¹

The classical retributivists such as Kant upheld culpable wrongdoing alone as sufficient justification for state punishment.¹¹² Nevertheless, after centuries of evolution this theory has been profoundly influenced by utilitarian thoughts, and 'a mix of welfare and autonomy derived rules' became fashionable among scholars such as Hart,¹¹³ Morris,¹¹⁴ and von Hirsch and Ashworth.¹¹⁵ The competition between these ideologies is likely to continue. The key question is, therefore, not whether or not multiple purposes can and should be upheld at the same time in the context of legal punishment but which one should be given the primacy and the extent to which it can be adjusted by the other. Again, retributivists and consequentialists would give different answers, but the essence of this question is in fact 'one of the line-drawing conundrums that are inescapable in a world of competing values'.¹¹⁶ Even so, a state's implementation of penal power should be morally justified primarily. This is the basis of the consideration in determining proper dispositions of certain wrongdoings. In this sense, factors based on non-retributivism ideologies should function secondarily as adjustment.

As discussed earlier, CPAs are generally approaches serving consequentialist goals instead of focusing on the past wrongdoings and upholding just deserts. Therefore in the case of CPAs, it is the extent to which the retributivist ideology can be adjusted by such goals which determines the scope of the state's bargaining power. The scope can be greatly differentiated in different legal systems from fine-tuning to significant modification. Such distinctions are particularly visible in the discretionary power of public prosecution services, as discussed previously. Divergence in the judiciary among different jurisdictions seems less apparent, but there is an interesting prevalence of sentencing

¹¹⁰ For the ordinal and cardinal dimensions of proportionality in sentencing, see *supra* note 62, von Hirsch and Ashworth (2005), pp. 138-139.

¹¹¹ For the discussion on the competing ideologies on justifying the punishment on wrongdoing, see William Wilson, 'Punishing Wrongdoing', in *Central Issues in Criminal Theory* (Oregon: Hart Publishing, 2002), pp. 43-76.

¹¹² See Immanuel Kant, *Metaphysical Elements of Justice*, 2nd Edition, translated with introduction and notes by John Ladd (Indiana: Hackett Publishing Company, Inc., 1999). Although Kant is usually considered as the most hard-core of retributivists, his theory has been challenged as a mixed model. See e.g., Thomas Hill, 'Kant on Wrongdoing, Desert, and Punishment', 18 (1999) *Law & Philosophy*, 407-441.

¹¹³ See H.L.A. Hart, 'Prolegomenon to the Principles of Punishment', in *Punishment and Responsibility* (with an Introduction by John Gardner), 2nd Edition (Oxford: OUP, 2008). Hart is a typical example of the merging of retributivism and utilitarianism that some scholars such as Douglas Husak and William Wilson consider him a retributivist, while others like Andrew von Hirsch and Andrew Ashworth classified Hart into the consequentialist group. See Douglas Husak, *The Philosophy of Criminal Law* (Oxford: OUP, 2010); *supra* note 111, Wilson (2005); *supra* note 62, von Hirsch and Ashworth (2005).

¹¹⁴ Noval Morris developed a theory of 'limiting retributivism' where retribution is used to set boundary for sanctions, while the territory within that boundary needs to rely on other grounds such as crime prevention. See Noval Morris, *The Future of Imprisonment* (Chicago, University of Chicago Press, 1974).

¹¹⁵ Andrew von Hirsch and Andrew Ashworth promote 'just deserts' as the fundamental principle in scaling sentencing. Other purposes can also be recognized as long as their coherence with the principle of proportionality. See *supra* note 62, von Hirsch and Ashworth (2005).

¹¹⁶ *Supra* note 109, Dolinko (2011), p. 423.

guidelines in recent decades in several jurisdictions such as the US,¹¹⁷ England and Wales,¹¹⁸ Israel,¹¹⁹ New Zealand¹²⁰ and China.¹²¹ These efforts do not necessarily change the extent of departure, but they can at least make the adjustment visible and assessable. Regardless of the concrete extent of discretion, the presumption here is that the higher the tolerance for departing from the recidivist ideology, the greater the negotiating power of criminal justice authorities.

6.1.2 Offender's Bargaining Power

The bargaining power of the offender in CPAs does not originate from any tangible or intangible resources that they may possess, but from their guaranteed free choice to either accept or reject cooperation. This is because pleading guilty, providing intelligence concerning other crimes and making restitution to victims have long existed in most legal systems in ancient times, but negotiation was generally impossible or unimaginable in a legal environment in which offenders were deemed as the subject of criminal proceedings.

The offender's free choice or autonomy in criminal justice has evolved over a long period both substantially and procedurally. The rise of the offender's bargaining power is actually a concomitant of the gradual recognition of the common faith and fundamental values with respect to such autonomy. It is a widespread, albeit not synchronized, civilizing process that the rationalization for penal sanction is promoted, and reckless cruelty and private vengeance are 'concealed and denied by the administrative routines of dispassionate professionals'.¹²²

In his research Cornwell identified four senses of 'civilizing criminal justice' that have been developed in academic studies: (1) re-assessing criminal justice principles and punitive operational practices to make them more likely to reduce crime within society; (2) enabling the outcomes of justice to deliver social benefits to all of the 'stakeholders' involved in criminal offending; (3) making justice processes themselves evidently more fair, consistent, understandable and amenable; and (4) re-visiting the traditional classification of certain less serious offences with an eye to 'decriminalization'.¹²³ Despite diverse understandings of the connotation of 'civilization' in criminal justice, some common characteristics can be summarized. A civilized criminal procedure recognizes offenders as subjects rather than objects; it relies primarily and mostly on rationality instead of assumption or divinity; it respects individual liberty and uses it as a baseline for the distribution of rights and obligations between state and citizen; it avoids cruelty and brutality at each stage of the

¹¹⁷ Sentencing guidelines have been evolving in the US since the 1970s with a unique grid-model. For discussion on the US model, see, e.g., Kat Stith and Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (London: The University of Chicago Press, 1998).

¹¹⁸ Among all legal systems that do not follow the US grid-model, England and Wales has developed comprehensive sentencing guidelines during the past decade. See Andrew Ashworth and Julia V. Roberts, *Sentencing Guidelines: Exploring the English Model* (Oxford: OUP, 2013).

¹¹⁹ In 2012 Israel introduced statutory directions on sentencing for courts through approving a new sentencing law. See Julian V. Roberts and Oren Gazal-Ayal, 'Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2012', *Israel Law Review*, 46(3) (2013): 455-479.

¹²⁰ See Warren Young and Claire Browning, 'New Zealand's Sentencing Council', *Criminal Law Review* 4(2008): 287-298.

¹²¹ In 2014 the SPC in China issued *The Sentencing Guiding Opinions on Common Crimes* (关于常见犯罪的量刑指导意见, 2014 Guiding Opinions).

¹²² David Garland, *Punishment and Modern Society* (Oxford: OUP, 1990), p. 235.

¹²³ David J. Cornwell, 'Justice and Punishment: Myths, Mercy and Anglo-Saxon Attitudes', in David J. Cornwell et al, *Civilising Criminal Justice: An International Restorative Agenda for Penal Reform* (Hampshire: Waterside Press Ltd., 2013), pp. 49-77.

procedure; and it upholds key principles such as ‘equality before the law, personal responsibility (internal or external), publicity, proportionality and finally that of subsidiarity (*ultima ratio*)’¹²⁴

The trend of civilizing criminal justice has put ‘new arrows in the defense’s quiver, coupled with greater willingness to use them’.¹²⁵ Procedural safeguards that aim at preventing the arbitrary infringement by the state on the fundamental rights of the citizens, such as the right to remain silent, the right to a fair trial and the right against self-incrimination, are receiving increasing respect and are guaranteed by institutions such as the European Convention of Human Rights (ECHR). It is a worldwide trend that more fundamental rights are gradually acknowledged and protected, although different legal systems move forward at their own pace and in their own way. It is these rights, privileges and immunities recognized and safeguarded in criminal proceedings that bestow upon individual offenders the power to reject cooperating with the powerful state agencies. One key characteristic of the offender’s procedural privileges is that most of them are disposable. It enables the offender to waive such safeguards and formulate his responses to the offer given by criminal justice agencies. Similar to the state’s bargaining power, there is also a basic presumption for offenders: the higher the protection of their free choice, the more powerful they are in any negotiation with the state.

To conclude, contemporary criminal justice grants bargaining power to both the state and the offender. The multiple and sometimes competing values in criminal justice enable the state to adjust strategies when dealing with crimes, and the legally guaranteed rights, privileges or immunities of individual offenders are the sources of their bargaining power. Behind this is a gradually evolved state-citizen relationship towards balanced status and mutual reliance. In particular, such a relationship enables both parties to negotiate and cooperate.

6.2 Necessity: The Demands of Parties

The ability to bargain does not necessarily lead to negotiation and cooperation. CPAs are mutually beneficial arrangements, which mean that there must be demands from both parties that cannot be sufficiently or effectively fulfilled through ordinary procedures. Thus the next step is to examine the necessity of CPAs in terms of the demands from both sides.

6.2.1 Offender’s Demands

From the offender’s perspective, it is not difficult to understand the desire for leniency and certainty.¹²⁶ On the one hand, it is common in different legal systems that offenders, ‘the smart, the stupid, the frightened and the confident, all are anxious to be found not guilty or, alternatively, to minimize their sentences’.¹²⁷ On the other hand, as criminal procedure is an on-going, dynamic process with many variables, the earlier the stage, the more uncertain the outcomes. As their personal interests are directly affected, it is normal for offenders to have a strong incentive to pin down legal decisions as soon as possible. Through comparing legal systems with adversarial and inquisitorial traditions, it can be observed that uncertainty in adversarial legal systems is aggravated by the emphasis on trial proceedings and jury participation, while in inquisitorial systems it is mitigated by

¹²⁴ John Blad, ‘Civilization of Criminal Justice: Restorative Justice Amongst other Strategies’, in *ibid*, Cornwell *et al* (2013), 209-253, p. 211.

¹²⁵ See *supra* note 13, Damaška (2004).

¹²⁶ This argument is based on the theoretical assumption of the non-existence of ‘trial penalty’. About detailed discussion on trial penalty, see, e.g., *supra* note 8, Lippke (2011).

¹²⁷ Philip A. Thomas, ‘Plea Bargaining in England’, 69(2) (1978) *The Journal of Criminal Law & Criminology*, 170-178, p. 171.

the reliance on the pre-trial investigation and dossier.¹²⁸ Here we arrive at a third hypothesis: the longer the period of uncertainty and the greater the number of variables, the higher the incentives for the offender to negotiate.

6.2.2 State's Demands

The state's demands in CPAs are highly relevant to purposes that cannot be effectively or sufficiently satisfied through formal criminal procedure. Ashworth and Zedner once commented that the 'paradigmatic sequence of prosecution-trial-conviction-sentence' has been frequently criticized as being 'not cost-effective', 'not preventive', 'not necessary', 'not appropriate', and 'not effective'.¹²⁹ On the one hand, there is a transformed understanding of criminal activities from occasional social deviancy to 'fact of everyday life'¹³⁰ where the full-dress proceedings become less necessary for all cases. While on the other hand, as shown in previous discussions, there is a strong pragmatic need to obtain the offender's cooperation in different forms which cannot be easily guaranteed through formal criminal procedure.

These arguments are largely fuelled by the increased complexity of full-dress proceedings featuring the panoply of human rights protections and complex evidence rules.¹³¹ For one thing, as symbols of procedural civilization, procedural safeguards for offenders are being continuously strengthened, and direct contact between offenders and criminal justice authorities is carefully prevented, in order to shield them from overbearing officials. It further sets limits on the channels through which the state can legally obtain the offender's cooperation. These trends have been accompanied by increased participation of lawyers in the trial proceedings. To some extent, the increasing procedural complexity and the increased bargaining power of the offender are two sides of the same coin. On the other hand, the high standard of proof and strict evidence rules reinforce obstacles to an easy conviction. Given such circumstances, legal and reliable evidence with a high capacity to provide proof is quite often in short supply especially with regard to complex and serious offences.

The increase in the complexity of proceedings has been accompanied by demands for procedural diversion. Commentators have ascribed such demands to two major factors: (1) the increased complexity in certain types of crimes, and (2) the reconsideration on the effect of conventional sanctions.¹³² The first factor derives from considerations of the fact that for the same

¹²⁸ Mirjan Damaška adopted another set of terminologies to describe the differentiated features in different legal systems: the hierarchy model and the coordinate model. Their distinction with the commonly used 'adversarial vs inquisitorial' is, however, difference in focuses rather than of kind. See Mirjan Damaška, 'Structures of Authority and Comparative Criminal Procedure', 84 (1975) *The Yale Law Journal*, 480-544.

¹²⁹ Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions', 2 (2008) *Criminal Law and Philosophy*, 21-51.

¹³⁰ Marcus Felson, *Crime and Everyday Life* (London: Sage Publications Ltd., 2002).

¹³¹ For discussions on the connection between procedural complexity and the origins of criminal procedural agreements, see, e.g., *supra* note 21, Feeley (1991). In their research Ashworth and Zedner noticed a deliberate subversion or avoidance of ECHR in England and Wales by expanding the scope of plea bargaining, which in turn indicates the strong connection between the heavy burden of carrying out full protection and the eager requirement of high efficiency. See *supra* note 129, Ashworth and Zedner (2008).

¹³² There is also argument on the increased caseload. For instance, in George Fisher's research the increased caseload pressures in the US on nineteenth-century prosecutors is considered to be a major source of plea bargaining. See *supra* note 21, Fisher (2000). However, this is difficult to assess as many factors may lead to the fluctuations in statistic numbers. Meanwhile, the trend of the crime rate is differentiated in different countries, which can be observed in the Crime and Criminal Justice Statistics (2003-20012) issued by the United Nations

crime, there are different levels of seriousness. The development of parallel procedural channels is promoted, especially by criminal law purists, demanding ‘the removal of “quasi-crimes” from the criminal to an administrative process, or by the application of civil procedure’ where ‘cases can be dealt with more cheaply, effectively, and appropriately, leaving the procedural requires of the criminal law ... to apply, undiluted and intact, to conduct that remains criminal’.¹³³

The second factor for procedural diversion has been generated by criticisms of the traditional way of processing crimes and criminals. It has long been debated that ‘nothing works’ or ‘what works’ in the context of criminal sanctions¹³⁴ where people’s perceptions are ‘molded by social forces’, and ‘does not exist independently of the social structures and processes that help to define and control it’.¹³⁵ One criticism is that there is an over-reliance on conventional penal measures without producing corresponding positive social effects such as a reduction in recidivism.¹³⁶ Such an argument encourages criminal justice agencies to divert qualified cases away from the normal flow of criminal proceedings or to impose more effective and humane measures that quite often contain less censure and deprivation of freedom. Restorative agreement is particularly a product of this trend

Collectively, these factors create demands for reforming strategies within current institutional structures and promote the ‘contractual governance’ in the criminal justice sphere. ‘Contract’ in the context of social governance is, as Crawford described, a ‘metaphor for a technique of “regulated self-regulation”’ which is characterized with responsibility, reciprocity, rationalization, sense of choice, ‘presentation’, and active responsibility.¹³⁷ Seeking cooperation through negotiation is based on the rationale that compared to the ‘command and control’ style of formal criminal procedure, collaboration based on ‘responsive regulation’ can be expected to ‘achieve higher levels of compliance’, ‘reduce the costs of monitoring and enforcement’, and ‘conserve the resources of the regulatory agency for the pursuit of particularly egregious cases’.¹³⁸ In this sense, CPAs are actually strategies adopted by the modern state to distribute its task of solving crimes to offenders. It is a change in the modality of penal power rather than in its ownership. CPAs still function within the framework of state-monopolized penal power with diversified strategies.

Office on Drugs and Crime (UNODC). Data are available at

<http://www.unodc.org/unodc/en/data-and-analysis/statistics/crime.html>. Accessed 25 August 2014.

¹³³ *Supra* note 129, Ashworth and Zedner (2008), p. 45.

¹³⁴ ‘Nothing works’ is a term adopted by D. Lipton, Robert Martinson and J. Wilks in their analysis of the criminal rehabilitation programs between 1945 and 1967, and widely used by scholars in various aspects of criminal justice. See D. Lipton, Robert Martinson and J. Wilks, *Effectiveness of Correctional Treatment – A Survey of Treatment Evaluation Studies* (Westport: Praeger Publishers, 1975). See also Thomas Orsagh, ‘What Works When: Rational-Choice Theory and Offender Rehabilitation’, 13 (1985) *Journal of Criminal Justice*, 269-277; James McGuire and P. Priestley, *Reviewing ‘What Works’: Past, Present and Future*. (Chichester: Wiley Press, 1995); Paul Gendreau, Tracy Little and Claire Goggin, ‘A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!’ 34(4) (1996) *Criminology*, 575-608; Monica Barry, ‘The Mentor/Monitor Debate in Criminal Justice: “What Works” for Offenders’, 30 (2000) *British Journal of Social Work*, 575-595; Francis T. Cullen and Gendreau Paul. ‘From Nothing Works to What Works: Changing Professional Ideology in the 21st Century’, 81(2001) *The Prison Journal*, 313-338; Anthony Petrosino and Julia Lavenberg, ‘Systematic Reviews and Meta-Analysis: Best Evidence on “What Works” for Criminal Justice Decision Makers’, 8(1)(2001) *Western Criminology Review*, 1-15.

¹³⁵ Roger A. Shiner, ‘Theorizing Criminal Law Reform’, 3(2009) *Crim. Law and Philos.*, 167-186, p. 168.

¹³⁶ John Blad describes such a trend as ‘incremental loss of civilization in criminal justice’. See John Blad, ‘Civilisation of Criminal Justice, Restorative Justice Amongst other Strategies’, in *supra* note 123, Cornwell *et al* (2013), pp. 209-254.

¹³⁷ Adam Crawford, ‘“Contractual Governance” of Deviant Behaviour’, 30(4) (2003) *Journal of Law and Society*, 479-505, pp. 488-490.

¹³⁸ Hugh Collins, *Regulating Contracts* (Oxford: OUP, 1999), p. 65.

From the discussion above an inner link between CPAs and ordinary procedure can be observed. The rise of CPAs originates from the civilization process of ordinary procedure that on the one hand satisfies increasing requirements for justice, fairness and respect of human rights, while on the other hand, however, this development may complicate criminal proceedings and marginalize other stakeholders. CPAs are born pragmatically and expediently, interwoven with ordinary procedure and functioning as supplements or corrections. Such a relationship gives rise to two more hypotheses. First, there is a positive correlation between CPAs and ordinary procedure, in that the more civilized the latter, the higher the demands for the former. Second, the values respected and guaranteed in ordinary procedure are indispensable in safeguarding the robustness of CPAs. Without these safeguards, CPAs may easily degenerate into mechanisms that have the mere appearance of fair negotiation while being dominated by pure coercion.

6.3 Feasibility of Coordinating CPAs with Ordinary Procedures

Discussion above reveals not only the connection but also distinctions between CPAs and ordinary procedure, indicating that there might be tension areas in-between. This section examines both potential conflicts between the two paradigms and the feasibility regarding coordination from a theoretical perspective. It starts with analysis on the unique features of CPAs that may not always be consistent with ordinary procedure and may create tensions areas. On the basis thereof, this section moves on to examine the feasibility of coordinating the tension areas.

6.3.1 Characteristics of CPAs in the Criminal Justice Scenario

One key characteristic of CPAs is the reciprocal cooperation between offenders and criminal justice agencies in processing crimes and making penal decisions.¹³⁹ Ordinary procedure is characterized with the state monopoly on manipulating penal power, and one of its major functions is to restrict such manipulation by carefully preserving a distance between state and citizens through explicit procedural rules. It is the basis of many fundamental procedural designs such as the distribution of burdens of investigation, prosecution and proof. Under the pure CPA model the segregation between two parties is weakening, the procedural restrictions on legal officials are loosening, and the breach of rules is becoming difficult to detect under the cover of negotiation. Such a feature to some extent transforms the manner in which penal power is manipulated from unilateral to multilateral.

The second characteristic concerns the behavioral pattern of an offender. Under ordinary procedure offenders are allocated limited active duties with respect to major procedural issues such as proof.¹⁴⁰ This passivity and the unilateral manipulation of penal power by professional officials are

¹³⁹ Tulkens and van de Kerchove once categorized criminal justice into four types to describe the interactions: imposed justice, participative justice, consensual justice and negotiated justice. As Tulkens himself acknowledged 'in criminal law the models are never rigidly fixed'. However, this categorization shows a gradually faded colour of the state's arbitration in using the penal process and an individual's increasing decisive power. This thesis shares the similar scope as 'negotiated justice', and all three other types are covered under ordinary procedure as they have not overturned the unilateral feature of the procedure. See Françoise Tulkens and Michel van de Kerchove, 'La justice pénale: justice imposée, justice participative, justice consensuelle ou justice négociée?', (1996) *Revue de droit pénal et de criminologie*, 445-494, cited in *supra* note 15, Tulkens (2002), p. 644.

¹⁴⁰ It needs to be noticed that in different jurisdictions the burdens on the offender in criminal procedure can be quite divergent. A typical example of such is that to date offenders in China are still obliged to deliver truthful confession. However, such an obligation has received increasing criticism and the overall trend is towards abolishing rather than preserving it. For detailed discussion on this obligation in Chinese criminal justice, see

two sides of the same coin, and it is collectively safeguarded through a set of internationally acknowledged human rights. Comparatively, CPAs cannot function unless with the offender's active participation. The offender is assigned more duties, not by the law but by the agreement, and safeguards on human rights are weakened mainly through waiver. This feature may give rise to risks for the minimum safeguards for human rights by changing the offender's behavior patterns from passive to active.

The third characteristic of CPAs is related to the primary focus of the procedure. As the main mechanism for solving crimes in one jurisdiction,¹⁴¹ the focus of ordinary procedure is facts. Under this model, one assumes that the application of legal norms follows a kind of syllogism and the conclusion can be deducted as long as facts are given. As to CPAs, to serve the aforementioned consequentialist goals, the primary focuses of the three types of CPAs may shift away from the facts of the offender's own case. In plea agreement, the focus is on speeding up proceedings, and in restoration agreement, the focus is mainly to satisfy victims and rehabilitate offenders. Assistance agreement is still concentrating on facts, but not those which affect the offender's own case. From this perspective, another area of tension can be detected with respect to the task of seeking the truth caused by diverting the focus away from facts.

Finally, CPAs also feature in the manner in which the mechanism is operated. Both the public nature of criminal justice and the requirement of power control lead to high transparency, publicity and formalization in ordinary procedure under the principle of legality. They both also guarantee predictability and improve understanding among persons who are not involved in the administration of criminal justice. CPAs, however, operate in a more internal and exclusive manner. How and to what extent the details in procedure and content are accessible to non-contractual parties may vary in different jurisdictions, but the use of inter-party negotiation may inevitably increase the potential risk against the key rights of other stakeholders.

It must be noted that these characteristics are mainly based on the pure theoretical model and it relies on observations made on legislative documents and relevant literatures. Therefore, the features of CPAs revealed here are unlikely to be rigidly presented in reality. Even so, this part still reveals some potential conflicts originating from the inherent nature of CPAs and ordinary procedure, which will be examined in more detail within specific jurisdictions in the following chapters.

6.3.2 Feasibility of Coordination

The four characteristics reveal the potential tension areas between CPAs and ordinary procedure. The subsequent questions are whether and to what extent the tension can be coordinated. Once more, answers to this question largely depend on the actual social and legal environment. When observing 'abnormal mechanisms' which depart from the fundamental framework of ordinary procedure, some scholars turn to human rights protection for solutions.¹⁴² Such efforts, however, may be ineffectual when faced with the important fact that some types of CPAs such as plea agreement aim exactly at circumventing the procedural safeguards on assisting offenders by encouraging waiver, while others

Chapter II of this thesis.

¹⁴¹ When 'primary mechanism' is used, it does not refer to a quantitative meaning. This is because in jurisdictions like the US the amount of cases solved through plea bargaining has much more than that through ordinary procedure.

¹⁴² In Andrew Ashworth and Lucia Zedner's research six major changes against conventional criminal law in England and Wales were identified: greater use of diversion, greater use of fixed penalties, greater use of summary trials, greater use of hybrid civil-criminal processes, greater use of strict liability, greater incentives to plead guilty, and greater use of preventive orders. *Supra* note 129, Ashworth and Zedner (2008), p. 44.

may by their nature lead to conflicts among different rights. Assistance agreement is, as discussed earlier, a typical example of the latter. In the case of a restoration agreement, introducing victims into the decision making process of criminal justice agencies may undermine the horizontal equity due to 'privatization'.¹⁴³ Therefore it has also been admitted that those protections were quite vulnerable because they 'ventured little into the criminal law itself; and its more demanding procedural protections ... do not impinge on the changes'.¹⁴⁴

Individual rights are, as Dworkin claimed in his esteemed work *Taking Rights Seriously* in 1977, 'political trumps held by individuals'.¹⁴⁵ Except for those deemed as indispensable for human beings, individual rights are, within a reasonable scope, characterized by respect for individual autonomy and liberty in disposition. The various safeguards are not designed to extinguish but to facilitate the personal autonomy in possessing these rights. CPAs are such a mechanism that enables parties to enter into legally binding deals based on their self-determination. From this perspective, instead of eroding criminal justice's liberal ideology, the application of CPAs reflects increased respect for individual autonomy.

The next question is whether CPAs are by their very nature coercive and detrimental to individual autonomy and liberty. In other words, is coercion an inherent part of CPAs? The answer is no. This is because coercion is an inevitable feature of any negotiation process whereby costs and benefits need to be balanced, and important interests may be harmed.¹⁴⁶ Therefore, from a purely theoretical view the coercive nature of CPAs lies in the opportunity to choose. Imposition is inherent to CPAs as it is a mechanism entailing specific obligations and legal dispositions. However, such imposition is not lessened if offenders refuse to cooperate and choose to follow ordinary procedure. In this sense, CPAs are by their nature no more coercive than other criminal justice mechanisms. However, the features discussed above may create loopholes for undue coercion if necessary safeguards are absent. Therefore the key question here is not whether a CPA is coercive, but how to minimize the risks against the integrity of criminal justice.

7. Conclusions

This chapter has sought to conceptualize CPAs by constructing a pure model for CPAs. Under the name of criminal procedural agreement, this model enables a systematic analysis of the origins and mechanisms of different types of agreements and examination on their correlation with ordinary procedure in the following discussion. Although the pure model reveals the kernel of various types of agreements in the criminal justice scenario, in reality variants exist due to the place and time a specific agreement takes place. Therefore when examining CPAs, it is not sufficient to merely look at the pure model. Rather, the relevant variants also deserve attention to better understand the nature and evolution of the state-citizen cooperation.

In this chapter it is argued that CPAs are mechanisms originating from multiple values upheld by the state in using punishment, and being fostered by the civilization of criminal justice; this is demonstrated in particular by the increasing restraints on official power and the protection of offenders' human rights. As the cost of ordinary procedures is increasing and crime is reframed as social risk, the state's role as the single manipulator of legitimized violence to maintain social order

¹⁴³ See Andrew von Hirsch *et al*, 'Restorative Justice: A "Making Amends" Model?' in *supra* note 62, von Hirsch and Ashworth (2005), pp. 110-130.

¹⁴⁴ *Supra* note 129, Ashworth and Zedner (2008), p. 45.

¹⁴⁵ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p. xi.

¹⁴⁶ See, for instance, Andrew von Hirsch and Andrew Ashworth's argument in 'The RJ intervention as an imposition', in *supra* note 62, von Hirsch and Ashworth (2005), pp. 115-116.

appears inadequate. What is expected in criminal justice does not always match what is actually achieved through criminal procedure,¹⁴⁷ and criminal justice agencies are urged to solve crimes more efficiently and effectively. The increased state demands in crime control are accompanied by the offender's desire for more predictability and leniency. Negotiation is facilitated by the growing respect given to offenders and the fact that their rights, privileges and immunities are guaranteed in ordinary procedure.

Through this study, an intrinsic connection between CPAs and ordinary procedure can be observed, which give rise to four implications. First of all, CPAs supplement and modify ordinary procedure but meanwhile may create tension areas in criminal justice. Second, as long as the state-citizen relationship reinforces the trend from a vertical hierarchy to horizontal coordination, mechanisms containing bargaining and negotiation are likely to expand. Furthermore, the quality of CPAs largely relies on that of ordinary procedure. Despite the tension, the decay in ordinary procedure would inevitably result in impairment of CPAs. Finally, the co-existence of both paradigms raises concerns about potential tension areas where guidelines for coordination are necessary.

Does the use of CPAs indicate a dilution of the state's role in social control? Not necessarily. CPAs also provide channels for the state to invade private territory through legalizing negotiation and exchanging benefits. Macneil once argued that the contract in modern world had become a 'plague' that enabled the exercise of power everywhere.¹⁴⁸ In this context, the risk of crime is allocated as well as the responsibility to solve it, and the conventional version of power operation is being reformed correspondingly. The obligation of proof that previously rested on the state's shoulder is transferred to the offender; the duty to collect evidence and information previously imposed on investigation organs is transferred to the offender; and the protection and remedy previously supposed to be offered by the nation through civil and administrative procedures is also transferred to the offender. Furthermore, through negotiation it tries to transform this allocation of tasks from external compulsion into internal compulsion, both through re-interpretation of crimes and their causations, and by encouraging civilians to consider themselves as indispensable parts of the administration of criminal justice. Therefore, the likely effect of these agreements is, as Sanders *et al* stated, to 'facilitate[d] a substantial expansion of formal state control of individuals'.¹⁴⁹

¹⁴⁷ William J. Stuntz, 'The Uneasy Relationship between Criminal Procedure and Criminal Justice', 107 (1997) *The Yale Law Journal*, 1-76.

¹⁴⁸ See Ian Roderick Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Heaven: Yale University Press, 1980).

¹⁴⁹ Andrew Sanders *et al*, *Criminal Justice* 4th Edition (Oxford: Oxford University Press, 2010), p. 6.

Chapter III Criminal Procedural Agreements in China

1. Introduction

Based on the pure model of CPAs constructed in Chapter I, this Chapter examines that model and its variants in the Chinese legal context and analyses CPAs' position in the current criminal justice system. The bone structure of today's Chinese criminal justice can be traced back to the legal reforms at the end of the 1970s after ten-year's turbulence caused by the Cultural Revolution (1966-1976). Its spirit, however, is deeply rooted in the ingrained legal traditions such as inquisitorial features and Confucianism doctrines.¹ Meanwhile, as a legal system operated in a context of party-state, Chinese criminal justice also embodies strong communist or socialist characteristics.² Furthermore, reforms on criminal procedure initiated around 1996 imported a number of adversarial approaches. Therefore, Chinese criminal justice nowadays is a combination of ingredients of traditional and modernized, domestic and international, inquisitorial and adversarial, and authoritarian and liberal democratic. Such a feature is obvious in the administration of criminal justice that on the one hand, the overall trend towards convergence with common values and principles respected in other jurisdictions is strengthening, whilst on the other hand traits with Chinese characteristics on specific mechanisms can be found everywhere.

This is the context in which different types of CPAs are shaped and manipulated in contemporary China. Plea agreement is relevant to mechanisms encouraging offenders' confession (坦白) or guilty plea (认罪). With the promulgation of relevant sentencing guidelines and modifications in summary procedure in the revised Criminal Procedure Law in 2012 (2012 CPL), the mutually-beneficial exchange based on confession in Chinese criminal proceedings experienced a process from subsidiarity to independence. Assistance agreement has experienced similar development under the term 'meritorious service' (立功). Amendment VIII of the 1997 Criminal Law (1997 CL) in 2011 has established the legal basis for the cooperation between criminal justice agencies and assisting offenders. Restoration agreement which features in individual reconciliation was marginalized during the 1980s and 1990s as a consequence of legal reforms towards professionalism and formalization. Since the beginning of the 21st century, this trend has been reversed by the prevalence of a mechanism named 'criminal reconciliation' (刑事和解). In 2012 this mechanism was legitimized by the 2012 CPL.

Despite of all these developments, controversies around these agreements are inevitable not only due to their potential tension with ordinary procedure but also because of the collision in ideologies behind. Within such a context, any explanation of the position of CPAs and their correlation with ordinary procedure in China needs to be linked to the history and the overall legal environment. Therefore, three major types of CPAs are examined respectively in the first three parts from aspects of historical origins, current legal regimes and institutional frameworks, and motivations and controversies around them. Derived from the separated discussion on the status of specific agreements in the criminal justice system are the common characteristics of CPAs as well as their collective correlation with ordinary procedure in China, which are explored in detail in part five.

2. Plea Agreement

¹ For general discussion on the historical and cultural roots for criminal justice system in China, see Klaus Muhlhahn, *Criminal Justice in China: A History* (London: Harvard University Press, 2009).

² See, e.g., Franz Michael, 'The Role of Law in Traditional, Nationalist and Communist China', 9 (1962) *The China Quarterly*, 124-148.

Under Chinese law, plea agreement is relevant to two concepts: confession and guilty plea. According to Black's Law Dictionary, 'guilty plea' refers to 'an accused person's formal admission in court to having committed the charged offence',³ while 'confession' means 'a criminal suspect's oral or written acknowledgment of guilt, often including details about the crime'.⁴ The essence of the two phrases is the same: the admission of charges.

However, at least two key distinctions can be observed. The first distinction concerns the content of the offender's statement. A 'guilty plea' only requires the offender to admit the charge with simple 'yes' or 'no'. Comparatively, 'confession' expects the offender to disclose more details of the criminal acts. The second distinction is that a guilty plea should be made in a public court hearing, while confession is supposed to be offered mostly at the pre-trial stage. In current Chinese criminal procedure there exist legal concessions for both confession and guilty plea. However, the emphasis has constantly been on the former instead of the latter. It reflects the profound inquisitorial tradition in the Chinese criminal justice system, featuring the reliance on pre-trial proceedings and the preference for crime control rather than due process. These features are embodied in the detailed procedural design.

In China, official attitudes towards the exchange between legal concession and the offender's confession or guilty plea appear to be contradictory, which can be observed in two criminal policies. The first one is the legal obligation of giving truthful confession (如实供述义务). It was established in Article 64 of the 1979 Criminal Procedure Law (1979 CPL) and is still valid in the 2012 CPL (Article 118). This obligation seems to indicate that in the Chinese legal context little room is left for the negotiation between the prosecution and the defense on confessing or not.

Another relevant policy is 'leniency to those who confess, and severity to those who resist' (坦白从宽, 抗拒从严). Some scholars regard this policy as the basis of plea agreement in China.⁵ Research has shown that in practice, especially during investigation, criminal suspects are quite often informed by interrogators about this policy. Once the suspect confesses, the prosecutor may state in the indictment that 'considering the good attitude of the suspect, it is suggested that the court should make a lenient sentence'. Such suggestion is normally accepted and embodied in the final court verdict.⁶

These two policies raise one question: if confession is a legal obligation for offenders, why should they be rewarded with 'leniency'? Behind this question is a conflict between the pragmatic rationale and the logic of current criminal rules in China. In recent years the Chinese criminal procedure has seen mounting divergence between two trends. One trend moves towards professionalism and modernization and the direct use of terms such as 'plea bargaining' is constantly denied by ordinary proceedings. The other trend, however, moves in another direction so that judicial interpretations increasingly facilitate the cooperation and the mutual exchange of benefit between offenders and criminal justice agencies with respect to a confession or guilty plea.

³ Bryan A. Garner *et al* (eds.), *Black's Law Dictionary* 9th Edition (Wisconsin: West Publishing, 2009), p. 1268.

⁴ *Ibid*, p. 338.

⁵ Long Zongzhi, 正义是有代价的: 论我国刑事司法中的变速交易, 兼论一种新的诉讼观 (The Cost of Justice: Research on Plea Bargaining in Chinese Criminal Justice, and a New Theory of Litigation), 20(6) (2008) 政法论坛 (*Tribune of Political Science and Law*), 3-8. See also Tao Jingyuan, 辩诉交易内质的完善 (The Improvement on the Essence of Plea Bargaining), 4 (2012) 法治与社会 (*Legal System and Society*), 117-118.

⁶ Long Zongzhi and Pan Jungui, 我国实行辩诉交易的依据和限度 (The Limits and Basis of Plea Bargaining in China), 1(2003) 四川大学学报 (*Journal of Sichuan University*), 24-32.

The following discussion outlines the development of the Chinese plea agreement through historical perspective, assessing the reasons behind it, and examining whether or not it is adaptable to the legal environment. It is worthy to be noted that when examining criminal law in China, a term appears to be relevant to confession: voluntary surrender (自首). Both ‘confession’ and ‘voluntary surrender’ encourage offenders to cooperate with criminal justice agencies through self-incrimination. However, the latter is not covered in this research because it happens before the criminal proceedings against a specific suspect are initiated, which leaves little opportunity for negotiation between offenders and criminal justice agencies.

2.1 Historical Review on Plea Agreement in China: from Subsidiary to Independent

In China, for a long period concession from criminal justice agencies on offender’s confession was attached to that for voluntary surrender in legislation. In fact, before 2011 ‘confession’ only existed in criminal policies instead of any specific legal provisions. This is consistent with Chinese legal traditions originated from the imperial era. In history confession was always deemed as a side effect of voluntary surrender. Only when the offender turned himself in before being detected or controlled by relevant authorities could he obtain legal concession. For instance, The Law of Han Dynasty (汉律) prescribed that ‘penalties could be exempted if there was voluntary surrender’ (先自告, 除其罪). A similar statement can also be found in The Law of Tang Dynasty (唐律), which stipulated that ‘criminals could be forgiven if they surrendered themselves before crimes were detected’ (诸犯罪未发而自首者, 原其罪).⁷

The subordination of confession in ancient China was partly due to the fact that confession could be extracted through torture, making negotiation unnecessary. Compared with obtaining a confession, apprehending offenders appeared to be thornier with higher reliance on offenders’ voluntary cooperation, and therefore turning oneself in was more encouraged than confession. These rules were inherited by the Chinese Communist Party (CPC) during the New Democracy Revolution period (新民主主义革命, from 1919 to 1949) to fight against counterrevolutionaries (反革命分子).⁸

The subsidiary status of confession remained unchanged in law until 2011 with the promulgation of Amendment VIII of the 1997 CL. Even so, both academia and practice have shown increasing interests in making better use of an offenders’ confession. There was even a moment at the beginning of the new century that plea bargaining in western jurisdictions appeared in Chinese legal practice. As the current criminal justice system is built on the framework established in 1979, the following discussion traces back to that year and divides the evolution of the Chinese version of plea agreement into three stages: out-of-law stage before the 21st century, transient thriving of plea bargaining at the beginning of the 21st century, and facilitating and formalizing plea agreement since 2003.

2.2.1 Before 21st Century: In Practice but Out-of-Law

After ten-year’s legal vacuum, in 1979 the Chinese criminal justice started to resurge with the promulgation of the 1979 CL and the 1979 CPL. The 1979 CL stipulated that ‘anyone who voluntarily

⁷ Yang Wenge and Deng Zibin, 关于坦白从宽、抗拒从严的思考 (Research on Leniency to Those Who Confess, And Severity to Those Who Resist), 1(2000) 公安大学学报 (*Journal of Chinese People’s Public Security University*), 43-44, p. 43.

⁸ Zhao Deming, 刑事诉讼视野中的“坦白从宽”(Leniency for Acknowledging Crimes in Criminal Procedure), 02(2007) 云南大学学报 (*Journal of Yunnan University*), 108-109.

surrenders after committing a crime may be given a lenient sentence' (Article 63). This provision paid no attention to confession, but it was revised later by the 1997 Criminal Law (1997 CL) into 'criminals who voluntarily surrender and confess on their crimes would be given a lesser or mitigated punishment' (Article 67). In the revised Article confession was emphasized, but offenders still could not get any concession if they confessed after being apprehended by investigators. The subsidiary role of confession was also embodied in procedural law that both the 1979 CPL and its 1996 revision (1996 CPL)⁹ did not establish a separated procedure for guilty plea offenders after they were detected or arrested.

In contrast with laws, judicial interpretations and other official documents during this period showed higher interests in confession, and gradually bridged it to legal concession especially in corruption and economy-related crimes. For instance, in 1982 the Decisions on the Severe Punishment of Criminals Who Seriously Sabotage the Economy (*关于严惩严重破坏经济的罪犯的决定*)¹⁰ stipulated that regulations, which had been issued before the Decisions, could be applied if 'offenders who were arrested before 1st May 1982 confess all crimes and report on other offenders'. Since the Decisions enhanced the penalties for crimes concerned, this provision actually offered leniency for offenders' cooperation. However, legal concession under this provision would not be granted unless both 'confession' and 'report on other offenders' were satisfied simultaneously. Another example is the 1996 SPC's Several Regulations on the Proper Application of Probation on Criminals in Corruption, Bribery, and Embezzlement Cases (*关于贪污、受贿、挪用公款犯罪分子依法正确适用缓刑的若干规定*). According to these Regulations, probation could be issued when (1) the total amount involved is less than 10,000 RMB, and (2) offenders confess, disgorge ill-gotten gains, and show regret.

2.2.2 Beginning of the 21st Century: The Boomlet of Plea Bargaining

Given the awareness of the independent value of offenders' confession to the administration of criminal justice, both academia and practice in China began to explore facilitating mechanisms especially by referring to western experience on plea bargaining.¹¹ Since 1996 Chinese criminal proceedings have begun to be transformed from 'a traditional inquisitorial system of justice into a more adversarial legal process',¹² and plea bargaining received increased attention. Instead of completely transplanting 'plea bargaining', most scholars at that time proposed similar mechanisms

⁹ For general discussion on the revision of the Chinese criminal procedure law in 1996, see Wei Luo, *The Amended Criminal Procedural Law and the Criminal Court Rules of the People's Republic of China* (NY: William S. Hein & Co., Inc., 2000).

¹⁰ Issued by the Standing Committee of NPC on 8 March 1982. Available at http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/content_5004412.htm. Accessed 23 October 2014.

¹¹ Most of the articles at that period were just for introduction, and plea bargaining hadn't been bridged with Chinese judicial reform yet. Relevant research can be found in e.g., Chen Ruihua, *美国辩诉交易程序与意大利刑事特别程序之比较* (Comparative Study of the Plea Bargaining Procedure in USA and Italian Special Criminal Procedure), Part 1&2, 3-4(1995) *政法论坛* (*Tribune of Political Science and Law*), 22- 28; Xiang Zhenhua, *美国司法价值观的新发展: 评辩诉交易* (Recent Development of the American Judicial Value: Comment on Plea Bargaining), 2(1996) *中外法学* (*Peking University Law Journal*), 63-67; He Jiahong, *辩诉交易的功过* (Merits and Deserts of Plea Bargaining), in He Jiahong: *域外痴醒录* (*Record on Madness and Consciousness Abroad*) (Beijing: Law Press China, 1997), p. 238.

¹² Lu Hong and Terance D. Miethe, 'Confessions and Criminal Case Disposition in China', 37(3) (2003) *Law and Society Review*, 549-578, p. 554.

with Chinese characteristics. These proposals can be categorized into two groups: one is to establish a new and independent procedure for guilty plea cases; while the other is to reform the current system.

A representative proposal of the first group is to adopt an ‘adjudication procedure by records’ (书面审程序) for minor crimes. According to it, the offender is expected to admit guilt to the public prosecutor, and the latter may submit a written agreement to the court. After examining its legitimacy, the judge may issue a lenient sentence. This procedure is especially designed for cases with ‘indubitable but insufficient’ evidence, and which meanwhile do not satisfy the conditions for non-prosecution.¹³ The second group claims that instead of establishing a completely new channel and disturbing the current legal framework, a more practical method is to reform the summary procedure by absorbing the essence of plea bargaining.¹⁴

Despite all these proposals, the theory was not echoed by legal practice until the *Meng Guanghu* (孟广虎) Case. In April 2002 the Railway Transport Court¹⁵ in Mudanjiang City, Heilongjiang Province heard an intentional injury case. Meng was accused to have seriously injured Wang Yujie, the victim, on 18th December 2000. After investigation, Meng’s lawyer reached an agreement with the public prosecutor on three issues: (1) Meng pleads guilty, accepts the court’s judgment and voluntarily compensates the victim; (2) Meng withdraws claims against vague facts and insufficient evidence, and agrees with the prosecutor on facts, evidence and charges; and (3) the prosecutor agrees to accept Meng’s guilty plea and suggests that the court should impose a lenient punishment and issue probation.¹⁶ The Court applied a summarized procedure and spent only 25 minutes on the trial. Finally Meng was sentenced to three-year’s imprisonment with three years’ probation.

Meng’s case was deemed as the first plea bargaining in China and stimulated wide discussion on the possibility and necessity of importing plea bargaining into the Chinese legal system.¹⁷ However, in 2002 the SPP expressed its attitude explicitly that judicial reform should follow the law;

¹³ Liu Genju, 确立中国式辩诉交易程序之研讨 (Research on Establishing Chinese Version of Plea Bargaining), 4(2000) 政法论坛 (*Tribune of Political Science and Law*), 75-82. See also, Li Yao, 认罪后的诉讼程序: 简易程序与辩诉交易的协调与适用 (Criminal Procedure after Guilty Plea: The Coordination and Application of the Summary Procedure and the Plea Bargaining), 12(2002) 法学 (*Legal Science Monthly*), 39-44.

¹⁴ Chen Weidong and Liu Jihua, 从建立被告人有罪答辩制度到引入辩诉交易: 论美国辩诉交易制度的借鉴意义 (From Establishing Defendants’ Guilty Plea Procedure to Importing Plea Bargaining: Research on the Implications of the American Plea Bargaining), 6(2002) 政治与法律 (*Political Science and Law*), 49-56.

¹⁵ Railway transportation court (RT court) in China is a special court system hearing civil and criminal cases which happened in or against railway facilities or relevant to the implementation of railway transport official duty. It consists of two levels: basic RT court and intermediate RT court. For the court system in China, see Appendix II.

¹⁶ In 18 December 2000, the defendant Meng Guanghu seriously injured the victim Wang Yujie. Meng Guanghu’s lawyer and the prosecutor reached an agreement on three aspects: a) the defendant Meng pleads guilty, See Zhang Jingyi *et al*, 聚焦国内“辩诉交易”第一案 (Focus on the First “Plea Bargaining” Case in China), available at <http://rmfbyb.chinacourt.org/public/detail.php?id=40277>. Accessed 28 August 2014.

¹⁷ Scholars such as Song Yinghui, Chen Xuequan and Xu Lanting expressed their attitudes on plea bargaining in legal practice immediately after Meng’s case. See Chen Xuequan, 辩诉交易: 诉讼中的双刃剑 (Plea Bargaining: the Double-Edged Sword in Litigation), 正义网 (*JCRB*), 23 April 2002, available at <http://review.jcrb.com.cn/ournews/asp/readNews.asp?id=85393>. Accessed 8 December 2014; Xu Lanting, 辩诉交易缺乏法律依据 (Plea Bargaining Lacks Legal Basis), 法治日报 (*Legal Daily*), 25 April 2002; Song Yinghui, 全面认识辩诉交易 (Fully Understand Plea Bargaining), 正义网 (*JCRB*), 15 August 2002, available at <http://review.jcrb.com.cn/ournews/asp/readNews.asp?id=104894>. Accessed 8 December 2014.

procedures that currently lack legal basis, such as conditional prosecution, plea bargaining, and community service, can be studied and explored, and proposed for legislation when the time is ripe. Nevertheless, they should not be applied in current judicial practice.¹⁸ From then on the legislation shut the door for plea bargaining.

2.2.3 After 2003: Enhanced Facilitation for Plea Agreement

Exploration on plea agreement in China continued regardless of the official denial on plea bargaining. In March 2003, the SPP, the SPC, and the Ministry of Justice (MOJ) issued Several Opinions on Applying Summary Procedure to Public Prosecution Cases (*关于适用简易程序审理公诉案件的若干意见*, 2003 Opinions on Summary Procedure) to expand the scope of summary procedure (简易程序). Summary procedure under the 1996 CPL was a separate trial proceeding dealing with minor cases under three situations (Article 174): (1) public prosecution cases where the defendants may be sentenced to no more than three years' imprisonment, criminal detention (拘役), criminal control (管制) or fines exclusively; (2) private prosecution cases where they can be handled only upon the victim's complaint to people's courts; or (3) minor cases where victims have evidence to prove. None of the situations listed here was relevant to an offender's confession or guilty plea. This was apparently changed in the 2003 judicial interpretation by authorizing the court to provide judicial mitigation for a defendant's guilty plea. Such a rule actually slightly deviated from the summary procedure prescribed in the 1996 CPL by adjusting the filtering criterion from seriousness of the offence to complexity.

Judicial interpretations are, however, not qualified to 'interpret' something from nothing in the law. An alternative is to 'summarize' the formal procedure, indicating that some steps of the full-dressed proceedings, such as the offenders' statement of the facts, may be unnecessary in guilty plea cases. Following this logic, on 14th March 2003, the SPP, the SPC, and the MOJ jointly promulgated the Several Opinions on the Application of Ordinary Procedure on Cases Where the Defendant Pleads Guilty (*关于适用简易程序审理“被告人认罪案件”的若干规定*, 2003 Opinions on Summarized Procedure) to invent a summarized procedure (普通程序简易审). This procedure is a simplified version of the ordinary procedure for cases where offenders plead guilty, and its Article 9 specifically authorized judges to impose lenient sentence on defendants who willingly and voluntarily plead guilty.

The legitimacy of plea agreement is challengeable due to the absence of any legal basis from both criminal law and criminal procedure law. In 2011 the Amendment VIII of the 1997 CL was issued, stipulating in Article 8 that suspects may get a lower punishment simply based on an 'honest statement' (如实供述) on charges. From then on the exchange between criminal justice agencies' concession and the offenders' confession gained legal basis in law, and confession now can be applied as an independent condition for lenient disposals. Correspondingly, in the 2012 revised CPL the summarized procedure created by judicial interpretations in 2003 is absorbed into a re-constructed summary procedure. In addition, in 2014 the SPC issued Sentencing Guiding Opinions on Common Crimes (*关于常见犯罪的量刑指导意见*, 2014 Guiding Opinions),¹⁹ clearly prescribing credits in percentage for confession and guilty plea.

¹⁸ Liu Genju, 确立中国式辩诉交易程序之我见 (Personal Opinion on Establishing Chinese Plea Bargaining Procedure), 20(2002) 政法论坛 (*Tribune of Political Science and Law*), 24-28, p. 28.

¹⁹ 法发[2013] 14号(*Fafa* [2013] No. 14), issued on 23 December 2013 and validated on 1 January 2014. Available at <http://en.pkulaw.cn/display.aspx?cgid=221534&lib=law>. Accessed on 18 August 2014. The Chinese exploration started from 2008 when the SPC promoted the unification of sentencing in 12 local

2.2 Current Legal Regime of Plea Agreement

The legal regime of plea agreement in the Chinese criminal justice system mainly consists of three legal documents: the Amendment VIII of the 1997 CL, the 2012 CPL, and the 2014 Guiding Opinions. These documents are supplemented by several judicial interpretations and other regulations stipulated by authorities in the criminal justice system. The following discussion covers mainly three issues: categorization, proceedings, and concessions in trial proceedings.

2.2.1 Categorization

According to the stage at which the offender offers his cooperation, plea agreement in China can be categorized into two groups: confession at pre-trial stage, and guilty plea in court. Categorization as such exists in neither the 1997 CL nor the 2012 CPL. However, the 2014 Guiding Opinions distinguish these two situations and impose different judicial concessions respectively.

Table 3.1 Sentencing Discounts in the 2014 Guiding Opinions on Confession and Guilty Plea

Category		Discount
Confession (Article 6 of Section 3)	On the charged crimes	≤ 20%
	On the same types of crimes as those charged but more severe and having not been discovered by investigators	10%-30%
	Leading to the avoidance of especially severe consequences	30%-50%
Guilty Plea in Court (Article 7 of Section 3)		≤10%

Two observations can be drawn in Table 3.1. First of all, compared with a guilty plea in court, a confession at pre-trial stage is rewarded with higher discount. Behind this are two factors. One is the inquisitorial tradition of emphasizing the pre-trial investigation rather than oral confrontation in court. The other is the purpose of encouraging an early guilty plea.

The second observation is that in confession, criminal justice agencies expect more than mere admission to charges. As shown in Table 3.1, for confession the 2014 Guiding Opinions list two situations with possible higher sentencing discounts. The first situation is when the suspect reports on certain crimes simultaneously satisfying three conditions. To begin with, reported crimes are the same type as those that have been investigated or charged. Simply put, if the investigators have charged the suspects with bribery, then the reported crimes must also be bribery. If crimes reported by the suspect are other types of crime, for instance, robbery, then this report is, according to the SPC's interpretations in 1998 (1998 Interpretations),²⁰ deemed as voluntary surrender rather than confession.

people's courts (basic and intermediate levels). In 2010 this experiment was expanded to people's courts on basic and intermediate levels across the country. Three years later, the SPC revised the guidelines and required all peoples' courts to stipulate detailed regulations and implement them before the end of 2014. The guidelines aim at enhancing the quality of sentencing on the one hand, and promoting consistency in adjudication on the other hand.

²⁰ See Article 2 of 最高人民法院关于处理自首和立功具体应用法律若干问题的解释 (SPC's Interpretations on Several Specific Issues Concerning Voluntary Surrender and Meritorious Service), 法释[1998] 第 8 号 (*Fashi* [1998] No. 8), issued on 6 April 1998 and validated on 9 May 1998. Available at http://www.law-lib.com/law/law_view.asp?id=13925. Accessed 28 August 2014. Hereinafter the 1998

The second condition is that the reported crime should be more severe than those which have been investigated or charged. It means that, for instance, an offender charged for robbery may confess to another robbery with a higher amount of money involved or with more serious consequences. It should be noticed that the 2014 Guiding Opinions do not invalidate the 1998 Interpretations. According to the latter, criminal justice agencies may still impose full concessions on cooperative suspects without making such comparison (Article 3).

Thirdly, reported crimes should be unknown to investigators. According to relevant interpretations, if wanted notices have been issued against the reported crimes, or such crimes have been registered in the national public security database on wanted offenders, then the reported crimes should be deemed as ‘having been discovered’.²¹

Another special situation stipulated in the 2014 Guiding Opinions concerns the consequences of confession. According to it the suspects may expect higher sentencing discount if their confession (1) leads to the avoidance of damages; and (2) the damages would have been extremely severe. The 2014 Guiding Opinions do not further interpret the connotation of ‘extremely severe damages’, and thus it requires judges’ evaluation in individual cases.

2.2.2 Proceedings

From a procedural perspective, the current legal framework in China does not specify proceedings for the exchange between confession and concession at the pre-trial stage. Comparatively, proceedings in dealing with a guilty plea in court have gained some developments during the past years especially in the 2012 CPL.

The new summary procedure is especially designed for cases satisfying the following conditions simultaneously: (1) the facts are clear and evidence is sufficient; (2) the defendant confesses to charges and does not object to the prosecutor’s indictment; and (3) the defendant agrees to apply summary procedure. According to the SPC’s judicial interpretation on the 2012 CPL, the people’s court may impose lenient sentence on summary procedure cases, that is, cases where offenders plead guilty.²²

Summary procedure under the 2012 CPL can be applied only in cases where the basic people’s court has jurisdiction. Therefore the following crimes are excluded according to the hierarchical jurisdiction (级别管辖): (1) crimes endangering state security; (2) terrorism crimes; (3) crimes where offenders may be imposed on life-time imprisonment or death penalty; (4) crimes with provincial influence; and (5) crimes with national influence. Furthermore, the 2012 CPL also requires that ‘when interrogating a criminal suspect, the investigator should inform the suspect of the legal provisions on leniency for an honest confession’ (Article 118).

With all these reforms, the police, public prosecutors and judges may participate in the task of ‘persuading’ an accused person to plead guilty: the police may inform the suspect of the policy and

Interpretations.

²¹ See 最高人民法院关于处理自首和立功若干具体问题的意见 (Opinions on Several Specific Issues Concerning Voluntary Surrender and Meritorious Service, 2010 Opinions), 法发[2010] 第8号(*Fafa* [2010] No. 6), issued and validated on 22 December 2010, available at http://www.court.gov.cn/qwfb/sfwj/yj/201104/t20110411_19419.htm. Accessed 22 May 2014.

²² 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 (SPC’s Interpretation of Several Issues Concerning the Implementation of the Criminal Procedure Law of People’s Republic of China, 2012 SPC Interpretations), 法释[2012] 第21号(*Fashi* [2012] No. 21), issued on 20 December 2012 and validated on 1 January 2013, available at <http://www.chinacourt.org/law/detail/2012/12/id/146027.shtml>. Accessed 22 May 2014.

possible judicial leniency; the public prosecutor may suggest that the court use summary procedures based on Article 208 of the 2012 CPL; and judges may issue lenient sanctions based on the aforementioned rules. However, the way that the summary procedure works is still at the preliminary stage and only a very general principle is provided in law on the implementation:

'...cases where a summary procedure is applied are not subject to the procedural provisions in Section One of this Chapter on the periods [for formal criminal procedure], interrogation of defendants, questioning of witnesses and forensic examiners, presentation of evidence, and court arguments. The above notwithstanding, the final statement of the defendant should be heard prior to the pronouncement of the judgment'.²³

Normally the trial proceedings should be ended within 20 days, and it can be extended to one and half months only if the defendant risks more than three years' imprisonment. This is much shorter than the formal proceedings where the normal trial period is two months.

2.2.3 Legal Concessions

Available legal concessions for cooperative offenders in plea agreement in China can be divided into two groups based on the stage at which a certain concession is offered.

During trial proceedings, the major type of concession is sentencing discount. This is also an approach more formalized and specifically regulated in law. Apart from the detailed discounts mentioned in the 2014 Guiding Opinions, judges are required to give full and comprehensive examination to the whole case before issuing a concession. The examination should cover the nature of the crime, the severity of the activity, the content of the confession or guilty plea, remorse, and the stage at which the confession or guilty plea is offered.

Apart from sentencing discount, offenders may obtain extra benefits through confession on pre-trial stage. One typical example relates to arrest. In China arrest is implemented by police but approved by people's procuratorates.²⁴ However, arrest may be disapproved for first-time offenders or the accomplice involved in relatively minor offences if they show remorse, voluntarily surrender, or actively compensate.²⁵

A relevant question here is whether non-prosecution is applicable for a guilty plea or confessed offenders. In the current Chinese criminal justice system, prosecutors may issue non-prosecution decisions based on their discretionary power when two conditions are satisfied: (1) the charged crime is minor, and (2) the criminal punishment is unnecessary or can be exempted according to criminal law.²⁶ The first condition normally refers to crimes carrying a possible sentence lower than three years' imprisonment. The key question lies on the second condition as to whether a

²³ Article 213 of the 2012 CPL.

²⁴ Three conditions are required in Chinese criminal procedure law to approve arrest: (1) there must exist evidence to prove the facts of a crime; (2) the suspects may be sentenced to at least imprisonment; and (2) residential confinement is insufficient to prevent threats to social security. See Article 79 of the 2012 CPL.

²⁵ Article 144 of 人民检察院刑事诉讼规则（试行）(Regulations for People's Procuratorate on Criminal Procedure (Trial Implementation), the 2012 SPP Regulations), 检释[2012] 第 2 号(Jianshi [2012] No. 2), issued on 22 November 2012; validated on 1 January 2013, available at http://www.spp.gov.cn/flfg/gfwj/201212/t20121228_52197.shtml?COLLCC=3922337501&. Accessed 22 May 2014.

²⁶ Article 173 of the 2012 CPL.

guilty plea or confession could render the offender exempt from punishment, or make the punishment unnecessary.

Referring to the 1997 CL and relevant judicial interpretations is necessary to answer this question. Although Amendment VIII promotes confession as an independent condition for concession, it restricts such a concession to ‘mitigation’ or ‘reduction’ in sentencing (Article 8).²⁷ This means that, in general, confession or a guilty plea itself cannot render exemption.

However, exceptions can be found in specific crimes which mainly include the following situations in the draft of Amendment IX of the 1997 CL:²⁸ (1) the suspect confesses to bribe company staff before he is prosecuted (Article 164); (2) the suspect is charged with corruption which involves amount lower than 10,000 RMB, shows remorse and takes the initiative to return the illegally obtained money (Article 383); (3) the suspect confesses to normal bribery before being prosecuted with the conditions that the crime is relatively minor and the confession plays a critical role in solving other crimes or other meritorious service (Article 390); and (4) the suspect confesses to introducing bribery to a state functionary before prosecution (Article 392). In this sense, when suspects confess before bribery-related crimes are prosecuted and the circumstances of the charged crimes are minor, prosecutors are allowed to issue a non-prosecution decision.

2.3 Motivations for Plea Agreement

Discussion above has revealed the tendency of the expansion of plea agreement in China. Behind this trend are considerations in favor of a more effective use of offenders’ self-incrimination. According to relevant studies, motivations to establish a Chinese version of plea agreement can be generally categorized into three aspects: judicial efficiency, individual rights, and the principle of legality.

2.3.1 Enhancing Efficiency

Among all proposals in favor of mechanisms facilitating plea agreement, efficiency is primarily and commonly proclaimed. For instance, the 2003 Opinions on Summarized Procedure claimed in its very first sentence that the purpose of reforms was to ‘improve the quality and efficiency in hearing criminal cases’. Similar statements can also be found in the 2003 Opinions on Summary Procedure.

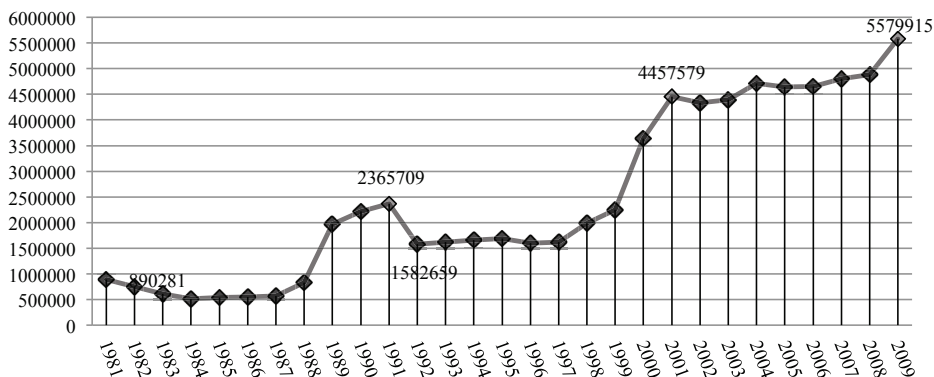
Behind the claim for higher efficiency is the context of the increasingly aggravated burden of caseload on criminal justice agencies. Figures 3.1 and 3.2 below outline the fluctuation in caseloads since the 1980s handled by police and prosecutors.

Figure 3.1 Number of Criminal Cases Investigated by Public Security Organs (PSO)²⁹ (1981-2009)

²⁷ There is slight difference between ‘mitigation’ (从轻) and ‘reduction’ (减轻) in sentencing. According to the 1997 CL, the extent of mitigation should be within the legally prescribed range of punishment (Article 62). In the case of ‘reduction’, the sentence for the offender can be reduced to the next lower range. (Article 63).

²⁸ The draft was published on 3 November 2014 for public comment. Available at http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2014-11/03/content_1885029.htm. Accessed 9 December 2014.

²⁹ ‘Public security organ’ (公安机关) is a direct translation of the police services in China. In this thesis PSO is interchangeable with police.



Source: Law Yearbook of China (1987-2010)

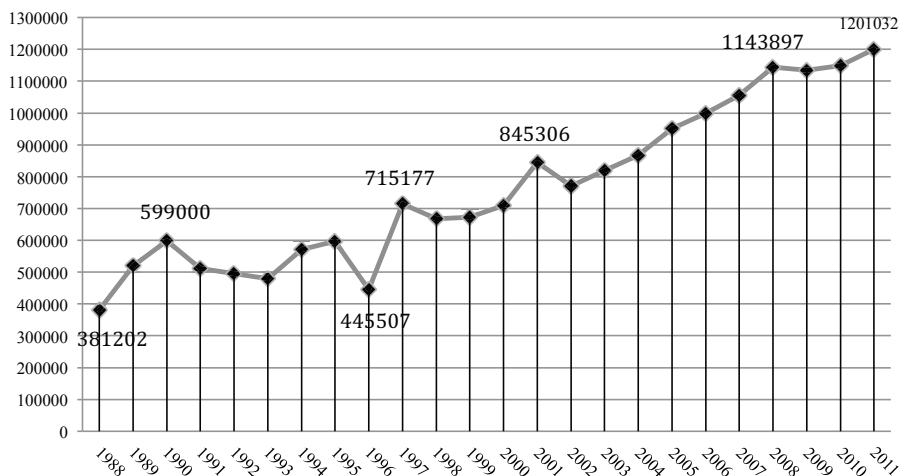
Figure 3.1 illustrates the changes in the amount of criminal cases investigated by police services from 1981 to 2009. At the beginning of the Reform and Opening-up (改革开放) in the 1990s there was a comparatively sharp increase of criminal cases, peaking in 1991 with 2,365,709 cases investigated. The increase ceased in 1992, and the total amount registered by police dropped to 1,582,659. This drop was to large extent a consequence of the adjustment in the threshold for theft crimes rather than a real reduction in criminal activities.³⁰ After 1992, the caseloads stayed stable for the next five years. In 1998, however, the total amount of criminal cases filed by police started to increase again, and this is exactly the period when Chinese academia started to explore plea bargaining. Three years later the statistics reached 4,457,579, almost tripled that in 1992, and never dropped back to the level before the 21st century. Many reasons contributed to the increase such as the national severe strike campaigns (SSC) against crimes launched in 1996 and 2001 from the micro perspective,³¹ and the social

³⁰ On 30 December 1991 the SPC and SPP jointly issued Notice on Adjusting the Standard of Amount in Incriminating Theft (关于修改盗窃犯罪数额标准的通知, 法研发[1991]47号 [Fayanfa [1991] No. 47], issued and validated on 30 December 1991 and invalidated on 29 August 1994, available at <http://www.chinalawedu.com/news/1200/21994/21998/2006/3/gu431362513183600211232-0.htm>. Accessed 28 August 2014), which increased the amount from 40 to 50 RMB to more than 300 RMB. Accordingly, the Ministry of Public Security (MPS) promulgated Notice on Adjusting the Filing Statistics on Theft (关于修改盗窃案件立案统计办法的通知), which directly led to the sharp decrease in registered theft cases. See 公发[1992]第 12 号 [Gongfa [1992] No. 12], issued and validated on 17 March 1992. Available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=11035&keyword=%E5%85%B3%E4%BA%8E%E4%BF%AE%E6%94%B9%E7%9B%97%E7%AA%83%E6%A1%88%E4%BB%B6%E7%AB%8B%E6%A1%88%E7%BB%9F%E8%AE%A1%E5%8A%9E%E6%B3%95%E7%9A%84%E9%80%9A%E7%9F%A5&EncodingName=&Search_Mode=accurate. Accessed 28 August 2014. For discussion on the influence of the change in criteria on statistics, see Daniel J. Curran, 'Economic Reform, the Floating Population, and Crime: The Transformation of Social Control in China', 14 (1998) *Journal of Contemporary Criminal Justice*, 262-280, p. 270.

³¹ Severe strike campaign is a special strategy employed by the Chinese government in combating crimes. It features swiftness and harshness, and quite often the approaches adopted by the legal actors are far beyond rule of law. The first SSC was launched in 1983. After that there were another three national SSC in 1996, 2001 and 2010. The former two were jointly initiated by the SPP, SPC and MPS. In 2010, however, the SPP and SPC withdrew from the campaign launched by the MPS. For discussion on SSCs in China and their effect on criminal justice, see e.g., Susan Trevaskes, *Policing Serious Crime in China: From 'Strike Hard' to 'Kill Fewer'* (Oxon: Routledge, 2010); 'Severe and Swift Justice in China', 47(1) (2007) *Br. J. Criminol.*, 23-41; Bin Liang,

transition regarding household registration, urbanization, economic stratification, etc. during that period from the macro perspective.³²

Figure 3.2 Number of Criminal Cases Prosecuted (1988-2011)



Source: The SPP's Annual Working Report (1988-2012)

The increasing trend in criminal caseloads is also illustrated in Figure 3.2 where the number of crimes prosecuted more than doubled in 2009 from ten years previously. In the ten years from 2001 to 2011, the public prosecution cases increased by 4.2 per cent per year, with an annual increase of about 35,573 cases. In contrast, during the same period the total amount of public prosecutors decreased from 166,866 in 2001 to 151,402 in 2011.³³ The steep rise in crime imposes a heavier burden on criminal justice agencies and pressurizing them to search for more effective methods. Plea agreement highlights efficiency through simplified procedures. It is supposed to assist Chinese criminal justice agencies to speed up the procedure, reduce the cost, and consequently realize the optimal allocation of resources.³⁴ Derived from efficiency, some scholars further argued that plea agreement can better promote justice, for efficiency itself is an indispensable part of the connotation of justice.³⁵

2.3.2 Indication of Improving Respect for Individual Rights

³² 'Severe Strike Campaign in Transitional China', 33(2005) *Journal of Criminal Justice*, 387-399; Harold M. Tanner, *Strike Hard! Anti-Crime Campaigns and Chinese Criminal Justice 1979-1985* (New York: Cornell University East Asian Program, 1999).

³³ For detailed analysis on the influence of social transition in the 21st century on crime and punishment in China, see Bin Liang, 'Crime and Punishment in Transition', in *The Changing Chinese Legal System, 1978-Present* (New York: Routledge, 2008), pp. 82-116.

³⁴ 中国法律年鉴(*Law Yearbook of China*) 2002 and 2012.

³⁵ See *supra* note 14, Chen and Liu (2002).

³⁶ See, e.g., Ji Xiangde, 辩诉交易中国化的理论与现实考量 (Theoretical and Practical Considerations on Importing Plea Bargaining into China), 20 (2007) *刑事法评论 (Criminal Law Review)*, 210-246.

The second argument proposed by scholars for facilitating plea agreement claims that plea bargaining and mechanisms alike embody an ideology of respecting and protecting individuals' rights.³⁶ From the offenders' perspective, it is argued that through plea agreement they are given the opportunity to exercise personal rights based on their own cost-benefit evaluations. China has a long history of inquisitorial tradition, under which individuals, both defendants and victims, were deemed as the object rather than the subject of criminal proceedings. Even today some inquisitorial features still remain. For example, the 2012 CPL still denies defendants the right to remain silent, and 'truthful confession' is obligatory for the accused. By introducing a plea agreement, according to proponents, the defendant's role in the criminal procedure system may be improved as a real party who can look after his own interests during the process.³⁷ As to victims, plea agreement is claimed to be beneficial as well, for they will shorten the criminal proceedings, saving victims from unnecessary suffering caused by either the tedious proceedings or the painful confrontations with the offenders in court.³⁸

However, these arguments actually have a logic problem. It has been discussed in Chapter I that it is the improved procedural safeguards that enable offenders to negotiate and cooperate with criminal justice authorities in a relatively equal way, and this causality cannot be reversed. The emergence of using plea agreement in China may reflect the on-going improvements in criminal proceedings, but it cannot lead to the conclusion that by using such a mechanism the offenders' rights can be better protected. In fact, according to analysis in the previous chapter, using plea agreement in a legal environment without sufficient safeguards on human rights is likely to produce risks of pure coercion.

2.3.3 Uphold the Principle of Legality

The third consideration is rooted in the principle of legality. Scholars have argued that even without explicit statutory basis, a practice similar to plea bargaining has already existed in China.³⁹ One of the typical Chinese plea agreement cases is the Yu Zhendong case in 2006.

Case 3.1 Yu Zhendong Case, Guangdong Province, 2006

Yu Zhendong, the former chief of the Bank of China's Guangdong Branch, was accused that from 1991 he engaged in a RICO (Racketeer Influenced and Corrupt Organizations) conspiracy, and embezzled more than \$485 Million from the Bank of China through fabricating accounts and money laundering. In 2002 Yu fled to the United States and Canada by means of a fake marriage, and was arrested in 2004 after 14 months hiding. On 18th February 2004, Yu pleaded guilty to engaging in a racketeering enterprise, and voluntarily returned to China.⁴⁰ For exchange, China promised that (1) the death penalty would not be issued; (2) no more than 12 years

³⁶ For research in favour of this argument, see e.g., *supra* note 13, Liu (2000).

³⁷ Chen Weidong and Liu Jihua, 从建立被告人有罪答辩制度到引入辩诉交易:论美国辩诉交易制度的借鉴意义 (From Establishing Defendants' Guilty Plea Procedure to Importing Plea Bargaining: Research on the Implications of the American Plea Bargaining), 20(6) (2002) 政治与法律(*Political Science and Law*), 49-56.

³⁸ See *supra* note 35, Ji (2007).

³⁹ See *supra* note 6, Long and Pan (2003).

⁴⁰ Department of Justice of the United States, 'Former Bank of China Managers and Their Wives Sentenced for Stealing More Than \$485 Million, Laundering Money through Las Vegas Casinos'. Available at http://www1.worldbank.org/finance/star_site/documents/arw/Xu_US_DOJ_Press_Release_Sentencing_May_6_2009.pdf. Accessed 23 September 2012.

imprisonment would be imposed on Yu; and (3) Yu's wives would be exempted. After reaching the agreement Yu returned to China on 16th April, 2004, and in 2006 was sentenced by the intermediate people's court in Jiangmen City, Guangdong Province, to 12 years' imprisonment for corruption and embezzlement.⁴¹

Decisions in the Yu Zhengdong case were fiercely criticized, and this case was declaimed as trading justice. Moreover, the practice is branded with strong 'Chinese characteristics' that judges are actively involved into the bargaining. According to Sun Changyong and Wang Biao's field study in a basic people's court in western area of China in 2011, judges frequently participated into the task of persuading the defendant into a guilty plea.⁴² This is consistent with what happened in the Yu Zhengdong case and the Meng Guanghu case. Given such circumstances and based on the principle of legality, it would be proper to establish clear rules for such arrangements rather than leave the negotiation to be operated in secrecy.

2.4 Potential Risks

Apart from justifications, commentators have pointed out the potential risks that plea agreement may give rise to on the integrity of criminal justice. These areas mainly concern three issues: the task of seeking truth, the ingrained inquisitorial tradition, and the absence of supporting mechanisms.

2.4.1 Tension with Seeking Truth

The Chinese criminal justice system has deep belief in substantive truth rather than legal truth. This ideology has been especially strengthened under the Marxist legal theory which requires 'seeking truth from fact' since the foundation of the New China in 1949.⁴³ From this point derive two ingrained beliefs. The first one is that substantial truth can and should be discovered through collecting sufficient evidence. However, despite the unrealistic character of such expectations in practice, it has become an obstacle in legislation to acknowledge legal pragmatism in China.

Another belief is that all participants in a criminal justice system, including offenders themselves, should cooperate with each other because of the common target. This leads to two specific rules regarding the administration of criminal justice. One is the principle acknowledged by the Chinese Constitution (1982 Constitution) that 'the people's courts, the people's procuratorates and PSO 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' (Article 135).⁴⁴ This principle is embodied in both criminal law and criminal

⁴¹ Sun Xuejun and Zhang Shuning, 从余振东贪污案谈辩诉交易(Discussion on Plea Bargaining in Yu Zhendong Corruption Case). Available at <http://sdfy.chinacourt.org/public/detail.php?id=5197>, accessed 23 September 2012.

⁴² See Sun Changyong and Wang Biao, 刑事诉讼中的“审判交易”现象研究 (A Study of 'Judge-Defendant Bargain' in Criminal Proceedings), 35(1) (2013) 现代法学 (*Modern Law Science*), 125-138.

⁴³ See Yu Xingzhong, 'Legal pragmatism in the People's Republic of China', 3(1989) *Journal of Chinese Law*, 29-51.

⁴⁴ Adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on 4 December 1982. It has been amended in 1988, 1993, 199 and 2004. Available at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm. Accessed 23 October 2013.

procedural law.⁴⁵ Under this structure, there is a lack of an impartial and independent third party to examine the legitimacy of the agreement reached between the prosecution and the defense, which could inevitably threaten the reliability of the confession. The other rule is that, as mentioned earlier, the accused bears the obligation to give truthful statements during interrogation. It impairs the fundamental basis for the bargaining between the accuser and the accused because they both are theoretically supposed to serve one common purpose: seeking truth.

The ideological dilemma has to some extent broadened the justice gap. With such procedural design several serious miscarriages of justice have happened during the past decades such as the She Xianglin case in 1994, the Nie Shubin case in 1995, the Du Peiwu case in 1998, and the Zhao Zuohai case in 2002.⁴⁶ Several similarities can be observed in the four cases. First, they were murder cases. In China there is a political slogan requiring that ‘homicide cases must be solved’ (命案必破), and therefore the local officials were under high pressure to solve these cases swiftly.⁴⁷ Secondly, a common mode of dealing with these cases was ‘police-prosecutors-judges jointly solve the case’ (公检法三家联合办案). Thirdly, all offenders confessed. Finally, all these cases were later overturned due to either another offenders’ admission of guilt or the so-called ‘victim’ returning alive. In these cases no safeguards were provided to prevent torture for confession. The consequences were extremely severe: She, Du and Zhao served several years in prison, while Nie was executed.

Apart from the legal ideology believing in substantial truth, there is also a risk that plea agreement may undermine the task of seeking truth by using simplified proceedings. The ordinary proceedings featuring charge-adjudication schemes are, as commented by Lippke, ‘their ability to help us discern the truth or falsity of the charges against individuals that have been levied by state officials’.⁴⁸ After the 2012 CPL, the summary procedure which is designed for solving guilty plea cases can be applied to almost all types of cases except for those carrying a possible life sentence or the death penalty, or those threatening state security or involving terrorism (Article 20). This may lead to the consequence that the examination of evidence and confrontation between the prosecution and the defense in court would be further weakened, and criminal justice agencies would build their decisions on fragile or unstable foundations.

2.4.2 Tension with Inquisitorial Tradition

Chinese judicial culture enjoys a long history of inquisitorial tradition that the individual right and governmental power are unbalanced.⁴⁹ First, there has long been inequality between criminal justice authorities and offenders, and the latter is fairly weak in the proceedings. Secondly, collective interests, rather than individual rights, have long-been worshipped in Chinese society.⁵⁰ Thirdly,

⁴⁵ It refers to Article 5 of the 1979 CPL, Article 7 of the 1996 CPL, and Article 7 of the 2012 CPL.

⁴⁶ For detailed introduction on cases of She Xianglin, Du Peiwu and Zhao Zuohai, see Yuwen Li, ‘The Criminal Trial Process’, in *The Judicial System and Reform in Post-Mao China: Stumbling Towards Justice* (Surrey and Burlington: Ashgate, 2014), pp. 87-132. For Nie Shubin case, see Kandis Scott, ‘Why Did China Reform Its Death Penalty’, 19(2010) *Pac. Rim. L. & Pol’y J.*, 63-80.

⁴⁷ Many scholars have argued that this slogan is one the major sources of miscarriages of justice in China. See, e.g., Chen Guangzhong and Yu Zengzun, 严防冤案若干问题思考 (Several Issues on Preventing Wrongful Convictions), 1(2014) *法学家 (The Jurist)*, 56-66; Xiong Qiuhong, 冤案防范与权利保障 (Precautions against Wrongful Conviction and Protection of Human Rights), 25 (2010) *法学论坛 (Legal Forum)*, 33-38.

⁴⁸ Richard L. Lippke, *The Ethics of Plea Bargaining* (Oxford: OUP, 2011), p. 217.

⁴⁹ Xie Youping, and Wan Yi, 中国引入辩诉交易制度的三重障碍 (Three Obstacles for China to Import Plea Bargaining), 4(2003) *政治与法律 (Political Science and Law)*, 107-112.

⁵⁰ Xin Zhou, 我国目前不宜引进辩诉交易的原因考 (Examinations on the Reasons of Rejecting Plea

compared with ‘due process’, Chinese citizens lay more trust in people from high authorities, which can be observed in the high preference for administrative petition rather than litigation⁵¹. The legal system with these features on the one hand lacks the supportive basis for equal conversation between the offender and judicial organs, and the system is designed to avoid uncertainty through collaboration within the judicial system. On the other hand, because of the imbalance between offenders and criminal justice authorities, it may be easier to foster corruption and coercion if a plea agreement is included.⁵²

2.4.3 Tension with Supporting Mechanisms

Apart from the former two arguments, it is also widely claimed that the current Chinese criminal justice system cannot provide sufficient support and legal basis for plea agreement. Among all complaints there are two key arguments against plea agreement: the absence of a systematic procedure for negotiation, and the deficiencies in ordinary proceedings.

The first argument is about the absence of a special procedure for guilty plea cases. Two defects existed in the reformed summary procedure. First of all, reforms in the 2012 CPL only focus on trial proceedings and pay little attention to investigation and prosecution proceedings. However, a jurisdiction with inquisitorial features strongly relies on the pre-trial stage rather than a court hearing for detecting facts and proving guilt. Therefore a mismatch can be observed. Secondly, instead of creating a different procedure, the 2012 CPL just provides possibilities for the trial process to bypass some steps of ordinary procedures. However, the law remains silent on to what extent and under what circumstances the procedures can or cannot be simplified.

Apart from the specific defects in procedural design in summary procedure, there are also systematic defects in the ordinary proceedings, which may further undermine the quality of plea agreement. As mentioned earlier, efficiency is one of the most common arguments for plea agreement. One premise is that through offenders’ confessions the burden of proof on the prosecutors in conviction can be removed, and the trial proceedings can be abbreviated. However, this can be challenged from two perspectives. For one thing, the ordinary trial proceeding in the Chinese criminal justice system is quite simple. It is a system without comprehensive protection for the defendant. It also lacks the dominating role of lawyers, or the sophisticated rules of evidence.⁵³ Therefore, it leaves little space for further simplification, and consequently reduces the value of plea agreement. For another, trial proceedings in China do not separate conviction and sentencing. Even if the defendant pleads guilty in court or confesses before the trial, investigation and a court hearing will continue, which again undermines the necessity of plea agreement.

Another defect concerns the absence of procedural rights for offenders. On the one hand, several fundamental rights for criminal offenders, such as the right to remain silent, have not been acknowledged in China. On the other hand, offenders in the current Chinese criminal justice system cannot get sufficient and proper legal assistance.

The insufficient legal assistance can be further analyzed from qualitative and quantitative aspects. The quantitative aspect is about the proportion of offenders with lawyers’ assistance. According to Ji Xiangde’s 2011 report on his field study on cases in certain local jurisdictions, the

Bargaining in China), 5(2004) 法学家 (*Jurists Review*), 110-119.

⁵¹ Taisu Zhang, ‘Why the Chinese Public Prefer Administrative Petitioning over Litigation’, 3(2009)*Sociological Study*, 139-172.

⁵² See *supra* note 35, Ji (2007).

⁵³ Yi Yanyou, 辩诉交易应当缓行 (The Application of Plea Bargaining Should be Postponed), 12(2003) 法学 (*Law Science Magazine*), 57-61, p. 61.

average percentage of legal assistance from lawyers in the investigated areas during 1997 and 2009 is less than 30%.⁵⁴ This is similar to the findings in the empirical research led by Zuo Weimin in 2007 and 2008.⁵⁵

The qualitative aspect is about the effectiveness of legal assistance. For instance, according to Article 38 of the 2012 CPL, defense lawyers have no access to case files and evidence collected by the police until the date on which the people's procuratorate begins to examine a case for prosecution. This means that when lawyers get the chance to defend their clients, evidence has already been collected by investigators and the case has been proved, leaving little chance for negotiation.

Furthermore, Chinese criminal defense lawyers are under explicit or implicit political influence. As Liu Sida and Halliday once noticed, although lawyers 'potentially can challenge state power', they often 'have to rely on political connections with state agencies to protect themselves and to solve problems in their legal practice'.⁵⁶ Such connection becomes the hotbed for malpractice in some cases such as the Huang Songyou case⁵⁷ in 2010 on the one hand, whereas in other situations it makes lawyers' work 'bear little substantive impact on the final outcomes of the criminal trials'.⁵⁸

More importantly, the political influence can easily become direct interference and pure pressure.⁵⁹ Quite often such pressure is manipulated with legitimized excuses. For instance, scholars argue that Article 306 of the 1997 CL on crimes of destroying, forging evidence or disturbing testifying committed by defense lawyers or litigation representatives have been transformed into a powerful weapon to crack down 'arrogant' lawyers.⁶⁰ A recent example is Article 309 of the draft of Amendment IX of the 1997 CL. This Article describes four types of disturbance to the court order: (1) gathering crowds to make a racket or attack the court; (2) attacking judicial officials or litigation participants; (3) insulting, defaming or threatening judicial officials or litigation participants, or not heeding the court's admonitions to stop; and (4) other conducts that seriously disturbs the court order.⁶¹ People who have performed the aforementioned acts may be liable for up to three years'

⁵⁴ Ji Xiangde, 中国刑事辩护若干问题调查分析 (Investigation and Analysis on Several Issues in China's Criminial Defense), 7(2011) 中国司法 (*Justice of China*), 29-35, p. 30.

⁵⁵ Zuo Weimin and Ma Jinhua, 效果与悖论: 中国刑事辩护作用机制实证研究 (Effectiveness and Paradox: Empirical Study on the Mechanism of Chinese Criminal Defense), 2(2012) 政法论坛(*Tribune of Political Science and Law*), 60-73. Relevant arguments can also be seen in Xu Henan, 关于律师辩护制度发展路径的思考 (Thinking about Solicitors' Defense System Development), 2(2007) 法学杂志(*Law Science Magazine*), 104-107.

⁵⁶ Sida Liu and Terence C. Halliday, 'Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers', 45(4) (2011) *Law & Society Review*, 831-865, p. 831. See also, Sida Liu, 'Lawyers, State Officials and Significant Others: Symbiotic Exchange in the Chinese Legal Services', 206 (2011) *China Quarterly*, 276-293.

⁵⁷ Huang Songyou was the former vice president of the Supreme People's Court. He was convicted of accepting more than 3.9 million RMB (570,000 US Dollars) in bribes from four lawyers in return for favorable rulings from 2005 to 2008. See 'Chinese Supreme Court Judge Gets Life Term', available at http://news.xinhuanet.com/english2010/indepth/2010-01/20/c_13143957.htm. Accessed 18 November 2012.

⁵⁸ Bin Liang et al, 'The Deep Divide in China's Criminal Justice System: Contrasting Perceptions of Lawyers and the Iron Triangle', (2014) *Crime, Law and Social Change*, 1-17, p.1.

⁵⁹ See e.g., Elizabeth M. Lynch, 'China's Rule of Law Mirage: The Regression of the Legal Profession since the Adoption of the 2007 Lawyers' Law', 42(2010) *The Geo. Wash. Int'l L. Rev.*, 535-585.

⁶⁰ See e.g., Yanfei Ran, 'When Chinese Criminal Defense Lawyers Become the Criminals', 32(2008) *Fordham International Law Journal*, 988-1042; *ibid*, Lynch (2010),.

⁶¹ Currently no official translation of the draft has been provided. This translation is from <http://chinalawtranslate.com/en/%E4%B8%AD%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%9B%BD%E5%88%91%E6%B3%95%E4%BF%AE%E6%AD%A3%E6%A1%88%EF%BC%>

imprisonment, criminal detention, criminal control or a fine. Literally, it is not improper to ban acts disturbing the order of the court. However, the ambiguous expression and the miscellaneous provision may cause this Article to deteriorate into another official weapon to catch or muzzle defense lawyers.⁶²

2.5 Chinese Version of Plea Agreement: Nature and Future

The offenders' confession or guilty plea in the Chinese criminal justice system is generally treated as a method to collect evidence. This is quite obvious in both the 1996 CPL and the 1997 CL that most provisions relevant to confession are actually focusing on its role as one of the seven legal forms of evidence.⁶³ The traditional legal system in China shows great reliance on confession, with the consequences of both torture and undermining its reliability. Regarding this problem, the 1996 CPL adopted a prudent attitude towards confession to avoid credulity (不轻信口供).⁶⁴ Nevertheless, the law pays little attention to the proper use of confession, and does not regard it as a way for the accused to forgo his procedural rights. It leads to the absence of considerations on both how to maximize the value of confession and how to protect offenders' procedural rights.

This leads to a question on the purpose of the plea agreement in China: what is the exact consideration offered by offenders in exchange for a judicial concession? If it is just the self-incrimination, then within the Chinese legal system little space is left for plea agreement because of its conflicts with the ideology of seeking substantial truth, the standard of proof which is 'facts are clear, and evidence is reliable and sufficient' (事实清楚, 证据确实充分), and relevant legal provisions of criminal justice in China.

Nevertheless, apart from its role in proving, the offenders' guilty plea is also of procedural importance. In his research on the history of plea bargaining Aschuler argued that two elements had contributed to its rise: one is the proliferated caseload, and the other is the over-protection of offenders.⁶⁵ The first element has already emerged in China. As to the second, despite the fact that there is no 'over-protection' for offenders, efforts have been continuously made from the 1979 CPL to the 2012 CPL to enhance their status in criminal proceedings, providing primitive bargaining chips for them in the negotiation with criminal justice agencies.

To begin with, some basic norms concerning due process have been gradually accepted in Chinese criminal justice. Since the 1970s when China started its judicial reform, the basic trend of the reform is to 'provide greater legal protection to the accused, enhance the role of defense lawyers, curb the discretionary power of police and prosecutors, and define a new role for judges as neutral adjudicators ... as under more adversarial-type court proceedings'.⁶⁶ Under this trend, the kernel of

88%E4%B9%9D%EF%BC%89%EF%BC%88%E8%8D%89%E6%A1%88%EF%BC%89/. Accessed 9 December 2014.

⁶² To date more than five hundreds of Chinese lawyers have published a joint letter to the Standing Committee of the NPC, calling for cancel this Article. See AFP, 'Chinese Lawyers Fear Draft Law Will Muzzle Them', Mail Online, 28 November 2014, available at <http://www.dailymail.co.uk/wires/afp/article-2852683/Chinese-lawyers-fear-draft-law-muzzle-them.html>. Accessed 9 December 2014.

⁶³ In 1996 CPL the legal forms of evidence is stipulated in Article 42, which includes (1) 'material evidence and documentary evidence', (2) 'testimony of witness', (3) 'statement of victims', (4) 'statements and exculpations of criminal suspects or defendants', (5) 'records of inquests and examination', and (7) audio-visual materials.

⁶⁴ Article 46 of the 1996 CPL stipulates that 'the decision of all cases should be based on evidence, investigation, and research; credence shall not be readily given to oral statements'.

⁶⁵ Albert W. Aschuler, 'Plea Bargaining and Its History', 79(1) (1979) *Columbia Law Review*, 1-43.

⁶⁶ Mike P. H. Chu, 'Criminal Procedure Reform in the People's Republic of China: The Dilemma of Crime

the presumption of innocence was firstly accepted by the 1996 CPL (Article 12), and later inherited by the 2012 CPL (Article 12).⁶⁷ In addition, although the offender's obligation of confession still remains in the new criminal procedure law (Article 118), it is acknowledged that he should not be forced to incriminate himself (Article 50). The co-existence of these two expressions implies that the criminal procedure itself is in a transforming process towards higher procedural protection for the accused.

The evidence rule also has been reformed correspondingly during the past years. One of the most typical improvements in this aspect is the introduction of the exclusionary rules on illegally obtained evidence into the Chinese criminal justice system ignited by the Zhao Zuohai case.⁶⁸ In 2003 Zhao was convicted of homicide and sentenced to death with suspended execution after he confessed for nine times. Ironically, years later the alleged murder victim returned alive, proving Zhao was actually wrongfully convicted because of torture. In 2010 two judicial interpretations were promulgated to regulate the use of evidence obtained through torture, and to clarify the procedure to exclude evidence as the basis of conviction when the prosecutor could not show that the evidence was obtained legally.⁶⁹ This reform indicates a 'broader series of largely administrative reforms within the criminal justice system establishing greater supervision over, and stricter standards for, the collection of evidence'.⁷⁰ In 2012 these rules were finally absorbed into the newly revised criminal procedure law with its Article 54 clearly stating that 'confessions extracted from the offender through torture or other illegal means should be excluded'.

These two elements aim to guarantee the voluntary nature of the offender in participating in negotiation with criminal justice authorities. Nevertheless, they will stay invalid if not combined with the third one: continually strengthened legal assistance especially from lawyers. For instance, in the 1979 CPL the offender could not appoint a lawyer until the trial proceedings (Article 26). This time was advanced to the stage of reviewing for prosecution in the 1996 CPL, and during the investigation a lawyer could be designated only to provide 'legal consultation' (Article 96). The 2012 CPL again moves up the time of appointing defense lawyers from prosecution to investigation by stipulating that 'the suspect has the right to appoint a defender as of the date on which the suspect is first interrogated

Control and Regime Legitimacy', 18(2000) *Pacific Basin Law Journal*, 157-210, p. 158.

⁶⁷ Whether or not Article 12 of the 1996 CPL established a presumption of innocence is under debate. This is mainly because instead of stating 'presumption of innocence' directly, the provision phrased this principle as 'no person should be determined guilty without a judgment rendered by a people's court according to law'. To some extent the law begged this question and maintained a logical consistency with the aforementioned ideology of substantive truth. However, such logic creates legislative difficulties in introducing procedural safeguards for criminal offenders. For details of the debate, see *supra* note 45, Li (2014), pp. 89-92.

⁶⁸ About the details of the Zhao Zuohai case, see Ira Belkin, 'China's Tortuous Path toward Ending Torture in Criminal Investigations', 24(2) (2011) *Columbia Journal of Asian Law*, 273-302.

⁶⁹ In 2010 the SPC, SPP, PSO, Ministry of National Security, and Ministry of Justice jointly issued two evidence rules: (1) 关于办理刑事案件排除非法证据若干问题的规定(Regulations on Exclusionary Rules for Illegally Obtained Evidence in Solving Criminal Cases); and (2) 关于办理死刑案件审查判断证据若干问题的规定(Regulations on Several Issues on Evidence Examination in Death Penalty Cases). 法发[2010]20号 (*Fafa* [2010] No.20), issued and validated on 13 June 2010, available at

http://www.court.gov.cn/qwfb/sfwj/tz/201007/t20100705_7369.htm. Accessed 28 August 2014. For detailed discussion on these two regulations, see Ruihua Chen, 'Reforming China's Criminal Procedure: China's New Exclusionary Rule: An Introduction', 23(2) (2011) *Columbia Journal of Asian Law*, 229-246; Yu-Jie Chen, 'One Problem, Two Paths: A Taiwanese Perspective on the Exclusionary Rule in China', 43(2011) *International Law and Politics*, 713-728.

⁷⁰ Hyeon-Ju Rho, 'The Exclusionary Rule in China and A Closer Look at the Dynamics of Reform', 43(2010) *The NYUJ Int'l L. & Pol.*, 729-738.

by the investigating authority or is subject to compulsory measures; during the investigation period, only a lawyer may be appointed as the defender'. During investigation with license, law firm's certificate, and proxy, lawyers may request to meet with a detained suspect or defendant, and this meeting should not be monitored (Article 37). Quantitatively, in 1996 there were 8,265 law firms in China with 100,198 lawyers. 15 years later, these numbers have surged to 18,235 and 214,968. At the same time, the number of criminal cases with legal assistance also rose from 204,382 in 1996 to 569,330 in 2011.⁷¹

These reforms and developments illustrate a relatively positive picture of legal assistance in China. This may be challenged as some legal rules and government acts in recent years, such as those aforementioned, have intensified the tension between lawyers and government officials. However, such tension is inevitable and may be continue in the coming years as long as the role of defense lawyers is constantly transforming from accessory and symbolic governmental functionary to independent and determined human rights safeguard.

The early involvement of the legal assistance is accompanied by the expanded legal aid system in the 2012 CPL. In the new law criminal justice authorities who are obliged to provide legal aid service changed from the court alone in the 1996 CPL, to the entire judiciary including the police, the prosecutors, and the judges (Article 34). The cases qualified for compulsory legal aid expand to those where a lifetime imprisonment is possible, or the criminal is a mentally-disabled person who has not completely lost his capacity to comprehend or to control his behavior (Article 34).

Collectively, all these developments predict trends under which the offender may be eventually enhanced to a level for equal and mutual-beneficial negotiation on the one hand, and the demands for more efficient case disposals may become even more urgent for criminal justice agencies on the other. Therefore, it is quite predicable that current expansion in plea agreement will continue.

2.6 Summary

In this section the current status of plea agreement in China is examined. The exchange between offender's confession and legal concession in China is gradually being recognized in legal norms, but the whole mechanism is at the preliminary stage. By saying 'preliminary stage' it means that some fundamental rights, privileges and immunities that enable the offender to conduct a fair and voluntary negotiation with criminal justice authorities have not been fully acknowledged by law and respected in practice yet. A typical example is that the obligation of confession is still legally valid. The past decades have witnessed increasing demands especially from the state's aspect to cooperate, but the bargaining power has not been evenly distributed between the offender and the criminal justice authorities. Therefore in the case of plea agreement, what can be detected in China is a shadow of plea agreement instead of the pure model. Even so, the recent developments in ordinary proceedings reflect a zigzag but on-going trend moving towards improved safeguards for offenders especially with regard to fundamental principles, evidence rules and legal assistance. Under this trend, a shift from shadow to a pure model of plea agreement is likely to happen in a gradual way.

3. Assistance Agreement

In current Chinese criminal proceedings there is a lack of specific mechanisms particularly designed for assistance agreement. Therefore, similar mechanism can hardly be described with existing terms. This makes it necessary to illustrate the Chinese version of assistance agreement before entering into detailed discussion.

⁷¹ 中国法律年鉴 (*Law Yearbook of China*), 1997 and 2012.

In China the assistance offered by offenders to criminal justice agencies is quite often connected with the term ‘meritorious service’ (立功). According to the 1997 CL, meritorious service can be provided not only within criminal proceedings (Article 68) but also during execution (Articles 50 and 78). This research narrows its scope to the former. In this context, the offender’s assistance in the Chinese law refers to activities exposing other people’s crimes that can be verified or provide important clues leading to the successful investigation of other crimes (Article 68).

A relevant mechanism to assistance agreement is ‘immunity for tainted witness’ (污点证人) especially in crimes against terrorism, corruption, organized crimes, drug crimes, and other crimes greatly disturbing social security and having difficulties in collecting evidence.⁷² Compared with meritorious service, this mechanism mainly appears in academic research, and until now scholars have not reached unified understandings of this concept.⁷³ Nevertheless, two key characteristics can be identified. On the one hand, ‘tainted’ refers to the witness charged with certain crimes. A tainted witness gives evidence, information, or other forms of assistance not based on the duty of testifying but the exchange of benefits with criminal justice agencies. On the other hand, this accused person should also be a witness at the same time.

In Chinese criminal law there is no explicit definition of ‘witness’, and the 2012 CPL only stipulates that ‘any person who knows information regarding a criminal case is obliged to testify’, except for those physically or mentally handicapped, or minors who cannot distinguish between right and wrong or cannot correctly express themselves (Article 60). Meanwhile, it is the witness’ statement, rather than the person himself, which is cross-examined in court by the prosecution and the defense (Article 59). In this sense, ‘witness’ in Chinese criminal justice actually bears no general obligation to testify in court orally, thus ‘tainted witness’ has little distinction with offenders providing meritorious service. To avoid confusion, the following discussion adopts the legal concept ‘meritorious service’.

3.1 Historical Review on Assistance Agreement: From Subsidiarity to Independence

Similar to a plea agreement, the tradition of encouraging offenders’ assistance by offering concessions from criminal justice agencies can be traced back to ancient times. One key feature of the Chinese legal culture is the combination of rewards and punishment,⁷⁴ and meritorious service was constantly regarded as a condition for the former despite the transitions among different dynasties. For instance, in The Law of Tang Dynasty (唐律) there were provisions which stated that in a joint offence where criminals fled, if the offender with minor liability arrested the one with severer liability and meanwhile confessed voluntarily; or if he arrested more than half of the co-offenders with equal liability and meanwhile confessed voluntarily, then he could be exempted from punishment (诸犯罪

⁷² Xu Jingcun and Pan Jingui, “污点证人”作证豁免制度研究 (Study on the Immunity on Tainted Witness), 4(2004)人民检察 (*People’s Procuratorial Semimonthly*), 12-16.

⁷³ For academic research on tainted witness, see, e.g., Tan Shigui and Dong Wenbing, 试论在贿赂案件中引入污点证人豁免制度 (Research on Introducing the Immunity on Tainted Witness into Bribery Cases), 4 (2004) 海南大学学报 (*Journal of Hainan University*), 2-6; Wang Haiyan, 建构我国污点证人刑事责任豁免制度 (Establishing the Immunity on Tainted Witness in China), 1 (2006) 法商研究 (*Studies in Law and Business*), 26-32; Qu Xin and Liang Song, 建立我国污点证人豁免制度的实证分析——以贿赂案件为例 (Empirical Research on Establishing the Immunity on Tainted Witness: Using Bribery Cases as an Example), 6 (2008) 证据科学 (*Evidence Science*), 60-73.

⁷⁴ See 商君书: 修权 (The Book of Shang Yang: the Modification of Power).

共亡，轻罪能捕重罪首，及轻重等，获半数以上首者，皆除其罪。⁷⁵ Similar regulations can also be found in the Law of Ming Dynasty (明律), and it clarified that reward might only be issued for catching more severe criminals.⁷⁶

After Qing Dynasty, Chinese society moved into a period of turbulence for almost half century. The criminal justice system on the national level collapsed, but legal traditions remained. Take the CPC during that period for example. After the establishment of the contemporary government of the Chinese Soviet Republic, principles such as ‘distinction between principals and accessories in a crime’ (区分首要与胁从), and ‘encouraging confession and rehabilitation’ (鼓励自首自省) were applied especially to combat the counter-revolutions, traitors, and their collaborators.⁷⁷

Later the policy of ‘combining punishment with leniency’ (惩办与宽大相结合) was acknowledged by the new government after 1949, and it was gradually developed into a mature system with the essence of ‘leniency to those who confess, and severity to those who resist; sanction concession for meritorious service, and reward for major meritorious service (坦白从宽，抗拒从严，立功折罪，立大功受奖)’.⁷⁸ Similar to the period before 1949, the policy was initially tailored for counter-revolution activities, but later it was generalized to include other crimes, and even became one of the fundamental criminal policies in China.⁷⁹

Three characteristics can be noticed on the connection between concession and meritorious service in this period. First of all, assistance as such during this period was not an independent condition for legal concession; it was usually attached to the offender’s voluntary surrender and confession. For instance, in Article 3 of the 1956 Decisions on Lenient Disposals and Arrangement for Counterrevolutionaries Remained in Cities (关于宽大处理和安置城市残余反革命分子的决定) issued by the Standing Committee of the NPC, meritorious service, either major or minor, was listed as an supplementary activity after the offenders’ complete confession.

Secondly, the exchange between meritorious service and concession existed mainly in the form of political slogans rather than concrete and systematic proceedings. Furthermore, instead of being implemented through exchange in benefit, concession on meritorious service during that period was offered in a top-down manner. This is mainly because that at that time offenders, especially those named ‘counter-revolutionaries’, were deemed to be enemies, and their assistance was adopted as a tool to further solve ‘contradictions between ourselves and the enemy’ (敌我矛盾) rather than ‘contradictions among people’ (人民内部矛盾). The ideology behind this tool was ‘unite with all forces that can be united’ (团结一切可以团结的力量) to fight against those who intended to destroy accomplishments of the revolution.⁸⁰

With the reforms in society and criminal justice system in China in the following years, the content and function of ‘reward for assistance’ changed correspondingly. The 1979 CL inherited the legal tradition of encouraging meritorious service, and for the first time transformed such a mechanism from general policy to legal provisions. Based on it, several judicial interpretations were

⁷⁵ See 唐律疏议：名例律 (The Law of Tang Dynasty: Name of Offences).

⁷⁶ Ye Xiaoxin and Guo Jian, 中国法律史研究 *Research on Chinese Legal History*, (Shanghai: Xuelin Press, 2003), p. 330-331.

⁷⁷ Zhao Kunpo, 中国法制史 *(Chinese Legal History)*, (Beijing: Peking University Press, 2002), p. 363.

⁷⁸ See Dong Biwu, 关于肃清一切反革命分子的报告 (Report on the Elimination of the Counterrevolution Elements) in the Second Session of the Second National Committee of the Chinese People’s Political Consultative Conference (CPPCC). Available at http://news.xinhuanet.com/ziliao/2004-10/11/content_2075766.htm. Accessed 23 September 2012.

⁷⁹ Ma Kechang, 刑事政策学 *(On Criminal Policy)*, (Wuhan: Wuhan University Press, 1999), p. 52.

⁸⁰ Jin Fu, 论立功制度 *(Meritorious Service)*, (2009) PhD thesis from Jilin University, China.

promulgated on certain crimes to employ ‘meritorious service’. For example, in 1984 the SPC, SPP and MPS jointly issued Replies on Specific Issues Concerning the Contemporary Application of Voluntary Surrender (关于当前处理自首的有关问题具体应用法律的解答, 1984 Replies).⁸¹ In this document ‘meritorious service’ was categorized into four types: (1) report severe crimes of other criminals; (2) provide clues or evidence leading to the successful investigation of other severe cases; (3) assist judicial organs with arresting other criminals; and (4) report several crimes or clues of other criminals. Mostly this legal instrument was used for severe crimes, such as corruption crimes,⁸² drug-related crimes,⁸³ and crimes infringing on national security.⁸⁴

However, the 1979 CL placed meritorious service as an attachment to voluntary surrender (Article 63). According to Article 63, offenders who committed serious crimes and voluntarily surrendered could get sentencing reduction or exemption if they provided meritorious service. This rule was followed by many specific official documents. For instance, in the Pilot Working Details for People’s Procuratorates (检察院刑事监察工作施行细则) issued by the SPP in 1980, criminal suspects in serious crimes could be exempted from prosecution if they voluntarily surrendered and meanwhile provided meritorious service (Article 22).⁸⁵

Despite the explicit principle established in the 1979 CL, the independent value of meritorious service was gradually recognized and embodied in some interpretations issued by criminal justice agencies. For instance, in the 1984 Replies mitigation or exemption in penalty could be offered by referring to Article 63 of the 1979 CL if the offender provided meritorious service but had not voluntarily surrendered first.

At the same time, the independence of meritorious service was remarkably enhanced especially in corruption-related crimes such as bribery and graft, and drug-related crimes. For the corruption crimes a relevant document is the Supplementary Regulations on Punishing Bribery and Graft (关于惩治贪污贿赂罪的补充规定, the 1988 Supplementary Regulations)⁸⁶ in 1988 where voluntary surrender, remorse and meritorious service were enumerated equally as mitigating factors

⁸¹ See 法研字[1984]6号 (Fayanzi [1984] No. 6), issued jointly by SPC, SPP and MPS on 16 April 1984, and validated simultaneously. Available at http://cnki.yctc.edu.cn/edu/6/Product5/Law/13_criminal_liability_apply/13_criminal_liability_apply1191.htm. Accessed 15 May 2014.

⁸² See the Standing Committee of the NPC, 关于惩治贪污罪、贿赂罪的补充规定(the 1988 Supplementary Regulations on Dealing with Bribery Crimes),主席令第 63号 (President Decree No.63), issued and validated on 21 January 1988, abolished by the 1997 CL. Available at <http://www.lawinfochina.com/display.aspx?lib=law&id=1192&CGid=>. Accessed 28 August 2014.

⁸³ See the Standing Committee of the NPC, 关于禁毒的决定(The 1990 Decisions on Anti-Drug), 主席令第 38号 (President Decree No.38), issued and validated on 28 December 1990, abolished on 29 December 2007. Available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=4923&keyword=%E5%85%B3%E4%BA%8E%E7%A6%81%E6%AF%92%E7%9A%84%E5%86%B3%E5%AE%9A&EncodingName=&Search_Mode=accurate. Accessed 28 August 2014.

⁸⁴ See the Standing Committee of the NPC, 中华人民共和国国家安全法 (The 1993 State Security Law of the People’s Republic of China), 主席令第 68号 (President Decree No.68), issued and validated on 22 February 1993, revised on 27 August 2009. Available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=6133&keyword=%E4%B8%AD%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%9B%BD%E5%9B%BD%E5%AE%B6%E5%AE%89%E5%85%A8%E6%B3%95&EncodingName=&Search_Mode=accurate. Accessed 28 August 2014.

⁸⁵ Issued and validated on 21 July 1980, and abolished on 3 December 1993. Available at

<http://vip.chinalawinfo.com/NewLaw2002/SLC/SLC.asp?Db=chl&Gid=770>. Accessed 14 May 2014.

⁸⁶ See President Decree No. 63.

when the amount of money involved was between 2,000 and 5,000 RMB. The example for drug-related crimes is the Decisions on Drug Control (*关于禁毒的决定*, 1990 Decisions)⁸⁷ issued by the Standing Committee of the NPC in 1990. According to its Article 14, offenders who disclosed other drug-related crimes could get reduction, mitigation or exemption in penalty. To make it clear, the SPC specially issued interpretations in 1994 to distinguish meritorious service stipulated in the 1990 Decisions from that in the 1979 CL.⁸⁸

Changes in these documents were much motivated by the worsening situation in certain crimes in China during that period, and this created an urgent need for more effective crime control approaches.⁸⁹ These documents also reflected the strong trend in promoting the independence of meritorious service, which led to the major change in the 1997 CL. In this new law meritorious service becomes an independent condition for criminal justice agencies' concession. The separation between 'meritorious service' and voluntary surrender reflected a new development of the relationship between suspects or defendants' assistance and legal concessions, and was continually valid and further clarified in the following decades.

3.2 Current Legal Regime of Assistance Agreement

In the Chinese criminal justice system, although there is an absence of systemized procedures for assistance agreement, the 1997 CL, the 2012 CPL and relevant interpretations have provided some basis for the exchange between concession and offenders' assistance, either explicitly or implicitly. To sketch the general contour of the legislation on this legal instrument, the following study is conducted from the perspective of the offers of both parties.

3.2.1 Assisting Offender's Offer: Connotation of 'Meritorious Service'

As mentioned earlier, Article 68 of the 1997 CL lays the legal basis for assistance agreement by stipulating that criminals who perform meritorious service by exposing other persons' crimes that can be verified or who provide important clues leading the solving of other cases *may* be given a lesser punishment or a mitigated punishment; those who performed major meritorious performance *may* be given a mitigated punishment or *may* be exempted from punishment.

In Article 68 meritorious service is categorized into two types: one is to expose other persons' crimes that can be verified, and the other is to provide important clues against other crimes. In 1998 three more types were introduced by judicial interpretation (the 1998 SPC Interpretations): (1) assisting criminal justice agencies to catch other criminal suspects (including accomplice); (2) preventing other persons' criminal activities; and (3) particular services benefiting state and society.⁹⁰

⁸⁷ See *President Decree* No. 38.

⁸⁸ See 最高人民法院关于适用《全国人民代表大会常务委员会关于禁毒的决定》的若干问题的解释 (*Interpretations on Several Issues Concerning the Implementation of the 1990 Decisions*), 法发[1994]30号 (*Fafa* [1994] No. 30), issued and validated on 20 December 1994, available at http://www.law-lib.com/law/law_view.asp?id=10964. Accessed 15 May 2014.

⁸⁹ See e.g., the Standing Committee of the NPC's Explanations on the draft of the 1990 Decisions, issued on 25 October 1990, available at http://www.npc.gov.cn/wxzl/gongbao/2000-12/27/content_5002497.htm. Accessed 15 May 2014.

⁹⁰ Article 5 of 最高人民法院关于处理自首和立功具体应用法律若干问题的解释 (the SPC Interpretations on Several Legal Issues on the Application of Voluntary Surrender and Meritorious Performance), 法释[1998] 8号 (*Fashi* [1998] No. 8), issued and validated on 9 May 1998, available at http://www.law-lib.com/law/law_view.asp?id=13925. Accessed 15 May 2014.

Among all five types, providing clues or intelligence against other suspects or crimes and assisting investigators to catch other criminal suspects are the most common but meanwhile confusing forms. In 2010 these two forms were further interpreted by the SPC (2010 SPC Opinions).⁹¹ For the former, three conditions are imposed on the way the intelligence is collected. First of all, clues should not be collected through illegal measures such as bribery or violence, or violating relevant rules. Secondly, assistance should be provided by offenders themselves rather than by other individuals like relatives or friends. Thirdly, intelligence obtained while the assisting offender is performing his official duty cannot be recognized as meritorious service. For the latter, the 2010 SPC Opinions exclude situations when the assisting offender provides merely the name, address or appearance of his accomplice, or the contact during their criminal activities.

Apart from these legislations and interpretations, judicial decisions on individual cases also developed more detailed rules to scope and clarify the conditions for meritorious service. For example, in the Jiang Junyan case⁹² in 2009 the SPC gave opinion that considering the legislative purpose and the distinction between ‘disclosing other crimes’ and ‘reporting crimes as a victim’, exposure of crimes against the defendant himself shall not be cognized as meritorious service. In the Chen Leilei case⁹³ in 2010 the SPC held that clues or information provided without clear sources should not be adopted as a basis for ‘meritorious service’, aiming to prevent any illegal actions in the collection of evidence or trade of clues or information in practice.

From the perspective of the value of the assistance, the legal regime in China distinguishes normal meritorious service from major meritorious service. The categorization between these two types of meritorious service was firstly adopted in the 1997 CL but without clear criteria. The 1998 SPC Interpretations employ two baselines. To be recognized as ‘major meritorious service’, the targeted suspects must carry a possible sentence of no less than lifetime imprisonment, or the crime committed by them has great influence at either the provincial or the national level.

In addition to these two criteria, when considering joint crimes judicial interpretations also attempt to reach a reasonably balanced opinion between the assisting offender’s liability and that of his accomplices. In the 2010 SPC Opinions three principles are established. First of all, for a prime culprit who reports to or assists judicial organs in arresting his accomplices who are less liable for the crime, the people’s court should not issue lenient sentence. Secondly, for a prime culprit who reports to or assists judicial organs in arresting offenders with equal liability in other crimes, the people’s court may consider mitigating the punishment. Thirdly, for an accomplice in joint crimes and participants at the basic level of the hierarchy in criminal organizations who assist judicial organs in arresting prime culprits, the people’s court should impose on them sentencing reduction. The intention of these rules is quite clear: to encourage assistance against ‘bigger fish’.

Given these relevant rules and decisions two characteristics of the connotation of ‘meritorious service’ can be identified. First, the assistance is not limited to the assisting offenders’ own cases, but also can be other crimes where they hold relevant information; and second, the form of assistance is not limited to being a witness in court, but is quite varied. This is partly due to the fact that Chinese

⁹¹ 最高人民法院处理自首和立功若干具体问题的意见 (Opinions on Several Specific Issues on Voluntary Surrender and Meritorious Service in 2010), 法发[2010] 60号 (*Fafa* [2010] No. 60), issued and validated on 22 December 2010, available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=143184>. Accessed 15 May 2014.

⁹² *Jiang Junyan Case*, Jiangsu Province, 2009, in Zhang Jun and Huang Ermei (eds.), 最高人民法院自首、立功司法解释: 案例与理解适用 (*Guiding Cases and Understandings on SPC’s Judicial Interpretations on Voluntary Surrender and Meritorious Service*) (Beijing: Law Press China, 2012), p. 215.

⁹³ *Chen Leilei Case*, Anhui Province, 2010, in *ibid*, Zhang and Huang (2012), p. 215.

criminal justice does not have complicated evidence rules, such as hearsay rules, and all information collected by investigators should be comprehensively considered, emphasizing the mutual confirmation among different evidence.

3.2.2 Criminal Justice Agencies' Offer

Just like a plea agreement, the most common and formalized rewards for meritorious service is sentencing reduction. The 2014 Guiding Opinions set limitations on judicial concessions offered to 'meritorious service', and establish a graduated sentence discount system, which can be seen in Table 3.2.

Table 3.2 Graduated Sentencing Discount in the 2014 Guiding Opinions for Meritorious Service

Category	Discount
NMS	≤ 20%
MMS	20% - 50%
MMS + Minor Crimes (Normal)	>50%
MMS + Minor Crimes (Special)	Exemption

Note: NMS: normal meritorious service; MMS: major meritorious service

As to the range of the final discount for multiple crimes, Article 2 of the 2014 Guiding Opinions stipulates that the discount for each crime should be calculated separately first, and then be summed up to a cumulative punishment based on rules in criminal law. Apart from the general rules on normal cases, the Chinese legal system also pays special attention to death penalty cases. According to Article 251 of the 2012 CPL, the implementation of the death penalty should be ceased if the convict exposes any major crimes of others or has other major meritorious service, and the sentence may be changed correspondingly.

To avoid misuse of this mechanism, the 2010 SPC Opinions further establishes the principle of comprehensive examination. This principle contains three key requirements: (1) the criminal's own crime should be sufficiently investigated; (2) the utility of the assistance should be properly evaluated; and (3) the intention of providing assistance should be examined. This means that if the offender intends to take advantage of the rules and escape from punishment by giving assistance, the people's court may refuse to impose a lenient punishment.

Apart from the sentencing reduction, a subsequent question is whether the assisting offender can obtain other types of concession, especially immunity from prosecution. As aforementioned, one key premise for discretionary non-prosecution is that the punishment is unnecessary or can be exempted according to the 1997 CL. Before 2011, offenders who provide major meritorious service and meanwhile voluntarily surrender *should* be exempted from punishment (Article 68 of the 1997 CL). However, this rule was removed by Amendment VIII of the 1997 CL, indicating that assisting offenders may still serve penalties even if both voluntary surrender and major meritorious service are fulfilled simultaneously.

What needs to be noticed here is that the changes in the Amendment VIII do not deprive the discretionary power of criminal justice agencies in offering full exemption for major meritorious service; a non-prosecution decision is still applicable as long as all the conditions are satisfied.

3.3 Motivations for Assistance Agreement: Corruption-Related Crimes as Example

From the discussion above a rough contour of assistance agreement in the legal context is sketched. It also reflects constantly enhanced recognition of meritorious service in the Chinese criminal justice system. Behind this phenomenon are motivations at both domestic level and international level. To better illustrate these motivations, two high-profile cases in recent years in China are provided before the detailed discussion.

3.3.1 Internal Motivation: Detect Effect

Case 3.2 Rainbow Bridge Case, Chongqing City, 1999

In January 1999 the 180 meter-long Rainbow Bridge in Qijiang County, Chongqing City, collapsed three years after it had been built by a private contractor, Fei Shangli, and caused 40 deaths and 14 injuries. This tragedy was caused by 'irregularities' in both the contracting and construction of the steel bridge,⁹⁴ and uncovered the bribery offered by Fei to Lin Shiyuan, the former deputy secretary of Qijiang County Committee of the Chinese Communist Party. During the trial Fei acted as witness of the prosecutor to charge Lin with bribery, and in exchange, Fei was only held responsible for the crime of causing a serious construction accident (Article 137 of the 1997 CL), and was sentenced to 10 years' imprisonment. Lin was charged for bribery and malfeasance, and sentenced to death in the first instance trial. However, this sentence was reduced to the death penalty with suspension in the appeal because of his major meritorious service in revealing the corruption facts of Zhang Kaike, the former Communist Party secretary of Qijiang County, and acted as witness during Zhang's trial.⁹⁵

Case 3.3 Wu Ying Case, Zhejiang Province, 2012

Wu Ying is an entrepreneur from Dongyang City, Zhejiang Province. On 18th January 2012, Wu was convicted of the financial fraud of 390 million RMB, and sentenced to death by the Higher People's Court in Zhejiang Province. On 20th April 2012 the SPC overturned the sentence and remanded for a retrial with the explanation that 'Wu Ying truthfully described her criminal activity, and confessed the facts of her bribery of many public officials'. Considering this Wu's death penalty can be suspended. On 21 May 2012, the sentence was reduced into death penalty with suspension by the Higher People's Court of Zhejiang Province. The key arguments for this reduction in the final verdict were 'Wu honestly confessed, and reported on several civil servants taking bribes, among which three have been confirmed and charged'.⁹⁶

⁹⁴ 'China Bridge Collapse Kills 39'. BBC News, 9 January 1999, available at <http://news.bbc.co.uk/2/hi/asia-pacific/251723.stm>. Accessed 28 January 2015.

⁹⁵ 綦江虹桥垮塌案 (Case of the Bridge Collapse in Qijiang County), 检察日报 (*Procuratorial Daily*), 08 July 2008, available at http://www.jcrb.com/zhuanti/szzt/wmdssn/ssnda/ssnda/200807/t20080708_35373_1.html. Accessed 23 September 2014.

⁹⁶ (2012) 浙刑二重字第1号 ((2012) Zhexing'erchongzi No. 1). 最高人民法院未核准吴英死刑 (*The SPC Disapproves Wu's Death Penalty*), Xinhuanet, 20 April 2012, available at http://news.xinhuanet.com/legal/2012-04/20/c_111818815.htm. Accessed 28 January 2015. For detailed discussion on Wu Ying's case and the death penalty, see Wei Pei and Qianyun Wang, *Survival and Application*

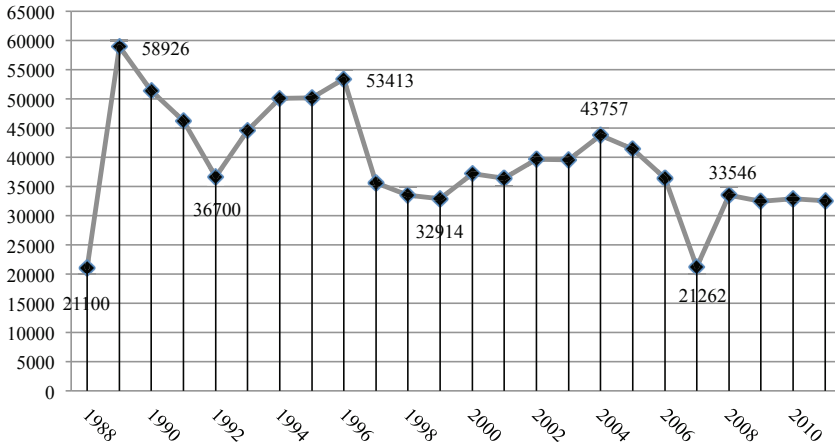
In both cases defendants were given a comparatively lenient sentence because of their cooperation in assisting investigations against other suspects. Several common characteristics can be detected from these two cases. To begin with, both defendants were involved in severe crimes carrying a possible sentence of death. Secondly, both defendants received some mitigation due to offering information against ‘bigger fish’, which successfully led to the conviction of the latter. Thirdly, through assistance both defendants actually incriminated themselves. Fourthly, the form of ‘assistance’ is not limited to acting as witness in court, but also providing relevant information to police and prosecutors. The two cases show that in China, the exchange between the offender’s assistance and legal concessions already exist, although such an exchange is operated not in explicit agreements but in the form of an interaction between cooperation and the use of discretionary power.

One may notice that both cases mentioned here are corruption-related. This is not a coincidence, for corruption-related crimes are crimes where meritorious service is necessary or helpful. In fact, most of the specific regulations promulgated after 1979 concerning meritorious service focus on corruption-related crimes.⁹⁷ Figure 3.3 generally illustrates the changes in corruption-related crimes registered by the SPP from 1988 to 2011.

Figure 3.3 Registered Corruption Cases (1988-2011)

for the Crime of Fraudulent Fundraising in China’, in Bleichrodt *et al.*, eds., *Onbegreend Strafrecht: Liber amicorum Hans de Doelder* (Oisterwijk: Wolf Legal Publishers, 2013), pp. 81-92.

⁹⁷ For relevant regulations, see e.g., the 1988 Supplementary Regulations; the SPC and SPP, 关于贪污、受贿、投机倒把等犯罪分子必须在限期内自首坦白的通告 (Notice on That Criminals of Corruption, Bribery, and Speculation Crimes must Surrender and Confess within a Definite Time), 法研发[1989]21号(*Fayanfa* [1989] No.21), issued and validated on 15 August 1989, abolished on 4 January 1980, available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=4385&keyword=%E5%85%B3%E4%BA%8E%E8%44%AA%E6%B1%A1%E3%80%81%E5%8F%97%E8%B4%BF%E3%80%81%E6%8A%95%E6%9C%BA%E5%80%92%E6%8A%8A%E7%AD%89%E7%8A%AF%E7%BD%AA%E5%88%86%E5%AD%90%E5%BF%85%E9%A1%BB%E5%9C%A8%E9%99%90%E6%9C%9F%E5%86%85%E8%87%AA%E9%A6%96%E5%9D%A6%E7%99%BD%E7%9A%84%E9%80%9A%E5%91%8A&EncodingName=&Search_Mode=accurate. Accessed 28 August 2014; the SPC and SPP, 关于办理职务犯罪案件认定自首、立功等量刑情节若干问题的意见 (Opinions on Several Issues Concerning Determination of Voluntary Surrender, Meritorious Service and Other Sentencing Factors in Post Crimes, the 2009 Joint Opinions), 法发[2009]13号(*Fafa* [2009] No. 13), issued and validated on 12 March 2009. Available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=114655&keyword=%E5%85%B3%E4%BA%8E%E5%8A%9E%E7%90%86%E8%81%8C%E5%8A%A1%E7%8A%AF%E7%BD%AA%E6%A1%88%E4%BB%B6%E8%AE%A4%E5%AE%9A%E8%87%AA%E9%A6%96%E3%80%81%E7%AB%8B%E5%8A%9F%E7%AD%89%E9%87%8F%E5%88%91%E6%83%85%E8%8A%82%E8%8B%A5%E5%B9%B2%E9%97%AE%E9%A2%98%E7%9A%84%E6%84%8F%E8%A7%81&EncodingName=&Search_Mode=accurate. Accessed 28 August 2014.



Source: The SPP’s Annual Working Report (1988-2012)

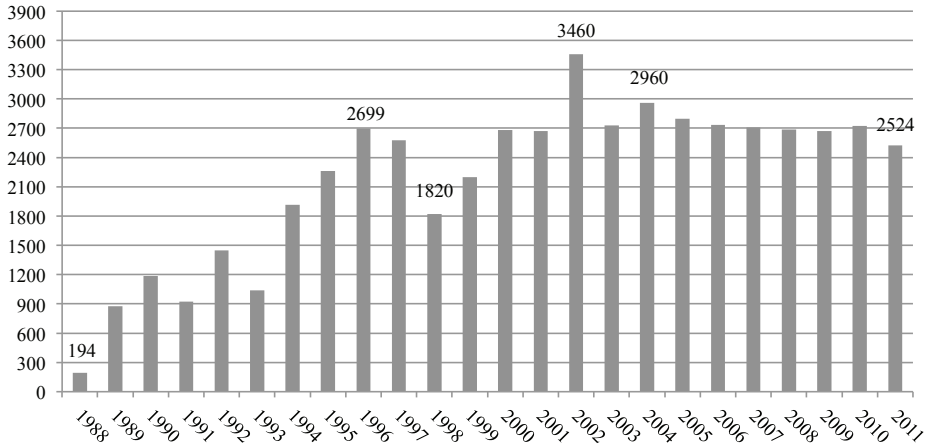
Note: ‘Corruption crime’ here refers to three types of cases: corruption, bribery, and embezzlement.

Figure 3.3 shows that between 1988 and 1989 the total number of corruption-related crimes increased sharply, and in 1989 the amount was more than double that of the previous year. This is because in 1988 the SPP launched a campaign especially aiming at corruption crimes. To take better control of corruption cases, on 15th August 1989 the SPP and SPC jointly issued a Notice That Criminals of Corruption, Bribery, and Speculation Crimes must Surrender and Confess within a Definite Time (关于贪污、受贿、投机倒把等犯罪分子必须在限期内自首坦白的通告), and stipulated that criminals who confessed, disgorged ill-gotten gains, reported other suspects or performed other meritorious performance within a definite time would be given lesser or mitigated punishment, or exempted from penalty. With comprehensive methods against corruption crimes, from 1989 to 1992 the amount decreased, and reduced to 36700 in 1992.

In 1992, with Deng Xiaoping’s Speech during his southern tour, the ‘Reform and Opening’ policy moved into a new stage, and more economic crimes and corruption crimes emerged. It can be observed in Figure 2.3 that since 1992 the amount of corruption cases rose again, and peaked in 1996. In this year the revision of the 1979 CL started, and finally resulted in the 1997 CL. In this new CL two things should be mentioned relating to corruption crimes: first, the threshold for bribery is increased from 1000 RMB to 5000 RMB, which contributed to the drop in the caseload in 1997; and second, meritorious service is given special attention and composes one major conditions for leniency. From 1997 to 2011 the overall trend of corruption crimes went evenly, except for the year of 2007 when the number dropped to 21262.

However, the gradually decreasing number of cases does not necessarily mean that the situation of anti-corruption is getting better. The SPP also published annual statistics of high-ranked officials involved in corruption cases.

Figure 3.4 Officials above County-Level Prosecuted in Corruption Crimes (1988-2011)



Source: SPC's Annual Working Report (1988-2012)

In Figure 3.4, even though the total amount of corruption cases is reduced gradually, the number of government officials involved does not show the same trend. In 2011 the number was ten times that of 1988, indicating that corruption cases were becoming more and more serious. On 8th July, 2007 the SPP and SPC jointly issued *Several Opinions on Legal Issues in Dealing with Bribery Cases* (关于办理受贿案件适用法律有关问题的若干意见), claiming that the form of bribery has been amplified and diversified in recent years, with increasingly hidden methods and widespread consequences. Furthermore, studies on 'meritorious service' also expose three difficulties in solving corruption cases: difficult to file the case, difficult to investigate and to collect evidence, and difficult to convict.⁹⁸ These difficulties greatly influence the use of suspects as informers and witnesses, leaving space for the assistance agreement.

3.3.2 External Motivations: International Trend

Beside the internal necessity and requirements generated from Chinese society, there are also some motivations from the international context. One of the most influential external motivations is the United Nations Convention against Corruption (UNCAC), which was ratified by the Standing Committee of the 10th NPC on 27 October 2005. Article 37 of UNCAC requires its members to 'take appropriate measures to encourage persons who participate or who have participated in the commission of an offence ... to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders for the proceeds of crime and to recovering such proceeds'. According to UNCAC, the 'appropriate measures' for 'encouraging' include 'mitigating punishment' and 'granting immunity' for those who provide 'substantial cooperation in the investigation or prosecution'. Members shall provide protections to those cooperative persons based on Articles 37 and 32.

Apparently seeking the cooperation of the crime-participants or insiders is a common method applied internationally to crimes such as corruption, and as a member of UNCAC, China is expected

⁹⁸ Qu Xin, 建立我国污点证人豁免制度的实证分析 (A Field Analysis of Establishing the Tainted Witness Immunity System in China), 16(6) (2008) 证据科学 (*Evidence Science*), 699-712, p.703.

to take corresponding measures required or suggested in the Convention, and the assistance agreement with the exchange of concession and ‘meritorious service’ is one of them.

3.4 Potential Risks

Despite the motivations, questions remain as to the way in which assistance agreement is implemented in practice, especially when the procedure law is silent on this issue. McConville’s empirical research on 13 people’s courts showed that 37.1 per cent of the defendants incriminated others, either their own accomplice or suspects in other cases, expecting lenient sentences.⁹⁹ However, until now there has been no systematic and formalized mechanism for assistance agreements in Chinese criminal proceedings. How to regulate the negotiation between the prosecution and the defense, how to implement the agreement, how to supervise the negotiation and implementation, and how to provide remedies, all these questions remain unanswered.¹⁰⁰ Given such a procedural vacuum, three major risks emerge concerning the protection of assisting offenders, the protection of the accused who is targeted in an assistance agreement, and the risk of miscarriages of justice.

3.4.1 Risks on Protecting Assisting Offenders

Previous studies have shown strong concern on how to protect assisting offenders’ rights and interests in assistance agreements. That’s where the theory of immunity of tainted witness enters.¹⁰¹ However, despite academic explorations and proposals, the current criminal legislation pays little attention to this issue.

The legislative silence reflects the low respect for the assisting offenders’ rights and interests in criminal procedure. For one thing, assisting offender’s right against self-incrimination may be violated. At first glance, the obligation to confession in Article 118 of the 2012 CPL is only applicable to assisting offender’s own criminal acts, and therefore he bears no such obligation and is protected by Article 50 of the 2012 CPL when his statement refers to other suspects. However, earlier discussion has revealed an overlap in content between confession and meritorious service especially in corruption-related crimes where informing the investigator on the person who accepted the bribe is normally deemed as part of the confession of the person offering the bribe. This overlap reflects an expanded interpretation on confession, and a conservative attitude in recognizing meritorious service. For another, the risk against assisting offenders as well as their relatives and friends during providing assistance has not been given attention in the 2012 CPL, and therefore no special protection is offered.

3.4.2 Risks on Protecting the Accused Who is Targeted

The rights and interests of the targeted person in an assistance agreement are also at risk due to the procedural vacuum, which can be reflected in two issues. For one thing, the general rule of confronting witness orally in court has not been acknowledged in the 2012 CPL yet. This can be even more problematic in assistance agreement with respect to the risk that assisting offenders and criminal

⁹⁹ Mike McConville, *Criminal Justice in China: An Empirical Inquiry* (Cheltenham & Northampton: Edward Elgar, 2011), p. 98.

¹⁰⁰ For discussion on the problems in meritorious service in Chinese criminal justice system, see, e.g., Li Keqing, 立功制度的现实困境与完善 (Actual Problem of the Meritorious Performance and Its Solution), 17(2009) 国家检察官学报 (*Journal of National Prosecutors College*), 117-125.

¹⁰¹ Duan Xiaobo, 污点证人作证豁免制度在我国的运用 (The Application of the Immunity for the Tainted Witness in China), 1(2011) 中国检察官 (*The Chinese Procurators*), 7-9, pp. 7-8.

justice agencies may take advantage of this device to serve their own purposes. This will be further discussed later.

From another perspective, the rules of evidence concerning meritorious service are vulnerable and vague. This can be observed in three aspects. Firstly, one key requirement on recognizing meritorious service, as discussed earlier, is to be confirmed by relevant authorities. Nevertheless, the law and relevant interpretations do not explain the standard and manner of ‘confirmation’. Secondly, the major distinction between normal meritorious service and major meritorious service is whether the targeted suspects risk a possible sentence higher than lifetime imprisonment. When the targeted suspects have not been heard in court, how to confirm the possible sanction becomes problematic.¹⁰² Thirdly, unlike confessions in plea agreement, testimony offered by assisting offenders does not need to be corroborated to convict the targeted defendant. All these elements may reduce not only the reliability of meritorious service but also the chance to recognize, assess and challenge it.

3.4.3 Risks of Miscarriages of Justice

Given the ambiguity in procedural and substantive rules, miscarriage of justice becomes an inevitable risk. A recent high-profile case can help to illustrate this problem.

Case 3.4 Zhang Hai Case, Guangdong Province, 2014

Zhang was the former president of the beverage maker Jianlibao Group. He was convicted in 2007 of official embezzlement and misappropriation of funds and sentenced to 15 years imprisonment in the first instance. The penalty was reduced to ten years imprisonment in the appeal process due to Zhang’s exposure of two other suspects. After that Zhang performed another two meritorious services and walked out of prison in 2011. Later this case attracted the people’s procuratorate’s attention as the judge involved in the sentencing reductions for Zhang had been prosecuted for graft. So far more than 40 officials in criminal justice agencies were involved, and criminal investigations against 24 suspects have been initiated.¹⁰³

What was exposed in this case was a streamlined production of fabricated meritorious service throughout the entire criminal proceedings from defense lawyer’s buying clues, to prison officials’ providing convenient opportunities, the police’s active cooperation in investigation, and then to the judges’ hasty examination. Almost every link in the proceedings in this case went wrong.

Zhang Hai’s case is hardly exceptional. In fact, criminal justice agencies have noticed such problem before this case and made efforts to reduce the risk. The 2009 Joint Opinions were specifically prescribed to solve problems occurring in the process of determining ‘meritorious service’

¹⁰² For discussion on recognizing major meritorious service, see e.g., Xia Wei, 认定重大立功的主观要件和时间要求 (Requirements on Subject and Time in Recognizing Major Meritorious Service), 24(2009) 人民司法 (*The People’s Judicature*), 29-32.

¹⁰³ For details of Zhang Hai’s case, see 揭假立功减刑内幕：腐蚀政法人员，炮制冤假错案 (‘Disclosing Sentencing Reduction for False Meritorious Service: Corrupted Political and Criminal Justice Personnel, and Produced Miscarriages of Justice’), People, 15 March 2014, available at <http://politics.people.com.cn/n/2014/0315/c70731-24641835.html>. Accessed 7 April 2014. For English introduction, see Zhang Yan, ‘Prosecutors Seek Extradition of Embezzler on Bribery Charges’, China Daily, 26 February 2014, available at http://www.chinadaily.com.cn/china/2014-02/26/content_17305107.htm. Accessed 7 April 2014.

and issuing corresponding ‘reward’, which is intensively embodied in the phenomenon of the improper frequent use of ‘probation’, ‘exemption’, and ‘sentence mitigation’ in dealing with duty-related crimes.¹⁰⁴

3.5 Summary

From discussion on both legislation and practice concerning assistance agreement in China, a complex attitude towards this legal instrument can be observed. On the one hand, the system intends to take full advantage of suspects or defendants’ assistance by either adopting a rather broad definition of ‘meritorious service’ or formalizing corresponding rewards from criminal justice agencies. While on the other hand, it is also fully aware of the high risk of being misused by both assisting offenders and criminal justice agencies, leading to the constantly refined and tightened restrictions on recognizing meritorious service. The former attitude leads to the independence of this mechanism for criminal justice authorities’ concession in law, whereas the latter results in the constantly narrowing down scope of its connotation in judicial interpretations.

Even so, in current legislation there is no special procedure designed for ‘meritorious service’. Despite the fact that meritorious service is quite often provided during pre-trial proceedings,¹⁰⁵ most of the legal provisions focus on *ex post* procedures on examining the reliability of the information and rewarding the assisting offenders rather than *ex ante* procedures regulating the negotiation process. Efforts have been made by both the legislator and legal practitioners to reduce the potential risks. They, however, were proved to be less effective by cases like Zhang Hai. This is because the major problem behind the misuse of assistance agreement in China is not ‘what should be excluded from the content of meritorious service’ but ‘how to exclude certain activities from being recognized as meritorious service’. Without answering the ‘how’ question, miscarriages of justice is unlikely to be avoided.

4. Restoration Agreement¹⁰⁶

Compared with the two former types of CPA, the exchange between concession and the offender’s restorative measures gains more attention in recent Chinese judicial reform especially under the name ‘criminal reconciliation’. Criminal reconciliation refers to a mechanism embedded in criminal proceedings whereby the offender and the victim reach reconciliation based on the former’s guilty plea, compensation, apology, etc., and the latter’s forgiveness. By fulfilling his civil obligations towards victims, the offender may receive lenient treatment from criminal justice authorities.¹⁰⁷

¹⁰⁴ 最高人民法院、最高人民检察院有关部门负责人就《关于办理职务犯罪案件认定自首、立功等量刑情节若干问题的意见》答记者问(the SPC and SPP Responses to Questions on the Explanations on the ‘Opinions on Several Issues Concerning Determination of Voluntary Surrender, Meritorious Service and Other Sentencing Factors in Post Crimes’), 检察日报 (*Procuratorial Daily*), 30 March 2009, available at http://newspaper.jcrb.com/html/2009-03/20/content_13925.htm. Accessed 29 January 2015.

¹⁰⁵ According to the empirical research on meritorious service in 2006 and 2007 conducted by Taizhou Intermediate People’s Court, Zhejiang Province, among all assisting offenders about 63.2% provided meritorious service during investigation and 10.6% during prosecution review. See Research Group of Taizhou Intermediate People’s Court, 关于刑事审判中立功制度适用情况的调研 (Empirical Research on the Application of Meritorious Service during a Court Trial), 8(2008) 法律适用 (*Journal of Law Application*), 44-49.

¹⁰⁶ The major content of this section has been published in Wei Pei, ‘Criminal Reconciliation in China: Consequentialism in History, Legislation, and Practice’, 3(3-4) (2014) *China-EU Law Journal*, 191-221.

¹⁰⁷ Chen Guangzhong and Ge Lin, 刑事和解初探 (Exploration on Criminal Reconciliation), 5(2006) 中国法

For the Chinese criminal justice system, mechanisms similar to criminal reconciliation have long existed. Nevertheless, they are normally referred to as ‘mediation’ (调解) rather than ‘reconciliation’ (和解).¹⁰⁸ According to Black’s Law Dictionary, ‘mediation’ is ‘a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution’,¹⁰⁹ whereas ‘reconciliation’ refers to the ‘restoration of harmony between persons or things that had been in conflict’.¹¹⁰ The key difference here is that ‘mediation’ focuses on the procedural elements, such as ‘neutral third party’ and ‘mutually agreeable solution’; whereas ‘reconciliation’ pays more attention to the final consequence – restoring harmony. In the Chinese language, ‘reconciliation’ shares the same character as ‘harmony’ (和). In this sense, what is distinctive about criminal reconciliation is not just its rhetorical expression, but more importantly, the ideology behind it.

However, despite the different emphasis between mediation and reconciliation, their implementation in practice in China is hardly distinguishable. Meanwhile, these two words share the core essence of encouraging a private settlement between the offender and the victim. To maintain the consistency, in the following discussion the term criminal reconciliation is adopted to describe the restoration agreement in the current Chinese criminal justice system, and the two words are interchangeable in describing the historical evolution of criminal reconciliation.

It should be noticed that apart from criminal reconciliation, restoration agreement in the current Chinese criminal justice system can be applied to another two areas: the private prosecution procedure (自诉案件)¹¹¹ and incidental civil litigation (附带民事诉讼案件).¹¹² These two areas

学 (*China Legal Science*), 3-14. In Fan Chongyi’s research criminal reconciliation is interpreted similarly, where during criminal litigation, offenders reconcile with victims on civil damages through compensation, apology, or other methods. Based on this reconciliation, a judicial organ may exempt suspects from criminal liability, punishment, or impose lenient or mitigated penalties. See Fan Chongyi and Ai Jing, 刑事和解管见和实证考量 (Personal Opinions and Empirical Examination on Criminal Reconciliation), 2(2010) 中国司法 (*Justice of China*), 24-28.

¹⁰⁸ For research on Chinese mediation, see, e.g., Jerome Alan Cohen, ‘Chinese Mediation on the Eve of Modernization’, 54(3) (1966) *California Law Review*, 1201-1226; Stanley Lubman, ‘Mao and Mediation: Politics and Dispute Resolution in Communist China’, 55(1967) *Cal. L. Rev.*, 1284-1360; Margaret YK. Woo, ‘The Right to a Criminal Appeal in the People’s Republic of China’, 14(1989) *Yale Journal of International Law*, 118-160; Eric J. Glassman, ‘The Function of Mediation in China: Examining the Impact of Regulations Governing the People’s Mediation Committees’, 10(1991) *UCLA Pac. Basin L. J.*, 460-488; Hualin Fu, ‘Understanding People’s Mediation in Post-Mao China’, 6(1992) *Journal of Chinese Law*, 211-246; Carl F. Minzner, ‘China’s Turn against Law’, 59(2011) *The American Journal of Comparative Law*, 935-984; Taisu Zhang, ‘The Pragmatic Court: Reinterpreting the Supreme People’s Court of China’, 25(1) (2012) *Columbia Journal of Asian Law*, 1-61. The common feature of these studies is that they all focus on civil or administrative mediation.

¹⁰⁹ Bryan A. Garner (ed.), *Black’s Law Dictionary*, 9th Edition (Wisconsin: West Publishing, 2004), p. 1098.

¹¹⁰ *Ibid.*, p. 1415.

¹¹¹ Private prosecution procedure can be applied to three situations under the 1997 CL: (1) cases to be handled only upon individual complaint, including insult and slander (Article 246), violent interference with the freedom of marriage (Article 257), abuse (Article 260), and normal embezzlement (Article 270); (2) minor criminal cases that the victims must have evidence to prove, including eight kinds of crimes under 1997 CL: intentional injury (para 1, Article 234), intrusion (Article 245), infringing upon right of the communication (Article 252), bigamy (Article 258), abandonment (Article 261), infringement of intellectual property rights (Section 1 in Chapter 3), manufacturing and selling fake and shoddy goods (Section 1 in Chapter 3), and crimes within Chapters Four and Five for which a sentence of less than three years’ imprisonment may be imposed; and (3) cases for which the victims have evidence to prove that the defendants, who infringed upon the victim’s personal or property rights,

have hardly been revised since 1979. Private prosecution can only be applied in a very limited scope, and the incidental civil litigation is, by its nature, a civil procedure. The following discussion focuses on the latest development in the field of restoration agreement: criminal reconciliation in public prosecution cases.

4.1 Historical Review of Restoration Agreement: Ups and Downs

With regard to the criminal justice field, the use of reconciliation is not completely new. In fact, mechanisms sharing the essence of criminal reconciliation have long existed in Chinese legal history. Ancient China was a typical agricultural society that ‘favor[ed] the harmonious and peaceful social order, and meanwhile, deem[ed] disputes as pathological phenomenon of society’.¹¹³ Penalties, based on Confucius’ understandings, were less effective: the application of penalty could only compel people to obey, while the application of morality and virtue could stimulate the sense of shame and set self-discipline willingly.¹¹⁴ Under such ideology, litigation was denounced because it undermined harmonious neighborhood relationships and damaged the common wealth – ‘the more frequent the litigation is, the more barren the field is; the more barren the field is, the more empty the barn is; the more empty the barn is, the poorer the nation is’.¹¹⁵

In ancient China for a long time there was no clear distinction among administrative, criminal and civil functions of local government. Local officials were ‘obliged to act as detective, prosecutor, judge, and jury rolled into one’.¹¹⁶ The mixed identities and functions gave rise to two main consequences. The first one is that local officials adopted various ways to solve criminal cases beyond laws and regulations, and in trivial cases there were no strict boundaries between ‘slight penalty or severe penalty’, ‘rule of law or rule of virtue’, ‘guilty or acquittal’, and ‘punishment or exemption’.¹¹⁷

The second consequence is that social organizations beyond judicial authorities, such as the village community, clansmen and guilds could participate in social governance. These entities not only helped to smooth social frictions, but also to mediate disputes and to impose sanctions, such as the cultivation and mediation hosted by three noble elders (三老教化调解) in the Han Dynasty, the mediation hosted by elders in Li-jia institutions (里甲老人调解) in the Ming Dynasty, and

should be investigated, whereas, the PSO or the public prosecutorate refuses to investigate. The purpose of the third type case, which is distinguished from the former two, is to provide remedy to the victims when the state machinery fails to function, and its nature is a limitation on judicial discretion. Thus only in the former two types may parties have their cases reconciled either by victims withdrawing prosecution, or by the people’s court recognizing the reconciliation agreement. Private prosecution cases only account for a very small proportion of the entire criminal caseload.

¹¹² The incidental civil litigation is by its nature a civil procedure rather than a criminal procedure.

¹¹³ Wu Xiaofeng, 冲突与对接——刑事和解刑法制度研究 (*Connection and Conflict: Research on Criminal Law on Criminal Reconciliation*) (Beijing: CPPSUP Press, 2008).

¹¹⁴ See 论语: 为政 (The Analects of Confucius - Governing). Research on Confucian preference for mediation, see *supra* note 108, Cohen (1966). For discussion on the content and influence of Confucianism and other legal philosophy on Chinese criminal justice system, see, e.g., *supra* note 1, Muhlhahn (2009).

¹¹⁵ See 韩非子: 解老 (Hanfeizi: Explaining Laocius). Analysis on this thought see, e.g., Philip C. Huang, ‘Court Mediation in China, Past and Present’, 32(2006) *Modern China*, 275-314, p.275.

¹¹⁶ Derk Bodde, ‘Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China’, 107(5) (1963) *Proceedings of the American Philosophical Society*, 375-398, p. 376.

¹¹⁷ Xu Zhongming, 明清刑事诉讼“依法判决”之辩证 (Dialectical Study on the ‘Adjudgement According to Law’ in Ming and Qing Dynasties), 4(2005) *法商研究 (Studies in Law and Business)*, 159-164, p. 159.

self-governing based on rural agreement (乡约自治) in the Qing Dynasty.¹¹⁸ These mechanisms focused more on solving disputes rather than judging right or wrong. Proceedings and formalities were of little importance, as long as both parties could have their disputes resolved.

In the era of the Republic, Chinese legal system was fragmented due to wars. In Republic Kuomintang (KMT) areas, the legal system largely followed the process of modernization which began in late Qing Dynasty¹¹⁹ It was in this period that China adopted public prosecution,¹²⁰ and started to marginalize mediation. In 1907, for instance, the Provisional Regulations for Adjudicates below Higher Courts (高等以下各级审判庭试办章程) explicitly prescribed in Article 106 that all cases prosecuted by prosecutors should not be reconciled. Later similar rules appeared in the Criminal Procedure Law of the Republic of China in 1928 and 1935.

Despite the changes in legal norms, research shows that in this period law in action greatly departed from law in books. In their research on judicial archives in *Longquan* County from 1929 to 1949, Hu Ming and Zhang Jian noticed that ‘criminal mediation still occupied a fairly large proportion in criminal justice practice’.¹²¹ 245 criminal files were preserved, and 102 cases were reconciled with a proportion of 41.6 per cent.¹²² Scholars commented on this phenomenon that the legal system imported during this period was just like ‘oil floating on the water’, and never blended with Chinese society.¹²³

The application of reconciliation on criminal cases was inherited by CPC in the Shanxi-Gansu-Ningxia Border Region (陕甘宁边区, SGN) during both the War of Resistance against Japan (1937-1945) and the Liberation War (1945-1949). Xie Juezai, the first President of the Higher Court in the SGN emphasized that judicial work and practice had to be based on a correct understanding of historical traditions and precise analysis of the current social situation.¹²⁴ The former referred to the long history of worshipping flexible mediation in solving disputes, while the latter required the legal system to serve political needs, especially to incite as much public support as possible to win the war.¹²⁵

With these requirements, mediation was preserved in solving criminal cases. For instance, in October 1941, the CPC issued the Proposals for the Higher Court Legal Conference in the SGN (陕甘宁边区高等司法会议提案), which was later adopted in the Regulations on Mediation in Civil and Criminal Cases in the SNG (陕甘宁边区民刑事案件调解条例, 1943 Regulations) on 11 June 1943. According to them, all criminal cases could be reconcilable except for serious cases and cases

¹¹⁸ Wu Xiaofeng, 不可回避的存在：解读中国古代社会刑事和解 (An Inevitable Existence: On the Criminal Reconciliation in Ancient China), 3(2008) 政法论坛 (*Tribune of Political Science and Law*), 39-48, p. 39.

¹¹⁹ For detail discussion on the history of Late Qing legal reform, see Shiping Hua, ‘Shen Jiaben and the Late Qing Legal Reform (1901-1911)’, 30(2) (2013) *East Asia*, 121-138.

¹²⁰ In 1906 the Qing government issued 大理院审判编制法 (*The Formulation of Adjudication System in Daliyuan*) and legally prescribed public prosecution.

¹²¹ Hu Ming and Zhang Jian, 转型与承续：民国时期的刑事和解 (Transformation and Inheritance: The Criminal Mediation in the Period of the Republic of China), 4(2013) 浙江大学学报 (*Journal of Zhejiang University*), 1-15, p.1.

¹²² *Ibid*, Hu and Zhang (2013), p.3.

¹²³ Pan Dasong, 中国近代以来法律文化发展考察 (Study on the Legal Cultural Development Since 1840 in China), 2(1989) 社会学研究 (*Sociological Studies*), 116-117, p. 116.

¹²⁴ See Wang Shirong, 陕甘宁边区高等法院的成就 (The Accomplishment of the Higher Court in SGN), 6(2010) 西南政法大学学报 (*Journal of Southwest University of Political Science & Law*), 10-17, p. 10.

¹²⁵ See Xiao Zhoulu, 陕甘宁边区判例汇编考略 (Research on Case Report in SGN), 1(2014) 法学研究 (*Chinese Journal of Law*), 190-207.

infringing public interests.¹²⁶ On 20 December 1943 the Higher Court explained the benefits of mediation and described it as a way that ‘can reconcile the dispute between parties, as well as restore their relationship; it not only reduces the cases submitted to court, but also cultivates and educates citizens’.¹²⁷ In 1946, considering the possibility of corruption and abuse of judicial power, the 1943 Regulations were modified, restricting mediation to criminal cases which ‘involve slight injuries due to impulsive or negligent action when the public has no objection to reconciliation’.¹²⁸

After 1949 China moved into a new era to construct her legal system. The lack of experience urged the government to learn from the Former Soviet Union and China’s own history, and many old practices were retained. For instance, on 25 February 1954, the new government issued the General Rules on People’s Mediation Committee (人民调解委员会暂行组织通则) and prescribed in Article 3 the mediation of slight criminal cases.¹²⁹ Behind this rule were the traditional preferences for maintaining or restoring ‘harmonious relationship between the parties’ on the one hand, and the ‘lack of judicial sophistication and experience’ on the other.¹³⁰

The legislation process was interrupted by the Cultural Revolution from 1966 to 1976. Atrocities against human rights during that period reminded the legislator in later years to promote and protect the authority of law, and simultaneously to reduce the discretionary powers of individual persons.¹³¹ With the promulgation of the 1979 CL and 1979 CPL, the Chinese criminal justice system took the first steps on the road towards formalization and professionalization by accepting concepts such as the ‘rule of law’, the ‘protection of human rights’, and ‘judicial independence’.¹³² The 1996 CPL pushed this trend even further by establishing a ‘rudimentary framework for adversarial trials’.¹³³ Under this trend restoration agreement in criminal justice gradually atrophied.

The government’s preference for formalizing criminal proceedings started to change at the beginning of the 21st century,¹³⁴ and since then criminal reconciliation was gradually expanded to public prosecution cases. This shift initially emerged at the local level. The People’s Procuratorate of

¹²⁶ Article 2 of the 1943 Regulations stipulated that crimes such as ‘against the internal security of the State, , treason, homicide, banditry, extortion, violation of governmental regulation, disruption of public order, corruption, obstructing an officer in discharge of his duties, interference with voting, and escape’ could not be reconciled.

¹²⁷ See The Higher Court of the SGN, 《注意调解诉讼纠纷》的指示信 (Letter of Instructions on the Mediation in Solving Disputes), cited in Tang Guangfeng, 陕甘宁边区人民调解制度述论 (Comments on People’s Mediation in SGN), 4(1993) 甘肃政法学院学报 (*Journal of Gansu Political Science and Law Institute*), 51-56, p.51.

¹²⁸ See *ibid.*

¹²⁹ Article 3 stipulated ‘the task of the Committee is to reconcile general civil disputes and slight criminal offences, and to promote legal promulgation and education through mediation’.

¹³⁰ Stanly Lubman, ‘Bird in a Cage: Chinese Law Reform after Twenty Years’, 20(2000) *Nw. J. Int’l L. & Bus.*, 383-423, p. 388.

¹³¹ For the history of the Cultural Revolution and its relationship with China’s modernization, see T. B. Gold, ‘After Comradeship: Personal Relations in China since the Cultural Revolution’, 104 (1985) *The China Quarterly*: 657-675.

¹³² Regarding China’s judicial reforms related to the rule of law, see Randall Peerenboom, *China’s Long March toward Rule of Law* (New York: Cambridge University Press, 2002); Anthony Dicks, ‘The Chinese Legal System: Reforms in the Balance’, 119(1989) *The China Quarterly*, 540-576, p. 540.

¹³³ Gerard J. Clark, ‘An Introduction to the Legal Profession in China in the Year 2008’, 41(2008) *Suffolk University Law Review*, 833-850.

¹³⁴ This is a trend that has emerged not only in the criminal justice system, but in the entire legal system in China. For a detailed analysis on this topic, see *supra* note 108, Minzner (2011).

Chaoyang District in Beijing is usually understood to have been the first mover, and, as shown in Table 2.3, in merely ten years its practices had spread to other regions.

Table 3.3 Local Regulations and Relevant Official Documents on Criminal Reconciliation

Year	Institution	Title
2002	PP of Chaoyang District, Beijing	Provisional Implementation Procedural Rules on Dealing with Slight Injury Crimes (轻伤害案件处理程序实施规则 (试行))
2003	Politics and Law Committee, Beijing	Summary on Seminar on Dealing with Slight Injury Crimes in Judicial Organs in Beijing (关于北京市政法机关办理轻伤害案件工作研讨会纪要)
2004	Provincial PP, HPC, Provincial PSB, Zhejiang Province	Opinions on Several Issues on Applying Law to Deal with Slight Injury Crimes (关于当前办理轻伤犯罪案件适用法律若干问题的意见)
2005	PP and Justice Bureau, Yangpu District, Shanghai	Provisional Regulations on Entrusting People's Mediation to Solve Minor Criminal Cases (关于在办理轻微刑事案件中委托人民调解的若干规定 (试行))
2005	Provincial PSB, HPC, Provincial PP, Anhui Province	Opinions on Solving Intentional Injury (Slight) Cases (关于办理故意伤害案(轻伤)若干问题的意见)
2006	Provincial PP, Hunan Province	Provisional Regulations on People's Procuratorate Applying Criminal Reconciliation to Solve Criminal Cases (关于检察机关适用刑事和解办理案件的规定 (试行))
2007	PP, Zhejiang Province	Provisional Regulations on Dealing with Minor Crimes Where Parties Reach Reconciliation (关于办理当事人刑事和解的轻微案件的规定 (试行))
2007	HPC, PP, PSB, Justice Bureau, Hainan Province	Opinions on Issues in Dealing with Slight Injury Cases (关于办理轻伤伤害案件其中问题的意见)
2007	PP, Kunming City, Yunnan Province	Provisional Regulations on Applying Criminal Reconciliation in Solving Criminal Cases (在办理刑事案件中适用刑事和解的规定 (试行))
2008	PP, and HPC, Guangdong Province	Provisional Guiding Opinions on Applying Criminal Reconciliation in Criminal Procedure (关于刑事诉讼中适用刑事和解的指导意见 (试行))
2008	PP, Taiyuan City, Shanxi Province	Provisional Regulations on Applying Criminal Reconciliation in Dealing with Minor Criminal Cases (办理轻微刑事案件适用刑事和解的规定 (试行))
2008	PP, Chongqing City	Regulations on Applying Criminal Reconciliation on Dealing with Minor Criminal Cases (关于适用刑事和解办理轻微刑事案件的规定)
2008	PP, Fujian Province	Minutes on Seminar on Criminal Reconciliation in People's Procuratorate in Fujian Province (全省检察机关刑事和解专题会议纪要)
2009	PP, Henan Province	Provisional Regulations on Dealing with Criminal Cases where Parties Reach Reconciliation (关于办理当事人达成刑事和解案件暂行规定)
2010	PP, Justice Bureau, Jiangxi Province	Provisional Implementation Opinions on the Connection and Cooperation between Criminal Reconciliation and People's Mediation in the Province (关于在全省建立刑事和解与人民调解联动机制的实施意见 (试行))

2010	PP, Justice Bureau, Sichuan Province	Provisional Guiding Opinions on the Connection and Cooperation between Criminal Reconciliation and People's Mediation (关于建立刑事和解与人民调解联动机制的指导意见(试行))
2010	PP, Guizhou Province	Guiding Opinions on Applying Criminal Reconciliation in Solving Criminal Cases (检察机关适用刑事和解办理刑事案件指导意见)
2011	PP, Guangxi Province	Guiding Opinions on Applying Criminal Reconciliation on Non-Prosecution Cases (关于适用刑事和解办理不起诉案件的指导意见)
2011	PP, HPC, PSB, and Justice Bureau, Jiangsu Province	Provisional Regulations on Several Issues on Reconciliation in Minor Criminal Cases (关于轻微刑事案件和解工作问题的规定(试行))
2011	PSB, Liaoning Province	Regulations on Mediation in Slight Injury Cases (公安机关调解轻伤案件暂行规定)
2011	PP, Neimenggu Municipality	Provisional Guiding Opinions on Solving Public Prosecution Cases through Criminal Reconciliation (办理公诉案件实行刑事和解的指导意见(试行))
2012	HPC, PP, PSB, Hebei Province	Measures on Reconciliation and Mediation in Solving Minor Criminal Cases (关于轻微刑事案件和解调解处理办法)

Note: PP: people's procuratorate; BPC: basic people's court; HPC: higher people's court; PSB: public security bureau

The 22 official documents listed in Table 3.3 were mainly issued at the provincial level. At least two observations can be drawn from these documents. Firstly, the expansion process of criminal reconciliation has been mainly dominated by the local criminal justice authorities including police, prosecutors and judges; out of these three actors, prosecutors appeared to be the most pro-active with respect to issuing regulations on applying the new mechanism, whereas the police were the least. The other observation is that the regulations listed in Table 2.3 can roughly delineate a roadmap of the development of criminal reconciliation. It is not difficult to notice two dimensions of the expansion: politically from the Capital City to marginal regions, and economically from rich areas to less developed areas. This background is somewhat indicative of the profound political will of the central government at that time, which not only allowed but also guaranteed its expansion.

If one examines these local regulations carefully, then it can be seen that several targets are quite frequently mentioned. Among all of these, two phrases appear in almost all of the documents: 'promote social harmony and stability' (促进社会和谐稳定) and 'resolve social conflicts' (化解社会矛盾). The second frequently-claimed target is to 'enhance judicial efficiency', where at least seven provinces explicitly emphasized this.¹³⁵ Four provincial documents paid attention to the target of 'protecting victims' interests'.¹³⁶ Very few documents mentioned offenders, let alone communities.

Along with the swift development of criminal reconciliation in regional areas, central government gradually showed its support for this new technique. In 2004 the new Hu-Wen government proposed a refreshed social control ideology – 'constructing socialist harmonious society' (构建社会主义和谐社会). The new ideology requires all social and governmental institutions,

¹³⁵ These seven provinces are Zhejiang, Shanghai, Anhui, Hunan, Jiangsu, Liaoning, Hebei.

¹³⁶ These four provinces are Jiangsu, Henan, Guangdong, Liaoning.

including criminal justice actors, to pro-actively promote harmony in their daily work through ‘social governance innovation’ and to ‘resolve social conflicts’.¹³⁷

As an echo, criminal policy was adjusted correspondingly from the SSC to ‘tempering justice with mercy’ (宽严相济). Without abolishing its harsh character, the new policy attempts to balance criminal policy by treating offences differently, which resembles the old strategy of ‘harshness for felony, and leniency for misdemeanor’ (重其重罪, 轻其轻罪) seen in imperial China. Criminal reconciliation perfectly met the requirement of ‘mercy’, and therefore was advocated by the SPC and the SPP.

In 2007 the SPP issued Several Opinions on the Application of the Criminal Policy of Tempering Justice with Mercy in Prosecution (关于在检察工作中贯彻宽严相济司法政策的若干意见, 2007 SPP Opinions), requiring local institutions to ‘strengthen research on criminal reconciliation’. In March 2011, this requirement was reiterated in the SPP’s annual working report, and, five months later, it was incorporated into the SPP’s interpretations (the 2011 SPP Opinions).¹³⁸ Simultaneously, the SPC initiated reforms for criminal reconciliation. In the third Five-Years’ Outline for Reform of the People’s Court (人民法院第三个五年改革纲要 (2009-2013)) criminal reconciliation was identified as one major reform.¹³⁹ Through all these efforts, in 2012 the offender-victim reconciliation in public prosecution cases was absorbed into the newly revised criminal procedure law as a special procedure.¹⁴⁰

4.2 Current Legal Regime of Criminal Reconciliation

As mentioned earlier, criminal reconciliation in public prosecution cases represents the latest developments in restoration agreement in China, which is regulated in Articles 277, 278 and 279 of the 2012 CPL and relevant implementation regulations and interpretations from the SPC, SPP, and MPS.¹⁴¹ The following discussion focuses on these documents to examine the legal regime of criminal reconciliation.

¹³⁷ 中共中央关于构建社会主义和谐社会若干重大问题的决定 (The Decision of the CPC Central Committee on Certain Major Issues in Constructing of an Harmonious Socialist Society), on the 6th Plenary Session of the 16th Central Committee of CPC, available at http://news.xinhuanet.com/politics/2006-10/18/content_5218639.htm. Accessed 16 January 2015.

¹³⁸ 最高人民检察院关于办理当事人达成和解的轻微刑事案件的若干意见 (The SPP’s Several Opinions on Reconciliation in Slight Criminal Cases), 高检发研字[2011]2号 (Gaojianfa Yanzi [2011] No. 2), issued and validated on 29 January 2011. Available at <http://www.chinalaw.gov.cn/article/fgkd/xfj/sfwj/201108/20110800348002.shtml>. Accessed 28 August 2014.

¹³⁹ 人民法院第三个五年改革纲要 (2009-2013) (The third Five-Years’ Outline for Reform of the People’s Court), 法发[2009] 14号 (Fafa [2009] No.14), issued on 23 February 2009. Available at http://news.xinhuanet.com/legal/2009-03/26/content_11074127.htm. Accessed 28 August 2014.

¹⁴⁰ In the 2012 CPL there are four special procedures described in part 5 (‘Special Procedures’). They are: procedures for juvenile crime; procedures for reconciliation between parties in public prosecution cases; procedures for the confiscation of illegal earnings in cases where the suspect or defendant has absconded or died; and compulsory medical procedures for mentally ill persons legally exempted from criminal liability.

¹⁴¹ There are three major official documents issued by criminal justice authorities: (1) the 2012 SPP Regulations; (2) the 2012 SPC Interpretations; and (3) 公安机关办理刑事案件程序规定 (The MPS Procedural Regulations for Public Security Organs on Solving Criminal Cases, the 2012 MPS Regulations), 公安部令第 127号 (Gonganbu Ling No. 127), issued on 3 December 2012 and validated on 1 January 2013. Available at <http://www.mps.gov.cn/n16/n1282/n3493/n3823/n442421/3486957.html>. Accessed 28 August 2014.

4.2.1 Eligibility and Mechanism

As prescribed in Article 277 of the 2012 CPL, two types of cases are reconcilable. The first type refers to cases satisfying three conditions: (1) caused by disputes among civilians (民间纠纷); (2) falling into crimes stipulated in Chapter 4 and Chapter 5 of the 1997 CL;¹⁴² and (3) with a possible sentence lower than three years' imprisonment. The second type refers to negligent crimes with a possible sentence lower than seven-year's imprisonment, except for duty-related crimes. Suspects or defendants who committed intentional crimes within five years are disqualified.

Legal mechanisms follow eligibility: victims and offenders may reach reconciliation if offenders (1) show sincere remorse for their crimes, and (2) receive the forgiveness of the victim(s) following the offender's compensation, apology, or other measures (Article 277). Once both parties reach mutual consent, the MPS, SPC and SPP's regulations require them to provide a written agreement where the offender expresses remorse and agrees to compensate, and the victim agrees with the criminal justice authorities' lenient decisions.¹⁴³

Given such regulations two questions arise. The first question is what the legal consequences are if the offender and the victim reconcile in cases beyond those prescribed in Article 277 of the 2012 CPL, for instance, in serious injury cases. A common phenomenon of such is when both parties get their civil disputes reconciled in the incidental civil proceeding and such reconciliation would lead to judicial concession. The second question is what the legal consequences are if the offender is unable to compensate or the victim refuses to forgive regardless of the counterparty's reconciling intention. The 2012 CPL does not give answers, but some clue can be found in the 2014 Guiding Opinions, which will be discussed later.

4.2.2 Concession from Criminal Justice Agencies

Criminal reconciliation can be applied at every stage of the criminal proceedings; that is, from investigation to sentencing, and there is no limitation on the number of times reconciliation can be actioned. Criminal justice authorities may all participate in this process, not only as supervisors reviewing the willingness and legality of reconciliation,¹⁴⁴ but sometimes even as mediators.

If offenders fulfill their obligations set out in the agreement, criminal justice authorities may issue different types of concession. For police, the 2012 CPL only empowers them to suggest that prosecutors treat suspects with leniency. According to the 2012 SPP Regulations, such suggestions are not binding.

Criminal reconciliation can also occur during the prosecution process. At this stage, the SPP restricts the prosecutors' role to that of legal consultant and supervisor rather than of host or mediator.¹⁴⁵ One type of concession is non-prosecution, which carries two main restrictions. The first restriction, as mentioned earlier, is the requirements for both minor offences and unnecessary or exemptible penalties based on the 1997 CL. Secondly, a 'non-prosecution decision' must be reviewed and approved by the chief prosecutor or the procuratorate committee within a people's procuratorate,

¹⁴² Chapter Four of the 1997 CL regulates crimes infringing personal rights and citizens' democratic rights, and Chapter Five pertains to crimes encroaching on property. Most crimes stipulated in these two Chapters don't violate social or collective benefits directly, where victims are the major group who suffer from these crimes.

¹⁴³ Article 326 of the 2012 MPS Regulations, Article 501 of the 2012 SPC Interpretations, and Article 516 of the 2012 SPP Regulations.

¹⁴⁴ Article 278 of the 2012 CPL.

¹⁴⁵ Article 514 of the 2012 SPP Regulations.

which makes the procedure more complex and time-consuming.¹⁴⁶

The second type of leniency available to prosecutors is to make sentencing proposals to judges. This is a newly prescribed power included in the 2012 CPL, but, according to the 2012 SPC Interpretations, such a proposal is also not binding. Criminal reconciliation may influence decisions on other matters that prosecutors are required to consider. For instance, according to Articles 144(4) and 519 of the 2012 SPP Regulations, prosecutors may issue a non-arrest decision or change coercive measures based on a reconciliation agreement.

In contrast to prosecutors, judges may host the reconciliation process based on parties' requirements. They can issue sentence discounts, probation, or even penalty exemption based on a criminal reconciliation agreement. The scope of sentencing discount is stipulated in the 2014 Guiding Opinions, as shown in Table 3.4.

Table 3.4 Sentencing Discount for Criminal Reconciliation in the 2014 Guiding Opinions

Category		Discount	
Criminal reconciliation in Article 277 of 2012 CPL	In Minor Crimes	≥ 50% or exemption	
	Normal	≤ 50%	
Crimes beyond Article 277 of 2012 CPL	Compensate victims	Forgave by victim	≤ 40%
		Rejected by victim	≤ 30%
	No compensation but with victim's forgiveness	≤ 20%	

From Table 3.4 two observations can be drawn. The first one is that among all elements the victims' attitude and the offenders' compensation play a crucial role in scoping sentencing discount. Another observation is that despite the restrictions on the application of criminal reconciliation in Article 277 of the 2012 CPL, concessions would be offered in a broader scope.

4.2.3 Comparison between MPS, SPP and SPC' Regulations on Criminal Reconciliation

When examining regulations issued by the MPS, SPP, and SPC and making a comparison between them, two key features can be detected. One feature concerns the function of criminal justice authorities in the reconciliation process. Compared with the police, as stated in the 2012 CPL, judges and prosecutors enjoy larger decisional power in criminal reconciliation. Police have no obligation to inform parties that they are entitled to have their cases reconciled; prosecutors *maysuggest* that parties have their disputes reconciled;¹⁴⁷ while judges *should inform* qualified parties on criminal reconciliation.¹⁴⁸ As to their role in the reconciliation process, the police's task mainly concerns approving and supervising,¹⁴⁹ prosecutors may advise parties when necessary,¹⁵⁰ while judges can host criminal reconciliation.

The second feature is that, compared with regulations for police and prosecutors, rules for judges appear to impose more obligations on them to reach reconciliation. This can be observed in three

¹⁴⁶ Article 406 of the 2012 SPP Regulations.

¹⁴⁷ Article 514 of the 2012 SPP Regulations.

¹⁴⁸ Article 496 of the 2012 SPC Interpretations.

¹⁴⁹ Article 322 of the 2012 MPS Regulations.

¹⁵⁰ Article 514 of the 2012 SPP Regulations.

major issues: the additional conditions, the official recognition of the agreement, and the implementation. The first issue concerns additional conditions in the context of three regulations. The 2012 MPS Regulations specify six situations that cannot be recognized as ‘civil disputes’ (Article 323),¹⁵¹ and the 2012 SPP Regulations emphasize the condition whereby ‘facts are clear, and evidence is reliable and sufficient’ (Article 510). On the contrary, the 2012 SPC Interpretations do not stipulate further requirements.

The second issue concerns the official recognition of the final reconciliation agreement. For the police, the 2012 MPS Regulations only require participants to sign the agreement; for prosecutors, the 2012 SPP Regulations clearly state that the agreement *should not* be signed by prosecutors or stamped by the people’s procuratorate (Article 516). In comparison, mediating judges *should* sign the final reconciliation agreement.¹⁵²

Furthermore, there are apparent differences among the three regulations concerning offenders’ fulfillment of the agreement. The 2012 MPS Regulations only demand that the offender adheres to the agreement ‘in time’ (Article 326). In the 2012 SPP regulations, the offender is required to fulfill his obligations ‘immediately after signing the agreement’, or at least before the prosecutor makes their final decision. Even so, offenders are still allowed to pay the compensation in installments when there is (1) an effective guarantee, and (2) victims’ permission (Article 517). When the matter comes before the court, offenders have no other choice but to implement the agreement immediately.¹⁵³

Through comparison, it can be concluded that from investigation to prosecution and then to court trial, obligations and functions of criminal justice agencies are gradually enhanced in criminal reconciliation. Among all three legal actors, judges appear to be more obliged to encourage reconciliation, enhance the validity of the agreement and guarantee its implementation. This is slightly different from the image presented in Table 3.3 that procuratorates were more willing than courts to issue relevant regulations. The MPS, SPP and SPC have not given clear explanations of these differences, but what is present in these regulations reflects each institution’s concerns, which originates from their expectations of criminal reconciliation, as well as its actual operation in practice.

4.3 Criminal Reconciliation in Practice: Field Study in Three Cities

The 2012 CPL assigns only three provisions to this new process, and many questions remain unanswered: who can start the procedure? How long should the process be? How many times can parties reconcile? Who is the mediator? Where should the negotiation take place? What is the form and validity of the agreement? How to maintain proportionality in dispositions? Is there any remedy if the reconciliation agreement is illegal or unfair? How to bridge the gap between criminal reconciliation and formal procedure? The new law is silent on all of these procedural requirements. From the discussion above one may also notice that there are slight but nonetheless important distinctions among the specific rules prescribed by the three criminal justice authorities: police and prosecutors appear to be more conservative than are judges on this issue.

To explore the reasons behind that phenomenon and to better understand the attitude and role of legal actors in criminal reconciliation and their strategies, from July to August in 2012 interviews were conducted with criminal justice authorities in cities B, T and C in China.¹⁵⁴ This research

¹⁵¹ These six situations are: (1) bodily injury through hiring offenders; (2) mafia-like crimes; (3) activities causing disturbances; (4) activities involving gang fights; (5) intentional bodily injury occurring on several occasions; and (6) other situations.

¹⁵² Articles 496 and 501 of the 2012 SPC Interpretations.

¹⁵³ Article 502 of the 2012 SPC Interpretations.

¹⁵⁴ The names of the cities are concealed for the reason of confidentiality,

encountered several practical obstacles from the outset. The first obstacle was the lack of access to potential interviewees and the fact that the interviewer had to rely on personal contacts, which inevitably restricted the size and representativeness of the samples. Another key hurdle was the impartiality and credibility of the interviews. All interviewees were still working in the legal system. Although the truthfulness of the interviewees is not in dispute, as criminal reconciliation was not perceived to be a politically sensitive area, their responses might still be affected by the official propaganda, and by respondents' willingness to embellish daily work or other factors. Considering all of the elements that may discredit the outcomes of the interviews, this research does not aim at providing detailed quantitative analysis on criminal reconciliation. Rather, it expects to sketch a rough outline of the practice, and then shed light on the reasons and concerns that underlie it. All of the interviews focused on three major issues: the proportion of criminal reconciliation cases in practice and explanations; the detailed proceedings; and its actual function.

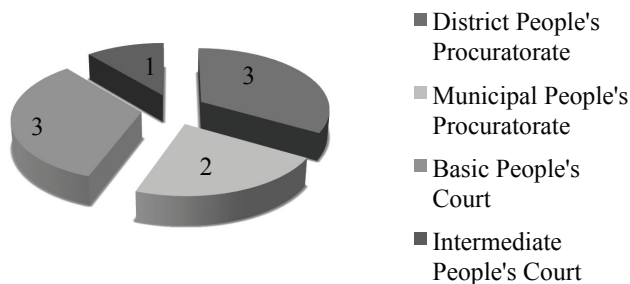
The interviewees were limited to prosecutors and judges; police were not involved. This is mainly because, in the new framework prescribed in the 2012 CPL, the police have little power in the reconciliation process. Three factors are considered in the sample selection. First is accessibility, which refers to both published information and personal contact. The second factor is geographical distribution. Cities B, T, and C are located in the east, middle, and western areas of China. The third factor is economic development. Compared with City T and City C, City B is one of the most developed regions in China, and it is also the political center of the country. Based on these considerations, nine institutions were selected, as shown in Table 3.5 and Figure 3.5.

Table 3.5 Research Samples and Number of Interviewees

City	People's Procuratorate (PP)		People's Court (PC)	
	Institution	No. of Interviewees	Institution	No. of Interviewees
B	PP of District C	2	Basic PC of District H	2
T	PP of City T	2	Intermediate PC	3
			Basic PC of District Y	1
C	PP of City C	3	Basic PC of District J	2
	PP of District J	2		
	PP of District N	4		

Note: The people's procuratorate at the municipal level and the intermediate people's court are on the second-lowest level of the judicial system in China, and both the district people's procuratorate and the basic people's court are on the lowest level.

Figure 3.5 Sample Distributions According to the Type and level of Judicial Organs



Information collected in these interviews should be examined cautiously because of the limited samples and restricted access to credible statistics. Before this research, scholars and local judicial organs have done some field studies. Particularly, Song Yinghui has conducted several field studies on criminal reconciliation. In 2006 and 2007 Song led a research program on the judicial practice in People's Procuratorates at the basic level in four major cities located in the East of China,¹⁵⁵ and in 2008 he launched another field study of 112 slight injury cases trialed in seven district courts in Beijing.¹⁵⁶ To enhance the credibility of this research, the findings of previous studies are used in this section in order to supplement and examine the findings stemming from the interviews. In the following discussion people's procuratorates and people's courts are examined separately.

4.3.1 Criminal Reconciliation in People's Procuratorates

4.3.1.1 General Description

As shown in Figure 3.5, the interview covers five people's procuratorates, three at the district level (the People's Procuratorate of District C in City B, and the People's Procuratorate of District J and the People's Procuratorate of District N in City C) and two at the municipal level (People's Procuratorate of City T, and People's Procuratorate of City C).

Generally speaking, criminal reconciliation is rarely conducted at the municipal level. In the People's Procuratorate of City T, on average more than 5000 suspects were prosecuted each year, and among these about one fifth satisfied the criteria for criminal reconciliation. In 2007 this People's Procuratorate started to implement criminal reconciliation, but from 2007 to 2011 only 134 cases were reconciled. Detailed data was not available in the People's Procuratorate of City C, but according to its prosecutors, this new device was rarely used in their daily practice. Respondents explained that this was because the offences which qualified for prosecution at this level were generally too severe or too complex to be reconciled. The major function of municipal people's procuratorates in criminal reconciliation is either to issue regulations and instruct people's procuratorates on a lower level, or to review their reconciliation decisions.

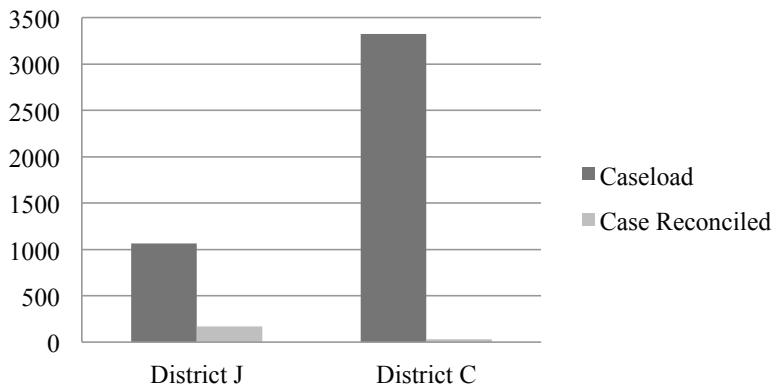
As to the three district people's procuratorates, the approximate number of cases received at this level varied between 1000 and 3000 per year. Both the People's Procuratorate of District J in City C and the People's Procuratorate of District C in City B also conducted research on criminal

¹⁵⁵ See Song Yinghui and Yuan Jinbiao (eds.), *我国刑事和解的理论与实践 (Theory and Practice of Criminal Reconciliation in China)* (Beijing: Peking University Press, 2009).

¹⁵⁶ See Song Yinghui, *公诉案件刑事和解实证研究 (On Criminal Reconciliation in Public Prosecution)*, 3(2009) *法学研究 (Chinese Journal of Law)*, 1-14.

reconciliation in 2008, but no detailed statistics were obtained from the People’s Procuratorate of District N in City C.

Figure 3.6 Cases Prosecuted and Reconciled in People’s Procuratorate of District J in City C and People’s Procuratorate of District C in City B in 2008



Source: interviews with prosecutors in the People’s Procuratorate of District J and the People’s Procuratorate of District C

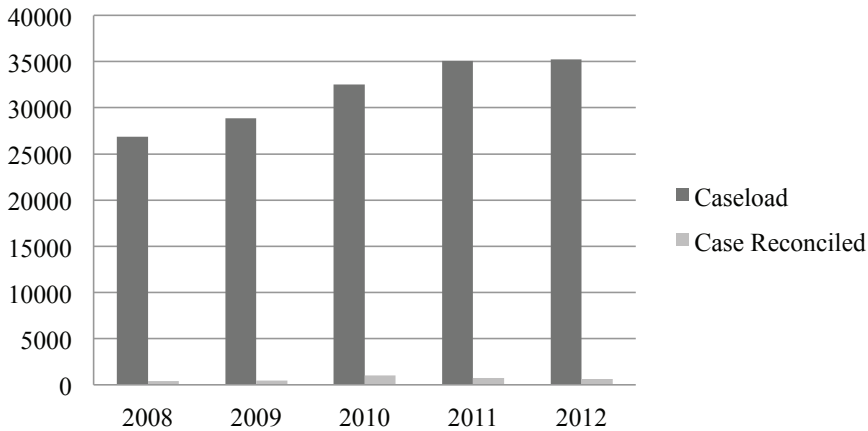
As mentioned above, City B is one of the most developed areas in China, and it was also the first place to promote the new device. Therefore it is not surprising that its caseload was much heavier than that of the other People’s Procuratorate. However, Figure 3.6 presents completely the opposite image of reconciliation cases as compared with the People’s Procuratorate of District J in City C. The People’s Procuratorate of District C in City B appeared to be even more prudent with respect to reconciling offences, where the reconciliation rate was only 0.87 per cent, in contrast to the rate of 15.73 per cent recorded in the People’s Procuratorate of District J in City C. One explanation obtained during the interview was that the more economically developed the area was, the more advanced its formal judicial proceedings, and consequently the higher restrictions were placed on judicial discretion in criminal reconciliation.

Although the study did not collect detailed statistics for the People’s Procuratorate of District N, according to the prosecutors’ introduction, they received about 1800 cases per year, and prosecutors seldom used criminal reconciliation to solve crimes. These findings are consistent with Song’s earlier field study in the basic people’s procuratorates that the rate of using criminal reconciliation ranged between 0.5 and 4.4 per cent.¹⁵⁷

From the data collected in five people’s procuratorates one can draw the conclusion that criminal reconciliation is not so popular with prosecutors. This is also reflected in Figure 3 that the number of cases reconciled in all people’s procuratorates (including district level and municipal level) in Chongqing from 2008 to 2012.

Figure 3.7 Cases Reconciled in All People’s Procuratorates in Chongqing (2008-2012)

¹⁵⁷ Song Yinghui, 我国刑事和解的实证分析 (Practical Analysis on Criminal Reconciliation in China), 5(2008)中国法学 (China Legal Science), 123-135, p. 123.



Source: *The Annual Working Report of the People's Procuratorate of Chongqing City (2009-2013)*

Figure 3.7 shows that the percentage of criminal reconciliation in all people's procuratorates in Chongqing City wavers between 1 and 3 per cent. One may argue that the crime strike campaign (打黑运动) launched by Bo Xilai¹⁵⁸ during this period might have enhanced the total caseload and meanwhile reduced the use of criminal reconciliation, which consequently decreased the proportion of reconciled cases to a low level. Even so, the absolute number of reconciled cases was still small, and, as shown in the earlier discussion, a similar phenomenon was also reported with respect to other regions.

Prosecutors mentioned several contributory factors to this phenomenon. The first factor was relevant to the restrictions placed on the non-prosecution decisions, as mentioned earlier. The low percentage of non-prosecutions had the consequence that many cases were still prosecuted even though they had been reconciled or were likely to be reconciled. Although the 2012 CPL authorizes prosecutors to make sentence proposals to judges, in practice judges normally would only consider the reconciliation agreement and then make their own decisions. Under such circumstances, it appeared to be more rational for parties to have their disputes reconciled during the court trial rather than during the pre-trial procedures.

The proportion of reconciled cases was also influenced by the attitude of individual prosecutors towards the new process. During the interview, prosecutors held quite prudent or even conservative attitudes towards criminal reconciliation. Most of them believed that the reconciliation should be under the charge of victims and offenders, and prosecutors were supposed to be passive during the process. Prosecutors in the People's Procuratorate of District J in City C, for instance, firmly adhered to the principle of 'restricted interference and rational guidance' (有限介入, 理性引导). The

¹⁵⁸ Bo Xilai is the former member of the Central Politburo and the secretary of the CPC's Chongqing branch. During his time in office, Bo initiated a campaign against organized crime, and his governance featured 'singing red' and 'strike black' (打黑唱红). On 22 September 2013, Bo was found guilty of corruption and sentenced to life imprisonment. For discussions on the rise and fall of Bo and the Chongqing model of governance, see, e.g., Lance Gore, 'The Fall of Bo Xilai and the Seduction of the Chongqing Model', 2(4) (2012) *East Asian Policy*, 53-61; Joseph Cheng, 'The "Chongqing Model": What It Means to China Today', 12(3) (2013) *The Journal of Comparative Asian Development*, 411-442.

prosecutor's responsibility was to guarantee the free will and legality of reconciliation, rather than to determine the content and form of the agreement.

Four reasons were provided in regards to their conservative attitude. First, most interviewees held the opinion that the function of the people's procuratorate in criminal justice was to make correct prosecution decisions rather than to solve the dispute. In other words, their focus was on establishing facts and not about interactions. Another widely accepted idea was that 'parties know what they want and what is best for them'. Thirdly, it was believed that restricted interference might help the prosecutors to maintain an image of neutrality and impartiality, and consequently to reduce unnecessary suspicion about individual cases from the public. The final reason referred to 'risk aversion'. Letting parties take control of the whole process might also reduce the possibility of petitions to higher government officials after reconciliation, and even if this happened, prosecutors were unlikely to be blamed.

4.3.1.2 Proceedings

Procedures of criminal reconciliation are diversified in people's procuratorates, and techniques applied also differ from case to case. So now, this discussion focuses on three issues: the host (or mediator in some cases) of reconciliation, the procedure, and the possible dispositions.

Among all five samples, there are three bodies that may host the reconciliation procedure. The first one is the standing prosecutor of the case (the People's Procuratorates of District N, District J, and City T). As stated above, prosecutors were quite reluctant to be actively involved in the negotiation process. Consequently, their functions were normally limited to delivering information, providing a place for reconciliation, and examining the legality of the agreement. Parties enjoyed more freedom in determining the content of the agreement, and the procedure was highly individualized.

The second body is the local People's Mediation Committee (PMC, used in the People's Procuratorate of City C). According to the interviewees, PMCs were more experienced in mediating disputes, especially civil disputes, and PMCs were deemed to be more neutral than the prosecutors. However, during the interview some prosecutors doubted the authority and credibility of PMCs because they were outsiders with respect to criminal proceedings. Their weak power in the criminal justice arena to some extent reduced their credibility and the legal validity of the final agreement.

The third body is a special office within the people's procuratorates, like the Criminal Reconciliation Office (CRO) in the Procuratorate of District C. When cases are submitted for prosecution decision, the standing prosecutor is obliged to filter them and send qualified cases to the CRO. The Office should meet parties separately, and suggest that they reconcile. Once victims and offenders had reached an agreement, the Office should report to the standing prosecutor for his final decision. Currently the Office consists of prosecutors, but according to the interviewees, lawyers might be recruited into this Office in future to maintain the neutrality of the procuratorate and to professionalize the reconciliation process.

The second procedural issue concerns the reconciliation process, which is also quite diverse. Even so, some commonalities can be detected. First, in all samples the payment of the compensation was seen as an indispensable premise for successful reconciliation. To be clear, the 2012 CPL does not require immediate payment. Nonetheless, all people's procuratorates refused to make lenient disposals unless the offender had compensated first. This was to prevent further problems in execution. Usually prosecutors gave parties a certain period to negotiate and compensate (for instance, in the People's Procuratorate of District C the period was 10 days), and if they could not reach an agreement or the suspects could not compensate, the offenders would be prosecuted.

Another common opinion among interviewees is that the reconciliation process should not interfere with the formal process. The legally prescribed period of prosecution for normal cases is one month. This means that the negotiation between two parties cannot be indefinite. In practice most prosecutors would not refer a case to a criminal reconciliation procedure unless both parties explicitly expressed a willingness to reconcile. Within the given period there were no limitations on the number of the times that negotiation could be conducted. Normally, certain documents were required from both parties. Suspects were supposed to submit (1) a repentance letter, showing that they were fully aware of the nature, severity and consequence of their activities, and further were sincerely regretful for what they have done, and have apologized to victims; and (2) a receipt or other documents proving that the compensation had been fully executed. For victims the following documents were usually required: (1) proof of cost and damages related to the crime; and (2) a declaration pertaining to acceptance of the suspects' apology and compensation, and waiving rights of requiring the case to be prosecuted. These declarations were simply internal documents and had no binding force on prosecutors.

As to the judicial concession, in practice there were four major forms. The first two forms were consistent with those listed in the 2012 CPL; that is, a non-prosecution decision and sentencing proposal. Public prosecutors interviewed in all people's procuratorates could drop charges for minor offences, but this measure was restricted by their internal regulations. For sentencing proposals (the People's Procuratorates of District J, District N, and City C), this measure was usually employed in three situations. The first situation was when, irrespective of whether parties had reached an agreement, the crime was too severe for non-prosecution. The second one was when the suspect showed remorse and agreed to compensate, but the victim disagreed with the non-prosecution decision. The third situation was when both parties agreed to reconcile but the offender could not pay the compensation all at once. A sentencing proposal enables prosecutors to pass on the disputes to judges, but it has several drawbacks. Usually the court would go through the reconciliation process again and re-examine all details that had already been checked during the prosecution, thereby making the procedure more costly. Meanwhile, it was difficult for prosecutors to precisely predict the possible sentencing discount, which inevitably reduced the motivations for parties to reconcile.

In addition, in practice there also existed two non-statutory practices. The first one was to return cases to the police and suggest that they withdraw (the People's Procuratorates of District J, District N, and City C). Another practice was for prosecutors to withdraw charges during the trial. For instance, in 2013 the Basic People's Court of Jinshan District in Shanghai City tried an intentional injury case between two lovers, A Qiang and Xiao Yan. Both parties reached a reconciliation agreement during the court trial, and the prosecutor withdrew the charge against the offender.¹⁵⁹ Both of these measures could avoid the legal restrictions associated with non-prosecution decisions, and therefore enhance efficiency and disposal rate of cases. However, these measures had no legal basis and were consequently not legally valid.

4.3.2 Criminal Reconciliation in People's Courts

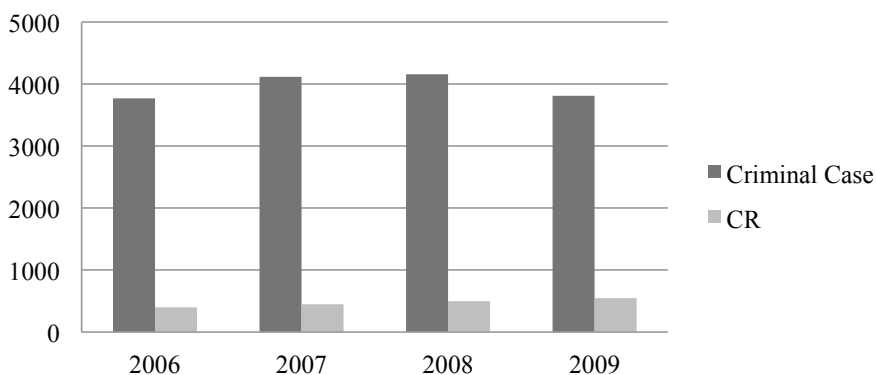
4.3.2.1 General Description

¹⁵⁹ See Wei Jianping, 以柔克刚的刑事和解 (Criminal Reconciliation: Conquering the Unyielding with the Yielding), People's Court Daily, 29 July 2013, available at http://rmfyb.chinacourt.org/paper/html/2013-07/29/content_68211.htm?div=-1. Accessed 20 December 2013. Article 13 of the 1997 CL stipulates that 'if the circumstances are clearly minor and the harm is not great, they (offences) are not to be deemed crimes'. Article 15 of the 2012 CPL describes six situations leading to withdrawal, and one is that 'an act is obviously minor, causing no serious harm, and is therefore not deemed a crime'.

The interview with judges covered four people’s courts, including three at the basic level – the Basic People’s Court of District H in City B, the Basic People’s Court of District Y in City T, and the Basic People’s Court of District J in City C, and one intermediate people’s court: the Intermediate People’s Court of City T. Similar to procuratorates, criminal reconciliation was mainly applied at the basic level, and was confirmed by judges in the Intermediate People’s Court of City T. One reason provided for this was that only minor crimes qualified for reconciliation, and cases with their first instance trial in intermediate people’s courts were usually serious and complex. Another reason was that one major target of criminal reconciliation was to end the dispute as early as possible, which might reduce the number of qualified cases which might be the subject of appeal to the intermediate people’s courts.

Interviews at the basic level showed that criminal reconciliation was first used in juvenile delinquency cases, and then gradually the scope spread to adult crimes. Only the Basic People’s Court of District H in City B kept rough statistics on criminal reconciliation cases from 2006 to 2009.

Figure 3.8 Criminal Cases and Criminal Reconciliation (CR) Cases in the Basic People’s Court of District H (First Instance) (2006-2009)



Source: (1) Annual Working Report of the Basic People’s Court of H District (2007-2010); (2) Fan and Ai 2010.

Figure 3.8 shows that the reconciliation rate in this court was between 10 and 14 per cent, although more than half of the cases qualified for criminal reconciliation according to law. It should be noticed that the data can only provide a rough indication of the proportion of the reconciliation cases put on trial in this court. This is because, among interviewees, there was considerable confusion between criminal reconciliation and mediation in the incidental civil litigation. Based on the judges’ introduction the practice of the latter shared the same kernel of criminal reconciliation - offering judicial concession for the reconciliation on civil disputes between parties.

Underlying this confusion was the fact that, even without a statutory basis, the judiciary had already taken the mediation of civil disputes into account in their decisions, and the 2012 CPL merely justified the long-existing judicial practice without much innovation. It was also due to this reason that statistics on criminal reconciliation in other samples were difficult to collect. Judges in the Basic People’s Court of District J in City C concluded that the only difference between criminal reconciliation and mediation in the incidental civil litigation was that the former attempted to combine criminal and civil procedures into one, thereby attempting to resolve both civil and criminal disputes simultaneously. If these two mechanisms actually have no significant differences, then it gives rise to the question of why courts started to issue new regulations during the last decade.

4.3.2.2 Proceedings

The practice of criminal reconciliation in people's courts was similar to that seen in people's procuratorates in many respects, such as the content of the reconciliation agreement and the documents required from both parties. Because the Intermediate People's Court of City T did not report systemized proceedings for criminal reconciliation, this study only summarize the practice in the three basic people's courts.

Essentially there are two phases in which parties can reconcile: pre-trial, and during the trial. Pre-trial reconciliation can shorten the trial proceedings and therefore save judicial resources. However, reconciliation at an early stage may also undermine the credibility of evidence. In current practice this problem was not significant, as most of the offences were minor and simple. If reconciliation was reached at a later stage then the examination was more substantial; however, judicial resources were not much conserved. On some occasions reconciliation had been reached during prosecution. In this situation judges might only examine the legality and validity of the reconciliation, and then issue a verdict. Another common situation is that the parties may propose reconciliation during the court trial. Normally parties would be given a period between half of one month to one month to reconcile. After reaching reconciliation, they would sign and seal the written agreement. The offender was normally required to compensate fully and immediately. After the execution of the reconciliation agreement judges would make their final decisions. According to the interviews, there were two major forms of judicial concession: sentencing exemption, and probation. The former was normally used for particularly minor cases.

Two key differences can be identified by comparing judge's practices with those of the prosecutors. To begin with, the common practice among the three basic people's courts was to let judges host the reconciliation process. When they received qualified cases – normally traffic offences, slight injury cases, or minor property crimes, judges would pro-actively inquire about the attitudes of the offender and the victim towards reconciliation. If they had applied for reconciliation in any of the former stages such as investigation or prosecution, judges would initiate the reconciliation process immediately. Compared with prosecutors, judges were more concerned with the success of reconciliation. For instance, some judges in the Basic People's Court of District H adhered to the principle of 'full confession, full compensation, and full forgiveness' (充分认罪, 充分赔偿, 充分谅解), and made great effort to persuade the parties to negotiate. In cases in which such judges applied the aforementioned procedure, the process of criminal reconciliation could be much longer than normal.

Another difference between prosecutors and judges was that the people's courts' internal appraisal system always took the reconciliation rate as a key index. This is contrary to the restrictions on the non-prosecution rate in people's procuratorates. Interviewees in the three district people's courts were particularly required to enhance the reconciliation rate in criminal cases, which was consistent with reports from other judges. For instance, in 2012 the Intermediate People's Court of Chaoyang District in Beijing required all of its sections (including civil, criminal, and administrative sections), and all basic courts in this district, to increase their mediation rate by at least 5 per cent. Sections of this Intermediate People's Court or basic people's courts in the same jurisdiction failing to fulfill this target would be disqualified from the annual performance evaluation, and by extension career advancement and pay-rises.¹⁶⁰

¹⁶⁰ See Bi Zhenzhi, 朝阳中院: 案件调解率要提升 5% (IPC of Chaoyang: Mediation Rate must Increase by 5%), Infzb, 6 July 2012, http://www.infzb.com/news_view.aspx?id=20120606081733856. Accessed 15 August 2013.

Some judges attributed this phenomenon to the fact that the court trial was the final stage of the criminal proceedings. If the parties' disputes could not be solved here – noting that the issue was related to the 'parties' disputes' rather than a 'trial for criminal wrongdoings', then they would be more likely to deteriorate into administrative petitions to local government, causing social instability. This was exactly what the central government had exerted all its efforts to avoid. In fact, criminal reconciliation was quite controversial among judges. On the one hand, all interviewees agreed that criminal reconciliation might be helpful in solving disputes completely. A judge from the Intermediate People's Court of City B admitted that through reconciliation many relatives or neighborhoods repaired their relationships. On the other hand, judges also held the opinion that reconciliation should not be their major task. For instance, the interviewee in the Basic People's Court of District Y in City T believed that the best stage at which to reconcile a case was during prosecution. The reason was that filtering minor cases out of criminal procedures at an early stage could save more judicial resources.

4.4 Motivations and Potential Risks

From the historical review it can be noticed that criminal reconciliation has deep roots in Chinese culture and legal traditions. Some scholars have argued that such a background provides a psychological basis for criminal reconciliation in modern society.¹⁶¹ However, two questions remain. First, if criminal reconciliation is rooted in traditional Chinese thoughts, why did the resurgence of reconciliation start from the beginning of 21st century? Secondly, the worship of mediation in ancient China contrasted itself with an aversion of litigation.¹⁶² How to explain the co-existence of criminal reconciliation and ordinary procedure in current Chinese criminal justice?

Apparently the arguments of culture and legal tradition cannot answer these questions, and therefore further exploration is needed. Among them there are two major arguments in favor of criminal reconciliation: enhancing judicial efficiency, and restoring victims. Interestingly, both of them are also fiercely challenged in practice. The following discussion starts from examining these two arguments respectively, and then explores the key considerations in the rise of criminal reconciliation.

4.4.1 Enhancing Efficiency?

As mentioned earlier, several local regulations expected criminal reconciliation to enhance judicial efficiency. This argument actually deems criminal reconciliation to be a procedural diversion to filter out minor crimes at lower cost to judicial resources.¹⁶³ Behind it lies the fact that the majority of the criminal cases are actually minor, which can be observed from Figure 3.9.

Figure 3.9 Statistics on Criminals with Penalties of Less than 5 Years' Imprisonment (2002-2013)

¹⁶¹ See Chen Guangzhong, 刑事和解的理论基础与司法适用 (The Theoretical Basis and Judicial Practice on Criminal Reconciliation), 5(2006) 人民检察 (*People's Procuratorial Semimonthly*), 5-7; Li Xiang, 论刑事和解制度的适用空间拓展 (An Extending on the Application of Criminal Reconciliation), 2(2010) 华东政法大学学报 (*ECUPL Journal*), 107-113.

¹⁶² See *supra* note 51, Zhang (2009). In this article the author explained the relationship between the Confucian doctrines and how such relationship influence people's choice in solving disputes in China.

¹⁶³ Wu Zhi'ou, 刑事和解的初步经济分析 (Economic Analysis about Criminal Reconciliation), 9(2009) 法学杂志 (*Law Science Magazine*): 38-40.

Year	Criminals With Penalty	Criminals with Less than 5 Years Imprisonment						
		Imprisonment <5 Years	Criminal Detention	Probation	Criminal Control	Accessory Penalties	Amount	%
2002	690 506	345 351	45 438	117 278	9 994	12 121	530 182	76.8
2003	730 355	357 991	53 092	134 927	11 508	14 275	571 793	78.3
2004	753 314	363 012	59 472	154 429	12 553	17 611	607 077	80.6
2005	829 238	395 139	64 676	184 366	14 604	19 575	678 360	81.8
2006	873 846	409 571	65 790	206 541	16 166	22 054	720 122	82.4
2007	916 610	430 110	66 606	227 959	15 882	24 675	765 232	83.5
2008	989 992	463 166	73 183	249 111	18 065	27 447	830972	83.9
2009	979 443	459 621	66 125	250 635	16 833	23 554	816768	83.4
2010	988 463	461 523	63 848	265 230	16 171	22 430	829 202	83.9
2011	1 032 466	460 080	76 683	309 297	14 829	22 125	883 014	85.5
2013	1 138 553	484 511	133 044	356 523	14 641	24 819	1 013 538	89.0

Source: (1) Statistics from 2002 to 2009 are from the Law Yearbook of China (1987-2010). (2) Statistics after 2009 are from the SPC's Statistics on the Decisions of People's Courts on Criminal Defendants (全国法院审理刑事案件被告人判决生效情况表).

Note: statistics in 2012 are missing from the SPC database.

Figure 3.9 shows the statistics and proportion of different penalties from 2002 to 2013. It can be seen that although the crime rate rose sharply in 2001 and stayed at a high level in the following years, most offenders fall into the category with a lower sentence than five years' imprisonment. In 2013 the number of criminal offenders imposed on penalties lower than three years' imprisonment reached 953,290, constituting 82.3 per cent of the convicted offenders.¹⁶⁴ This means that minor crimes make up the majority of the total amount of criminal cases, and a more summarized procedure may be applied to divert these cases out of ordinary proceedings. Criminal reconciliation that deals with minor crimes where both parties reach reconciliation agreement can terminate cases before they enter the final stage of the criminal procedure, and therefore save more judicial resources.

This expectation, however, appeared neither in the 2011 SPP Opinions nor the three legal documents discussed earlier. In fact, during drafting the 2012 CPL, members of the Standing Committee of the National People's Conference (NPC) even suggested prolonging the trial period for criminal reconciliation cases because the average period for it, which was 93 days, was much longer than the legal periods stipulated in the 1996 CPL.¹⁶⁵

The low efficiency of criminal reconciliation was also exposed in the findings of the interviews. According to prosecutors in the People's Procuratorate of City T, dealing with minor injury cases through ordinary procedure normally cost them only four or five hours. The period for criminal reconciliation could, however, last for several days. This is consistent with the findings of Song's empirical research in 2008. According to him, the reconciliation period was between a

¹⁶⁴ 2013 年全国法院审理刑事案件被告人判决生效情况表 (The SPC's Statistics on the Decisions of People's Courts on Defendants), available at http://www.court.gov.cn/qwfb/sfsj/201407/t20140725_196836.htm. Accessed 19 January 2015.

¹⁶⁵ See 提高诉讼效率保证司法公正(Improve Judicial Efficiency and Guarantee Justice), 27 September 2011, available at http://www.npc.gov.cn/huiyi/lfzt/xsssfsg/2011-09/27/content_1717775.htm. Accessed 29 November 2014.

minimum of four days and a maximum of 298 days, and only 51.8 per cent cases were concluded within one month. Comparatively, the normal period was approximately only five days if such cases were prosecuted directly.¹⁶⁶

4.4.2 Improving the Status of Victims?

The interviews present a similar picture to that reflected in the three legal documents: judges are more pro-active in pushing forward criminal reconciliation and enhancing reconciliation rates. This phenomenon may be attributable to many factors, but there was one reason which was most frequently mentioned during the interview: ‘the court-trial is the last stage of the criminal proceedings’. Practically, this implies that the court-trial is also the last opportunity for reconciliation. In this sense, not only judges but even the entire judicial system appears to be obliged or even pressurized to reconcile criminal offences.

The next question is: where does such obligation or pressure come from? During the interview, the victims appeared to be the main source. This is difficult to comprehend because very few local documents discussed above mentioned victims’ interests, and victims in Chinese criminal justice have long been marginalized. They had no voice in the formal criminal proceedings, and even their financial interests could not be guaranteed. For instance, judges in the Basic Court of District H in City B admitted that their annual execution rate of financial compensation was nearly zero. As legally prescribed, the compensation obtained from incidental civil procedure can only cover the ‘material losses’, that is, ‘[the] direct economic losses caused by the criminal act, including medical expenses, funeral fees, etc.’.¹⁶⁷ If compensation for psychological loss is excluded¹⁶⁸ – which contradicts the 2010 Tort Law¹⁶⁹ and the 2010 State Compensation Law,¹⁷⁰ – then it is highly likely that the final compensation would be fairly low.

This situation has been reversed in the context of criminal reconciliation. On the one hand, the compensation rate has been greatly enhanced under the new mechanism. The People’s Procuratorate of District C in City B reported 100 per cent satisfaction among the parties involved in 100 reconciliation cases from 2002 to 2012.¹⁷¹ Song’s field study in 2008 also reported that, among 83 criminal cases that involved reconciliation in 11 jurisdictions, there was only one case where the

¹⁶⁶ *Supra* note 156, Song (2009), p.1.

¹⁶⁷ Shi Yan’an, ‘On Restorative Justice Practiced in China’, 3(2008) *Front Law China*, 306-323, p. 306.

¹⁶⁸ According to Article 99 of the 2012 CPL.

¹⁶⁹ Article 22 of the 2010 Tort Law of the People’s Republic of China stipulates that the victim of the tort may require compensation for mental damages when the crime is serious. 中华人民共和国侵权责任法 (Tort Law of the People’s Republic of China) 主席令第 21 号 (*President Decree No. 21*), issued on 26 December 2009 and validated on 1 July 2010. Available at http://www.gov.cn/flfg/2009-12/26/content_1497435.htm. Accessed 28 August 2014.

¹⁷⁰ Article 35 of the 2010 State Compensation Law of the People’s Republic of China stipulates that ‘in the case of mental injury, the state shall, to the extent of infringement, eliminate the effects of the infringement for the injured body, resume his or her reputation, make an apology and pay appropriate consolation money if the infringement causes serious consequences’. 中华人民共和国国家赔偿法 (State Compensation Law of the People’s Republic of China), 主席令第 29 号 (*President Decree No. 29*), issued on 29 April 2010 and validated on 1 December 2010. Available at <http://www.chinalaw.gov.cn/article/fgkd/xfq/fl/201004/20100400253174.shtml>. Accessed 28 August 2014.

¹⁷¹ See 北京朝阳检察院十年刑事和解工作当事人满意率 100% (100% Satisfaction Reached among Parties through Criminal Reconciliation during Past Ten Years in PP of Chaoyang District, Beijing), 26 September 2012, available at <http://legal.people.com.cn/n/2012/0926/c42510-19110709.html>. Accessed 28 August 2014.

defendant failed to compensate the victim.¹⁷² Currently there is no accurate data on the amount of money normally demanded by victims, but many interviewees admitted that in general compensation through criminal reconciliation was higher than that in ordinary proceedings. On the other hand, the victims' voice is also heard and respected in the criminal justice system through criminal reconciliation. The new device to some extent alleviates victims' suffering by empowering them to influence or even determine the offender's destiny.¹⁷³

In fact, it was acknowledged by interviewees that victims' satisfaction was the most crucial factor in criminal reconciliation. In practice, this factor was quite often reduced to financial compensation: the higher the compensation, the more likely the case to be reconciled. This phenomenon has been given a special name in mass media: 'buying their way out' (花钱买刑), and it is frequently criticized for undermining the fundamental values and integrity of criminal justice.¹⁷⁴ Another side of the story is that in some cases the offenders could not get full sentencing discount merely because the victims refused to reconcile with them. Sometimes this was due to the low compensation provided, while in other situations it was simply because the victim did not want to forgive.¹⁷⁵

However, a change in the victim's status cannot explain why he or she becomes the major source of pressure on criminal justice authorities to promote criminal reconciliation. Theoretically the legal actors still can send a case back to ordinary procedure if the parties fail to reconcile. However, the interviews showed that failing to reconcile would be quite undesirable for judicial authorities, especially for judges. Judge Ning Lanhong is a good example here. Ning is the presiding judge of the criminal division of the Basic People's Court of Ganzhou City in Gansu Province. In 2012, she was granted the title 'National Model Judge' by the SPC. In Ning's opinion, judges are on the frontline of solving social conflicts, and she demanded that all judges in the same criminal division mediate cases 'as long as there is a glimmer of hope'.¹⁷⁶

Ning's opinion is fully embodied in a case in 2008. On 15 July 2008, Jin Peng, the offender, while drunk, drove his Mercedes Benz automobile with his friends in Jiayuguan City, Guansu Province, and he lost control of his car. The traffic accident killed a pedestrian, Liu Sichen, and injured another, He Zhi. This case enraged local people and the court trial was interrupted three times because of vehement public protests. In 2010 Jin's case was designated to Ning's court. Ning immediately travelled to Jiayuguan City and visited both parties on four occasions, trying to persuade them to reconcile. With Ning's efforts the defendant agreed to compensate the victim's family 217,730.32 RMB, and obtained the latter's forgiveness. On 30 May 2009 the case was finally put on trial, and Jin was sentenced to three years' imprisonment.¹⁷⁷

¹⁷² See *supra* note 155, Song and Yuan (2009).

¹⁷³ Wu Jianxiong, 刑事和解与检察官客观义务 (Criminal Reconciliation and the Objective Obligation of People's Procuratorate), 5(2007) 法学家 (*Jurists Review*), 108-115, p. 108.

¹⁷⁴ See, e.g. Zhang Yu, 烟台首例刑事和解案引关注: 会导致花钱买刑吗 (The First Criminal Reconciliation in Yantai City Drew Attention: Will It Lead to Buying Penalty), 26 March 2013, available at http://qd.ifeng.com/sd/detail_2013_03/26/661668_0.shtml, accessed 28 August 2014; 专家解读刑事和解: 明确使用标准避免花钱买刑 (Experts Comment on Criminal Reconciliation: Clarify Standards to Avoid Buying Penalty), 27 September 2012, http://news.xinhuanet.com/legal/2012-09/27/c_123766919.htm. Accessed 13 August 2013.

¹⁷⁵ Interviews with judges in Basic People's Courts of District H in City B, and District J in City C.

¹⁷⁶ See 全国模范法官宁兰红同志先进事迹 (Meritorious Deeds of Ning Lanhong, the National Model Judge), 26 June 2013, <http://gzfy.chinacourt.org/article/detail/2013/06/id/1018071.shtml>. Accessed 21 August 2013.

¹⁷⁷ See (2009)甘刑初字第90号 ((2009) *Ganxingchuzi* No.9), available at <http://lawyer.legaldaily.com.cn/judgment/default/detail/uuid/95008673491155392>. Accessed 28 August 2014.

The case itself was quite simple, and there were no controversies concerning either the facts or the evidence. What troubled the National Model Judge was the appropriate way to end the dispute. In practice, the offenders' desire to avoid a criminal record or severe punishment encourages them to fulfill the victims' requests. In this case, however, the proceeding trial had to be postponed for several times simply because the victim's requirements were not satisfied. During the interviews undertaken in this study, some judges and prosecutors had also encountered similar situations and complained that they felt they had been 'kidnapped by victims'.

Ning's attitude and complaints from interviewees may well explain the low efficiency of criminal reconciliation. However, one question still remains unanswered: how can individual persons be as strong as to 'kidnap' the powerful state apparatus in an authoritarian state like China? The answer to this question is simple: they cannot. This can be better illustrated through a high-profile case in China: the Li Qiming case.¹⁷⁸ On 16 October 2010, Li Qiming, a 22-year-old drunk driver, hit two university students, causing the death of the victim, Chen Xiaofeng. After the accident, Li shouted 'my dad is Li Gang' (deputy director of the local public security bureau), which swiftly became internet catchphrase and irritated both the victim's family and the public.

As social outrage surged, local government and the victim's family were at variance: the former wanted to appease the public, while the latter demanded justice. On 5 November, officials from Baoding PSO and Wangdu County informed Chen Guangqian, the victim's father, that 'higher officials urged the case to be reconciled to avoid aggravating social effects'. Under such pressure Chen accepted compensation to the amount of 460,000 RMB and promised no further contact with either the media or the offender. Reports on this event immediately stopped. Finally Li was sentenced to six years imprisonment.

Similar to Jin Peng's case, Li Qiming's case also satisfied the conviction standard in China: the facts of the crime are clear, and the evidence is reliable and sufficient. Also similar is the fact that this case became a difficult one because of the victim's 'non-cooperation'. Unlike Jin's case, however, the victim in Li's case was finally pressurized into a compromise, not by judges, but by the 'powerful state apparatus' as a whole. These two cases together give rise to at least two observations. On the one hand, criminal reconciliation has indeed changed the victim's status in criminal proceedings by granting them greater power. However, on the other hand, no matter how great the power is, victims are not the fundamental source of the pressure felt by legal actors. The 'cooperation' between different government branches in Li's case has shown that the change in the victim's status is merely a symptom of deeper political concerns. What pressurizes the criminal justice system to promote criminal reconciliation is not the victims themselves, but rather the political will and purposes conveyed or served by victims.

4.4.3 Social Stability: Key Words behind Criminal Reconciliation

To better understand the status of criminal reconciliation in China, it is necessary to look back to its early period and to explore the social and political contexts that cultivated it. As mentioned earlier, the ideology of central government evolved towards the goal of 'constructing a socialist harmonious society' almost simultaneously with the rise of criminal reconciliation. This was of course relevant to the change of political leaders. But more significantly, the new ideology originated from an environment in which social stability and overall social control were under threat. Among all this

¹⁷⁸ See '李刚门'46万元和解玄机 (Hidden Story behind the 460,000 RMB Reconciliation in 'Li Gang Event'), 26 December 2010, http://news.xinhuanet.com/legal/2010-12/26/c_13665166.htm. Accessed 22 August 2013

there are two major indicators of social unrest: the visits and letters (信访),¹⁷⁹ and the mass protests (群体性事件).

The mechanism of visits and letters can be traced back to the 1950s. It was initially designed to enable individuals or organizations in society to express their requests, petitions or opinions directly to the government, the Party, or relevant official institutions including the judicial authorities, through visiting, letters, phone calls, or other communication measures. A petition against any government officials has been acknowledged by the 1982 Constitution as a fundamental right to which Chinese citizens are entitled. It is apparent that this mechanism was introduced with good will, but over the past few years it has been described as ‘one of the largest dilemmas in China’s legal framework’.¹⁸⁰ Visits and letters were supposed to be a supplementary dispute resolution outside the judicial system, but in practice it has overwhelmed the latter and become the first option for people with a grievance. Through this mechanism, all disputes, including those caused by criminal offences, are more likely to transform into a direct antagonism between individual persons and local governments. Since 1992 the total amount of visits and letters started to increase, and in 2003 it peaked at more than 12 million in one year.¹⁸¹

The large scale petitions outside the framework of law seriously disturbed local governments’ daily work and sometimes even threatened the social control of the central government, as many petitioners attempted to seek ‘justice’ in Beijing when local resources were exhausted or blocked. In fact, and in practice, individual petitioners quite often sank into a ‘Kafkaesque series of unending visits to government bureau after government bureau’,¹⁸² creating an endless and exhausting stalemate for either side.

In the light of these challenges, in 2005 the State Bureau for Letters and Calls (国家信访局, the national government branch in charge of visits and letters) started to rank local governments’ performance based on the number of visits and letters that they reported. This ranking imposed great pressure on local officials because it was a key factor in the administrative appraisal system. Thus receiving letters and visits, and reducing their total amount, became a vital task not only for the administrative branch but also for the judicial system in local areas. For instance, according to the SPP’s annual reports from 2004 to 2012, the amount of visits and letters solved by prosecutors in the whole country in 2011 reached 804,873, almost double that in 2003 with 527,332.¹⁸³ Dealing with litigation-related letters and visits actually represents ‘extra work’ for judicial authorities. In practice petitioners quite often jump between visits and letters and litigation, which creates a unique phenomenon in the Chinese judicial system: a vicious circle between litigation and petition (诉访循环).

Another indicator of social unrest is mass protest. Mass protest was at first defined as illegal activities that were ‘performed by collectives, violating the national law and regulations, and disturbing the social order and public security, as well as the personal and property safety of citizens’.¹⁸⁴ With the proliferation of mass protests during the last ten years, however, political

¹⁷⁹ Sometimes this term is also translated as ‘petition to higher government officials’ or ‘administrative petition’. In this article the author adopted its original meanings in the Chinese language.

¹⁸⁰ Xie Zhuoyan, ‘Petition and Judicial Integrity’, 2(1)(2009) *Journal of Politics and Law*, 24-30, p. 24.

¹⁸¹ See Yu Jianrong, 中国信访制度的困境和出路 (The Dilemma and Solutions for the Visits and Letters in China), 23 November 2012, available at <http://szk.hrchina.org/repost/3497>. Accessed 13 December 2013.

¹⁸² Carl F. Minzner, ‘Xinfang: Alternative to Formal Chinese Legal Institutions’, 42(103) (2006) *Stanford Journal of International Law*, 1-92, p.2.

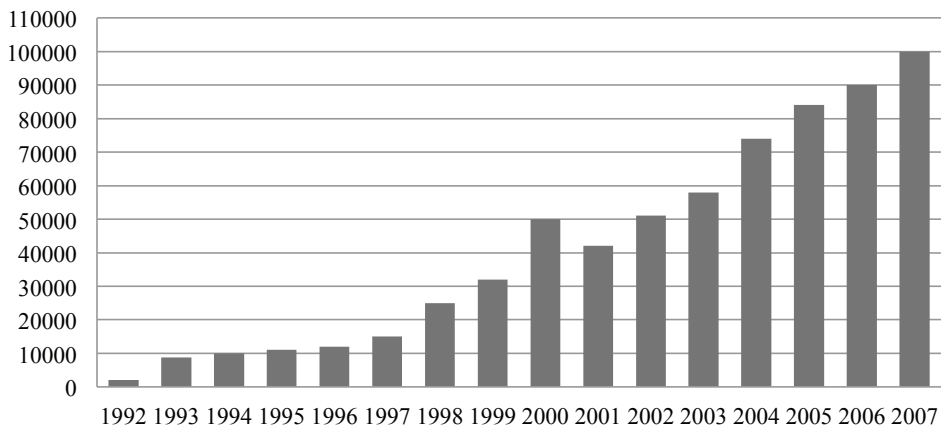
¹⁸³ SPP’s Annual Working Report, (2004-2012).

¹⁸⁴ See Article 2 of MPS, 公安机关处置群体性治安事件规定 (Regulations for Public Security Organs on Dealing with Popular Protests), 公发 [2000] 5号 (*Gongfa* [2000] No. 5), issued and validated on 5 April 2000.

narratives changed correspondingly. In 2005, the General Office of the CPC Central Committee adjusted the definition in its Working Opinions on Active Prevention and Proper Treatment of Group Events (关于积极预防和妥善处置群体性事件的工作意见, 2004 CPC Working Opinions), re-conceptualizing it as conflict generated from conflicts within the people who consider that their individual rights are infringed, and petition to relevant institutions or authorities by means of unlawful assembly or blockade. The latter definition reduces the political seriousness of the popular protest, by redefining it as a less grievous conflict occurring ‘within the people’.

The mechanism of mass protests is similar to letters and visits, aiming to express public discontent to government officials, but in a much fiercer and more vehement form. Over the past years, the number of mass protests has also increased sharply, as depicted in Figure 3.10.

Figure 3.10 Mass Protests (1992-2007)



Source: Chung et al 2006, 6; media.people.com.cn 2012.

Figure 3.10 shows a constant increase in mass protests in China. The annual increase rate is also enhanced correspondingly, with an average increase of 10 per cent for the years 1994 to 1996, and of 25.5 per cent from 1997 to 2004. Since 2008 the Central People’s Government ceased to publish statistics on mass protests, but no evidence shows that such increases have stopped. In fact, from 2008 to 2012 several serious protests happened, such as the *Weng’an 6.28 Event* in Guizhou Province in 2008,¹⁸⁵ the *Huining Event* in Gansu Province in 2009,¹⁸⁶ the *Wukan Event* in Guangdong Province

This document was updated in 2008, where the definition mentioned above was eliminated. See 公通字 [2008]56号 (*Gongtongzi* (2008) No. 56).

¹⁸⁵ See Chris Buckley, ‘Girl’s Death Sparks Rioting in Chinese County’, 29 June 2008, Available at <http://www.reuters.com/article/2008/06/29/us-china-riot-idUSPEK27256220080629>. Accessed 5 January 2013.

¹⁸⁶ See Li Zhanji and Zeng Huafeng, 甘肃会宁县群体性事件已妥善处置 (The Group Event Has Been Properly Dealt with in Huining, Gansu Province), 20 May 2009, available at <http://society.people.com.cn/GB/41158/9337033.html>, Accessed 5 January 2013.

in 2011,¹⁸⁷ and the *PX Event* in 2012.¹⁸⁸ The influence of these events sometimes lasts for months, or even years.

During the period when visits and letters and mass protests were increasing the dysfunction of the judicial system played a crucial role. Petitions and protests quite often originate from judicial authorities' failure to fulfill the parties' requirements, or to satisfy their perception of justice in criminal proceedings. In this context mediation was encouraged by the entire judicial system, not only in civil and administrative areas, but also in the criminal field. In 2006, the former SPC President Xiao Yang required the whole judicial system to 'mediate those which can be mediated, and try those who should be tried; combine mediation and trial, and solve the case and end the dispute' (能调则调, 当判则判, 调判结合, 案结事了).¹⁸⁹ During Wang Shengjun (the former SPC President)'s period this slogan was revised into 'giving priority to mediation and combining mediation with judgment' (调解优先, 调判结合).¹⁹⁰

Both slogans emphasized the use of mediation to achieve one purpose: that is, to 'solve the case and end the dispute'. Apparently the meaning of 'end the dispute' is not confined to ending litigation and making a final judgment as required in 'solve the case'. In 2008, the Higher Court of Guangzhou Province conducted empirical research on this term, and defined it in accordance with three dimensions: (1) the court has finished the trial proceedings and issued the judgment; (2) both parties have accepted the judgment and have had their disputes settled; and (3) the judgment has satisfied the public.¹⁹¹ Based on it, in order to 'solve the case and end the dispute', parties' satisfaction is indispensable; and to achieve that the use of processes such as mediation or reconciliation, in which parties can make their own decisions, is indispensable.

Following this logic, a national movement named 'grand mediation' (大调解) emerged and was encouraged by the central government. In 2007 the Former Secretary of Central Political and Legislative Committee of CPC published an article with the espousal of the integrity of people's mediation, administrative mediation and judicial mediation as well as their significance in maintaining social stability.¹⁹² This policy was later inherited by Luo's successor Zhou Yongkang.¹⁹³ As an echo,

¹⁸⁷ See Michael Wines, 'A Village in Revolt Could Be a Harbinger for China', 25 December 2011, available at <http://www.nytimes.com/2011/12/26/world/asia/in-china-the-wukan-revolt-could-be-a-harbinger.html?pagewanted=all>. Accessed 29 November 2012.

¹⁸⁸ See 沟通在先, 'PX'就不会闹大 ('PX Event' Would not have Deteriorated if Parties Communicated First), 25 October 2012, available at <http://scitech.people.com.cn/n/2012/1025/c1007-19380777.html>. Accessed 19 August 2013.

¹⁸⁹ See 能调则调, 当判则判, 调判结合, 案结事了 (Mediate Those Who Can be Mediated, and Try Those Who Should be Put on Trial; Combine Mediation and Trial, and Solve the Case and End the Dispute), 18 July 2006, available at http://www.gmw.cn/01gmr/2006-07/18/content_451097.htm. Accessed 9 September 2013.

¹⁹⁰ 最高人民法院关于进一步贯彻“调解优先、调判结合”工作原则的若干意见 (The SPC's Several Opinions on Further Implementing the Work Principle of 'Giving Priority to Mediation and Combining Mediation with Judgment'), 法发[2010] 16号 (*Fafa* [2010] No. 16), issued on 6 July 2010. Available at http://news.xinhuanet.com/legal/2010-06/28/c_12271040.htm. Accessed 28 August 2014.

¹⁹¹ See Research Group in the Higher Court of Guangzhou Province, 关于不断改进工作促进案结事了的调研报告 (Research Report on Improving Working Quality and Promoting Solving the Case and Ending the Dispute), 20 March 2012, available at <http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM22&gjid=20120320020835197722>. Accessed 13 December 2013.

¹⁹² Luo Gan, 政法机关在构建和谐社会中担负重大历史使命和政治责任 (The Significant Historical Missions and the Political Responsibility of Political and Legal Institutions in Constructing a Harmonious Society), originally published on 3(2007) 求是 (*Seeking Truth*), available at

in 2011 the Ministry of Justice issued a research report from an institutional and regulatory perspective on how to connect the people's mediation to judicial mediation.¹⁹⁴ Criminal justice authorities, as part of the judicial system, were also obliged to embrace mediation in their daily endeavors. Such actions represented the beginning of the steps towards criminal reconciliation's codification.

In conclusion, criminal reconciliation in China is a product of the political pressure caused by social unrest, which is then passed on to the criminal justice system. Under a form of consequentialist ideology of 'ending the dispute', the criminal justice system is the only component that can achieve this purpose. In the relay race of maintaining social stability, the Chinese judicial system still remains a weak actor *vis a vis* political power. The race even continues within the criminal justice system from police to prosecutors and finally to judges. In practice such pressure has been further passed on to the parties, although most of the time it was implemented through persuasion and compromise rather than through compulsory means. Such persuasion needs to be carefully orchestrated to ensure that the parties will not be incited into taking 'rash action'. Many local people's courts and people's procuratorates established an 'early warning system' (预警机制) to prevent cases escalating into litigation-related visits and letters or even popular protests. This mechanism appeared in the SPP's annual report in 2009, requiring that prosecutors all over the country evaluate instability risks sufficiently and solve them in a timely manner before implementing the law. Pressures from both the government and the parties have cornered legal actors into a dilemma that they cannot escape from unless their purposes and mechanisms are pushed in another direction, away from 'the very institutions Chinese authorities themselves attempted to construct in the late twentieth century'.¹⁹⁵

4.5 Summary

In this section the restoration agreement in China is examined with a focus on the recent surged mechanism 'criminal reconciliation'. By tracing back its history it can be noticed that criminal reconciliation in China has experienced several ups and downs. The latest rise of criminal reconciliation in the 21st century is largely relevant to the social and political context. Social stability has always been a major concern for the Chinese government. The slogan proposed by Deng Xiaoping in 1989, 'ensure stability as a principle of overriding importance' (稳定压倒一切) has been resurrected in the new term 'harmonious society'. Criminal reconciliation and the confusing phenomena that surround it in the criminal justice system is just one indicator of the big picture. It exposes the fact that political leaders have a strong preference for outcome over method, and encourages a more flexible strategy containing elements of both 'concession' and 'repression'. Criminal reconciliation is contradictory to watchwords such as 'repression' and 'severe strike campaign' which were in use in the 1980s and early 1990s. But it is also different from the trend in the late 1990s judicial system, which emphasized professionalization and adjudication.

http://news.ifeng.com/mainland/200702/0209_17_74611.shtml. Accessed 10 December 2014.

¹⁹³ For discussion on grand mediation and its differences to similar mechanisms applied in the past, see Hu Jieren, 'Grand Mediation in china: Mechanism and Application', 51.6 (2011) *Asian Survey*, 1065-1089; *supra* note 46, Li (2014).

¹⁹⁴ See Wang Gongyi *et al*, 完善以人民调解为基础的“大调解”工作体系调研报告 (Research Report on Promoting Grand Mediation Which is based on the People's Mediation), 18 October 2012, available at http://www.moj.gov.cn/yjs/content/2012-10/18/content_2787450.htm?node=30053. Accessed 16 December 2013.

¹⁹⁵ *Supra* note 108, Minzner (2011), p. 939

Nonetheless, what has not altered across these periods and strategies is the authoritarian government's ultimate purpose of maintaining social control and its own legitimacy.¹⁹⁶ The consequentialism embodied in policies and in action points not towards restoring parties, but rather to 'preventing legal conflicts and citizen petitions from rising toward central officials'.¹⁹⁷ The practice of criminal reconciliation is sometimes pushed to extremes by political motivations, and it is not surprising that the judicial system reacts pragmatically, even at the cost of integrity and basic values. This is the main source of the tension between criminal reconciliation and the ordinary procedure in Chinese criminal justice system.

5. Characteristics of CPAs in China

5.1 CPAs in Practice: A Hybrid of Different Types

Before making a comprehensive evaluation of CPAs in China as an entirety, an explanation on the categorization is necessary. Although three types of CPAs are defined, in practice it is quite common that a combination of different types may be found in one case. The question is how to calculate the credits when multiple types of cooperation exist. Some clues can be found in the 1997 CL. A fundamental principle for sentencing is that 'the sentence shall be imposed on the basis of the facts of the crime, the nature and circumstances of the crime, and the degree of harm to society, in accordance with the relevant stipulations of this law' (Article 61). In addition, the 1997 CL sets sentencing ranges for most crimes. Without legally prescribed mitigating situations, reduction under the minimum sentence is in principle banned unless with the SPC's permission (Article 63). Furthermore, the 2014 Guiding Opinions require comprehensive evaluation in sentencing, which can be reflected in four principles: (1) the principle of taking facts as a basis and the law as a criterion (*以事实为根据, 以法律为准绳*); (2) the principle of adapting punishment to crime and criminal liability (*罪责刑相适应*); (3) the principle of tempering justice with mercy; and (4) the principle of treating the same case equally (*de similibus idem est iudicium*).

A relevant question here is whether assistance agreement and restoration agreement in China can be established without offenders' self-incrimination. For restoration agreement, criminal reconciliation under Article 277 of the 2012 CPL clearly requires the offender's sincere remorse. As to reconciliation in crimes beyond this provision, victims can hardly reconcile with offenders without the latter's admission of guilt. For assistance agreement, its relationship with confession or guilty plea is largely shaped by two features of the Chinese criminal justice: the reliance on pre-trial investigation, and the unified trial proceeding on conviction and sentencing. The former enhances the criminal justice agencies' flexibility and discretion in making deals with the offenders, whereas the latter squeezes out the offender's opportunity to plead not guilty on the one hand, and to obtain sentencing reduction through cooperation on the other. Given these features, it is unlikely that assisting offenders will obtain concessions without self-incrimination, unless such assistance is offered during appeal proceedings.

5.2 Differences among Three CPAs

Through examining three CPAs in China, it can be observed that there are different levels of tolerance from the legislator – the least for plea agreement, and the most for criminal reconciliation. At least three elements contribute to this phenomenon. To begin with, the Chinese criminal justice system has

¹⁹⁶ See Yongshun Cai, 'Power Structure and Regime Resilience: Contentious Politics in China', 38 (03) (2008) *British Journal of Political Science*, 411-432, p. 411.

¹⁹⁷ *Supra* note 108, Minzner (2011), p. 938.

long demonstrated a strong preference for collectivism to individualism.¹⁹⁸ Under such ideology, legal instruments are expected to serve the society rather than individuals. Compared with criminal reconciliation that promotes social stability and assistance agreement which strengthens crime control approaches, offenders' contribution in plea agreement seems merely to perform the legal obligation of honest confession, and the extra effect for social welfare by enhancing efficiency is not so apparent at first sight.

The second distinction among three CPAs in China is relevant to the role of victims. From previous discussion one can notice that victims rarely appear in the debates around plea agreement and assistance agreement. As a comparison, they become the key player in criminal reconciliation. Given the major role of victims in initiating visiting and letters related to adjudication, which is in turn one of the main symptom of social unrest, it is understandable that mechanisms easing this group would receive more political support.

Furthermore, the ranking is also related to the role and image of criminal justice agencies in different types of CPAs. In both plea agreement and assistance agreement the police and prosecutors may be directly involved in the negotiations with the accused. The relationship between police, prosecutors and judges in China, however, is 'mutual coordination and restraint' both in law and in practice.¹⁹⁹ Therefore the three organs would be viewed as an entity during negotiations, which presents the image that the entire judicial system can be traded. In criminal reconciliation, however, the judicial organs hide themselves behind the direct communication between the two private parties, even though there actually also exists an exchange between power and rights.

5.3 Common Features of CPAs in the Chinese Criminal Justice

5.3.1 On-going Expansion

The analysis on three CPAs in China both in history and in contemporary society reveals an on-going expansion. Both plea agreement and assistance agreement have experienced a shift from subsidiarity to independence in exchange for legal concessions; and criminal reconciliation has risen from a marginalized role to a major solution for minor crimes beyond ordinary proceedings.

Two observations can be drawn from the expansion. The first observation is that by separating confession and meritorious service from voluntarily surrender and by legitimizing the use of criminal reconciliation, more channels are offered to offenders to gain legal concessions through cooperating with criminal justice agencies. From previous discussion it can be seen that the social transition has given rise to various social instabilities such as crimes, mass protests and visits and letters, urging the state officials including criminal justice agencies to explore more efficient and effective strategies. The second observation is that the discretionary power of Chinese criminal justice agencies in resolving criminal cases is also expanded. Through CPAs police, prosecutors and judges actually enjoy higher flexibility in criminal proceedings to filter cases, shape charges, and tailor sentencing.

¹⁹⁸ For discussion on the status and impact of collectivism on Chinese criminal justice and its administration, see, e.g., Robert Bejesky, 'Political Pluralism and Its Institutional Impact on Criminal Procedure Protections in China: A Philosophical Evolution from "Li" to "Fa" and from "Collectivism" to "Individualism"', 25(1) (2003) *Loy. L. A. Int'l & Comp. L. Rev.*, 1-40. For its impact on the legal system in general, see, e.g., Pitman B. Potter, 'Legal Reform in China: Institutions, Culture, and Selective Adaptation', 29(2) (2004) *Law & Social Inquiry*, 465-495; Chaihark Hahm, 'Law, Culture, and the Politics of Confucianism', 16(2) (2003) *Columbia Journal of Asian Law*, 253-301.

¹⁹⁹ Article 7 of the 2012 CPL stipulates that 'in conducting criminal proceedings, people's courts, people's procuratorates and PSOs shall divide responsibilities, coordinate their efforts and check each other to ensure the correct and effective enforcement of law.'

5.3.2 Imbalance between Substantial Justice and Procedural Justice

The pure model of CPAs has two attributes: one is the substantial attribute which focuses on the offender's participation as mitigating factors for legal decisions; the other is the procedural attribute which deems these agreements to be channels for individual parties to dispose their procedural rights, interests and privileges. Both attributes are crucial in establishing a well-functioning CPA system. However, for all three types of CPAs the current criminal justice system in China prioritizes substantial factors such as the value and the consequences of offenders' cooperation.

Comparatively, the procedural attribute of CPAs in China is not equally valued. Provisions within both criminal law and criminal procedure law mainly focus on the post-negotiation stage. However, how to start the process, how to reach an agreement, how to limit discretion and how to protect the interests and freewill of the counterparty, how to provide legal assistance, and how to define the scope of 'meeting of minds', how to validate and how to remedy – all these questions are left open without clear answers. For CPAs the law provides an equation of 'cooperation = concession' without giving rules of calculation. Such procedural vacancy may raise the risk of a 'backstage deal', and meanwhile undermine public confidence in the administration of criminal justice.

The procedural vacuum reflects the fact that in current ordinary proceedings there are few rights for offenders to waive or to make use of. To some extent it originates from an unequal relationship between criminal justice agencies and offenders in the Chinese criminal justice system, and such inequality in turn increases the risks of miscarriages of justice. It is the same for 'confession', 'meritorious service', and 'reconciliation' that leniency from criminal justice agencies is offered as a 'reward' from higher authority rather than 'consideration' exchanged in an equal and mutually-beneficial agreement. The theoretical presumption that criminal justice agencies bear the full responsibility of truth-finding confuses the roles and functions of participants in the system, and it leads to theoretical conclusions that cooperation from the accused, in whatever form, is supplementary, and that ordinary procedure can function without it even if it is actually in high demands in practice. With this premise the law is distanced from the practice, and the gap in-between provides chances for mal-practice from both sides.

5.3.3 Pragmatic Motivations

Although multiple motivations and causations are proposed and debated by academia and the legislator, the key ideology behind the CPAs is pragmatism. Instead of deeming themselves as adjustments to criminal justice through supplementing and cooperating with formal procedure, the practice of CPAs in China plays a role of *pis aller*, aiming at certain specific issues urgent with governance and social control. This gives some explanations on why there are so many inconsistencies and conflicts in ideologies, principles, mechanisms, legislations, and practice between CPAs, and the current criminal justice system in China.

Plea agreement applied in practice is anticipated to improve judicial efficiency by combining with summary procedure, even though the formal procedure itself is quite simple; the use of assistance agreement aims at corruption crimes, organized crimes, terrorist crimes, and other crimes that are increasingly complicated; and criminal reconciliation aims primarily at reducing social instabilities which are intensively embodied in the huge amount of petitions in the form of visits and letters and mass protests. The pragmatic ideology leads to a tendency that the law is always vague and ambiguous, leaving large space for judicial discretion in practice. To some extent, the function of criminal procedure law in CPAs is reduced to just legitimizing the diversified practice, rather than restricting judicial power and providing remedies to parties.

6. Conclusions

So what is the current status of CPAs in Chinese criminal justice? Despite the shadow of ingrained legal traditions, it can be observed that all three agreements are at the very preliminary stage in merging with criminal proceedings under an increasingly modernized legal context. Through examining the origins, the legal framework and debates concerning plea agreement, assistance agreement and restoration agreement in China, two trends can be detected. For one thing, both criminal law and criminal procedure law have been constantly facilitating and formalizing the use of these agreements during the past few decades. For another, rules on the administration of CPAs are still powerless to either uphold or regulate these mechanisms. Therefore a phenomenon can be observed in all three agreements from previous discussion: although the bargaining chips offered by criminal justice agencies appear to have been constantly enhanced to encourage more voluntary cooperation, real negotiation between two parties based on free will and the meeting of minds, or, the pure model of CPAs, can hardly be detected. It even gives rise to the question of whether or not those mechanisms with the appearance of CPA but without its essence can be named ‘agreements’.

In fact, this is consistent with the conclusions drawn in the previous chapter: the quality of CPAs relies on that of ordinary procedure, and the erosion in the latter would inevitably reduce the former into a cloaked coercion. On the one hand, the rise of CPAs to some extent reflects the improvement in legal reforms and the progress in civilizing criminal justice. While on the other hand, the current popularity of CPAs in Chinese criminal justice is to a large extent a product of governance expediency.

This is the fundamental source of the phenomenon of having law but meanwhile having no effective law in regulating CPAs, which may in turn widen the gap between CPAs and ordinary procedure at the cost of the public confidence in the latter. In fact, the public confidence in criminal justice has already been undermined in recent years. A typical example is the well-known slogan in China that ‘appealing to court is less useful than a petition to higher authority, and the latter is also less useful than complaining on the internet’ (上诉不如上访, 上访不如上网). From this perspective, the prevalence of under-regulated agreements in China may not improve the quality of criminal procedure but it is more likely to threaten the integrity of, and public confidence in, the criminal justice system.

Chapter IV Criminal Procedural Agreements in England and Wales

1. Introduction

The criminal proceedings in England and Wales have a long history of implementing agreements between the offender and the criminal justice agencies in various forms. It is to a large extent due to the adversarial tradition as well as the modernized criminal proceedings on protecting the offender and restricting the authorities.

During the past four decades the criminal justice system of England and Wales has experienced significant changes. Police powers have been gradually unified and restricted since the introduction of the Police and Criminal Evidence Act 1984 (PACE); the Crown Prosecution Service (CPS)¹ was created by the Prosecution of Offences Act 1985 and its power has been largely expanded since then; and there has emerged a tension between the Sentence Council (formerly the Sentence Guideline Council, SGC)² and the Court of Appeal in illustrating the scope of judicial discretion. In addition, the status of victims in the criminal justice scenario has been continually enhanced.

All these changes, combined with the continually competing but more importantly mingled ideologies between the Conservative's managerial reforms of criminal justice and the 'New Labour's' 'Third Way' policy in the 1990s,³ have reshaped the conventional relationships among the major players - police, prosecutors, judges, offenders, and victims - in the criminal proceedings. Some techniques with strong inquisitorial characteristics, like the emphasis on the pre-trial proceedings, have been gradually introduced into the existing system, challenging the long-standing adversarial traditions. Some call this phenomenon a 'convergence' between adversarial and inquisitorial systems, while others prefer the phrase 'multiplied commonalities'.⁴

In this context, CPAs in England and Wales are experiencing transformation to adapt themselves to the bigger picture. On the one hand, the legal regimes and institutional frameworks of

¹ The CPS was established under the proposal of the 1981 Royal Commission on Criminal Procedure, also named 'the Philips Commission'. In its report the Commission set up the principle that the functions of investigation and prosecution should be separated. This principle later came to be known as 'Philips principle'.

² It should be notice here that although the Sentencing Council has replaced the SGC, the guidelines issued by the latter will remain valid until the former replace them with new guidelines.

³ The Conservatives' managerialization of criminal justice, which started around the 1980s, was under the trend of new public management, emphasizing the marketization of public services in the criminal field, cost-efficiency and productivity. To regain dominance in the government, the Labour Party proposed a 'Third Way' between the new public management approach and the conventional approach in crime control under the slogan of 'touch on crime, tough on the causes of crime'. Some scholars such as John W. Raine and Michael J. Willson praised the new policy with 'more humanitarian values', while others argued that no fundamental distinction existed between the two policies and they actually combined during application. Despite the ideological debate, these policies have resulted in profound reforms in criminal justice system in England and Wales, which can also be observed from the evolvement of CPAs. For discussions on these two policies and their relationship, see, e.g., John W. Raine and Michael J. Willson, 'Beyond Managerialism in Criminal Justice', 36(1) (1997) *The Howard Journal of Criminal Justice*, 80-95; Ian Brownlee, 'New Labour – New Penology? Punitive Rhetoric and the Limits of Managerialism in Criminal Justice Policy', 25(3) (1998) *Journal of Law and Policy*, 313-335; Eugene McLaughlin *et al.*, 'The Permanent Revolution: New Labour, New Public Management and the Modernization of Criminal Justice', 1(3) (2001) *Criminal Justice*, 301-318.

⁴ About descriptions and discussions on this trend, see, e.g., Mireille Delmas-Marty and John R. Spencer (eds.), *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002); Jacqueline S. Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain', 35 (2009) *NCJ Int'l L. & Com. Reg.*, 319-362.

traditional types of agreements are changing, giving rise to new challenges in coordinating these agreements with the ingrained values and principles of criminal justice. On the other hand, new forms of agreement are generated to maximize the value of offenders' cooperation.

This chapter aims at examining the current status of three major types of CPAs – plea agreement, assistance agreement and restoration agreement – in the criminal justice system of England and Wales and their relationship with ordinary procedure. In a structure analogous to that of the previous chapter, each agreement is analyzed respectively in the first three parts from aspects of historical evolution, current legal framework, and controversies around this legal device. Based on them, part five is expected to answer the following questions: (1) what are the overall trends of the CPAs in the English system? (2) what are the main reasons behind these trends? (3) What are the main areas of tension between these trends and ordinary procedure? And (4) what are the responses from the English criminal justice system towards these tensions?

2. Plea Agreement

Plea agreement in England and Wales experienced many changes of direction during the past centuries and has gradually developed into a systemized structure of 'plea bargaining'.⁵ After years of development there are still heated discussions on almost every aspect of this mechanism: from the definition – is it bargaining or not,⁶ to its rationalities,⁷ from the statutory basis,⁸ to the practical operations,⁹ and from the expected functions,¹⁰ to the actual risks.¹¹ The legislator and legal

⁵ For a general introduction to plea bargaining in the English and Welsh legal system, see John Baldwin and Michael McConville, 'Plea Bargaining and Plea Negotiation in England', 13 (1978) *Law & Society Review*, 287-307.

⁶ Nick Vamos, 'Please Don't Call It "Plea Bargaining"', 9 (2009) *Criminal Law Review*, 617-630.

⁷ In Richard L. Lippke's research the author provides a detailed examination of the ethics and rationalities of the plea bargaining through a comparison between the United States and European countries and jurisdictions, including England and Wales. Richard L. Lippke, *The Ethics of Plea Bargaining* (Oxford: OUP, 2011). See also, Ralph Henham, 'Bargain Justice or Justice Denied? Sentence Discounts and the Criminal Process', 62(4) (1999) *The Modern Law Review*, 515-538; Mick McConville, 'Plea Bargaining: Ethics and Politics', 25(4) (1998) *Journal of Law and Society*, 562-587.

⁸ See, e.g., Geraldine Mackenzie, 'The Guilty Plea Discount: Does Pragmatism Win Over Proportionality and Principle?', 11 (2007) *Southern Cross University Law Review*, 205-223; Roderick L. Denyer, 'Changing Unequivocal Plea of Guilty in the Crown Court', Feb. (2007) *Criminal Law Review*, 156-159; D. A. Thomas, 'Sentencing: Plea of Guilty - Whether Defendant Entitled by Statute to Discount', Apr. (2002) *Criminal Law Review*, 327-328.

⁹ See, e.g., David Thomas, 'Sentencing: Discount for Guilty Plea – Defendant Convicted of Manslaughter on Indictment Charging Murder', 3 (2011) *Criminal Law Review*, 248-251; Penny Darbyshire, 'Transparency in Getting the Accused to Plead Guilty Early', 65(1) (2006) *The Cambridge Law Journal*, 48-51; Stanley A. Cohen and Anthony N. Doob, 'Public Attitudes to Plea Bargaining', 32 (1989) *Criminal Law Quarterly*, 85-109.

¹⁰ See, e.g., Russell Covey, 'Reconsidering the Relationship between Cognitive Psychology and Plea Bargaining', 91 (2007) *Marquette Law Review*, 213-247; Ralph Henham, 'Further Evidence on the Significance of Plea in the Crown Court', 41(2) (2002) *The Howard Journal*, 151-166; Aogan Mulcahy, 'The Justifications of "Justice": Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts', 34(4) (1994) *The British Journal of Criminology*, 411-430.

¹¹ See, e.g., Peter W. Tague, 'Barrister's Selfish Incentives in Counselling Defendants over the Choice of Plea', Jan (2007) *Criminal Law Review*, 3-23; Peter W. Tague, 'Guilty Pleas and Barristers' Incentives: Lessons from England', 20 (2007) *The Georgetown Journal of Legal Ethics*, 287-320; Peter W. Tague, 'Tactical Reasons for Recommending Trials Rather Than Guilty Pleas in Crown Court', Jan. (2006) *Criminal Law Review*, 23-37; Penny Darbyshire, 'The Mischief of Plea Bargaining and Sentencing Rewards', Nov. (2000) *Criminal Law*

practitioners constantly make efforts to impose detailed restrictions on plea agreement. Nevertheless, it is unlikely to squeeze out such practice from criminal proceedings. The following discussion aims to provide a comprehensive understanding of the current status of plea agreement in England and Wales. Given the fact that ‘plea bargaining’ is a commonly used term in English academia, ‘plea agreement’ and ‘plea bargaining’ are inter-changeable in the following discussion.

2.1 Historical Review of Plea Agreement

When talking about the agreement reached between prosecutors and the accused based on the former’s concession and the latter’s guilty plea, law in action and law in the books appear to be quite out of step, with the practice evolving faster than the law itself. This phenomenon can be better observed by tracing the history of plea bargaining in England and Wales, which can be generally divided into three periods: (1) the period of emergence in practice; (2) the period of acquiescence by the legal system; and (3) the period of acceptance in both legislation and judicial decision.

2.1.1 Before the 20th Century: The Emergence of Plea Bargaining

Alschuler once noticed that pleas of guilty were actively discouraged during most of the history of common law.¹² Studies show that the ‘disposition by means of guilty pleas in serious criminal cases began in the mid-nineteenth century’.¹³ Before that, for a long period guilty pleas were ‘unusual and often discouraged by the judge’.¹⁴ This is to some extent related to the characteristics of the early English criminal justice system:

*[Before the 19th century] ... Face-to-face communities and informal sanctions, legitimized in part by religion and custom, meant that the legal system was often used as a last resort. The courts, dominated by amateurs, dealt with the cases that came before them with breath-taking rapidity and operated in a highly personalized manner, but with little protection for the accused.*¹⁵

Before the 18th century the process against criminals was largely launched by individuals through means of private prosecution.¹⁶ Instead of adopting the public prosecution widely used in the continental practice, the use of the police force was for centuries deemed as an ‘invention of European tyrants’¹⁷ which could not be accepted by England. Lawyers were elbowed out to a marginal status in the criminal justice system. Although the Treason Trials Act of 1696 had permitted lawyers to appear

Review, 895-910.

¹² Albert W. Alschuler, ‘The Prosecutor’s Role in Plea Bargaining’, 36(1) (1986) *The University of Chicago Law Review*, 50-112, p. 50.

¹³ Malcolm M. Feeley, ‘Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining’, 31 (1997) *Isr. L. Rev.*, 183-222, p.187.

¹⁴ *Supra* note 11, Darbyshire (2000), p. 897. See also John H. Langbein, *The Origins of Adversary Criminal Trial* (New York: OUP, 2005). In this research Langbein provided some cases where the judges attempted to persuade the defendants to plead not guilty.

¹⁵ David Taylor, *Crime, Policing and Punishment in England, 1750-1914* (London: Macmillan Press, 1998), p. 2.

¹⁶ John H. Langbein, ‘The Origins of Public Prosecution at Common Law’, 17 (1973) *Am. J. Legal Hist.*, 313-335.

¹⁷ Douglas Hay, ‘Crime and Justice in Eighteenth- and Nineteenth- Centuries England’, 2 (1980) *Crime & Just.*, 45-84, p. 49.

in treason prosecutions,¹⁸ during the 18th century it was much asserted that ‘denying defence counsel benefited the accused’, as simplicity could be better deemed as a proof of innocence.¹⁹ In this context, it was unlikely that direct negotiations between the accused and the criminal justice authorities would occur.

Historical studies indicate that both defendants and judges before the 19th century held negative attitudes towards a guilty plea, at least in capital cases. Statistics in Beattie’s research show that between 1663 and 1715 only six per cent of the defendants in great larceny cases pleaded guilty in Surrey courts; from 1722 to 1802, the proportion was even lower, about two per cent.²⁰ This was partly because of the frequent and mandatory use of death penalty. Research shows that in 1669 there were at least 50 offences carrying capital punishment, and this number was increased to between 200 and 220 during the 1820s.²¹ The toughness and stiffness in punishment and few alternatives in sentencing at that time made guilty plea a rather undesirable option for the offender. The fixed penalties, even after the abolition of the death penalty, encouraged defendants to ‘merge their concern with maintaining innocence ... with a concern for offering mitigating factors and evidence of good character’.²²

Apart from the low possibility of negotiation during this period, plea bargaining also appeared to be unnecessary. This is because at that time the court hearings were much swifter than nowadays. For instance, research shows that the average time for court trials was within an hour, and it was only extended by about half an hour in the mid-18th century.²³ As a conclusion, with the absence of substantial legal assistance, the fixed and widely used severe punishment, and the swiftness of court trial, both offenders and criminal justice agencies had low demands for such cooperation, and offenders had little power to conduct fair and voluntary negotiations.

The situation started to change in the late 18th century based on a wider context of socio-economic, political and cultural changes, and ‘a more complex and sophisticated system of control’, which embodied most modern attributes, started to come into being.²⁴ Previous studies revealed two key elements contributing to the rise of plea bargaining: the expanded participation and the enlarged function of defense lawyers, and the modernization and increased complexity of criminal process.²⁵

The rise of lawyers was closely connected with the fall of private prosecution during that period, which was the result of three main challenges. First of all, the individual’s control of criminal prosecution appeared to be unreliable, and gaps had been observed between prosecution and non-prosecution for similar cases because of personal preference.²⁶ The second challenge was the reprisals toward or ‘rough musicking’ of private prosecutors, especially in cases where ‘communities felt that certain offenders should not have been prosecuted, or at least should have been proceeded against on a lesser charge’.²⁷ Furthermore, litigation became an expensive business for victims at that time, either because of the litigation fees or the tasks of collecting evidence, catching offenders, and summoning witnesses. In fact in 1752 the Parliament required local governments to provide

¹⁸ Stephan Landsman, ‘The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England’, 75 (1990) *Cornell Law Review*, 497-609, p. 500.

¹⁹ *Supra* note 14, Langbein (2005), p. 2.

²⁰ John. M. Beattie, *Crime and the Courts in England 1660-1800* (Oxford: OUP, 1986), p. 336.

²¹ John. M. Beattie, ‘The Pattern of Crime in England 1660-1800’, 62(1974) *Past & Present*, 47-95, p. 48.

²² *Supra* note 13, Feeley (1997), p. 191.

²³ *Supra* note 14, Langbein (2005), p. 17.

²⁴ *Supra* note 15, Taylor (1998), p. 3.

²⁵ See *supra* note 13, Feeley (1997).

²⁶ *Supra* note 16, Langbein (1973), p. 318.

²⁷ Clive Emsley, *Crime and Society in England 1750-1900*, 2nd Edition (London: Longman, 1996), p. 139.

‘rudimentary legal aid schemes’ for reimbursing the prosecution cost of victims of certain offences.²⁸ Similar consideration was also embodied in s28 and s29 of the Criminal Law Act 1826.

Weaknesses in private prosecutors gave rise to the professionalization of prosecution, and lawyers began to ‘appear on both the defense and prosecution sides in criminal trials’.²⁹ In 1836, by the Prisoners’ Counsel Act defense lawyers were for the first time allowed to address the jury on behalf of their clients. This reform strengthened lawyers’ controlling power in the court hearing by influencing conviction decisions.

Along with the changing role of lawyers was the reform in criminal proceedings where both procedures and evidence rules became increasingly complex. For instance, around the 1730s the Old Bailey³⁰ proceedings started to exclude hearsay evidence in some cases.³¹ Changes in procedural rules enhanced offenders’ requirements for more professional and effective defense in court, and gradually, their voices were expressed through defense lawyers. The cross-examination that had sometimes been done by judges began to be taken full advantage of by the defense lawyers.³²

Under such circumstances, the complexity of the judicial process was enhanced and the cost of the procedure was increased, which gradually laid the ground for plea bargaining. Along with the complexity of procedural rules was the increase in criminal caseload. Statistics from the Parliament show that the number of prosecutions in courts of assize and quarter sessions rose from 4,600 in 1805 to 31,300 in 1842.³³ As a response, in 1855 the Summary Jurisdiction Act allowed lesser offences to be heard without a jury.³⁴ Merely in one year the number of jury trials reduced sharply from 29,359 in 1854 to 19,437 in 1856 in England and Wales,³⁵ and by the early 20th century the summary justice gained its predominance by dealing with 98 per cent of all cases.³⁶ At the same time, the types of ‘hybrid’ offences that could be tried either by jury or summarily were also increased.³⁷ Since the severity of the punishment was almost directly linked to the level of the court, such reform in division of cases actually strongly encouraged the accused to plead guilty in magistrates’ courts rather than to take the risk of being convicted and to receive harsher punishment in the Crown court.

With the changes in respect of the role of the lawyer, the complexity of the procedure, and the division of cases, the judicial system had made preparations for the further application of plea agreement.

2.1.2 Before the 1990s: Increasing Tolerance for Plea Agreement in Case Law

²⁸ *Supra* note 13, Feeley (1997), p.193.

²⁹ John. M. Beattie, ‘Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries’, 9(2) (1991) *Law and History Review*, 221-267, p. 233.

³⁰ ‘Old Bailey’ refers to the Central Criminal Courts of England and Wales situating on the street of Old Bailey and housing the Crown Court.

³¹ John Hostettler, *A History of Criminal Justice in England and Wales* (London: Waterside Press, 2009), p. 230.

³² *Supra* note 29, Beattie (1991), p. 233.

³³ ‘Judicial Reform: the 1840s and 1850s’, available at <http://www.parliament.uk/about/living-heritage/transformingsociety/laworder/court/overview/judicialreform/>. Accessed 17 January 2014.

³⁴ The original version of this Act is available at http://www.legislation.gov.uk/ukpga/1857/43/pdfs/ukpga_18570043_en.pdf. Accessed 17 January 2014.

³⁵ *Supra* note 31, Hostettler (2009), p. 210.

³⁶ *Supra* note 15, Taylor (1998), p. 106.

³⁷ *Supra* note 13, Feeley (1997), p.198.

Compared with former stages, criminal offenders in the 20th century showed much higher interests in guilty plea. Home Office statistics showed that in the 1970s about two-thirds of the accused pleaded guilty in the Crown Court, and the proportion in the magistrates' courts were even higher, about 90 per cent.³⁸ The exchange between a guilty plea and lenient disposals from police, prosecutors and judges gradually became unspoken rules in the practice.

From the judges' perspective, although at that time they were not required to take a guilty plea into consideration, in some cases such as *R v Hall* in 1968,³⁹ offenders finally did receive substantial reduction for their guilty plea. In the early 1970s, the official publications still presented an attitude that a guilty plea was supposed to be merely 'a full, free, and voluntary decision by the defendant'.⁴⁰ With such a background, the courts frequently 'translated' the admission of guilty into 'remorse' to justify the sentence mitigation, which can be observed in *R v Harper* in 1968:

*It is quite improper to use language which may convey that a man is being sentenced because he has pleaded not guilty. It is, however, of course proper to give a man a lesser sentence if he has shown genuine remorse, among other things by pleading guilty.*⁴¹

What the court conveyed was the message that it was 'genuine remorse' rather than a 'guilty plea' that had made a difference in this case. However, the argument of 'genuine remorse' was directly weakened by legal decisions in other cases. For instance, in *R v de Haan*⁴² in 1968 where the appellant had pleaded guilty, the Court did not examine 'genuine remorse', but claimed that 'a confession of guilt should tell in favor of an accused person, that is clearly in the public interest'.

To better understand the significance of this change in argument, a further exploration into the concept 'public interest' would be helpful. As Sorauf once commented, 'the concept of the public interest lacks a neat and precise formulation'.⁴³ This is still true in today's criminal justice. For instance, the CPS' Full Code Test provides nine key elements in evaluating public interest: seriousness of the offence, culpability of the suspect, the circumstances of and the harm caused to the victim, the suspect's age, the impact on the community, the principle of proportionality, and the protection of information sources.⁴⁴ These elements cover almost every aspect of a case, and therefore enable flexible justifications on certain legal decisions.⁴⁵

From this perspective, if the term 'genuine remorse' provides a specific justification for plea bargaining, then 'public interest' actually offers criminal justice authorities a 'supermarket' by introducing multiple options where different combinations of goods can be manipulated to serve certain purposes. Furthermore, the adoption of 'public interest' also reflects a shift in criterion from subjective to a combination of subjective and objective. In this sense, by emphasizing 'public interest'

³⁸ Home Office, *Criminal Statistics, England and Wales, 1976* (Cmnd 6909) (London: HMSO, 1977).

³⁹ *R v Hall* [1968] 2 Q.B. 788.

⁴⁰ *Supra* note 5, Baldwin and McConville (1978), p. 288.

⁴¹ (1968) 52 Cr. App. R. 21. See also *Fraser*, (1982) 4 Cr App. Rep. (S) 254; *Sharkey and Daniels*, [1994] Crim. LR 866.

⁴² *R v Haan* (1968) 52 Cr. App. R. 25

⁴³ Frank J. Sorauf, 'The Public Interest Reconsidered', 4(19) (1957) *The Journal of Politics*, 616-639, p. 616.

⁴⁴ S4.12, a-g, *The Full Code Test*, available at

http://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html. Accessed 23 January 2014.

⁴⁵ For discussions on the elements of 'public interest', see e.g., Andrew Ashworth, 'The "Public Interest" Element in Prosecutions', Sep. (1987) *Criminal Law Review*, 595-607.

instead of ‘genuine remorse’, the tolerance on plea agreement was actually enhanced, as shown in *R v Boyd*⁴⁶ in 1980:

The policy of the courts is that where a man does plead guilty, which does give rise to public advantage and avoids the expense and nuisance of a trial, which may sometimes be a long one, the court encourages pleas of guilty by knocking something off the sentence which would otherwise have been imposed if there had not been a plea of guilty.

In this case, the exchange between guilty plea and sentence discount was not only acknowledged but also even ‘encouraged’ for the avoidance of formal trials which could be both ‘expensive’ and a ‘nuisance’.

The pressure from the court to push the accused into a guilty plea was realistic and strong.⁴⁷ In *R v Barnes* in 1971, for instance, the conviction was quashed by the Court of Appeal because the original judge had put ‘extreme pressure on the accused to plead guilty’ by claiming that the accused was ‘plainly guilty, and that the time of the court was being wasted’.⁴⁸ Later the pressure on the defendant from the judiciary was manipulated through more subtle techniques, and the difficult relationship between the expectation of the accused and the changeable attitude of judicial organs were intensively embodied in the fierce confrontation in *R v Turner*⁴⁹ in 1970. In this case the offender changed his plea from not guilty to guilty because his counsel indicated a probable reduction from imprisonment to a non-custodial sentence after the meeting with the judge in a private room.

The *Turner* case exposed the long standing practice of offering judicial concession for a guilty plea, and further stressed the necessity to set rules on such practice instead of keeping reticent about it. Several major principles referring to both the rights and obligations of lawyers, of judges, and of the accused were established in this case concerning ‘plea bargaining’, and the most important rule was that judges should ‘never indicate the sentence which he is minded to impose’, with only one exception that the possible sentence was irrelevant to guilty pleas. The judgment also reclaimed the principle that ‘justice must be administered in open court’. However, private communication between counsels and judges was allowed in *Turner* when ‘it is felt to be really necessary’. How to define ‘really necessary’ falls into the judges’ discretion.

The ambiguities in the judgment of the *Turner* case indicated a dilemma between the disclaiming of plea agreement in criminal policy, and its carefully broadened application in practice. The judgment in *R v Atkinson*⁵⁰ in 1978 clearly expressed this dilemma that on the one hand, ‘plea bargaining has no place in the English criminal law’ and there was ‘no room for any bargain about sentence between Court and defendant’; while on the other hand, the judgment also loosened the *Turner* rules by claiming that ‘it is not possible to lay down ... any general rule that there must never be any communication outside trial, either openly or privately, between the judge and those representing the Crown and the accused’. According to Baldwin and McConville’s research on the cases heard in the Court of Appeal between 1974 and 1978, there were altogether 25 appeals related

⁴⁶ (1980) 2 Cr. App. R. (S) 234.

⁴⁷ For the judge’s role in promoting plea bargaining in Britain, see Mike Mc Conville and Luke Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (Glos and Massachusetts: Edward Elgar Publishing Limited, 2014).

⁴⁸ *R v Barnes* (1971) 55 Cr. App. R. 100

⁴⁹ *R v Turner* [1970] 2 QB 321

⁵⁰ *R v Atkinson* (1978) 67 Cr. App. R. 200

to 'plea bargaining', showing the frequent disregarding of established directions in practice,⁵¹ and from case to case those negative responses from the Court were gradually reduced into a 'hallow denunciation'.⁵²

Judicial decisions on cases during this period showed that the private meeting beyond open court was the result of demands from both criminal justice authorities and the defendants. Apart from the judge's use of such an instrument on his own initiative, the defendant also had strong motivations for seeking sentence indications. In *R v Davis* in 1978, for instance, the defendant's counsel met the judge in private twice to deliver a message from his client. The latter required him to make sure that a discount would be given if he pleaded guilty.⁵³ Incentives for such meetings mainly originated from the uncertainties of the trial proceedings, and those private discussions were 'almost inevitably about sentence'.⁵⁴ With these practices, plea bargaining had already become 'a fact of life in the English criminal justice system' approved by the court itself, and the 'blind indifference of judges and lawyers' on this issue by criticizing plea bargaining with 'lip service' only reinforced the 'back-stairs agreements and discussions' in an informal way.⁵⁵

2.1.3 Since the 1990s: Explicit Acceptance in Legislation and Case Law

Confirmation of the existence of plea bargaining in academic research, and the frequent use of private pre-trial meetings for sentence negotiation called for a more serious attitude towards this legal instrument. In 1993 the Report of the Royal Commission on Criminal Justice (the 1993 Report) admitted that 'for many decades defendants who plead guilty in the Crown Court have been regarded by the Court of Appeal as usually entitled to a discount or reduction in their sentence'.⁵⁶ This requirement was further strengthened by another phenomenon in criminal proceedings. 'Cracked trials', which refers to 'cases which are listed for a contested trial but on the day of the trial the case is disposed of in some other way',⁵⁷ started to become a 'growing and urgent problem',⁵⁸ and courts, victims and witnesses, and other co-defendants all suffered from the last-minute guilty plea.

In such circumstances, plea bargaining in the 1990s started to be 'dealt with in the Code, in contrast with the conventional English reticence about its very existence'.⁵⁹ To better save judicial resources and spare parties from unnecessary anxiety, the 1993 Report proposed two methods to encourage an early guilty plea. One recommendation was to adopt a 'graduated sentence discount' that 'the earlier the plea the higher the discount';⁶⁰ whereas the other approach was 'sentence canvass', which suggested that 'at the request of the defence counsel on instructions from the defendant, judges should be able to indicate the highest sentence that they would impose at that point

⁵¹ In *Plimmer* the judge described the private pre-trial meeting with counsels as 'my general practice in this matter'. (1975) 61 Cr. App. R. 264

⁵² John Baldwin and Michael McConville, 'Plea Bargaining and the Court of Appeal', 6(2) (1979) *British Journal of Law and Society*, 200-218.

⁵³ (1978) Unreported (5854/c/77), cited in *ibid*.

⁵⁴ *Ibid*, p. 207.

⁵⁵ *Supra* note 5, Baldwin and McConville (1978), pp. 305-306.

⁵⁶ S41 of Chapter Seven: Pre-Trial Procedures in the Crown Court (II), *The Report of the Royal Commission on Criminal Justice 1993*, p. 110.

⁵⁷ Andrew Sanders *et al*, *Criminal Justice*, 4th Edition (Oxford: OUP, 2010), p. 439.

⁵⁸ Andrew Ashworth, 'The Royal Commission on Criminal Justice: Part 3: Plea, Venue and Discontinuance', Nov. (1993) *Crim. L. R.*, 830-840, p. 835.

⁵⁹ *Supra* note 45, Ashworth (1987), p. 600.

⁶⁰ S47 of Chapter Seven: Pre-Trial Procedures in the Crown Court (II), *The Report of the Royal Commission on Criminal Justice 1993*, p. 111.

on the basis of the facts as put to them'.⁶¹ The second proposal attempted to overturn the *Turner* rules.⁶² Finally, the utilitarian analysis under the title of 'balancing' was adopted when considering the incentives for and pressures on defendants to plead guilty. On the one hand, the 1993 Report admitted that 'it would be naïve to suppose that innocent persons never plead guilty because of the prospect of sentence discount',⁶³ while on the other hand, such concern was overwhelmed by the purpose of minimizing the waste of resources.

Coherent with such ideology, Parliament saw the fit to give legislative effect to the established principle.⁶⁴ Consequently, the Criminal Justice and Public Order Act 1994 (CJPOA 1994) provided in s48 that 'account must be taken of the stage in the proceedings at which the indication of a guilty plea was made and the circumstances in which the indication was given'.⁶⁵ Nevertheless, in both the 1993 Report and the CJPOA 1994 judges were not obliged to give sentence discount, and they had no obligation to indicate the size of the discount.

Even so, the discount size had been gradually established through judicial decisions instead of statutes. In *R v Buffrey* in 1993, for example, the Court gave two comments on the possible sentence discount. For one thing, 'it would be quite wrong to suggest that there was any absolute rule as to what the discount should be'; while for another, 'one third would very often be an appropriate discount from the sentence which would otherwise be imposed on a contested trial'.⁶⁶ From this judgment two pragmatic justifications for plea bargaining can be observed: one is for the smooth running of the criminal justice system, and the other is to spare 'victim and/or witnesses from having to attend court and give evidence'.⁶⁷

Nevertheless, there were always controversies on how to define the discretionary power on judicial concession. For instance, in *R v Costen*⁶⁸ in 1989 the Court listed four circumstances which should be principally considered when withholding mitigation: (1) for the purpose of the protection of the public; (2) 'tactical plea', referring to the situation 'where an offender delayed his plea until the final arraignment, in a case where he could not hope to put up much of a defense'; (3) in the situation where the defendant was caught 'red-handed'; and (4) in the situation where 'the count was a specimen'.⁶⁹ Furthermore, the Court in *R v Carroll*⁷⁰ in 1995 held that 'the maximum sentence for any offence should be reserved for the most serious offences of that kind', and the maximum sentence issued in the first instance for this case was 'wrong in principle'.

In 2003 the Criminal Justice Act 2003 (CJA 2003) was promulgated, and principles established in the CJPOA 1994 were inherited by s 144 of the new Act. In its s 174 (2) (d) the CJA 2003 supplements to the principle by stating that under circumstances mentioned in s 144 (1) 'the court imposes a punishment on the offender which is less severe than the punishment it would

⁶¹ S50 of Chapter Seven: Pre-Trial Procedures in the Crown Court (II), *The Report of the Royal Commission on Criminal Justice 1993*, p. 113.

⁶² *Supra* note 58, Ashworth (1993), p. 836.

⁶³ S42 of Chapter Seven: Pre-Trial Procedures in the Crown Court (II), *The Report of the Royal Commission on Criminal Justice 1993*, p. 110.

⁶⁴ Andrew Ashworth, *Sentencing & Criminal Justice*, 2nd Edition (Edinburgh: Butterworths, 1995), p. 136.

⁶⁵ Robin C. A. White, *The English Legal System in Action: The Administration of Justice*, 3rd Edition (Oxford: OUP, 1999), p. 178.

⁶⁶ *R v Buffrey* (1993) 14 Cr. App. R. (S.) 511

⁶⁷ *Supra* note 64, Ashworth (1995), p. 137.

⁶⁸ *R v Costen* (1989) 11 Cr. App. R. (S.) 182

⁶⁹ It should be noticed here that apart from the four situations listed here, there are also specific provisions in the 2003 Sentencing Act prescribing minimum mandatory sentences in certain circumstances, and for these circumstances the sentence reduction for guilty plea is restricted.

⁷⁰ *R v Carroll* [1995] 16 Cr. App. R. (S.) 488

otherwise have imposed', and such reduction should be stated in open court. To provide further restrictions and directions for sentencing in courts, the SGC stipulated definitive guidelines on the Reduction in Sentence for a Guilty Plea, firstly in 2004 and then revised in 2007. In the Guidelines the purpose of the reduction for a guilty plea is described in s 2.2 as follows:

*A reduction in sentence is appropriate because a guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence. The reduction principle derives from the need for the effective administration of justice and not as an aspect of mitigation.*⁷¹

With all these reforms in both legislation and judicial decisions, the *Turner* rules were continually 'flouted' during the past decades.⁷² In Auld L. J.'s Review of the Criminal Courts of England and Wales (2001) those rules were directly challenged by the proposal that 'a graduated scheme of sentencing discounts (for a guilty plea) ... should be coupled with a system of advance indication of sentence for a defendant considering pleading guilty'.⁷³ The suggestion of 'advance indication' was accepted by s3 of the CJA 2003, and finally those rules were abandoned and replaced by new instructions established in the *Goodyear* case⁷⁴ in 2005. This case set rules that a defendant's request should normally take place in an open court, and a sentencing indication can be given only based on that request. One of the key points in the judgment is that 'the indication is binding on the judge and any other judge who deals with the defendant, provided the defendant pleads within a reasonable time',⁷⁵ and according to it the discretionary power of the judge is restricted by his own sentencing indication. Such restriction actually translates the exchange between judicial concession and guilty plea into a mutually binding agreement.

2.2 Current Legal Regime of Plea Agreement

From the brief review of the development of plea bargaining in England and Wales, it can be seen that the exchange between legal concessions and guilty plea has long existed and is widely used. After decades of evolution, plea bargaining in England and Wales gradually transmutes into three categories: sentence bargaining, charge bargaining, and fact bargaining.⁷⁶

2.2.1 Type I: Sentence Bargaining

⁷¹ The SGC, *Reduction in Sentence for a Guilty Plea: Definitive Guideline*, firstly issued in 2004, and then revised in 2007.

⁷² *Supra* note 57, Sanders *et al* (2010), p. 454.

⁷³ Auld L. J., 'Preparing for trial', in Sept. (2001) *A Review of the Criminal Courts of England and Wales*, p. 395. Available at <http://webarchive.nationalarchives.gov.uk/+http://www.criminal-courts-review.org.uk/chpt2.pdf>. Accessed 5 November 2014.

⁷⁴ [2005] EWCA Crim. 888

⁷⁵ D.A. Thomas, 'Sentencing: Advance Indication of Sentence – New Procedure', Aug. (2005) *Crim. L. R.*, 659-664, p. 664.

⁷⁶ For the categorization on plea bargaining in English criminal justice system, see, e.g., Regina Rauxloh, *Plea Bargaining in National and International Law* (Oxon and New York: Routledge, 2012), pp. 25-26; *supra* note 57, Sanders *et al* (2010), pp. 440-488.

A common form of plea bargaining in England and Wales is the exchange between a defendant's guilty plea and the judicial concession in sentence. In this form the concession can be categorized into two groups: one is sentence discount, and the other refers to 'other benefits'⁷⁷ in sentencing.

2.2.1.1 Sentence Discount Offered by Courts

For a guilty plea the most direct reward is sentence discount. From previously mentioned cases it is evident that such discount is used as routine in judicial practice. The SGC guidelines have established a sliding scale of sentencing discount ranging from the maximum 1/3 at the first reasonable opportunity to the minimum 1/10 at the door of the court or after the trial has begun, to encourage an early guilty plea. According to Annex 1 of the SGC Guidelines the substantive meaning of 'first reasonable opportunity' has to be decided in the light of the 'particular facts of the case'. It may be 'the first time that a defendant appears before the court'; judges, however, still may consider that 'it would be reasonable to have expected an indication of willingness even earlier'. The CPS guidance further clarified the time of 'first reasonable opportunity' as 'at an appearance in the magistrates' court ... or immediately on arrival at the Crown Court'.⁷⁸

There is always tension between judges' discretion and the binding forces of these guidelines.⁷⁹ On the one hand, the Court of Appeal is constantly resisting such statutory obligations. As it was stated in *R v Last* in 2005, the Guidelines does not 'remove the judges' discretion'; instead, judges can decide not to follow the Guidelines 'as long as [they] gives valid reasons for not so doing'.⁸⁰ On the other hand, sentencing guidelines are strengthening the restrictions on judges' discretion. For instance, the Coroners and Justice Act 2009 (CJA 2009) requires judges to 'follow any sentencing guidelines'.

The CJA 2009 also imposes on the Sentencing Council the obligation of monitoring the consistency between actual sentencing and the guidelines, which leads to the Crown Court Sentencing Survey (CCSS) since 1st October 2010. Since then three full reports have been released in 2011, 2012 and 2013. Statistics show that about 88 per cent in 2011, 84 per cent in 2012 and 76 per cent in 2013 of the offenders who made an early guilty plea received the highest level of reduction,⁸¹ indicating high consistency within the Crown Court with sentencing guidelines. Scholars also noticed significant distinctions in sentencing between those who plead guilty and those who do not. Flood-Page and Mackie's research found that in rape cases the normal sentence for guilty pleas is 3.9 years, while that for not guilty pleas is 8.7 years.⁸² As to magistrates' courts, the average sentence length for a guilty

⁷⁷ *Supra* note 57, Sanders *et al* (2010), p. 445.

⁷⁸ See 'First reasonable opportunity' in the CPS Guidance on Sentencing – Overview, available at http://www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles/index.html. Accessed 6 February 2014. This guidance explicitly derecognizes the stage of 'plea and case management hearing (PCMH)' as 'first reasonable opportunity'.

⁷⁹ About the relationship between sentencing guidelines and the regulating power of the Court of Appeal on sentencing, see e.g., Andrew Ashworth and Julian V. Roberts (eds.), *Sentencing Guidelines: Exploring the English Model* (Oxford: OUP, 2013).

⁸⁰ *R v Last* [2005] EWCA Crim 106.

⁸¹ In CCSS reports, 'early guilty plea' refers to the period before or at the PCMH. The 2011 report is available at http://sentencingcouncil.judiciary.gov.uk/docs/CCSS_Annual_2011_-_revised.pdf; the 2012 report is available at http://sentencingcouncil.judiciary.gov.uk/docs/CCSS_Annual_2012.pdf; the 2013 report is available at http://sentencingcouncil.judiciary.gov.uk/docs/CCSS_Annual_2013.pdf. Accessed 27 October 2014.

⁸² Claire Flood-Page and Alan Mackie, *Sentencing Practice: An Examination of Decisions in Magistrates' Courts and the Crown Court in the Mid-1990's*, Home Office Research Study 180 (London: Home Office, 1998), p.91.

plea is 3.7 months, compared with 3.8 months for others.⁸³ They also noticed different proportions of guilty plea in similar crimes. For instance, the not-guilty plea rate in rape cases can be 70 per cent, while that in other sexual offences is only 39 per cent.⁸⁴

Apart from sentencing guidelines, there are other restrictions on the judicial discretion on plea bargaining. For crimes there are usually two restrictions. The first restriction concerns murder cases where the sentence is bound by the mandatory ‘whole life order’⁸⁵ with a minimum term of imprisonment ranging from one’s remaining years (e.g., a murder conducted by an offender convicted of murder previously) to 30 years (e.g., a murder of a police officer), and to 15 years. The second restriction is about crimes carrying a presumptive minimum custodial sentence. According to the Crime (Sentences) Act 1997 (CSA 1997), for instance, a mandatory life sentence will be imposed on a second serious offence, and a minimum sentence of seven years on a third Class A drug trafficking offence.⁸⁶ From the perspective of offenders, the restriction on sentence discount mostly refers to crimes falling into Schedule 15 of the CJA 2003, which are described as ‘serious offences’.

For offenders committing crimes presumed to be ‘dangerous’, and for the purpose of public protection, ‘a longer than commensurate sentence’⁸⁷ is expected to be imposed on the accused. The decision in *R v P and Blackburn* in 2008 has suggested that in such cases the mathematical approach should not be taken.⁸⁸ One typical case of this type is *R v Kiely* in 2009. In this case, the appellant plead guilty on nine charges, including robbery and possessing a firearm. He also offered substantial assistance in a murder case. The council claimed at least 20 per cent sentence reduction for each fact based on sentencing guidelines and case law. Nevertheless, the Court considered the appellant as ‘a dangerous violent criminal’ and the offences as ‘very serious’, and imposed on the appellant life imprisonment so that ‘the public can properly be protected’.⁸⁹

Apart from sentence discount explicitly prescribed in statutes and guidelines, pleading guilty or not may also make differences in the courts’ selection among penalties.

Figure 4.1 Custody Rate in Crown Court: Comparison between Guilty Plea and Non-Guilty Plea

⁸³ *Ibid.*, p. 34.

⁸⁴ *Ibid.*, p. 91.

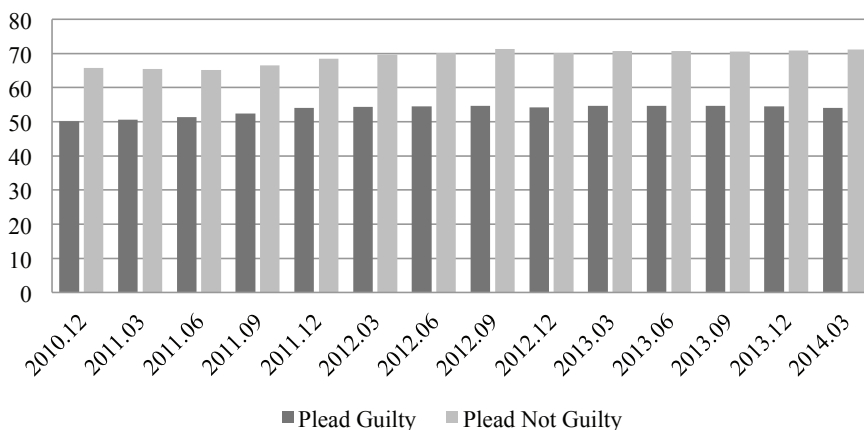
⁸⁵ Schedule 21 of the CJA 2003

⁸⁶ Ralph Henham, ‘Making Sense of the Crime (Sentences) Act 1997’, 61(2) (1998) *The Modern Law Review*, 223-235, p. 224.

⁸⁷ *Supra* note 57, Sanders *et al* (2010), p. 445.

⁸⁸ *R v P; R v Blackburn*, [2007] EWCA Crim 2290

⁸⁹ *R v Kiely* [2009] EWCA Crim 756



Source: Ministry of Justice, *Criminal Justice Statistics Quarterly* (2010.12-2014.03)

Note: These data record the past three months' statistics since the date marked on the X axis. For instance, the data for '2010.12' covers the period from '2010.10 to 2010.12'.

Figure 4.1 shows that from December 2012 to March 2014, the proportion of offenders who plead guilty and are sentenced to custody in Crown Courts is between 50 and 54 per cent; and that for non-guilty pleas and sentenced to custody is between 65 and 70 per cent. Instead of a statutory basis, such difference is more based on judges' daily practice.

2.2.1.2 Sentence Reduction by Choosing Courts

Apart from getting direct discount from judges, offenders may also benefit from a guilty plea through taking advantage of the jurisdiction division between magistrates' courts and the Crown Court. The two-tier structure of criminal courts in England and Wales may encourage or create incentives for persuade offenders to choose to plead guilty because the sentencing power of the magistrates' court is restricted to a maximum six months' imprisonment (or no more than 12 months when more than one offence is considered),⁹⁰ or fines of up to £5,000.

In England and Wales criminal offences are divided into three groups: crimes triable only on indictment, crimes triable only summarily, and crimes triable either-way. Restrictions on the sentencing power of the magistrates' courts are especially influential to offenders in either-way cases, considering that magistrates' courts possess the power to send a case to the Crown Court by declining their jurisdiction. Research has shown that for this group of offences, the average punishment can be more lenient in the magistrates' courts than that in the Crown Court.⁹¹ Although it is the magistrates' court making the allocation decisions, the defendants' guilty plea can often 'persuade' magistrates to process the case by themselves.

In 2012, the old committal proceedings in the magistrates' courts under the CJA 2003 were replaced by a new 'allocation procedure'. The key difference between the two is that when

⁹⁰ Article 154 of the CJA 2003

⁹¹ *Supra* note 82, Flood-Page and Mackie (1998). There is also some research in recent years proving that for cases submitted to the Crown Court, the bench declining jurisdiction in magistrates' court is a major reason. See Steven Cammiss, 'Deciding Upon Mode of Trial', 46(4) (2007) *The Howard Journal*: 372-384.

distributing cases, the former requires the magistrates' courts to examine justice comprehensively during the committal hearing, while the latter only asks judges to evaluate whether the magistrates' court has sufficient statutory sentencing power. When preparing the allocation procedure, the judge is authorized to indicate whether a custodial or non-custodial sanction would be imposed if the offender pleads guilty based on the offender's request.⁹² This modification has at least two effects: one is to facilitate the magistrates' courts to retain jurisdiction rather than committing cases to the Crown Court; the other is to enhance the incentives for the offender to plead guilty at an earlier stage rather than delaying it until the Crown Court trial.

2.2.2 Type II: Charge Bargaining

Charge bargaining refers to the situation of 'the defendant agreeing to plead guilty in exchange for a less serious charge'.⁹³ This type of plea agreement was firstly acknowledged by the Criminal Law Act 1967 (CLA 1967) to avoid the odd consequences that happened in cases like *R v Hazeltine* in 1967. In this case the defendant pleaded not guilty to the charged crime of wounding with intent to cause grievous bodily harm; instead, he offered a plea of guilty of unlawful wounding. Hazeltine's guilty plea was rejected by the Crown Court, and then he was acquitted by the jury under the charged crime. Later the Crown Court tried to sentence the defendant on the crime that he pleaded guilty. The Court of Appeal that held that when the Crown Court entered a trial based on the plea of not guilty, the guilty plea on a lesser crime could not be reinstated by either the judge or the prosecutor, however, quashed this sentence.⁹⁴ To solve this dilemma, the CLA 1967 required that 'whenever a count is put to the accused on which the jury could find him guilty of a lesser offence, he may offer a plea of not guilty as charged but guilty of the lesser offence. If the plea is accepted, he stands acquitted of the offence charged, and the court proceeds to sentence him for the lesser matter'.⁹⁵

As it is indicated in *Hazeltine* and the CLA 1967, in contrast to the sentence bargaining, the controlling power in charge bargaining is mainly with police and prosecutors rather than judges. Apart from those minor offences where the police can make independent charge decisions, in practice the charge bargaining is mainly a product of the co-operation of police and prosecutions. In these cases, the CPS normally has no direct contact with the defense lawyers, but gives guidance to the police through the 'telephone charging system'.⁹⁶

Nowadays, charge bargaining has been recognized as a commonplace of the criminal proceedings in both magistrates' courts and the Crown Court.⁹⁷ It relies on two elements. The first one is the prosecutors' discretion on shaping charges. The POA 1985 authorizes Crown Prosecutors to make additions, deletions or alterations to the charges, as well as terminating proceedings altogether. This power is further enlarged by the CJA 2003 that the determining power on the initial charge in non-minor crimes is transferred from the police to the CPS.⁹⁸ Prosecutors' power in shaping charges is also recognized by the judiciary. In *R v Grafton* in 1993, for instance, the Court of Appeal confirmed that a prosecutor was free to drop or reduce charges without the need to refer the matter to the trial judge.⁹⁹

⁹² CJA 2003 (Commencement No. 31 and Saving Provisions) Order 2013, 2013 No. 1103 (C. 46), available at <http://www.legislation.gov.uk/uksi/2013/1103/made>. Accessed 17 December 2013.

⁹³ *Supra* note 57, Sanders *et al* (2010), p. 463.

⁹⁴ *R v Hazeltine* [1967] 2 QB 857; (1967) 51 Cr. App. R. 351.

⁹⁵ John Spark, *A Practical Approach to Criminal Procedure, 13th Edition* (Oxford: OUP, 2010), p. 280.

⁹⁶ Interview with prosecutors in the CPS, 24 November 2013.

⁹⁷ DPP v Deborah Ann Edgar, 2000 WL 191281.

⁹⁸ S28 of the CJA 2003.

⁹⁹ *R v Grafton* [1993] Q.B. 101

Considering the possible ‘unsuccessful’ outcome such as acquittals, and cost-benefit evaluations, there is strong motivation for prosecutors to encourage a guilty plea, even though both the Code for Crown Prosecutors 2010 (CCP 2010) and its Consultation Document in 2012 require them to accept the defendant’s plea only if ‘they think the court is able to pass a sentence that matches the seriousness of the offending ... [and] prosecutors must never accept a guilty plea just because it is convenient’. As was acknowledged in cases like *R v Steward*¹⁰⁰ in 1990, once the prosecutor downgrades the charge to a lower level offence, the judge is bound to that charge and cannot make the sentence decision based on the actual offence.

The charge bargaining is also highly relevant to the two-tier structure of the jurisdiction based on crimes in England and Wales which produces opportunities for prosecutors to choose courts by transforming the nature of the charged crime. During the past decade, there has been a strong trend of extending the scope of summary trials and meanwhile leaving the most serious crimes for the Crown Court.¹⁰¹ This trend to some extent encourages prosecutors to take speed and expediency into consideration, as it is stated in the Code for Crown Prosecutors that ‘prosecutors should consider the effect of any likely delay if a case is committed or sent to the Crown Court, and the possible effect on any victim or witness if the case is delayed’.¹⁰² Through charge bargaining a case triable only on indictment may be reduced to either-way cases, and make the summary procedure available in the magistrate’s courts. Even after sending a case to the Crown Court, charge bargaining is still rife partly as the consequence of administrative and bureaucratic convenience.¹⁰³

2.2.3 Type III: Facts Bargaining

The third type of plea agreement in England and Wales is fact bargaining, which means that ‘the prosecutor, in exchange for the guilty plea, promises to present the facts of the case in court in a way beneficial to the defendant’.¹⁰⁴ Through the selection of factual counts of the case, fact bargains are always combined with charge bargains and sentence bargains, leading to enormous discounts for defendants.¹⁰⁵

A typical case of this kind is *R v Peverett* in 1996.¹⁰⁶ In this case the defendant was charged with 16 indecent assaults on 11 students aged between 11 and 13 from 1969 to 1977. Among all the charges Peverett pleaded guilty to nine offences relating to seven complainants in exchange for a non-custodial sentence, and his counsel reached an agreement with the prosecutor that (1) the defendant’s ‘circular movements by his hands on the buttocks’ of complainants was ‘fondling’ instead of ‘spanking’, and (2) the defendant’s motivation was to ‘express his power over the children’ rather than ‘generate a sexual thrill’. This agreement was accepted by the Crown Court and the defendant was sentenced to 18 months’ imprisonment with two years’ suspension.

In cases similar to *Peverett*, the facts of crimes were to some extent manipulated by public prosecutors. The judiciary has noticed this problem and made some effort to regulate such agreements. One solution for judges is to direct a Newton hearing.¹⁰⁷ The Newton hearing is a post-conviction

¹⁰⁰ *R v Steward* (1990) 12 Cr App Rep (S) 15.

¹⁰¹ *Supra* note 91, Cammiss (2007), p. 384.

¹⁰² The Code for Crown Prosecutors 2010, para 9.2. Available at <http://www.cps.gov.uk/publications/docs/code2010english.pdf>. Last visited 29 September 2013.

¹⁰³ *Supra* note 10, Henham (2002), p. 151.

¹⁰⁴ *Supra* note 76, Rauxloh (2012), p. 26.

¹⁰⁵ *Supra* note 57, Sanders *et al* (2010), p. 485.

¹⁰⁶ *Peverett*, Attorney General’s Reference (No.44 of 2000), [2001] 1 Cr. App. R. 27; [2001] 1 Cr. App. R. (S.)

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¹⁰⁷ For guilty plea cases where the Newton hearing is applied, see, e.g., *R v Beswick* [1996] 1 Cr. App. R.(S.)

hearing established in 1983 in *R v Newton*,¹⁰⁸ and it is often applied when ‘a defendant wishes to plead guilty to the offence, but disputes the factual basis of the prosecution’.¹⁰⁹ This procedure can be utilized by the judiciary to re-evaluate facts material only to sentence, which ‘[have] not been resolved by the verdict of the jury, and [have] not been the subject of evidence called during the trial’.¹¹⁰ In this sense, the function of a Newton hearing is to build a factual basis for sentence rather than conviction, and consequently such a hearing only concerns ‘how the offence was committed, not whether it was committed’.¹¹¹

As happened in *Peeverett*, judges in practice do not necessarily act against the prosecutor, especially when their opinions are consulted in advance. In fact, the *Goodyear* rules set the judge’s sentence indication on the basis of factual consent, and make it likely to transfer fact bargains from random events to ‘a routine feature of Crown Court work in future’.¹¹²

2.3 Motivations for Plea Agreement

Several arguments are frequently referred to in justifying plea bargaining. First and foremost the argument is based on efficiency: to ensure that all those who are guilty plead guilty, and do so at the earliest stage of the process.¹¹³ ‘Efficiency’ is valued for two main reasons. The first one is the considerably increased caseload, which has been quoted in the argument for the adoption of plea bargaining since the 1970s¹¹⁴ and is still widely claimed in current discussion.¹¹⁵ The other reason is the high expense of ordinary procedure. According to Home Office’s research in the Crown Court that during 1997 and 1998, for instance, the average cost of a contested case was £17, 750, compared with £2,600 for a plea bargained case.¹¹⁶ As it is described by Ashworth, the criminal trial is an expensive commodity along with overall cost, and shortage of judges, court buildings and so forth.¹¹⁷

Besides the consideration of efficiency, a defendant’s guilty plea is, from the view of the proponents, a sign of remorse and repentance, which to some extent may justify the sentence reduction. In *Turner* the Court of Appeal’s attitude exactly reflected this theory by saying that ‘it will often include advice that a guilty plea, showing an element of remorse, is a mitigating factor which might enable the court to give a lesser sentence’.¹¹⁸

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¹⁰⁸ *R v Newton* [1983] 77 Cr. App. R. 13

¹⁰⁹ Alisdair A. Gillespie, ‘The Right to a Newton Hearing’, 74 (2010) *The Journal of Criminal Law*, 7-9, p. 8.

¹¹⁰ For the CPS Guidance on Newton hearings, available at

http://www.cps.gov.uk/legal/l_to_o/newton_hearings/, last visited 15 January 2014.

¹¹¹ David Ormerod, and the Right Honorable Lord Justice Hooper, *Blackstone’s Criminal Procedure 2011* (Oxford: OUP, 2010), p. 1602.

¹¹² *Supra* note 57, Sanders *et al* (2010), p. 486.

¹¹³ Andrew Ashworth and Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions’, 2 (2007) *Crim. Law and Philos.*, 21-51, p. 34.

¹¹⁴ It was showed that between 1965 and 1974 the work of the Crown Court in England more than doubled. See Inter-Departmental Committee, *The Distribution of Criminal Business between the Crown Court and the Magistrates’ Court*, Cmnd. 6326 (London: HMSO, 1975).

¹¹⁵ See George Fisher, ‘Plea Bargaining’s Triumph’, 109 (2000) *The Yale Law Journal*, 857-1086.

¹¹⁶ Richard Harries, ‘The Cost of Criminal Justice’, (1999) *Home Office Research, Development, and Statistics Directorate*, research findings no. 103, available at

<http://www.lawteacher.net/PDF/Cost%20of%20Criminal%20Justice.pdf>. Accessed 5 November 2014.

¹¹⁷ *Supra* note 113, Ashworth and Zedner (2007), p.35.

¹¹⁸ *Supra* note 49, *Turner*.

Furthermore, it is argued that the adversarial tradition not only leads to a complex procedural system, but also, as claimed by many scholars, embraces an ‘ambiguous, unsettled and hypocritical attitude’.¹¹⁹ Through plea bargaining, ‘rational parties forecast the expected trial outcome and strike bargains that leave both sides better off by splitting the saved cost of the trial’.¹²⁰ The increased predictability and the reduced harshness of the sanction seem to provide enough motivations for the accused to confess.

The justification of this institution goes even further as it no longer simply sticks to the limited argument of ‘cost/benefit actuarialism’,¹²¹ but also finds other arguments. One of these arguments is to claim ‘administrative realities’. The typical expression as such was stated in *R v Cain* in 1976:

*It was trite to say that a plea of guilty would generally attract a somewhat lighter sentence than a plea of not guilty after a full-dress contest on the issue. Everybody knew that it was so, and there was no doubt about it. Any accused person who did not know about it should know it. The sooner he knew the better.*¹²²

Another argument is that the mechanisms which encourage a guilty plea are in the best interests of victims and witnesses, even though it is the defendants who makes the decision to plead guilty, and accepts the consequences of the decision. So on the one hand the Royal Commission on Criminal Justice argued in their report that ‘the procedure ... would be initiated solely by, and for the benefit of, defendants who wish to exercise a right to be told the consequence of a decision which is theirs alone’;¹²³ while on the other hand, it is said that plea bargaining spares witnesses and victims from ‘having to attend court and from what may be distressing experiences of giving evidence’.¹²⁴ Such arguments on victims and witnesses are consistent with the SGC Guidelines mentioned earlier.

2.4 Potential Risks

Despite of all those motivations, the history of plea bargaining in England and Wales also reveals some risks that the integrity of criminal justice may be undermined. The criticisms of this mechanism are often quite different and sometimes mutually contradictory, depending on the status of the speakers, and many scholars have conducted research on the attitudes of different stakeholders in plea bargaining.¹²⁵ Hereinafter the focus is on three major parties: offenders, victim, and the public.

2.4.1 The Offender’s Perspective: Coercion v Willingness

¹¹⁹ *Supra* note 11, Darbyshire (2000), p. 897.

¹²⁰ Stephanos Bibas, ‘Plea Bargaining Outside the Shadow of Trial’, 117(8) (2004) *Harvard Law Review*, 2463-2547, p. 2464.

¹²¹ *Supra* note 7, McConville (1998), p. 562.

¹²² *R v Cain* [1976] 61 Cr. App. R. 186

¹²³ *Report of the Royal Commission on Criminal Justice* (1993; Cm. 2263; Chair, Lord Runciman) 113, para 51.

¹²⁴ Feilzer and Hood report, cited in *supra* note 57, Sanders *et al* (2010), p. 441.

¹²⁵ See e.g., Julian. Roberts and M. Hough, *Understanding Public Attitudes to Criminal Justice*(Maidenhead: Open University Press, 2005); Julian. Roberts *et al*, ‘Public Attitudes to Sentencing Purposes and Sentencing Factors: An Empirical Analysis’, 11(2009) *Criminal Law Review*, 771-782; William Dawes *et al.*, ‘Attitudes to Guilty Plea Sentence Reductions’, Sentencing Council Research Series 02/11, available at [http://sentencingcouncil.judiciary.gov.uk/docs/Attitudes_to_Guilty_Plea_Sentence_Reductions_\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Attitudes_to_Guilty_Plea_Sentence_Reductions_(web).pdf). Accessed 6 January 2014. The Sentencing Council research collected opinions from offenders, victims, witnesses, and the public.

The principal issue of plea bargaining concerns the willingness of the offender. It means not only that the accused admits the crime willingly, but also that he fully understands the conditions and the consequences. Many cases mentioned earlier show that the evaluation of the free will of the defendant has been constantly an intractable issue, especially when judges are involved in the pre-trial stage and giving indications on sentence discount.

In practice offenders can be pressurized into confession, and such pressure becomes increasingly obvious with the enhancing participation of judges. Although pressure from the judge's clear statement on possible sentence may lead to a nullified plea rendered by the Court of Appeal, the judge's indication allowed in *Goodyear* is difficult to detect and control. During the trial proceedings the defendant can be officially questioned for several times on his attitude towards a guilty plea,¹²⁶ which is highly likely to produce a pressurizing environment for offenders.

It is also argued by scholars that, based on his own analysis of cost and benefit, a barrister may prefer to 'crack cases at the last moment rather than engineer a plea of guilty at an earlier stage or take the case to trial'.¹²⁷ To deal with this the Criminal Procedure Rules 2005 explains that its overriding objective is 'dealing with a criminal case justly', in which 'dealing with the case efficiently and expeditiously' is an indispensable part,¹²⁸ and requires councils to assist the court in avoiding delay and unnecessary hearings.¹²⁹

One argument claims that the coercion of plea bargaining is so strong that it may force innocent people to plead guilty.¹³⁰ As aforementioned, the 1993 Report has explicitly recognized such risk. In both *Turner* and *Goodyear* the obligation of avoiding guilty pleas from the innocent accused is expected to be borne by the defense barristers rather than criminal justice agencies, by requiring the former to 'emphasize that the accused must not plead guilty unless he has committed the acts constituting the offence charged'.¹³¹ The CPS' Code of Conduct has acknowledged that although barristers bear the duty to inform their clients about the consequence and advice the accused not to confess if they are innocent, 'the decision is one for the defendant'.¹³²

This risk has been frequently mentioned in academic research. For instance, McConville noticed that 'no fewer than 58 per cent of the defendants interviewed made some claim ... that they were innocent of some or all of the charges they faced'.¹³³ The key explanation of this phenomenon is that 'innocent individuals might plead guilty for fear of harsher consequences of a wrongful conviction at trial'.¹³⁴

¹²⁶ See Appendix I, 'How Many Times Can Defendants be Requested'.

¹²⁷ *Supra* note 57, Sanders *et al* (2010), p. 454. See also Peter W. Tague. 'Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea'. Jan (2007) *Crim. L.R.*, 3-23; Peter W. Tague, 'Guilty Pleas or Trials: Which Does the Barrister Prefer?' 32 (2008) *Melbourne University Law Review*, 242-274.

¹²⁸ Rule 1.1 (2) (e), CPR 2005

¹²⁹ Rules 3.2-3.3, CPR 2005

¹³⁰ Whether plea bargaining will increase convictions of the innocent is a common issue that frequently mentioned in academic researches, and many of them confirmed its existence. See, e.g., F. Andrew Hessick III and Reshma M. Saujani, 'Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge', 16 (2001) *B.Y.U. Journal of Public Law.*, 189-242.

¹³¹ *Supra* note 49, *Turner*

¹³² Code of Conduct, *Written Standards for the Conduct of Professional Work* (8th Edition), para 11.5, available at

<https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/written-standards-for-the-conduct-of-professional-work/>. Accessed 5 November 2014

¹³³ *Supra* note 5, Baldwin and McConville (1979), p.296.

¹³⁴ Oren Gazal-Ayal and Limor Riza, 'Plea-Bargaining and Prosecution', European Association of Law and

2.4.2 The Victim's Perspective: Participation vs Protection

Another tension area of plea agreement is the exclusion of other stakeholders whose participation rights may be better served under adversarial proceedings. Among them, the victim is in the center. Previous discussion has shown that one justification frequently proclaimed for plea bargaining is that this instrument 'would obviate a victim giving evidence'.¹³⁵ Sparing further stress seems eminently reasonable in domestic violence cases where victims may be more open to plea agreement.¹³⁶ Nevertheless, whether this is always the case still remains questionable. In *Peverett*, for instance, victims, 'looking forward to their day in court' for years, were stunned by the judgment of non-custody of the offender.¹³⁷

Apparently the presumed protection offered by the judiciary is not always welcomed by victims in real life, and as a response, the Code for Crown Prosecutors requires a consideration of victims and their families when assessing whether a guilty plea is acceptable. This Code, however, as many other documents, impairs the validity of such 'consideration' by adding 'the decision rests with the prosecutor'.¹³⁸ Consequently, the consultation with victims 'rarely go[es] far as a genuine discussion, and prosecutors need take no notice of what the victim says'.¹³⁹

2.4.3 The Public's Perspective: Indifferent or Ignorant

In contrast with offenders and victims, the public are not directly involved in individual cases. Their understandings of plea bargaining as well as the administration of criminal justice are largely influenced by second hand resources especially those portrayed by mass media.¹⁴⁰ Therefore misunderstandings exist as 'people often ... think sentences are too lenient, fewer and fewer people are being sent to prison, that judges are out of touch and that crime is just getting worse'.¹⁴¹ However, public opinion is one of the key elements for the policy makers, which in turn may have a direct influence on the offender and the victim's interests.

According to previous studies, plea bargaining is not favored by the public, especially on the issue of sentence discount. The Sentencing Council's empirical research in 2011 showed that respondents often perceived sentencing for the offenders as 'too lenient'. They also showed stronger preference for the victims of the offenders,¹⁴² and consequently their evaluation on plea bargaining quite often converges with that held by the victims. Also in 2011, Prime Minister David Cameron blocked all plans that would enhance sentence discounts for early guilty plea from 30 to 50 per cent

Economics Working Paper No. 013-2009, available at <http://eale.haifa.ac.il/WorkingPapers/Binder%20WP%20013.pdf>. Accessed 5 November 2014

¹³⁵ *R v Billam*, [1986] 1 W.L.R. 349

¹³⁶ *Supra* note 57, Sanders *et al* (2010), p. 496.

¹³⁷ 'The Ex-Head Teacher Abused These Women When They were His Pupils. So Why Didn't He Go to Prison?', available at <http://www.guardian.co.uk/theguardian/2000/jun/22/features11.g24>. Accessed 5 November 2014.

¹³⁸ Section 9, para 9.3, *The Code for Crown Prosecutors: Consultation Document*, (2012) The Director of Public Prosecutions.

¹³⁹ *Supra* note 57, Sanders *et al* (2010), p. 739.

¹⁴⁰ See *supra* note 125, Dawes *et al* (2011).

¹⁴¹ The SC attempts to uncover the 'sentencing myths' by explaining to the public on some confusing understandings. These issues are listed on its website, <http://sentencingcouncil.judiciary.gov.uk/sentencing/sentencing-myths.htm>. Accessed 10 December 2014.

¹⁴² *Supra* note 125, Dawes *et al* (2011).

due to ‘an outcry on the Tory right and in the tabloids’.¹⁴³ These attitudes may become more prevalent as the voice for harsher punishment is getting louder. However, as acknowledged by the Sentencing Council, the public presented a quite ignorant image of the operation of the criminal justice system, and, as mentioned earlier, their opinions were products of ‘the media and word of mouth’.¹⁴⁴

2.5 Features of Plea Agreement in England and Wales

Many scholars have done comparative research on plea bargaining between the English and the American systems, and what they observed in common is the fact that this mechanism is much less popular in England and Wales. This is because of ‘certain features of the American criminal process that given an impetus to negotiated pleas’.¹⁴⁵

The English features which hinder the application of plea bargaining can be summarized into two aspects. On the one hand, in England and Wales judges wield wide sentencing discretion, theoretically making it difficult for the prosecutor to guarantee the promised agreement.¹⁴⁶ Adelstein noticed that the English legal system shared the tradition of the continental principle that ‘if concessions are to be offered in exchange for pleas at all, they must be made by the court itself, in the form of discounts from what would otherwise be seen as the appropriate sentence for the offence in question’.¹⁴⁷

Such tradition can be observed in the guilty plea process. Although the offender’s guilty plea can reduce the prosecutor’s obligation to prove, the court still possesses the options on either proceeding straight to sentence or adjourning the court hearing for more information. Despite the fact that judges sometimes may give sentence indication before the hearing, they are not strictly bound by such indication in the following trial proceeding. Even if the court in the first instance trial approves such bargaining and imposes concessions, there is still a risk that ‘if an unduly lenient sentence [is] imposed, the Attorney-General [may] seek to refer the case to the Court of Appeal under the Criminal Justice Act 1988, s.36’.¹⁴⁸

On the other hand, in England and Wales it is not common for offences to overlap each other.¹⁴⁹ Such a characteristic limits the options for the prosecutor to shape or select charges, and consequently narrows down the flexibility of charge bargaining. Another feature of the English criminal rules is that most offences do not carry a mandatory sentence. So even if the prosecutor can shape charges, he is less capable of shaping the sentence. Furthermore, prosecutors in the English

¹⁴³ Patrick Wintour *et al*, ‘Ken Clarke Forced to Abandon 50% Sentence Cuts for Guilty Pleas’, *The Guardian*, 21 June 2011, available at <http://www.theguardian.com/law/2011/jun/20/ken-clarke-abandon-sentence-cuts>. Accessed 10 December 2014.

¹⁴⁴ *Supra* note 125, Dawes *et al* (2011).

¹⁴⁵ *Supra* note 5, Baldwin and McConville (1979), p. 288.

¹⁴⁶ While on the contrary, one crucial cause for the growth of plea bargaining in the United States in the early 19th century was that the liquor law on the one hand provided the prosecutor with options of charges, and meanwhile on the other, left judges little discretion. See *supra* note 115, Fisher (2000), p. 874.

¹⁴⁷ Richard Adelstein, ‘Plea Bargaining: A Comparative Approach’, in P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law* (London: Macmillan, 1998), 46-50, p. 47. See also, e.g., Silvia S. G. Casale, *Plea Compromise in New York and London*, PhD Dissertation, Political Science Department, Yale University; Ralph J. Henham, ‘“Truth in Plea-Bargaining”: Anglo-American Approaches to the Use of Guilty Plea Discounts at the Sentencing Stage’, 29 (2000) *Anglo-American Law Review*, 1-38; *supra* note 6, Vamos (2000).

¹⁴⁸ *R v Peverett (Robin)* [2001] 1 Cr. App. R. 27

¹⁴⁹ *Supra* note 6, Vamos (2000).

system are not professionally trained as public prosecutors and they do not possess the power to recommend sentences to judges, which again impairs their control of the final results.¹⁵⁰

Based on these attributes, the use of plea agreement in England and Wales appears to be less prevalent, and they are manipulated in two manners. The first one is the direct bargaining between the offender and the prosecutor. As it was observed by Ashworth, ‘when it is presented to the court for sentence, it is a case which may have been negotiated in certain ways so that it is qualitatively different from the case originally brought by the police’.¹⁵¹

Another manner is indirect bargaining where the judge plays an implicit role in the deal. Sentencing guidelines are issued to make the sentence discount for guilty plea more transparent, precise, and binding, and cases such as *Goodyear* have created channels for judges to give sentence indications, even though they still ‘retain an unfettered discretion’ to give any.¹⁵² These two manners always exist side by side in plea agreement.

During the past decades, plea agreement in the English and Welsh criminal justice has experienced significant expansion. The general ideology appears to be the earlier the plea, the swifter the proceeding, the better. Some early judgments on guilty plea cases have shown the preference on immediate pleas. For instance, in *R v Hollinton* in 1986 the Court held that:

*If defendants put up tactical pleas and then change them to pleas of guilty when they are finally arranged, they cannot expect to get the same discount as they would have done if they had pleaded guilty at the beginning.... If an accused is arrested and immediately tells the police he is guilty ... he can expect to get a substantial discount.*¹⁵³

According to Henham’s research in 1998 in Leicester and Nottingham Magistrates’ Courts, 86.2 per cent of sentencers claimed that they had attached at least some importance to the stage at which the guilty plea was entered.¹⁵⁴ The SGC Guidelines, as mentioned above, also expressed similar attitude.

The criminal policy’s favor of crime control spurred a series of policies promoting earlier plea agreement, such as a plea before venue based on s49 of the Criminal Procedure and Investigations Act 1996, the ‘Narey reforms’¹⁵⁵ in which the early first hearing is introduced for simple cases where the accused are expected to plead guilty, and PCMH. Furthermore, the ‘*Criminal Justice: Simple, Speedy, Summary*’ (CJSS) promoted the idea of ‘next day justice’ for certain crimes. It also requires the Crown Court to ‘deal more effectively with early guilty pleas’,¹⁵⁶ and tries to ‘implement live

¹⁵⁰ *Ibid.*

¹⁵¹ Andrew Ashworth, *Sentencing and Criminal Justice*, 5th Edition (Cambridge: Cambridge University Press, 2010), p. 22.

¹⁵² *R v Goodyear* [2005] EWCA Crim. 888

¹⁵³ *R v Hollinton* (1986) 82 Cr. App. R. 281

¹⁵⁴ See R. Henham R, ‘Reconciling Process and Policy: Sentence Discounts in the Magistrates Courts’. Jun. (2000) *Crim. L.R.*, 436-451, p. 450.

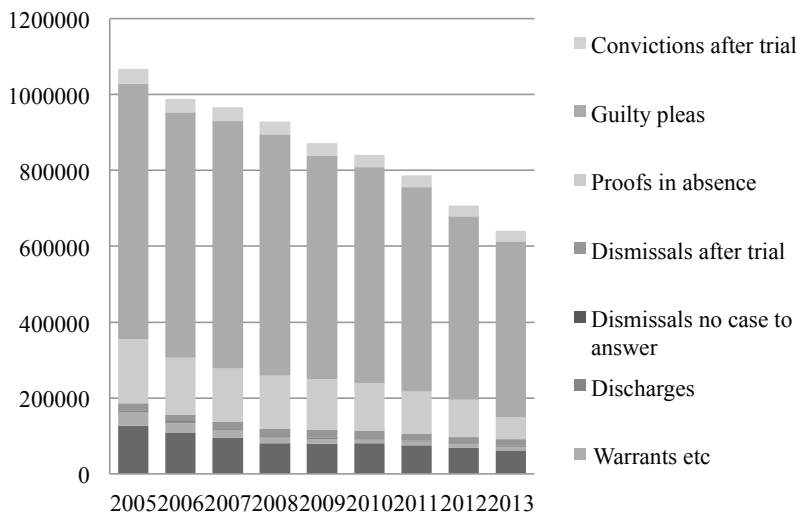
¹⁵⁵ “Narey Reforms” is promoted by Martin Narey, focusing on turning every Magistrates’ court into a “Narey court” with a new fast track system of case management. See Martin Narey, *Review of Delay in the Criminal Justice System*, available at <http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/P2/CPD/PVU/CRIMREV.HTM>. Accessed 6 February 2014.

¹⁵⁶ See Department for Constitutional Affairs, *Delivering Simple, Speedy, Summary Justice*. Available at http://www.criminalsolicitor.net/forum/uploads/Gavin/GLink/2006-07-21_075208_delivery-simple-speedy.pdf. Last visited on 23 September 2013.

links ... between the police station and the court for guilty pleas to be dealt with at the point of charge in low-level offences without ever leaving the police station'.¹⁵⁷

With all these efforts the guilty plea accounts for a high proportion of all cases in both the magistrates' courts and the Crown Court, as shown in Figure 4.2 and Figure 4.3.

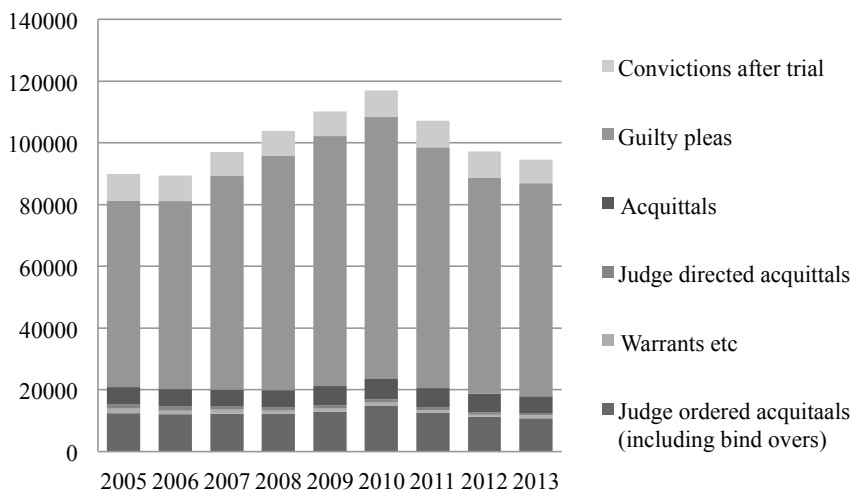
Figure 4.2 Magistrates' Court Outcomes 2005-2013



Source: CPS Annual Report 2013-2014, 2012-2013, and 2007-2008, and CPS Magistrates' Court Caseload 2007-2010.

Figure 4.3 Crown Court Outcomes 2005-2013

¹⁵⁷ *Ibid*, p.17.



Source: CPS Annual Report 2013-2014, 2012-2013, 2007-2008, and CPS Crown Court Caseload 2007-2010.

Both Figures show that whether for summary offences or indictable offences (including either-way offences), the most common solution is a guilty plea. In fact, among all convictions, guilty plea cases in both magistrates' courts and the Crown Courts constitute about 90 per cent. Both the 2011 and 2012 CCSS reports concluded that among all guilty plea sentences in the Crown Courts, most frequently the plea was entered before or at PCMH, with 74 per cent in 2011 and 77 per cent in 2012.¹⁵⁸

2.6 Summary

Plea agreement in England and Wales has experienced centuries of development, and despite the debates and controversies in history, in nowadays it has become a major approach in dealing with the main body of criminal cases. What can be observed in the current legal system is a relatively mature mechanism in respect of both facilitating and regulating the cooperation between offenders and criminal justice authorities. The strongest motivation for using this mechanism is still efficiency by encouraging early guilty pleas, although more claims such as respecting the interests of victims and witnesses have been attached to it. At the same time, the argument of 'genuine remorse' has, though still valid, receded to a secondary place in justifying the use of plea agreement. Despite the motivations and the long history, plea agreement in England and Wales still creates some tension areas especially in aspects of the false confession by innocent people, the infringement of the victim's procedural interests, and the public confidence in the administration of criminal justice.

Therefore two trends can be observed in the development of plea agreement. On the one hand, the cooperation between offenders and criminal justice authorities by means of the former's self-incrimination has been fully acknowledged in law and in practice. On the other hand, the terms and conditions especially in the case of sentence bargaining are gradually pinned down and

¹⁵⁸ The 2011 report is available at

http://sentencingcouncil.judiciary.gov.uk/docs/CCSS_Annual_2011_-_revised.pdf; the 2012 report is available at http://sentencingcouncil.judiciary.gov.uk/docs/CCSS_Annual_2012.pdf. Accessed 6 February 2014.

formalized in legal rules and relevant guidelines. Following these trends, the room for negotiation in individual cases may be narrowed down rather than being widened, and it is possible that the pure model transforms into a standard agreement in future. However, this does not mean that the negotiation in plea agreement would gradually disappear. Rather, it means that the bargaining process would be manipulated in a more delicate way. Meanwhile, it also does not exclude the possibility that new modality of plea agreement would emerge in criminal proceedings, which will be discussed later.

3. Assistance Agreement

Lord Bingham stated in *R v A and B*¹⁵⁹ that ‘it has been the long-standing practice of the courts to recognize by a further discount... the help given, and expected to be given, to the authorities in the investigation, detection, suppression and prosecution of serious crime’. A pragmatism ideology is adopted to encourage more co-operation from the accused for the aim of ‘benefiting the public’ by gaining information about criminal activities which would otherwise not be available.¹⁶⁰ In England and Wales, the use of criminal informants through agreements experienced a transformation from common law practice to one with a statutory basis, and the mile-stone on the way is the Serious Organized Crime and Police Act 2005 (SOCPA 2005).

3.1 Historical Review of Assistance Agreement

Utilizing criminal informers against other offenders is not new in England and Wales. In his research Donnelly briefly examined a similar mechanism in medieval time under the name of *aprovment*. Through appealing against the *appellee*, the targeted defendant, the *aprover* (the informer) could have his own crime pardoned if the *appellee* was finally convicted.¹⁶¹

Assistance agreement under the modernized criminal justice system in England and Wales can be traced back to the early 1970s. The power of negotiation was first with police authorities.¹⁶² Instead of relying on statutory or common law guidance, practice at that time mainly built itself on an *ad hoc* basis. For instance, in tax fraud cases the ‘Hansard procedure’ - a process adopted by the Board of Inland Revenue that permits immunity against prosecution to be conferred ‘in return for the taxpayer’s full co-operation including the payment of a monetary sum’ - was frequently used.¹⁶³

A systematic construction of using criminal informants was launched from the early 1970s as a direct consequence of the increased serious organized crimes, especially bank robberies, in and around London.¹⁶⁴ The *Bertie Smalls* case is a typical one during that period. In this case, the offender entered into a written agreement with the Director of Public Prosecutions (DPP), Sir Norman Skelhom, and obtained total immunity by giving ‘Queen’s evidence’ against dozens of his co-offenders in the charges of bank robberies and other criminal activities.¹⁶⁵ Small’s case showed a path for other career

¹⁵⁹ *R v A and B* [1999] 1 Cr. App. R. (S.) 52

¹⁶⁰ (1988) 87 Cr. App. R. 407

¹⁶¹ Richard C. Donnelly, ‘Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs’, 60(7) (1951) *The Yale Law Journal*, 1091-1131.

¹⁶² Jessica de Grazia and Kingsley Hyland, ‘Mainstreaming the Use of Assisting Offenders: How to Make SOCPA 2005, Section 73 and Section 74 Work’, 5 (2011) *Crim. L. R.*, 357-376.

¹⁶³ David Corker *et al*, ‘Sections 71 and 72 of Serious Organized Crime and Police Act 2005: Wither the Common Law?’, 4 (2009) *Crim. L. R.*, 261-271, p.262.

¹⁶⁴ Steven Greer, ‘Towards a Sociological Model of the Police Informant’, 46(3) (1995) *The British Journal of Sociology*, 509-527, p. 520.

¹⁶⁵ James Morton, ‘Helping Prosecutors with Their Inquiries’, 70(3) (2006) *Journal of Criminal Law*, 183-185.

criminals at that time, and many supergrasses, such as Maurice O'Mahoney¹⁶⁶ and Charlie Lowe,¹⁶⁷ turned up evidence against hundreds of their co-offenders to gain themselves sentencing reductions. With awareness of offenders' strategy, the agreement in Smalls was ruled as an 'unholy deal', and it was required by the law lords that future supergrasses should not be completely exempted from imprisonment.¹⁶⁸ Albeit being alert, such cooperation was still welcomed by the judiciary. In *R v Lowe* in 1978, for instance, the Court held that:

*It is in the public interest that persons who have become involved in gang activities resulting in armed robberies and kindred offences and stealing huge amounts of money and property should be encouraged to give information to the police in order that others may be brought to justice and when such information is given and can be acted upon successfully, substantial credit should be given upon pleas of guilty especially where there is no other evidence against the informer other than his own confession.*¹⁶⁹

Again, the argument of 'public interest' appeared in this judgment, and, according to it, the practice of giving assistance in exchange for lenient disposals was not only allowed, but even encouraged at that time.

However, the popularity of such practices was somewhat cooled in the 1980s, which was mainly due to the transferred strategies in criminal gangs, and the mistrust from juries about policing.¹⁷⁰ Serious problems emerged about using assisting offenders, including 'police corruption, the use of particularly unfavorable supergrasses and major failures in witness protection arrangements'.¹⁷¹ Even so, the practice of encouraging cooperation was never ceased, and was even strengthened in the 1990s with the publication of a new policy paper issued by the Audit Commission. Under the title 'Tackling Crime Effectively', this document expressed a vociferous recommendation for new policing techniques against a backdrop of 'ever rising crime rates and decreasing clear-up rates', and declared informants as 'the lifeblood of CID (Criminal Investigation Department)'.¹⁷²

In order to crack down on crimes more effectively and meanwhile to avoid scandals, two parallel trends emerged. On the one hand, the power of policing was expected to be more transparent and closely controlled. While on the other hand, the purpose of such control is not to narrow down the power, but to manipulate it more delicately, that is, 'sharpen their capabilities for the challenges

¹⁶⁶ About the story of the famous supergrass Maurice O'Mahoney, one can refer to his autobiography by Maurice O'Mahoney and Dan Wooding, *King Squealer: True Story of Maurice O'Mahoney* (London: W. H. Allen, 1978).

¹⁶⁷ *R v Lowe*, (1978) 66 Cr. App. R. 122

¹⁶⁸ Cahal Milmo, 'Bertie Smalls: Quiet Death of the Original Supergrass', *The Independent*, 7 February 2014, available at <http://www.independent.co.uk/news/uk/crime/bertie-smalls-quiet-death-of-the-original-supergrass-781020.html>. Accessed 7 February 2014.

¹⁶⁹ See *supra* note 167.

¹⁷⁰ M. Maguire, and T. John, 'Covert and Deceptive Policing in England and Wales: Issues in Regulation and Practice', 4 (1996) *European Journal of Crime, Criminal Law and Criminal Justice*, 316-334, p. 330.

¹⁷¹ Richard Martin, 'The Recent Supergrass Controversy: Have We Learnt from the Troubled Past?', 4 (2013) *Criminal Law Review*, 273-289, p. 274. Later in this section the author will discuss more about the mal-practice during these periods which originated from the application of assistance agreement.

¹⁷² Audit Commission, *Helping with Enquiries: Tackling Crime Effectively* (Police Paper No. 12) (London: HMSO, 1993).

ahead'.¹⁷³ During the past years controversies around assistance agreement has never ceased, but supporting voices gradually succeeded. It seems better to regulate such mechanism clearly and explicitly in statute, rather than to leave it to the hand of discretion.

The turning point towards a systematic statutory framework on assistance agreement was the publication of White Paper *One Step Ahead* in 2004. In this Paper, the Home Office expressed its willing to enshrine the long-standing practice into statute so that assistance from offenders could be obtained and used more effectively, especially in dealing with organized crimes and serious crimes.¹⁷⁴ Motivations behind this requirement are, as Macdonald once commented, that on the one hand, 'organised criminals, alongside terrorists, pose the greatest current challenge to law enforcement agencies, prosecutors and the wider criminal justice system', while on the other hand, these crimes are 'resourceful, well financed and innovative in their exploitation of new opportunities'.¹⁷⁵ These considerations led to the promulgation of the SOCPA 2005 in which assistance agreement not only gained statutory basis, but also expanded its territory in criminal justice.

Compared with common law conventions, the SOCPA 2005 makes two major reforms in using criminal informants. First, in the reformed mechanism it is the 'specified prosecutor'¹⁷⁶ rather than the investigator being vested with new powers to frame, sign, and monitor the deal with co-operating offenders. The new rules even confer prosecutors the power to issue full immunity for such cooperation.

The second reform concerns those who are not exempted from prosecution but offered assistance. The SOCPA 2005 does not only acknowledge the tradition of the court discounting the sentences during the trial proceedings, but even extends the court's review to the post-sentencing stage. Before the SOCPA 2005, once judges issued final decisions on the assisting offenders, there was little chance for the sentence to be reviewed. The power of sentence review belongs to the Court of Appeal, which is quite reluctant to interfere with the Crown Court's decision on the proper concession for the assisting defendants.¹⁷⁷ This does not mean that the Court of Appeal cannot interfere, especially when it considers that the assistance (1) is not fully appreciated; or (2) exceeds 'in quality or quantity or both what could reasonably be expected when the sentence is passed'.¹⁷⁸

Even so, the old practice appeared to be insufficient to encourage co-operation, and meanwhile it risked the enforceability of the agreement once the sentence was issued before the fulfilment of contractual obligations. These concerns are partly relieved in the SOCPA 2005. According to it, the original court is authorized to review its sentence according to the exact

¹⁷³ Home Office, *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime*, available at <http://www.archive2.official-documents.co.uk/document/cm61/6167/6167.pdf>. Accessed 24 October 2013.

¹⁷⁴ *Ibid.*

¹⁷⁵ 'CPS Will Use New Powers against Serious and Organised Crime', 11 January 2005, available at http://www.cps.gov.uk/news/latest_news/104_05/index.html. Accessed 14 November 2013.

¹⁷⁶ According to the Explanatory Notes of the SOCPA 2005, 'specific prosecutors' refers to designated prosecutors from the Crown Prosecution Service, the Revenue and Customs Prosecutions Office, the Serious Fraud Office or the Northern Ireland Director of Public Prosecutions office. Article 171 of the *Explanatory Notes*, available at <http://www.legislation.gov.uk/ukpga/2005/15/notes/data.pdf>. Accessed 1 November 2013. Later the SOCPA 2005 is revised by the Coroners and Justice Act 2009, and the powers under sections 71 to 74 are extended to the Secretary of State for Business, Innovation and Skills and the Financial Services Authority through designating chief prosecutors or deputy prosecutors as specified prosecutors.

¹⁷⁷ See *R. v A and B*, [1999] 1 Cr. App. R. (S.) 53. Even so, the Court of Appeal is not completely banned from such review under common law convention. The Criminal Appeal Act 1968 authorizes the Court of Appeal in its s 11 (3) to quash an original sentence when it is inappropriate, and this exception is applied in and reiterated in practice. See, e.g., *R. v A*, [2007] 1 Cr. App. R. (S.) 60.

¹⁷⁸ *R v Fleckney*, [2002] EWCA Crim. 992

implementation of the agreements. This arrangement is expected to encourage constant co-operation from the offender, and also to avoid failures in fulfilling contractual obligations after judicial concession.

3.2 Current Legal Regime of Assistance Agreement

The current legal framework of assistance agreement in England and Wales is mainly regulated by the SOCPA 2005, common law rules, and relevant CPS guidance. In the following discussion, four issues of the assistance agreement will be examined: categorization, content, quality, and lenient dispositions offered by the criminal justice authorities.

3.2.1 Categorization

Assistance agreement can be categorized into two types based on the time the assistance is offered: pre-sentencing and after-sentencing. This categorization is made because the judicial concession on the former has been quite well accepted and established, while the latter encountered reluctance from the Court of Appeal in the past.¹⁷⁹ As it was stated in cases such as *R. v A and B* in 1999, and *R. v Z* in 2008, the Court of Appeal normally would not take account of information supplied after sentence if ‘a defendant was convicted and sentenced without giving information or without expressing a willingness to do so’.¹⁸⁰ It was also confirmed in case law that one indispensable condition for a defendant to get a review, after the date of his sentence, for his assistance is ‘the [significant] information was given within a reasonable time of the sentence’.¹⁸¹ Compared with courts, it might be more appropriate ‘for the prison authorities and the Parole Board to consider what had transpired since the sentence was imposed’.¹⁸²

There are three major considerations for such hesitation. The first consideration is the presumption that ‘remorse’ is embodied in early assistance, as stated in the judgment in *R v X* in 1994:

*There was no true remorse if the offender fought his corner and volunteered information only when sentenced. To leave offenders with such an option would be no incentive to them to face up to their guilt at the outset or provide early assistance to the authorities.*¹⁸³

Another argument against concession for post-trial assistance concerns the reviewing function rather than a re-trial function of the Court of Appeal, which has been clearly acknowledged as a basic principle in *R v A and B*:

The Court [of Appeal’s] function was to review sentences imposed by courts of first instance, not to conduct a sentencing exercise of its own from the beginning. It ordinarily relied entirely, or almost entirely, on material before the sentencing court. A defendant who denied all guilt and withheld all co-operations before conviction

¹⁷⁹ *Supra* note 151, Ashworth (2010), p. 140.

¹⁸⁰ *R v Z*, [2008] 1 Cr. App. R. (S.) 60

¹⁸¹ *R v R* [2001] EWCA Crim. 143

¹⁸² *R v K*, [2003] 1 Cr. App. R. (S.) 6

¹⁸³ *R v X*, (1994) 15 Cr. App. R. (S.) 750

*could not hope to negotiate a reduced sentence in the Court of Appeal by co-operating after conviction.*¹⁸⁴

The third consideration concerns efficiency, which is also embodied in *R v X*. It is argued that a 'public policy interest' is better served through 'encouraging the speedy proffering of information', and meanwhile, the genuineness of the information provided by a defendant fighting his corner until the final judgment is issued can be even more difficult to assess.¹⁸⁵ That is why the judge in *R v Debbag and Izzet* required:

*The Court of Appeal could not readily countenance a system of what would amount to negotiation after conviction and sentence for a reduction in sentence on the strength of lately volunteered information, particularly where the information proved to be of no practical assistance to the authorities.*¹⁸⁶

However, it can be noticed from this judgment that a channel is left for the admission of late assistance, especially considering the smooth running of criminal proceedings. This channel usually opens when the assistance is of great importance. To facilitate this channel, a post-sentence review was established in the SOCPA 2005, which 'reversed the former practice in relation to post-sentence assistance which was previously left to the Home Office and the Parole Board'.¹⁸⁷ The judgment of this case requires that in a late assistance 'it was important to ask why the offer of assistance had been delayed', and 'whether the delay may have diminished its value'.¹⁸⁸ It also claimed that a defendant should not suffer from a 'lesser reduction in sentence' as long as the delay does not 'diminish the value of the assistance'.¹⁸⁹ It is difficult to judge what situations could be deemed to be 'diminished the value', and this ambiguity leaves the judiciary more opportunity to interpret. In *R v P*; *R. v Blackburn* it was emphasized that such evaluation ought to be 'a fact specific decision'.¹⁹⁰

3.2.2 Content of Assistance

For a long time there have been discussions in courts about what kind of assistance could, or should, be rewarded, and controversies once mainly focused on whether such assistance was relevant to the crimes committed by the assisting offender himself. Before the 1980s within the whole series of court decisions there appeared to be 'no distinction drawn between information given about the case in question and information given about other cases'.¹⁹¹ However, under the trend of using more and more supergrasses as mentioned earlier, the judiciary started to distinguish between assisting accomplices and supergrasses.

At first judges appeared to be unwilling to grant credit for supergrasses. For instance, in *R v Preston* in 1987, the appeal was dismissed because 'the property found did not relate to the offence of which he (the appellant) was convicted, and in the judgment of the court was not a matter which could be taken into account when deciding the correct sentence for the robbery'.¹⁹² By differentiating

¹⁸⁴ *Supra* note 159, *A and B*; see also *R. v K*, [2003] 1 Cr. App. R. (S.) 6

¹⁸⁵ *R v Debbag and Izzet*, (1990-91) 12 Cr. App. R. 733

¹⁸⁶ *Ibid.*

¹⁸⁷ *R v P*, [2008] 2 Cr. App. R. (S.) 5

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Supra* note 88, *P and Blackburn*

¹⁹¹ (1988) 87 Cr. App. R. 407

¹⁹² *R v Preston* (1987) 9 Cr. App. R. (S.) 155

supergrass from assisting accomplice, the Court held that ‘what the courts should not take into account ... is evidence of information given by any accused person who does not relate to the crime of which he stands charged’.¹⁹³

In this decision, what the Court was concerned about was the improper importation of irrelevant factors into the case on trial, which might lead to the consequence that the conviction and sentence of the defendant was not based on the facts and circumstances related to his own crime but elements beyond. Such concern sounds reasonable, but apparently again pragmatism prevailed, leading to the overturned decision in cases such as *R v Sivan* in 1988. In this case the Court of Appeal extended the scope of assistance by restating the functions of this procedure:

*The judge should tailor the sentence so as to punish the defendant but at the same time reward him so far as possible for the help he had given in order to demonstrate to others that it was worth their while to disclose the criminal activities of others for the benefit of the law-abiding public in general.*¹⁹⁴

Bearing such ‘general public benefit’ in mind, information against other criminals and crimes is expected to be gathered as much as possible. According to *Sivan*, two types of information should be evaluated by judges when deciding the sentence: one is the information relating to the crime in respect of which the defendant has been convicted, and the other is those relating to some other criminal activities which are irrelevant to the defendant’s own crime. This decision was followed by judges in other similar cases,¹⁹⁵ and finally was accepted in the SOCPA 2005.

3.2.3 Quality of Assistance

The key factor in evaluating assistance agreement is the quality of the assistance, which contains two crucial criteria. First, the assistance can be either intelligence or evidence, but normally the ‘Queen’s evidence’, which refers to giving testimony in court trial, is considered with enhanced value. In *R v D* in 2011 the Court of Appeal further developed this criterion by stating that the value of the assistance is based on ‘the value to the administration of justice of his performance of the agreement, not on the simple fact that the agreement had been performed’.¹⁹⁶ In this case the assistance provided by the defendant was considered as ‘limited’ because he refused to give evidence in court against anyone else.

The quality of the assistance can be further improved if it ‘produces convictions for the most serious offences ..., or prevents them, or which leads to the disruption of or indeed the breakup of major criminal gangs’.¹⁹⁷ It is normally considered that the severity of the targeted crime and the credit the assisting offender may receive are positively correlated. A general principle has been established that a further discount should be recognized when the assistance is given in connection with serious crimes.¹⁹⁸

¹⁹³ *Ibid.*

¹⁹⁴ (1988) 87 Cr. App. R. 407

¹⁹⁵ See [2008] 2 Cr. App. R. (S.) 5; [2006] UKPC 18; [2003] EWCA Crim. 365, [1995] 2 Cr. App. R. 194, and (1994) 15 Cr. App. R. (S.) 750.

¹⁹⁶ *R v D*, [2011] 1 Cr. App. R. (S.) 69

¹⁹⁷ *Supra* note 88, *P and Blackburn*

¹⁹⁸ See, e.g., *R v Sinfield*, (1981) 3 Cr. App. R. (S.) 258; *R v King* (1985) 7 Cr. App. R. (S.) 277; and *R v Sivan* (1988) 10 Cr. App. R. (S.) 282.

A relevant question here is whether the offender's guilty plea is a premise of the agreement. Based on the SOCPA 2005, when making agreements with prosecutors, the potential assisting suspects are not obliged to plead guilty first. Nevertheless, even without a statutory requirement, the CPS' guidance still requires such suspects to 'admit their criminality fully'. Once the agreement enters into the court hearing, a guilty plea becomes an indispensable premise of sentence reduction under s73 and sentence review under s74. The requirement, as it was stated by the judge in *R v Blackburn*, aims to avoid secret and 'unscrupulous' deals and problems generated from them.¹⁹⁹ Even so, in *R v Chaudhury*²⁰⁰ the Court explicitly acknowledged that 'pragmatism still obtains', and defendants who provide assistance should not be banned from any rewards if they 'for whatever reason, [are] unable or unwilling to enter into the formalized process envisaged in SOCPA'.

The SOCPA 2005 does not cover situations where an assisting suspect or defendant either refuses to fully admit his criminality but is nonetheless convicted, or refuses, or is disqualified from entering into, a written agreement. The first situation often happens when the accused person pleads not guilty on the basis of duress; whereas the second situation may occur when such person is a registered assistant who has assisted the investigators or prosecutors in the past. Under these circumstances, the CPS' guidance considers it is improper to diverge from trial proceedings, but prosecutors still can inform sentencing judges on such assistance through a common law practice named 'texts'.²⁰¹ According to it, the court still can issue sentence discount for the defendant's assistance under common law conventions. However, case law²⁰² has made it clear that defendants under such circumstances will not get the maximum discount.

A guilty plea before introducing assistance agreement in English system serves at least two main purposes. One is to enhance the credibility of the offender and the reliability of the assistance, which will be further discussed later. Another purpose is to avoid the offender's declining to give evidence based on self-incrimination. Witnesses in the English criminal justice system are entitled to the privilege against self-incrimination. Nevertheless, this privilege is no longer available if the witness has already incriminated himself independently and voluntarily. This can be observed in *Khan v R*²⁰³ in 2007. In this case, the offender refused to answer questions forensically on behalf of a co-accused under the argument against self-incrimination. The Court declined this argument, holding that answers required fell into the scope of the guilty plea made earlier by the offender.

3.2.4 Legal Concession

According to the SOCPA 2005, three forms of legal concession can be offered to the assisting offenders: immunity from prosecution (s 71), restricted use undertakings (s 72), and sentence discount (s 73, 74 and 75). The former two fall into the discretion of the public prosecutor, while the third one belongs to the judiciary. The SOCPA 2005 does not specify criteria in selecting different approaches, but the CPS's guidance provides some basic principles.²⁰⁴ The most important principle is that

¹⁹⁹ *Supra* note 88, *P and Blackburn*.

²⁰⁰ *R v Chaudhury* [2009] EWCA Crim 2485

²⁰¹ 'Texts' refers to 'the procedure by which the police, with the concurrence of the prosecution, make the sentencing judge aware, in confidence, of assistance given by an accused to the prosecution whether in relation to the present case or more generally'. See s39 of CPS Guidance on Queen's Evidence – Immunities, Undertakings and Agreements under SOCPA 2005, available at

http://www.cps.gov.uk/legal/p_to_r/queen_s_evidence_-_immunities_undertakings_and_agreements_under_the_serious_organised_crime_and_police_act_2005/index.html. Accessed on 19 January 2014.

²⁰² See, e.g., *supra* note 196, *R v D*.

²⁰³ *Khan v R* [2007] EWCA Crim 2331

²⁰⁴ CPS, *Queen's Evidence – Immunities, Undertakings and Agreements under the Serious Organized Crime*

prosecution serves public interest better when there is sufficient evidence to ‘provide a realistic prospect of conviction’. That is, compared with prosecution immunity and undertakings about the restricted use of evidence, prosecution and court trial should be the first option. Under this principle, offers from criminal justice agencies are discussed respectively based on the power division between the prosecutor and the judge.

3.2.4.1 Prosecutor’s Approaches

As it is mentioned above, two approaches are available to public prosecutors to reward the assisting suspect. The first approach is prosecution immunity under s71 of the SOCPA 2005. S71 authorizes a specified prosecutor to issue a written immunity notice to a suspect for the purposes of investigation or prosecution of other crimes. A major difference between the immunity notice and the longstanding practice of non-prosecution is that the former aims at the future activities of the suspect, whereas the latter is a unilateral and retrospective decision from the prosecutor based on the revealed facts of the crime and the consideration of public interest. The non-prosecution decision has no exclusionary power on future prosecutions against the same suspect.²⁰⁵

There are several restrictions on issuing an immunity notice. First of all, prosecution immunity can be applied only in extreme situations. The targeted crimes should be serious (summary offences are excluded); s113 of the CJA 2009 has amended s71 and s72 of the SOCPA 2005 to make sure that an immunity notice can be offered only when the assistance is related to an offence capable of being tried in the Crown Court. In addition, the agreement should be executable, the assistance should be indispensable and sufficient, and the entire criminal backgrounds of the co-operating offender should be collected and carefully assessed. To achieve a comprehensive evaluation, the CPS’ guidance even allows prosecutors to ask potential assisting suspects whether they want to waive their legal professional privilege, although the guidance acknowledges that answers to such a query will not necessarily affect the prosecutor’s decision on issuing an agreement.

After taking all these elements into consideration, the specific prosecutor should guarantee that prosecution immunity is ‘in the interests of justice’, ‘in the interests of public safety and security’, ‘is very unlikely that any information could be obtained without an offer of immunity and ... is also very unlikely that any prosecution could be launched against the person to whom the immunity is offered’.²⁰⁶ Prior to the SOCPA 2005, such immunity could not be issued by a prosecutor without the Attorney General’s permission.²⁰⁷ Now under the new rules such permission is no longer required. Even so, the CPS guidance still requires that the Attorney General should be consulted before granting full immunity.

Given the written immunity notice, no further prosecution can be brought against the offence specified in the agreement. The effect of such a notice can be ceased if the assisting suspect fails to comply with it, and it can be applied only to crimes already committed. That is, the specific prosecutor cannot issue an immunity notice for potential criminal activities in the future. Such an

and *Police Act 2005*, available at http://www.cps.gov.uk/legal/p_to_r/queen_s_evidence_-_immunities_undertakings_and_agreements_under_the_serious_organised_crime_and_police_act_2005/index.html. Accessed 4 November 2013.

²⁰⁵ *Supra* note 163, Corker *et al* (2009), p. 267.

²⁰⁶ The CPS, *Queen’s Evidence – Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005*, available at

http://www.cps.gov.uk/legal/p_to_r/queen_s_evidence_-_immunities_undertakings_and_agreements_under_the_serious_organised_crime_and_police_act_2005/index.html. Accessed 4 November 2013.

²⁰⁷ See *supra* note 163, Corker *et al* (2009).

arrangement may lower the risk of using co-operating offenders to fish for other criminals through participating in new offences.

The violation of a promise on prosecution immunity may generally amount to an abuse of process. Abuse of process in English criminal justice system is a set of rules aiming at reaching a balance between the basic principle that ‘the question of whether or not to prosecute is for the prosecutor’, and the courts’ ‘overriding duty to promote justice and prevent injustice’.²⁰⁸ The relationship between prosecution immunity and abuse of process was clearly stated in judgments such as *R v Croydon Justices ex parte Dean*.²⁰⁹ In this case the suspect was released without charge based on his promise to act as a prosecution witness. However, the CPS later changed their mind and decided to prosecute. The presiding judge Staughton LJ held that ‘the prosecution of a person who has received a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an “abuse of process”’.

The identification of abuse of process has been gradually systemized in a series of cases.²¹⁰ In 1997 Rose LJ summarized in *R v Townsend* three propositions on this issue:

*First, where a defendant has been induced to believe he will not be prosecuted, this is capable of finding a stay for abuse... Secondly, where in addition, a defendant has been told he will called for the prosecution, the longer he is left in that belief the more unjust it becomes for the prosecution to renege on their promise. Thirdly, where, as here, the defendant, co-operating as a potential prosecution witness, was interviewed without caution and made a witness statement, and steps were then taken which resulted in manifest prejudice to him, it becomes inherently unfair to proceed against him.*²¹¹

In *R v Abu Hamza*²¹² these rules were slightly modified so that ‘if facts come to light which were not known when the representation [on prosecution immunity] was made, these may justify proceeding with the prosecution despite the representation’. This means that there can be circumstances that the prosecution might not be deemed as an abuse of process despite of an earlier promise. During past years the argument of ‘abuse of process’ has been constantly challenged by victims. A typical case is *R v Killick* in 2011 where the Court of Appeal required the prosecutor to undertake a fresh review of the non-prosecution decision once an interested party (in this case the victim) requested it.²¹³ This case led to the launch of the Victims Right to Review scheme in July 2013.

The second technique stipulated in the SOCPA 2005 is the ‘restricted use undertakings’ which ‘enables the prosecutor to offer an undertaking not to use certain evidence in criminal proceedings or civil confiscation proceedings’.²¹⁴ The purpose of such an arrangement is to avoid the conflict between providing assistance and self-incrimination. However, it cannot exempt the accused person completely from prosecution, which makes it a less preferred option. It also does not prevent the use of ‘other evidence’ which may lead to the successful conviction of the co-operating offender.

²⁰⁸ See CPS’ *Guidance on Abuse of Process*, available at http://www.cps.gov.uk/legal/a_to_c/abuse_of_process/#general. Accessed 7 February 2014.

²⁰⁹ *R v Croydon Justices ex parte Dean* [1993] QB 769.

²¹⁰ See, e.g., *R v Horseferry Rood Magistrates’ Court ex parte Bennett* [1994] AC 42; *R v Bloomfield* [1997] 1 Cr App R 135.

²¹¹ *R v Townsend* [1997] 2 Cr App R 541.

²¹² *R v Abu Hamza* [2007] QB 659.

²¹³ *R v Killick* [2011] EWCA Crim 1608. See also *R (on the application of B) v DPP*, [2009] 1 W.L.R. 2012; [2009] 1 Cr. App. R. 38

²¹⁴ The Lord Goldsmith QC, ‘The New Powers to Tackle Organized Crime and the Role of the Prosecutor’, 5 (2006) *Inter Alia*, 28-31, p. 29.

3.2.4.2 Judge's Approaches

Ss73-75 of the SOCPA 2005 acknowledge judges' power in authorizing sentence discount for the assisting defendants. It does not, however, give specific instructions on how to provide appropriate sentence discount for them. Nevertheless, several rules have been formulated through a series of cases. Arising from them, three issues are discussed thereof: the general principles, the relevant impact factors, and the extent of the discount.

When considering the sentencing discount, several principles have been established through years of development. The first and foremost principle of sentencing reward for assistance, as stated in many cases, is the totality of the criminality of the defendant.²¹⁵ This is the 'starting figure' of further sentence calculation that promotes a comprehensive weighing of all relevant elements as an entirety rather than merely 'a mathematical approach'.²¹⁶

The second principle considers the calculation of different mitigating factors, especially between a guilty plea and assistance. It has been established in *R v Wood* in 1997 as a premise that:

*An offender who pleads guilty to an indictment and gives evidence against an accomplice should receive a greater discount in his sentence than would be allowed if he had pleaded guilty but not given evidence.*²¹⁷

This principle is confirmed and further clarified through several statutes²¹⁸ that when deciding the sentence, judges should address separately any other mitigating factors 'before calculating the reduction for the guilty plea'.²¹⁹ The consideration behind this principle is to avoid repeated reduction. It may, however, theoretically lead to the possibility of complete immunity from punishment after calculation. To solve this problem, the Court of Appeal in *R. v P; R. v Blackburn* addressed the third principle that the defendant who has committed and admitted serious crimes cannot and should not escape punishment altogether.²²⁰

Finally, it was clearly stated in *R v Cadbury* that the SOCPA 2005 would not abolish common law. This means that even though the defendant provides assistance, he may still be deprived of any rewards, especially when there are no written agreements.²²¹

As to the impact factors in sentencing reduction, in *R v Sivan* the Court identified three groups of factors: (1) 'the degree of assistance provided'; (2) 'the nature and effect of the information imparted'; and (3) 'the degree of risk to which the defendant by his actions exposed himself and his family'.²²² The first two factors have been discussed earlier, and discussion here mainly focuses on the third one.

The risk factor is usually considered as the 'greatest disincentive to the provision of assistance to the authorities', and mostly 'the greater the nature of the criminality, the greater the consequent

²¹⁵ *Supra* note 88, *P and Blackburn; R. v Z*, [2007] EWCA Crim. 1473. S 120(3) of the CJA 2009 also requires the SC to issue sentencing guidelines in accordance with 'the totality of sentences'.

²¹⁶ *Supra* note 198, *King*.

²¹⁷ *R v Wood*, [1997] 1 Cr. App. R. (S.) 347

²¹⁸ See, e.g., s. 152 of the Powers of Criminal Courts (Sentencing) Act 2000; s. 144 and s. 174 (2) (d) of the Criminal Justice Act 2003; para 2.4 of the Reduction in Sentence for a Guilty Plea, issued by the SGC in 2007.

²¹⁹ Para 2.4 of the Reduction in Sentence for a Guilty Plea, issued by the SGC in 2007

²²⁰ *Supra* note 88, *P and Blackburn*.

²²¹ *R v Cadbury* [2010] Crim LR 246.

²²² *Supra* note 198, *Sivan*.

risk'.²²³ One approach adopted by the legislator in order to balance that disincentive, is to raise the counterparties' offer: the higher the risk, the larger the discount.²²⁴ In *R v A*, for instance, a sentence reduction from 13 years' imprisonment to five years was upheld by the Court of Appeal on the basis of a 'real and might be continuing' risk for the defendant and his family because of giving evidence.²²⁵ Similarly, in *R v Johnson* in 2002 the Court expatiated on this principle that 'the unusual assistance and the unusual risk which this appellant gave and to which she exposed herself leads to the conclusion that a greater reduction in her sentence ought to have been given'.²²⁶

It should be noted here that in the case of balancing the risk in cooperation and the pragmatic purpose of solving tough crimes, lenient treatments are not the only or even the optimal option. This is because in this situation assisting offenders are actually urged to expose themselves to high risks and to be made use of for the expediency of criminal justice authorities. In this sense, using legal concessions as leverage for reckless cooperation cannot fundamentally and systematically mitigate the difficulties in obtaining assistance. What's worse, it may undermine the assisting offender's human rights by transforming his role from object to subject in the operation of criminal proceedings. Comparatively and from the long-term perspective, a more appropriate approach with respect to the risks is to improve the witness protection system.

The last issue is about the extent of the discount. The general rule is that the judge should 'tailor the sentence so as to punish the defendant but at the same time reward him so far as possible for [his] help'.²²⁷ A normal reduction for the defendant's assistance is between one half and two thirds, and only in the most exceptional cases may the reduction exceed three quarters.²²⁸ Apart from the common law tradition, the SOCPA 2005 extends the judiciary discretion in its s73(5) by legitimizing a sentence discount even lower than the minimum or statutorily fixed sentences as long as judicial transparency is guaranteed.

3.3 Motivations for Assistance Agreement

In *One Step Ahead*, assistance agreement has at least four merits: (1) speed up trials; (2) enhance prosecutions' impact; (3) approach major criminals; and (4) erode trust within criminal gangs.²²⁹ The kernel of such claim is using assisting offenders to enhance the detection effect in criminal justice, especially in dealing with serious and organized crimes. For the longstanding common law practice the judge in *R v P and Blackburn* gave a quite clear comment:

*[Even if there lacks] much enthusiasm about a process by which criminals receive lower sentences than they otherwise deserve because they have informed on or given evidence ... the stark reality is that without it major criminals who should be convicted and sentenced for offences of the utmost seriousness might, and in many cases, certainly would, escape justice.*²³⁰

²²³ *Supra* note 88, *P and Blackburn*.

²²⁴ *Supra* note 57, Sanders *et al* (2010), p. 442.

²²⁵ D. A. Thomas, 'Sentencing: Assistance Given by Offender – Assistance Given after Conviction and Sentence', Dec. (2006) *Crim. L. R.*, 1079-1082.

²²⁶ *R v Johnson* [2002] EWCA Crim. 2726

²²⁷ *Supra* note 198, *Sivan*.

²²⁸ *Supra* note 88, *P and Blackburn*.

²²⁹ Home Office, *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime*, available at <http://www.archive2.official-documents.co.uk/document/cm61/6167/6167.pdf>. Accessed 31 October 2013.

²³⁰ *Supra* note 88, *P and Blackburn*.

It has been frequently argued that compared with the offenders' suffering from the entire deserved sentence, a better option is to reward them with credit for assistance 'in the hope thereby that less crime will be committed, and if it is committed more people will be caught and punished'.²³¹ Behind it are concerns rising from the complexity and the foreseeable serious consequences of certain crimes. Take organized crime as an example. The Home Office in 2009 pointed out the consequences of organized crimes as a 'vicious downward spiral of fear, intimidation and economic decline',²³² which makes a comprehensive approach, including using assisting criminals, imperative.

Based on the detection effect, assistance agreement is further expected by scholars to strengthen the deterrence effect, arguing that the higher the possibility of detecting the crime, the lower the criminal rate will be.²³³ Such an argument becomes even more plausible when combined with the critique on the increasingly ineffective 'traditional reactive mode of investigation', and the tightened 'budgetary restrictions on public sector spending'.²³⁴

Furthermore, assistance agreement is also frequently described as cost effective.²³⁵ The 1993 Report, for instance, clearly stated that 'informants, a highly cost effective source of detections, are underused',²³⁶ and this statement was latter echoed by Her Majesty's Inspectorate of Constabulary in 1994 and the Association of Chief Police Officers in 1996.²³⁷

The latest claim of using such method, especially in solving serious and organized crimes, is made in the Serious and Organised Crime Strategy in 2013.²³⁸ At the very beginning of this document it has been claimed that each year organized crimes cost the UK at least £24 billion, but 'for too long, too many serious and organized criminals have been able to remain one step ahead and out of law enforcement's reach'. The document proposed to deal with these crimes with strategies 'we use to counter terrorism', and one major technique is to incentivize 'whistle blowing' (another expression for an informant), especially from those involved in crimes.

All these elements together seem to be capable of strengthening the legitimacy for using assistance agreement. Such a mechanism enables the government to dismantle serious and damaging organized crimes, protect its citizens against harm, and meanwhile, save tax-payers' money.

3.4 Potential Risks

Although the SOCPA 2005 laid the statutory foundation for assistance agreement in the criminal justice system of England and Wales, scholars have noticed that this technique remains as 'a rarity' in practice. From April 2006 to September 2009 the CPS only applied such agreement to about 21

²³¹ *Supra* note 198, *Sinfield*.

²³² Home Office, *Extending Our Reach: A Comparative Approach to Tackling Serious Organized Crime* (London: HMSO, 2004).

²³³ Miriam Hechler Baer, 'Cooperation's Cost', 88 (2011) *Washington University Law Review*, 903-967.

²³⁴ Martin Innes, "'Professionalizing" the Role of the Police Informant: The British Experience', 9 (2000) *Policing and Society*, 357-383, p. 364.

²³⁵ See, e.g., *supra* note 172, Audit Commission (1993); Home Office, *Extending Our Reach: A Comparative Approach to Tackling Serious Organized Crime* (London: HMSO, 2004);

²³⁶ *Ibid*.

²³⁷ Colin Dunnighan and Clive Norris, 'The Detective, the Snout, and the Audit Commission: The Real Costs in Using Informants', 38(2) (1999) *The Howard Journal*, 67-86, p. 70.

²³⁸ Issued in October 2013, available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf. Accessed 20 October 2013.

offenders.²³⁹ There seem to be doubts and reluctance in using criminal informants and ‘Queen’s evidence’.

3.4.1 Risks Rooted in the Legal Regime

In Grazia’s comparative research on assisting offenders in the USA and the UK, the author identified three road blocks in the concrete provisions of assistance agreement in the SOCPA 2005: the improper timing of judicial reward, the absence of provision for scoping agreements, and the encouragement for drip feeding.²⁴⁰ These traits of the English statutory framework introduce risks into the assistance agreement. For instance, the SOCPA 2005 attempts to encourage cooperation by offering early rewards, even when the obligation drafted in the agreement has not been fully performed. In the case of s72, the provision actually requires the specific prosecutor to abandon the use of the information against the informer before knowing its content.²⁴¹

Apart from the flaws in legal provisions, infringing some fundamental values in criminal justice also challenges the use of assisting offenders. This is intensively embodied in the so-called ‘cooperation paradox’, which refers to the phenomenon that ‘defendants who are most in the know, and thus have the most “substantial assistance” to offer, are often those who are most centrally involved in conspiratorial crimes’.²⁴² The paradox may distance punishment from the culpability of the accused, or, at least, impose risks for the principles of proportionality and equality.

One possible consequence of this paradox is ‘the government unwillingly encourages more crime’, and ‘the policy perversely causes society to pay for additional crime’ because of the increased administrative costs caused by the cooperation.²⁴³ This is what Baer described as imbalance between ‘detection effect’ and ‘sanction effect’. Assistance agreement can be manipulated into an instrument raising offenders’ expectation that the cooperation may ‘reduce the expected sanction for offenders who believe they can cooperate if caught’.²⁴⁴ Such an expectation, if it is over-enlarged, may undermine the validity of legal provisions and the deterrence of the criminal law in general, as well as the legitimacy of legal authorities.

From an even broader perspective, the establishment of assistance agreement in the English criminal procedure requires systemic integration with other supplementary techniques, and one of the major supporting mechanisms is, as mentioned earlier, the witness protection scheme. In 2004 the government rejected the proposal to establish a national wide witness protection program, and the task of protection falls on the shoulder of regional police departments. It may lead not only to uneven protection in different areas but also a heavy burden on local institutions especially considering the high cost of protection. Take the famous Damon Alvincase as an example.

Case 4.1: Damon Alvin Case, 2006, Essex

In February 2001 the victim, Boshell, was found dead in Essex. Damon Alvin, a man who ‘had been convicted of several offences and been in and out of prison’, was listed as a

²³⁹ *Supra* note 162, Grazia and Hyland (2011), p. 358

²⁴⁰ *Ibid*, p. 367

²⁴¹ *Supra* note 163, Corker *et al* (2009).

²⁴² In his research Stephen Schulhofer considers ‘cooperation paradox’ as the one of the major factors impairs the validity of legal provisions. See Stephen J. Schulhofer, ‘Rethinking Mandatory Minimums’, 28 (1993) *Wake Forest Law Review*, 199-222, p. 212.

²⁴³ See *supra* note 233, Baer (2011).

²⁴⁴ *Ibid*, p. 903.

*suspect. Nevertheless, for years the investigation appeared to be frustrated and going nowhere. To avoid the charge of murder, Alvin accused Percival of being responsible for Boshell's death, and acted as witness during Percival's trial in 2006. Based on Alvin's uncorroborated evidence, Percival was finally convicted and sentenced to life imprisonment.*²⁴⁵

It was reported that in Alvin's case the police officers spent approximate £35,000 on him, including £7,125 for a new car, £468 on a laptop, and £82.68 on an enclosure for his tortoises. Alvin was also given a new identity and relocated with his family.²⁴⁶ Gary Eaton, another star witness, also cost the police over £70,000 in 11 months.²⁴⁷

As a conclusion, assistance agreement requires several institutions within or even beyond the criminal justice system to participate. Martin described such a multi-participants system as one which includes:

*The police, tasked with de-briefing the supergrass, investigating the alleged crimes and ensuring the supergrass's protection; the prosecution service, charged with assessing the probative value of the evidence and deciding whether to prosecute; the Judiciary, entrusted with sentencing the supergrass, occasionally deciding the defendant's guilt and ultimately protecting the rule of law, and finally the Parole Board... responsible for releasing the supergrass upon the expiration of their tariff.*²⁴⁸

This system demonstrates that beyond the normal task of solving crimes, assistance agreement also needs to pay extra attention to coordinating different institutions. Negotiation may not only happen between investigators and criminal informants, but also between police, prosecutors, and judges. More than one case will be involved, and more than one defendant will be affected by such an arrangement. Apparently, the successful operation of assistance agreement relies heavily on comprehensive and systematic constructions not only within the SOCPA 2005, but also in other relevant legal and social frameworks.

3.4.2 Risks Caused by Criminal Justice Authorities: Malpractice and Corruption

Opponents of assistance agreement have criticized the huge discretionary power invested to criminal justice authorities with a possible consequence that 'the restrictions upon the activities [of investigators] can to a certain extent be circumvented'.²⁴⁹ Restrictions on this power are further weakened because of two features of this instrument. Firstly, the close connection between self-incrimination and assistance agreement is likely to result in the avoidance of procedural safeguards for the assisting offenders, making them more vulnerable to police and prosecutors.²⁵⁰ In addition, as such cooperation is mainly between investigators and offenders, it actually partly transfers

²⁴⁵ See Sandra Lawville, 'How Supergrass Damon Alvin Turned the Tables in Gangland Murder Case', the Guardian, 22 January 2012, available at <http://www.theguardian.com/uk/2012/jan/22/supergrass-damon-alvin-gangland-murder>. Accessed 24 October 2013.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Supra* note 171, Martin (2013), pp. 277-278.

²⁴⁹ *Supra* note 234, Innes (2000), p. 365.

²⁵⁰ See *supra* note 233, Baer (2011).

the power from the court to the police and the prosecutor to determine the deserved punishment,²⁵¹ and in some sense change the open trial to a secret deal.²⁵²

During the 1970s the Metropolitan Police Service (MPS) fought against the ‘epidemic of armed robberies of banks, post offices, and cash in transit companies’²⁵³ by recruiting supergrass.²⁵⁴ However, without an independent prosecutorial supervision institution like the CPS established in 1985, Serious Fraud Office in 1990, the Royal Commission on Criminal Justice in 1991, and the Revenue and Customs Prosecutions Office in 2005, and the statutory protections like the Police and the Criminal Evidence Act 1984 (PACE 1984), police forces created a series of false testimonies and convictions through coercion and concoction.²⁵⁵

The typical example of this misfeasance is the West Midlands Serious Crime Squad. In August 1989 the Squad was disbanded because of ‘mounting allegations of fabricated evidence’,²⁵⁶ and later over 40 convictions were quashed during 1996 and 2005 in the Court of Appeal.²⁵⁷ These events led to a stunning rebuke to the entire criminal justice in England and Wales for the system had failed to prevent such serious miscarriages of justice, and it generated a prudent, even conservative attitude in practice towards assistance agreement in the following years.

Another source of malpractice is that prosecutors and agents may use assisting offenders prospectively to apprehend suspects who might never have committed crimes in the first place, or who would have committed less serious crimes but for the co-operator’s urging,²⁵⁸ in other words, entrapment. In 1969 in *R v Birtles* the Court has made it clear that one key limit on the use of informers to avoid ‘grave injustice’ is that ‘the informer should not incite others to commit an offence which they would not otherwise have committed’.²⁵⁹ However, in many cases the defendants’ sentence was actually mitigated even though there was an entrapment,²⁶⁰ especially in cases where the line between ‘encouraging the commission of an offence and “stringing along” a person in order to obtain evidence’ was ‘gossamer thin’.²⁶¹ One typical example of such vague distinction is the technique frequently used in anti-drug trafficking operations where the informants may pretend to be a drug-dealer or buyer.²⁶²

In 2012, a series of ‘supergrass’ convictions, including the *Alvin* case, were re-examined by the Criminal Cases Review Commission (CCRC)²⁶³ because of the potential corruption and false

²⁵¹ *Supra* note 164, Greer (1995), p. 520.

²⁵² *Supra* note 234, Innes (2000), p. 365.

²⁵³ *Supra* note 162, Grazia and Hyland (2011), p. 360.

²⁵⁴ ‘Super-grass’ are those who give a large amount of information about his crimes and identify the people involved. See (1987) 9 Cr. App. R. (S.) 155

²⁵⁵ Rosemary Pattenden, ‘Evidence of Previous Malpractice by Police Witnesses and *R. v Edwards*’, Aug. (1992) *Crim. L. R.*, 549-557. About the general overview of the miscarriage of Justice happened since the 1980s in UK, see Richard Nobles and David Schiff, *Understanding Miscarriage of Justice: Law, the Media and the Inevitability of a Crisis* (Oxford: OUP, 2000). Many of the events involved the use of supergrasses.

²⁵⁶ *Ibid*, Pattenden (1992), Nobles and Schiff (2000). See also Michael McConville, ‘Videotaping Interrogations: Police Behaviour on and off Camera’, Aug (1992) *Crim. L. R.*, 532-548; Jeremy Dein, ‘Police Misconduct Revisited’, Oct. (2000) *Crim. L. R.*, 801-813.

²⁵⁷ *Supra* note 162, Grazia and Hyland (2011), p.362.

²⁵⁸ *Supra* note 233, Baer (2011), p. 931.

²⁵⁹ *R v Birtles*, [1969] 1 W. L. R. 1047

²⁶⁰ See, e.g., *R v Underhill* (1979) 1 Cr. App. R. (S) 270; *R v Chapman and Denton*, (1989) 11 Cr. App. R. (S) 222; *R v Perrin*, (1992) 13 Cr. App. R. (S) 518.

²⁶¹ Andrew Ashworth, *The Criminal Process: An Evaluative Study* (New York: OUP, 1995), p. 94.

²⁶² *Supra* note 170, Maguire and John (1996), p. 330.

²⁶³ The Criminal Cases Review Commission is an independent public body which was established by the Criminal Appeal Act 1995 (CAA 1995), aiming at reviewing possible miscarriages of justice through referring

testimony.²⁶⁴ This event again provoked public concerns on using criminals as the major source of evidence.

3.4.3 Risks Caused by the Assisting Offender: Inaccuracy, False Testimony, and Drip-Feeder

It has been noticed that assisting offenders are strongly motivated to modify the form and content of the assistance based on their own interests.²⁶⁵ A consequence of this motivation is the risk of inaccurate information, which can be generally categorized into two types: unintentional inaccuracy, and false testimony.²⁶⁶ Unintentional inaccuracy can be caused by the offender's inaccurate or decayed memory or rushed conclusion, but also be produced by suggestive questions from or conversations with investigators.²⁶⁷ In his research Greer noticed that with strong incentives, offenders are likely to pretend to know as a matter of fact about things which are only gossip or rumor. They are also inclined to give whatever the investigator wants.²⁶⁸

Compared with inaccuracy, perjury is an even more crucial issue. Baer categorized lies of assisting offenders into three types: (1) lies to 'minimize his culpability' for the charged conduct; (2) lies about his own criminal history; and (3) lies that 'falsely implicate others'.²⁶⁹ The problem is that current statutes do not elaborate measures to corroborate materials and information obtained from co-operating criminals. In recent years, some cases again provoked public suspicion against assistance agreement. In 2011 the MPS in London attempted to use the supergrass Gary Eaton as a witness but the trial judge described him as 'a pathological liar' and claimed his testimony as 'not just unreliable but false and highly dangerous'.²⁷⁰

In addition, the expectation of early co-operation encourages criminal justice authorities to reward informers even before they give full performance of the obligation. Such practice may encourage the assisting offenders to manipulate the system to their own advantages either by fabricating evidence, or by acting as 'drip-feeders' who 'provide investigators and prosecutors [with] a bit of what they know to obtain a lighter sentence on the current arrest but hold back other information to obtain sentencing leniency when they are arrested again'.²⁷¹ Karl Chapman, a supergrass who had provided key evidence in *R v Maxwell* in 2010, is a typical example. The CCRC

appropriate cases to the Court of Appeal. Until January 2013, CAA has referred 546 cases to the Court of Appeal, and caused 353 judgments quashed. See Ministry of Justice, *Triennial Review: CCRC Combined Report on Stages One and Two*, issued in June 2013, available at <http://www.justice.gov.uk/downloads/about/criminal-cases-review/ccrc-triennial-review.pdf>. Accessed 7 February 2014.

²⁶⁴ See Sandra Lawville, 'Supergrass Convictions Face Legal Challenges', *the Guardian*, 22 January 2012, available at <http://www.theguardian.com/uk/2012/jan/22/supergrass-convictions-legal-challenges-police>. Accessed 27 October 2013.

²⁶⁵ Nicholas Fyfe and James Sheptycki, 'International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases', 3(2006) *European Journal of Criminology*, 319-355, p. 347.

²⁶⁶ For a detailed discussion on different types of inaccurate information, see, e.g., *supra* note 233, Baer (2011).

²⁶⁷ For the causes of unintentional inaccuracy, see, e.g., Louis Kaplow, and Steven Shavell, 'Accuracy in the Determination of Liability', *NBER Working Papers Series*, working paper no. 4203, available <http://core.kmi.open.ac.uk/download/pdf/6881130.pdf>. Accessed 5 November 2014.

²⁶⁸ Steven Greer, 'Supergrasses and the Legal System in Britain and Northern Ireland', 102(1986) *Law Quarterly Review*, 198-249, p. 199.

²⁶⁹ See *supra* note 233, Baer (2011).

²⁷⁰ Sandra Lawville, 'Met's Supergrass System Called into Question by Dismissal of Gary Eaton', *the Guardian*, 20 September 2011, available at <http://www.theguardian.com/uk/2011/sep/20/ukcrime-metropolitan-police>. Accessed 27 October 2013. ('Met' is the informal title of Metropolitan Police Service.)

²⁷¹ *Supra* note 162, Grazia and Hyland (2011), p. 367

reported that to secure Chapman's continuing cooperation, he was offered various inappropriate benefits such as:

... while in police custody, [Chapman] was allowed to visit brothels, consume alcohol and drugs (including heroin), to socialize at police officers' homes, enjoy sexual relations with a WPC, enjoy periods of unsupervised freedom, was not proceeded against in respect of a vicious stabbing attack on a fellow prisoner or an alleged rape of another prisoner or assault on the WPC with whom he had then broken up; nor was action taken against his mother for attempting to supply heroin to Chapman and Chapman's girlfriend whilst both were serving prisoners.²⁷²

To enhance the reliability of the assistance, police invented a procedure named 'cleansing' or 'purging process'. 'Cleansing' is a part of the de-briefing process where the accused is expected to confess all his past crimes, regardless of their connection with current concerned offences.²⁷³ This process is deemed as a method to protect the informant system and avoid unscrupulous deals. It seems to be even more important in Queen's evidence cases where the value of the evidence may be challenged through cross-examination, and 'cleansing' can help in confronting arguments like 'previous conviction' or 'bad character' upheld by the defending barristers. Whether it can enhance the reliability of the evidence itself is in doubt.

Despite the cleansing process, the English criminal justice system appears to be reluctant to impose other concrete restrictions on using assisting offenders and accomplice evidence. One typical example concerns corroboration of evidence. Before the CJPOA 1994, judges were obliged to give a jury full 'corroboration warnings'²⁷⁴ about convicting the accused on the uncorroborated evidence of an accomplice of the accused. However, in 1991 the Law Commission²⁷⁵ issued report on Corroboration of Evidence in Criminal Trials, describing such standard warning as 'a violation of the principles of common sense, the dictates of morality, and the sanctity of a juror's oath'.²⁷⁶ This opinion was accepted by Parliament, and finally the warning obligation was abolished by s32 of the CJPOA 1994. Today, judges still maintain the discretionary power in giving such warnings.

²⁷² *Supra* note 47, McConville and Marsh (2014), pp. 236-237. This case also exposes the police' corruption in assistance agreement and it can support the aforementioned argument.

²⁷³ *Supra* note 163, Corker *et al* (2009), p. 266. According to the CPS' Code on Queen's Evidence, 'fully cleansing' refers to three requirements that the accused must fulfill: a. fully admit their own involvement in the crime or crimes under investigation; b. provide the investigators with all information available to them regarding the matters under investigation and those involved; and c. agree to maintain continuous and complete co-operation throughout the investigation and until the conclusion of any criminal or other proceedings arising from the said investigation, including giving evidence in court where appropriate. See s 24 of the CPS' Guidance on the Queen's Evidence-Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005, available at http://www.cps.gov.uk/legal/p_to_r/queen_s_evidence_-_immunities_undertakings_and_agreements_under_the_serious_organised_crime_and_police_act_2005/index.html#a07. Accessed 23 January 2014.

²⁷⁴ Before the CJPOA 1994, the 'full warning' was obligatory as to 'the danger of convicting upon uncorroborated evidence, which by rule of practice has to be given if the prosecution is relying upon the evidence of an accomplice, or the victim of a sexual offence or the sworn evidence of a child'. See *R v Spencer* [1987] UKHL 2.

²⁷⁵ The Law Commission in England and Wales is an independent body established by Parliament by the Law Commission Act 1965 (LCA 1965).

²⁷⁶ See s2.12 of the Law Commission's 1991 *Report on Corroboration of Evidence in Criminal Trials*, available at <http://www.bailii.org/ew/other/EWLC/1991/202.pdf>. Accessed 23 January 2014.

Nevertheless, due to this change, evidence from assisting offenders alone may lead to conviction without any corroboration.

3.5 Summary

Assistance agreement in England and Wales represents the typical pure CPA model that a mutually-beneficial cooperation between offenders and criminal justice authorities is constructed, serving the main purpose of improving the detection effect. Unlike plea agreement with relatively clear offers from contractual parties, terms and conditions in assistance agreement is unlikely to be fixed. Instead, they have to be bargained and tailored case by case.

Despite all the risks, the analysis above may present the picture that the entire criminal justice system is increasingly facilitating the use of assisting offenders. For example, reward for assistance is no longer restricted to the offenders' own crimes; sentence reductions are gradually routinized and formalized under sentencing guidelines and statutes; and the obligation of giving warning on corroboration of evidence has been removed.

This analysis also reveals a phenomenon that compared with plea agreement, studies on assistance agreement conducted either by criminal justice authorities or by scholars, are much limited. It is not because this topic is less important or prevalent, but largely because such arrangements with offenders are still operated behind a screen. In addition, considerations on protecting assisting offenders and securing further cooperation also prevent the disclosure of relevant information to the public in some cases. Insufficient rough data causes difficulties to academic analysis, and in turn, restricts the improvement in this type of agreement.

4. Restoration Agreement

Restoration agreement in England and Wales, although still centering on offenders, is closely related to victims. Before any discussion on this CPA, some explanations are necessary. The first explanation is about the mechanisms examined in this section. Although this study focuses on the pure model of CPA that has been constructed earlier, for the purpose of better understanding the nature of the cooperation as well as its evolution process, the research scope may be expanded to variants that may not rigidly fit into such a model.

Restoration agreement in England and Wales is especially the case for two main reasons. For one thing, in the case of restoration agreement, the criminal justice authorities do not directly benefit from the offender-victim reconciliation, which distinguishes this mechanism from plea agreement and assistance agreement, as the former can speed up proceedings, while the latter can enhance the detection effect. Such distinction reduces the institutional interests of police, prosecutors and judges to negotiate with offenders in individual cases, and therefore what can be commonly observed is a cooperation-reward model instead of a cooperation-negotiation model. Some of the devices such as conditional caution under this category of CPA fall into the standard-form agreement, while in other situations such as deferred sentencing, the characteristic of negotiation may appear to be even weaker. Despite these inconsistencies with the pure model, the core essence of CPA remains unchanged in the mechanisms discussed later: the mutually beneficial cooperation between offenders and criminal justice authorities.

For another, the status of victims in restoration agreement also to some extent challenges and modifies the negotiation process between criminal justice authorities and offenders. This is relevant to the second issue that is worthy of explanation: the role of victims in the English criminal justice system.

Victims used to have a strong position in criminal proceedings in England and Wales, as they quite often determined the treatment on offenders. Victims once, especially during the ‘acephalous societies’, ‘occupied the central position in common law, being responsible for the apprehension, charge and prosecution of offenders’.²⁷⁷ Nevertheless, during that period there was no clear distinction between ‘crimes’ or other ‘delinquencies’, and ‘civil’ or ‘criminal’, and therefore there were large opportunities offenders and victims to have their disputes, which may be deemed as crimes today, reconciled privately.²⁷⁸ From this perspective, the practice in the early society hardly resembles that of today.

As early as 1200 English courts distinguished between crime and tort, and set different official reactions for them. As Seipp noticed, such a distinction was based on neither the nature of wrongful acts nor persons who committed such acts, but on victims’ preference between vengeance and compensation.²⁷⁹ Once the victim chose ‘vengeance’, the state would take over the punitive power. However, the victim’s position was gradually marginalized in the administration of criminal justice as the state grew stronger and its institutional procedures more developed. Different from tort, crimes were closely ‘associated with social threats and public risks’,²⁸⁰ and the power of procedural initiative and selection was removed from the individual by the state. The overall shift in criminal domain from private to public hardly changed until the 1970s with the rediscovery of victims, and that is the period when the restoration agreement under the modernized criminal justice system started to emerge. Therefore the following discussion starts from this period.

4.1 Historical Review of Restoration Agreement

As an echo to the trend of the re-discovery of victims, as well as restorative justice, mediating criminal conflict received wide attention in the 1970s. However, difficulties have long existed in situating victim-offender’s interaction into criminal justice. In *R v Crosby and Hayes* in 1974, for instance, it was recognized that the offender’s reparation was only one concern for sentencing and that it could be overwhelmed and overturned by other principles such as equality.²⁸¹ The cooperation between offenders and criminal justice authorities was more acquiescent than explicitly expressed, causing handicaps in both identifying and regulating.

In England and Wales the 1970s witnessed the rise of reparation and reconciliation schemes in local areas.²⁸² Practices started by some charitable and voluntary agencies – notably the National Association for the Care and Resettlement of Offenders and its local branch, the Bristol Association for the Care and Settlement of Offenders, with an intention of helping offenders to realize the harm

²⁷⁷ Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Hampshire and New York: Palgrave MacMillan, 2006), p.4.

²⁷⁸ For the general introduction on restorative justice and similar mechanisms in early ages, see Theo Gavrielides, ‘Restorative Practices: From the Early Societies to the 1970s’, (2011) *Internet Journal of Criminology*, ISSN: 2045-6743.

²⁷⁹ David J. Seipp, ‘The Distinction between Crime and Tort in the Early Common Law’, 76 (1996) *Boston University Law Review*, 59-87.

²⁸⁰ *Supra* note 277, Kirchengast (2006), p.5.

²⁸¹ *Supra* note 151, Ashworth (2010), pp. 181-182.

²⁸² Philippe Gailiy, ‘Restorative Justice in England and Wales’, available at http://arpegeasbl.be/site/FCK_STOCK/File/Restaurative%20Justice%20in%20England%20and%20Wales.pdf. Accessed 5 November 2014. About the genesis of mediation in criminal justice, some scholar considers that it was occurred in Britain during the 1980s. See Tony F. Marshall, ‘The Evolution of Restorative Justice in Britain’, 4(4) (1996) *European Journal on Criminal Policy and Research*, 21-43.

caused by their acts by inviting victims in.²⁸³ In 1974 in Bristol the first Victim Support Scheme was established, which was followed by several similar schemes in the coming years and led to the formation of the National Association of Victims Support Schemes (NAVSS, now named as Victim Support) in 1979.²⁸⁴ In the same year the first victim-offender mediation program was instituted in Britain.²⁸⁵ One year later, NAVSS carried out the first survey of British reparation and mediation projects,²⁸⁶ and under this trend several restorative programs flourished in the 1980s.

In 1984 Marshall published his report on the current projects and plans on reparation, conciliation and mediation in England and Wales. Within 42 areas the author studied 25 existing schemes which can be generally categorized into four types: community mediation projects, diverting minor offences from the criminal justice system, reparation projects, and family conciliation schemes.²⁸⁷ Several features can be found among these programs. First of all, almost all schemes were 'exclusively concerned with juvenile as opposed to adult offenders'.²⁸⁸ The second feature is that although the entire 1980s was described as a 'decade of diversion',²⁸⁹ such a trend was not reflected in the restorative programs during that period. This is quite different from their motivations claimed from the outset: to avoid 'cumbersome formal procedures',²⁹⁰ and to solve 'the pressure of crime rates and of increasing caseloads' by seeking 'alternative arrangements'.²⁹¹ Thirdly, most of the schemes limited their scope to relatively minor crimes, which reflects a cautious attitude for this new legal device. This was partly because of the worries of making mistakes, and partly because of the limited time and resources.²⁹² Fourthly, questions were still unanswered as how to coordinate those programs with the criminal justice system, and their potential legal implications concerning fairness, voluntariness, legality, and so on. Several practical problems and difficulties had been proposed during that period such as the appropriate point of intervention, case selection, costs, and balance between two parties.

Despite all these features, since the end of the 1980s restorative schemes started to step into a more generalized scenario in which adult offenders were involved. In 1986 a three-year pre-trial diversion scheme, namely the Kettering Adult Reparation Scheme (KARS), raised the curtain of such transformation. Two elements were considered in the KARS when making referral decisions. The first element referred to the seriousness of the offence that only comparatively minor crimes, such as theft, criminal damage, shoplifting and minor assaults could be referred to this scheme. Another element concerned the will of the victim. An interview with the victim to confirm his consent was always necessary in the proceedings; otherwise the offender would be prosecuted instead of being cautioned. The outcome of the scheme was usually in the form of a reparation agreement where financial compensation constituted the major content.²⁹³ Although KARS expanded the scope of criminal

²⁸³ Mike Maguire and Peter Raynor, 'How the Resettlement of Prisoners Promotes Desistance from Crime: Or Does It?', 6(1) (2006) *Criminology and Criminal Justice*, 19-38.

²⁸⁴ *Supra* note 282, Gailly.

²⁸⁵ Tony R. Marshall, 'Restorative Justice on Trial in Britain', 12(3) (1995) *Mediation Quarterly*, 217-231, p. 217.

²⁸⁶ Tony R. Marshall, *Reparation, Conciliation and Mediation* (London: Home Office, 1984), p. iii.

²⁸⁷ *Ibid*, p. 9.

²⁸⁸ Jim Dignan, 'Can Reparation be Made to Work in the Service of Diversion?' 32(4) (1992) *British Journal of Criminology*, 453-472, p. 454.

²⁸⁹ *Ibid*, p. 453.

²⁹⁰ *Supra* note 286, Marshall (1984), p. 4.

²⁹¹ *Supra* note 286, Marshall (1984), p. 10.

²⁹² *Supra* note 285, Marshall (1995), p. 226.

²⁹³ For a detailed introduction of the Kettering Adult Reparation Scheme, see *supra* note 288, Dignan (1992), p. 457.

mediation to adult offenders, its application was restricted to the 'pre-trial' model and had only a loose connection with legal decisions.

From 1985 to 1987 the Home Office initialed four reparation projects in Coventry, Cumbria, Leeds, and Wolverhampton. Practice in Leeds was especially aimed at 'more serious offences and worked mainly with the Crown Court'.²⁹⁴ Both Coventry and Wolverhampton adopted a 'post-conviction, pre-sentence' scheme. These projects did not specify the connection between offenders' participation and courts' decision. However, Young's empirical research showed that these schemes strongly suggested to interviewed victims and offenders that offenders might escape punishment because of their participation.²⁹⁵

These pilot programs were at first sponsored by the government with the intention of promoting procedural diversion and substitute non-custody or non-punitive disposals of convicted offenders.²⁹⁶ Their outcomes, however, were quite irrelevant to such an aim: offenders or victims showed little interest in the procedural diversion through reparation schemes.²⁹⁷ The mismatch between the policy target and the participants' concerns led to a 'benign neglect' towards restoration agreement during the 1990s; there was 'no legislative framework to encourage them, no directives to agencies that would bring such activity into their mainstream jobs, nor any pot of money dedicated to encouraging further development'.²⁹⁸

An important change appeared at the beginning of the 21st century. One symbol of this change was the Home Office's White Paper, *Justice for All* in 2002. In this document restorative justice was highly recommended, so that offenders must be actively encouraged to 'make amends for the crimes they have committed'.²⁹⁹ Following the Halliday Report³⁰⁰ and the Auld Report³⁰¹ in 2001, a sentencing reform in England and Wales led the way. In mid-2001 the Home Office launched three restorative justice schemes under its *Crime Reduction Programme*: CONNECT, the Justice Research Consortium, and REMEDI. These schemes aimed to insert restorative measures into the ordinary criminal proceedings. They mainly focused on adult offenders and attempted to expand the scope to relatively serious crimes.

As a result of about a decade's exploration, in 2010 the Ministry of Justice issued *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* and proposed that restorative justice interventions should be used at each stage of the justice system.³⁰² The trend of promoting restorative justice has caused reforms in the entire English criminal proceedings with constantly enhanced incentives for offenders' taking restorative measures towards victims.

4.2 Current Legal Regime of Restoration Agreement

²⁹⁴ *Supra* note 282, Marshall (1996), p. 25.

²⁹⁵ Richard Young, 'Reparation as Mitigation', Jul. (1989) *Criminal Law Review*, 463-472.

²⁹⁶ 'Victim-Offender Mediation and the Idea of Criminal Justice', May (1988) *Criminal Law Review*, 261-262.

²⁹⁷ As regards the mismatch between the policy target and the real concern of parties, see, e.g., Ralph Henham, and Grazia Mannozi, 'Victim Participation and Sentencing in England and Italy: A Legal and Policy Analysis', 11(2003) *European Journal of Crime, Criminal Law and Criminal Justice*, 278-317.

²⁹⁸ *Supra* note 282, Marshall (1996), p. 31.

²⁹⁹ Home Office, *Justice for All* (London: HMSO, 2002), para 5.8.

³⁰⁰ Home Office, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (The Halliday Report) (London: Home Office, 2001).

³⁰¹ Auld Report, *Report of the Review of the Criminal Courts of England and Wales* (London: HMSO, 2001).

³⁰² Ministry of Justice, *Breaking the Cycle, Government Response*, June 2011, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/186345/breaking-the-cycle-government-response.pdf. Accessed 30 September 2013.

As mentioned above, current English criminal justice encourages inserting restoration schemes into all stages of criminal proceedings. Police, prosecutors and judges can all make or participate in restorative arrangements through their particular channels, and certain types of lenient dispositions are always provided under these arrangements to encourage offenders' cooperation. The following discussion identifies different forms of restoration agreement within the criminal procedure with reference to the criminal justice authorities involved in proceedings, and to their powers.

4.2.1 Police Level

A large amount of minor offences are solved through informal channels even before they are officially filed. Some of these practices are with the presence of the victim and combined with restorative arrangements. Beyond the informal mechanisms, the Ministry of Justice has acknowledged six major forms of out-of-court disposals applicable for police.³⁰³ Generally, restorative agreement 'can be used out-of-court and in conjunction with an out-of-court disposal', and these practices for adults are normally named 'adult restorative disposal'. This device mainly targets low-risk, low-level and mostly first-time offenders.³⁰⁴

The latest development in restoration agreement at the police stage is the expansion of conditional caution for adults. This instrument was firstly introduced in the CJA 2003, intended for adult offenders and trying to invite victims in. This power was at first granted to prosecutors only, but the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has revised it. In this Act, the procedural requirement for prosecutor's authorization has been removed, and generally both police and prosecutors now can issue conditional caution.

4.2.2 Prosecution Level

As mentioned above, conditional caution for adult offenders was firstly introduced in the CJA 2003. In the following years rules were gradually developed concerning this new instrument, and the latest one is the Code of Practice for Adult Conditional Cautions 2013 (hereinafter 2013 Code). According to the 2013 Code, the mechanism of this legal device is:

*When an offender is given a conditional caution for an offence, criminal proceedings for that offence are halted while the offender is given an opportunity to comply with the conditions. Where the conditions are complied with, the prosecution is not normally commenced.*³⁰⁵

It has been claimed that the objects of conditional caution are both to facilitate the offender's rehabilitation, and/or to ensure that he makes reparations to the victims or the community.³⁰⁶ On the one hand, conditional caution in England and Wales echoes the requirements of restorative justice to

³⁰³ The six types of out-of-court disposals are: community resolutions for adults and youths, cannabis warnings for adults, penalty notices for disorder for adults, youth cautions, simple cautions for adults, and conditional cautions for adults and youths. See Ministry of Justice, *Quick Reference Guides to Out of Court Disposals*, 8th April 2013, available at <http://www.justice.gov.uk/downloads/oocd/quick-reference-guides-oocd.pdf>. Accessed 9 November 2013.

³⁰⁴ *Ibid.*

³⁰⁵ Ss1, 2, 1.2 of Ministry of Justice, *Code of Practice for Adult Conditional Cautions*, 8 April 2013, available at <http://www.justice.gov.uk/downloads/oocd/code-practice-adult-conditional-cautions-oocd.pdf>. Accessed 23 October 2013.

³⁰⁶ S22(3) of CJA 2003

provide substantial remedies to suffering victims and communities; while on the other hand, it also bears the task of making ‘an early positive response to low-level offending’,³⁰⁷ and diverting them from formal procedure, in other words, another program designed for the purpose of CJSSS.

One thing that needs to be clarified here is that current conditional caution for adult also covers foreign offenders, and special terms and conditions for them have been established. In the following discussion the focus is on conditional caution for domestic offenders.

4.2.2.1 Case Selection

Similar to the techniques at the police stage, conditional caution is an out-of-court disposal mechanism. A ‘full code test’ with two steps should be passed before issuing this decision. The first test is on sufficient evidence. To issue a conditional caution, the prosecutor must guarantee that the evidence collected is sufficient to satisfy the ‘51 per cent rule’, which means that if charged, the offender is more likely to be convicted than not. The second test is the public interest test. As mentioned before, the evaluation of public interest is based on the prosecutor’s comprehensive evaluations on several relevant factors. The general principle here is that the more serious the offence, the more likely it is that that public interest will only be satisfied through prosecution, and the less likely a conditional caution will be appropriate.

Apart from these two tests, cases are selected according to two criteria. First, offenders involved must be aged 18 or over.³⁰⁸ Normally, offenders’ previous convictions or caution record will not disqualify them, but still, these records will be considered in specific cases. The second criterion concerns the seriousness of offences. According to the 2013 Code, all three categories of criminal offences – summary offences, offences triable either-way, and indictable only offences – can be resolved through conditional caution. Indictable offences normally will attract a severe community order or imprisonment, so in principle these cases will proceed to court trial except for the most exceptional circumstances.³⁰⁹ Procedures are adjusted accordingly, in that conditional cautions in both summary offences and ‘either-way’ offences can be determined by authorized officials, while only prosecutors can make such decisions for indictable only offences

4.2.2.2 Conditions of Conditional Cautions

Conditions to be attached to the caution are listed in the ss1, 2 (1.4) of the 2013 Code, including ‘proportionate response’ which almost equals ‘guilty plea’, reparation towards victims and communities, attending rehabilitative services, or accepting financial penalty. These conditions are categorized into four types and further detailed in Annex B of the 2013 Director’s Guidance on Adult Conditional Cautions: reparative, rehabilitative, punitive, and conditions for foreign offenders.³¹⁰

Reparative conditions include compensation, ‘payment’ (not donation) to charity or fund, repairing damages, unpaid work (less than 20 hours), apology letter, or attending restorative justice mediation. The new Guidance distinguishes different levels of injuries to assign adequate compensation, as show in Table 4.1.

³⁰⁷ Office for Criminal Justice Reform, *Revised Code of Practice for Conditional Cautions – Adults* (2010) (2010 Code). Available at <http://www.bedfordshire.police.uk/pdf/Annex%20D%202010-00130.pdf>. Last visited on March 29th 2012.

³⁰⁸ Juvenile offenders will be referred to different proceedings. Conditional caution under current statutory framework is only designed for adults.

³⁰⁹ Para 12.2 of the CPS, *Director’s Guidance on Adult Conditional Cautions*, 7th edition.

³¹⁰ *Ibid.*

Table 4.1 Compensation for Personal Injuries

Type of injury	Description	Compensation
Graze	Depending on size	Up to £75
Bruise	Depending on size	Up to £100
Black eye		Up to £125
Minor cut - no permanent scar	Depending on size and whether stitched	£100 to £250
Sprain	Depending on loss of mobility	£100 to £250

Note: Table 4.1 is adapted from CPS's interpretations on the Director's Guidance on Conditional Cautioning 2013 (2013 Director's Guidance).³¹¹

Table 4.1 conveys at least two pieces of information. First, although several conditions are enumerated in the 2013 Director's Guidance, apparently the CPS pays more attention to compensation than to others. Secondly, the most severe injury in this list is 'sprain', which again restricts conditional caution to minor offences.

The only punitive measure is financial penalty.³¹² The 2013 Director's Guidance classifies penalties into three levels, and assigns corresponding amounts to each (Table 4.2). The general principle here is that financial penalty should not be applied unless rehabilitative and reparative measures are not proper.

Table 4.2 Financial Penalty Conditions Banding

Penal Band / Subject	A	B	C
Standard Penalty	£50	£100	£150
Mitigated Penalty Offences	£20 - £40	£30 - £50	£100 - £150
Scales	Summary only offences	Offences triable either way	Indictable only offences

The other two categories are rehabilitative conditions, which are mainly measures preventing future offences; and conditions specifically designed for foreign offenders, like departing from the UK or removal from the UK.

³¹¹ Available at http://www.cps.gov.uk/publications/directors_guidance/conditional_cautioning_annex_b.html. Accessed 23 October 2013.

³¹² It is questionable that whether unpaid work can be deemed as a 'punitive condition' or not. Some official documents, like Home Office's *Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority* in July 2006, consider it is; while others, like 2013 Director's Guidance, give the opposite answer. Professor Jacqueline Hodgson also described unpaid work as serving 'punitive purposes'. See Jacqueline Hodgson, 'Recent Reforms in Pre-Trial Procedure in England and Wales', *Warwick School of Law Research Paper* No. 2009/02, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1494391. Accessed 28 October 2013. One thing is for sure that neither fines nor unpaid work was attachable in conditional caution before 2006.

4.2.2.3 Procedure to Issue Conditional Cautions

To issue a conditional caution, there must be sufficient evidence to prove that the offender has committed an offence that can be charged by the prosecutor. In addition, after the prosecutor's evaluation and with full understanding of the effect of conditional caution, the offender must sign a document containing his detailed admission of the offence to the authorized person, and his consent to the attached conditions.³¹³

As mentioned earlier, the procedure starts from the 'full code test' on both evidence and public interest. Once the case is considered permissible for conditional caution, the prosecutor may direct the authorized person to make an offer to the offender, inform the offender that he can withdraw his acceptance at any stage, and ensure that he has received free and independent legal assistance and sufficient information.³¹⁴

By fully understanding the conditions and consequences of conditional caution, the offender is supposed to make an admission of the offences he is charged with. There is one question concerning such an admission: is it a premise for conditional caution? In principle, when assessing the possibility of conditional caution, decision makers should make sure that they have collected sufficient evidence for charge. Offender's admission should be offered after the evaluation. In this sense, 'admission' differs from 'guilty plea' that the former is supposed to be a repetition of what was confirmed by the prosecutors and be given after the prosecutors' decision. The tricky part here is that according to the 2013 Director's Guidance, decision makers may offer conditional caution where 'the suspect has made a clear and reliable admission to the offence and has said nothing that could be used as a defence'. This means that admission can actually be given before the conditional caution decisions are made, and it seems that the line between 'admission' and 'guilty plea' is merely rhetorical. It further implies that despite the appearance of standard-form agreement, there is still some space for offenders and criminal justice authorities to negotiate before entering into a conditional caution.

With the admission of the offender, the caution document will take effect; and with his compliance within the agreed timescale, the possibility of prosecution for the original offence normally will be precluded. According to s2.31 of the 2013 Code, conditions for summary only offences should be completed within 16 weeks, and for offences triable either way or indictable only offences the period is no more than 20 weeks. During the entire process the offender may withdraw from the conditional caution at any stage, and then it is for the decision maker to judge whether or not to consider this withdrawal as non-compliance.

Once there are reasonable grounds to believe that the offender has failed without 'reasonable excuse to comply with any conditions attached to a caution',³¹⁵ the offender can be arrested or detained so that the reasons can be investigated. If there is a lack of adequate reasons to justify the non-compliance, the offender will be prosecuted. All relevant information in the whole process of conditional cautions should be recorded, and can be cited in any subsequent criminal or civil proceedings.

4.2.2.4 Expansion of Punitiveness and Pragmatic in Conditional Caution

The last decade has witnessed the expansion of punitiveness and pragmatism in this mechanism. The first sign of such expansion lies in the changed scope of conditional caution. Before the 2013 Code,

³¹³ S4.1 of the 2010 Code

³¹⁴ Ss12, 13 of the 2010 Code

³¹⁵ S14 of the 2010 Code

conditional caution could only be used in summary only offences or offences triable either way, and all indictable only offences were excluded.³¹⁶ It is evident in the discussion above that the scope has been extended, even though the new rules emphasize the preference of prosecution in indictable only offences and reserve the power only for a Deputy Chief Crown Prosecutor.

Another reform concerns punitive penalties. At the very beginning, penalties were considered as improper to be issued by organizations other than courts. This restriction has been gradually loosened during the past years. In 2006, the Home Office proposed to expand the use of conditional caution by ‘enabling punitive conditions’.³¹⁷ Correspondingly, the Police and Justice Act 2006 (PJA 2006) admitted that ‘punishment of the offender’ was an acceptable objective for conditional caution. This was further accepted in the 2010 Director’s Guidance on Conditional Cautioning (2010 Director’s Guidance) that financial penalty could be used in five pilot areas: Cambridgeshire, Hampshire, Humberside, Merseyside, and Norfolk.³¹⁸ Later, the 2010 Code prescribed that a financial penalty no more than ‘one quarter of the amount of the maximum fine for which a person is liable on summary conviction of the offence’ or £ 250³¹⁹ can be imposed on the offender. Now this condition is generalized in the new Guidance.

These reforms lead to controversy on the nature of conditional caution: is it a conviction if penalties can be imposed on the accused? As it was stated in *H v L* that ‘the record of a caution administered to an adult was not a criminal conviction for any purpose at all’,³²⁰ this view is constantly denied by government from the CJA 2003, to the PJA 2006, and the Code for Crown Prosecutors in 2010, which enables the investigating officers to circumvent the rights to fair trial.

Another question is: is conditional caution still serving restorative aims? At the beginning, conditional caution was designed to satisfy restorative and rehabilitative purposes. Nevertheless, after a decade of evolution, this device appears to serve neither victims nor offenders.³²¹ In conditional cautions, the victims’ voice shall be heard, while their opinions are not conclusive or decisive; victims’ participation shall be guaranteed, while in most situations it only means that they should be informed; victim’s feeling shall be considered, while officials are warned ‘not to raise the expectations of the victim whilst seeking their views’;³²² and victims should be informed on the process, while they can be deprived of the opportunity to express their feelings in an open, fair court.³²³

From rehabilitation and restoration to punishment, the changing intentions of conditional cautions reflect the ever-consistent governmental proposition of ‘seeking ways of suppressing conduct without invoking the criminal law’.³²⁴ The recent reforms actually allow the police and the CPS to act as investigators, prosecutors and even judges.³²⁵ Even if the new regulations changed their rhetorical

³¹⁶ *The Director’s Guidance on Conditional Cautioning* (2010 Director’s Guidance), 6th edition, January 2010, available at http://www.cps.gov.uk/publications/directors_guidance/conditional_cautioning.pdf. Accessed 3 October 2013.

³¹⁷ Home Office, *Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority, Cutting Crime, Reducing Reoffending and Protecting the Public*, July 2006, available at <http://webarchive.nationalarchives.gov.uk/20060904182404/http://homeoffice.gov.uk/documents/CJS-review.pdf/CJS-review-english.pdf?view=Binary>. Accessed 28 October 2013.

³¹⁸ *Supra* note 316, Director’s Guidance (2010).

³¹⁹ S23 A (3) of the 2010 Code

³²⁰ *H v L* [2006] EWHC 3099 (Fam)

³²¹ *Supra* note 3, Hodgson (2009), p.338.

³²² S12, para 2.48 of Ministry of Justice, *Code of Practice for Adult Conditional Cautions*, 8 April 2013.

³²³ See Carolyn Hoyle and Lucia Zedner, ‘Victims, Victimization and Criminal Justice’, in Mike Maguire *et al* (eds.), *The Oxford Handbook of Criminology*, 4th Edition (Oxford: OUP, 2007), pp. 484-486.

³²⁴ *Supra* note 113, Ashworth and Zedner (2007), P. 22.

³²⁵ *Supra* note 312, Hodgson (2009).

description of unpaid work from ‘punitive’ to ‘rehabilitative’, proceedings of conditional caution are more administrative than judicial.

4.2.3 Court Level

Beside pre-trial proceedings, restoration agreement is also applicable during the period between conviction and sentencing. Before the pronouncement of final judgment, there is an opportunity for the defendant to have his sentence deferred. As mentioned before, most court-based restorative justice programs during past decades adopted the post-conviction and pre-sentencing model. In England and Wales, two measures are normally adopted to facilitate defendants at this stage to gain some credit for his final sentence by consenting to take restorative actions. One is through the probation service’s pre-sentence report (PSR), and the other is through deferred sentencing newly revised in the Crime and Courts Act 2013 (CCA 2013).

4.2.3.1 Probation Service’s Pre-Sentence Report

It has long been the practice that before sentencing, judges may require the probation service to submit reports to better understand the personal character and circumstance of the defendant. Before the Criminal Justice Act 1991 (CJA 1991) a similar practice was generally named ‘social inquiry report’, aiming to assist both prosecutors and judges to take the offender’s personality, circumstances and attitudes into their consideration. The CJA 1991 introduced significant reforms in this mechanism and established PSR.

Now this device is mainly regulated by s158 of the CJA 2003. According to this provision, PSR refers to a report ‘with a view to assisting the court in determining the most suitable method of dealing with an offender’. In adult offences the qualified officer is an officer of a local probation board. Under the CJA 2003, the function of PSR is to assist the sentencers by presenting factors, either aggregating or mitigating, to make comprehensive evaluation of the defendant, not only the seriousness of the crime or the dangerous nature of the defendant, but also the possibility of recidivism in the future.³²⁶

In practice, an offenders’ attitude towards restorative schemes is quite often taken into the probation officer’s consideration, and may influence the final content of the report. Although theoretically this report is only to provide information, studies have shown that there is a blurred boundary between mere information and persuasion.³²⁷ In this sense, the implicit consensus reached between the defendant and the probation service outside the formal criminal proceedings may be translated into one inside.

4.2.3.2 Deferred Sentencing for Restorative Purposes

Deferred sentencing was originally outlined in s22 of the Criminal Justice Act 1972, which enables the court to ‘have regard, in determining his sentence, to his conduct after conviction ... or to any change in his circumstances’. Both the offender’s consent and the court’s satisfaction are indispensable conditions. These rules are inherited by the Powers of Criminal Courts (Sentencing) Act

³²⁶ See, e.g., Peter Raynoret *al*, ‘Quality Assurance, Pre-Sentence Reports and the Probation Service’, 25 (1995) *British Journal of Social Workers*, 477-488.

³²⁷ See Cyrus Tata, *et al*, ‘Assisting and Advising the Sentencing Decision Process’, 48 (2008) *British Journal of Criminology*, 835-855. See also, Anthony E. Bottoms and John D. McClean, *Defendants in the Criminal Process* (London: Routledge, 1976).

2000. In this Act, courts are permitted to defer for up to six months after the conviction if the offender consents and undertakes to comply with certain requirements.

In the CJA 2003 the option of ‘deferment of sentence’ is further developed and detailed, and again, it aims to give judges an opportunity to consider offenders’ conduct after conviction. The fundamental condition for this device is ‘the offender undertakes to comply with any requirements as to his conduct that the court considers it appropriate to impose’.³²⁸ According to the Act, sentencing can be deferred just once, and the period of deferment should not exceed six months after the announcement of the decision (sch. 23, 1(4)).

Although the CJA 2003 implies that the sentencing deferment can be used to provide opportunities for defendants to carry out certain restorative or rehabilitative activities, it does not specifically mention such a connection. After several years’ research on local or regional restorative programs, in 2012 the government started to amend existing national legislation to fill the gap between conviction and sentencing through inserting victim-offender restorative programs.³²⁹ The Ministry of Justice argued that although the practice had proved such programs to be effective, their application in practice was quite narrow. Introducing deferred sentencing would not only widen the access to restorative justice within the criminal justice system, but also expand its scope to more serious crimes.³³⁰

With all these efforts, the CCA 2013 officially establishes ‘Deferring the Passage of Sentence to Allow for Restorative Justice’ in Section 1 (court’s power to defer passing of sentence). It is quite evident that such procedural design is encouraging successful victim-offender restorative programs by indicating an implicit connection between these programs and sentence mitigation. During the period when the passage of sentencing is deferred, the case will be referred to relevant programs under qualified supervisors. Normally at the end of the deferment, the local probation service will submit reports to the court on the implementations of the referral orders, and after that the court will make its final decisions.

One thing that should be mentioned here is that although in this process PSR is still applicable, deferred sentencing prescribed in the CCA 2013 in fact partly shifts the power of imposing restorative conditions from probation officers to judges. This change indicates a strengthened connection between restorative justice schemes and ordinary criminal proceedings. However, the CCA 2013 does not cover the issue of to what extent the defendant’s cooperation may influence the final sentence. Currently the Sentencing Council has not published detailed instructions for courts on this issue, and courts themselves are quite reluctant to touch upon it.³³¹

³²⁸ *Explanatory Notes of CJA 2003*, available at

http://www.legislation.gov.uk/ukpga/2003/44/pdfs/ukpgaen_20030044_en.pdf. Accessed 3 October 2013.

³²⁹ See, e.g., ‘Legislation Introducing Restorative Justice for Victims of Adult Offenders Announced’, Restorative Justice Council, 23 October 2012, available at

http://www.restorativejustice.org.uk/news/rjlaw/#.Uk6TptJsL_E. Accessed 4 October 2013.

³³⁰ About the Ministry of Justice’s response to the legislative amendment, see Ministry of Justice, ‘Restorative Justice Action Plan for the Criminal Justice System’, November 2012, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217311/restorative-justice-action-plan.pdf. Accessed 4 October 2013.

³³¹ In his research Roberts listed the ‘9 steps’ listed in the Sentencing Guidelines for helping judges to do the calculation. Unlike assistance and guilty plea, defendants’ restoration is not clearly listed. See Julian V. Roberts, ‘Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues’, 76 (2013) *Law and Contemporary Problems*, 1-25. It should be noted here that although the Sentencing Council’s first definitive guideline (for assault offences) adopts a nine-step methodology, some more recent guidelines have used a different approach. See, for instance, Sentencing Council, *Fraud, Bribery and Money Laundering Offences Definitive Guidelines*, effective from 1 October 2014, available at

The *R v Collins* case³³² in 2003 is one of the exceptions. After undertaking to participate in a VOM program and to deal with his own drug problems, the appellant was sentenced to seven years' imprisonment for unlawful wounding and robbery.³³³ The Court of Appeal acknowledged that the offender's participation in restorative schemes should be reflected in sentencing, and consequently reduced the total penalty from seven years to five years. However, the exceptional part of this case is that, at that time the appellant's case was selected to be in a control group of a local judicial restorative justice experiment, and judges in that court were required to take restorative activities into consideration. From this perspective, *Collins* is not typical. Also, the judgment, as described by Edwards, 'enthuse[s] about RJ (restorative justice), but obfuscate[s] both the principles on which RJ is based and the relationship between them and fundamental sentencing values'.³³⁴ However, it seems clear that the change in statute will lead to corresponding reforms in practice.

4.3 Motivations and Risks on Restoration Agreement

During past decades the British government has made great effort to embed restorative justice into the criminal justice system. Through examining the relevant official documents and academic studies three motivations can be observed: reduce re-conviction, reduce crime cost, and satisfy both the victim and the offender. They are discussed respectively.

4.3.1 Crime Reduction?

The last decade's endeavors into restorative programs from the Home Office were mainly steered by the aim of 'crime reduction'. The Crime Reduction Programme was launched at the end of the 20th century when both criminal procedure and prison system were fiercely doubted as incapable of controlling crime and of maintaining social safety.³³⁵

*Figure 4.4 Trends in Police Recorded Crime and CSEW, 1981-2012/13*³³⁶

https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf. Accessed 20 January 2015.

³³² *R v Collins* [2003] EWCA Crim 1687

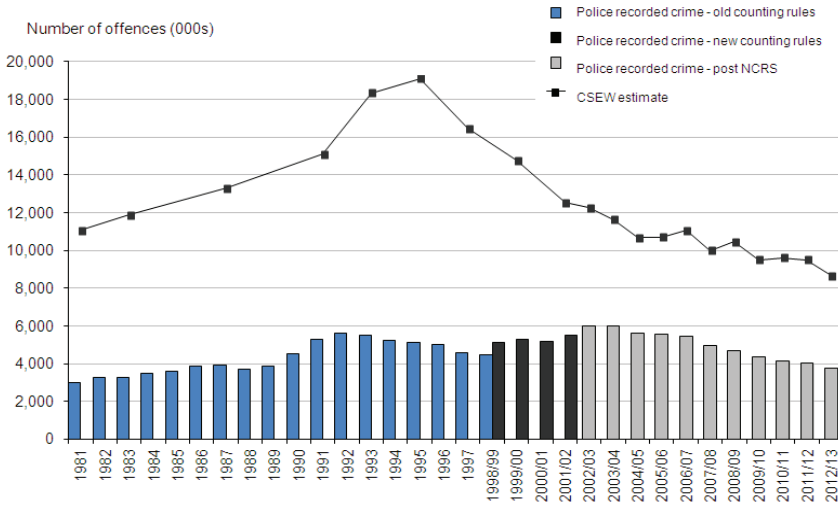
³³³ Key-Practitioners' Report of United Kingdom, *The 3E Model for a Restorative Justice Strategy in Europe*, JUST/2010/JPEN/Ag/1534, January 2013, available at http://3e-rj-model.web.auth.gr/files/key_reports/UK.pdf. Accessed 10 November 2013.

³³⁴ Ian Edwards, 'Restorative Justice, Sentencing and the Court of Appeal', Feb (2006) *Criminal Law Review*, 110-123, p. 112.

³³⁵ About the backgrounds of this program, see Mike Maguire, 'The Crime Reduction Programme in England and Wales: Reflections on the Vision and the Reality', 4 (2004) *Criminal Justice*, 213-237.

³³⁶ Figure 4.4 is cited in Home Office: *Crime in England and Wales, Year Ending March 2013*, 18 July 2013, available at

<http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-march-2013/stb-crime--period-ending-march-2013.html>. Accessed 8 October 2013.



Source: Crime Survey for England and Wales - Office for National Statistics, Police recorded crime - Home Office

Figure 4.4 shows that from 1981 there was a constant increase in registered crimes in England and Wales, and this trend peaked at the end of the 20th century. An interesting fact is that in Figure 4.4, from 1992 to 1997 the police records and the CSEW estimate show opposite trends in criminal cases, and from the overall perspective, the numbers in the former are much lower than in the latter. Even so, earlier discussion has shown the claims that the large volume of crimes has itself become a major threat to social governance, not to mention the high costs in solving crimes. Such claims require updating mechanisms for crime control, and since then the methods employed by the government appear to be dichotomous: one is to adopt tougher measures, whereas the other is to adopt more flexible procedures.

The Crime Reduction Program was introduced during this period, and three restorative projects mentioned above followed the second batch of crime control strategies. In Shapland *et al*'s research, the target of crime reduction was mainly evaluated through the recidivism rate, and it focuses on the key index: the number of re-convictions. According to their reports, although to different extents according to the specific situations of the project, the frequency of reconviction was significantly decreased. These outcomes confirmed the government's position on the positive effect of restorative programs' in reducing reoffending, which is embodied in the Ministry of Justice Business Plan 2012-15. According to the Plan, the major purpose in introducing 'the use of restorative justice for adult and youth crimes' is to 'ensure that the justice system reduces reoffending'.³³⁷ These opinions finally led to the reform in the CCA 2013.

However, although Figure 4.4 shows similar trends since the beginning of the new century, it does not indicate a direct connection between the total decrease in crimes and the use of restorative programmers. This is mainly because of, as mentioned by Shapland *et al*, the limited case flow and short experimental periods. Although the three projects intended to extend the application of restorative justice into a broader scope, the cases actually solved in these programs were quite limited. For instance, during the experiment period from 2001 to 2004, only 151 cases were solved through

³³⁷ Ministry of Justice Business Plan 2012-15, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217281/moj-2012-business-plan.pdf. Accessed 14 October 2013.

restorative justice in the JRC in London, 172 in the JRC in Northumbria, 70 in the JRC in Thames Valley, 50 in CONNECT, and 132 in REMEDI.³³⁸ Research also shows that the success in re-conviction reduction much depends on the original attitude of the offender.

4.3.2 Cost Reduction?

The second motivation is cost reduction, which has been emphasized since the very beginning of the Crime Reduction Programme.³³⁹ According to Home Office reports, in 2000 the total cost of crime reached £39.9 billion. In 2003/04 this number reduced slightly to £36.2 billion,³⁴⁰ which was still quite high. One thing that should be clarified here is that the ‘costs’ calculated in the Home Office reports do not only refer to costs in implementing criminal procedures. The 2003/04 report also took the following issues into consideration: defensive expenditure, health services, insurance administration, physical and emotional impact, victim services, net value of property lost, and lost output.³⁴¹

Shapland *et al*’s research mainly focused on the cost of convictions and cost of further offending.³⁴² Because all these three schemes were attached to the ordinary criminal proceedings, their costs were also ‘additional to the criminal justice costs’.³⁴³ According to the research outcomes, JRC programs in total showed a much lower cost of convictions in RJ cases than others.³⁴⁴ If victim’s satisfaction is taken into consideration, the cost may be even lower.

Even so, the evaluation of the cost is still quite limited mainly due to two reasons. First of all, because of the simplification in the criterion by emphasizing re-offending in future, the evaluation in the cost reduction is restricted by elements similar to that in re-conviction. Secondly, evaluating cost reduction also encounters the problem of identifying direct and indirect, short-term and long-term, and relevant and irrelevant costs in implementing restorative programs. Such a problem may not only influence the outcomes of cost-benefit evaluations, but also produce an effect on the government’s policy, which is normally in favor of more direct and instant results within the electoral cycle.³⁴⁵

4.3.3 Victim’s and Offender’s Satisfaction?

³³⁸ See Table 3.1 in Joanna Shapland *et al*, *Restorative Justice in Practice: Evaluating What Works for Victims and Offenders* (Oxon and New York: Routledge, 2011), p. 49. These numbers covers both adults and juveniles crimes.

³³⁹ Sanjay Dhiri and Sam Brand, ‘Crime Reduction Programme – Analysis of Costs and Benefits: Guidance for Evaluators’, (1999) available at <http://www.costsofcrime.org/PolicyTools/pdf/cdp1costeff.pdf>. Accessed 7 October 2013.

³⁴⁰ Home Office, *The Economic and Social Costs of Crime against Individuals and Households 2003/04*, Home Office Online Report 30/05, available at <http://webarchive.nationalarchives.gov.uk/20100413151441/http://www.homeoffice.gov.uk/rds/pdfs05/rdsolr3005.pdf>. Accessed 7 October 2013. In 2000’s report this number was £59.9 billion. The new report changed methodology and ‘£39.9 billion’ is the revised outcome according to it.

³⁴¹ *Ibid.*

³⁴² See *supra* note 338, Joanna Shapland *et al* (2011).

³⁴³ Joanna Shapland *et al*, ‘Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes’, *Ministry of Justice Research Series 10/08*, June 2008, available at http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/restorative-justice-report_06-08.pdf. Accessed 27 September 2013.

³⁴⁴ *Supra* note 338, Joanna Shapland *et al* (2011), p. 172.

³⁴⁵ In his article Mike Maguire considered the Crime Reduction Programme to be ‘vulnerable’ in front of government ministers’ impatience. See *supra* note 335, Maguire (2004)

One major target expressed in those restorative schemes is to enhance the victim's and offender's satisfaction in the criminal process. For instance, in the Home Office Report on Implementing Restorative Justice Schemes in 2004, one of the original aims is 'leaving the victim and offender with a greater sense of satisfaction about criminal justice'.³⁴⁶

It is not difficult to understand the target concerning victims. In the Restorative Justice Action Plan for the Criminal Justice System issued by the Ministry of Justice, the first paragraph sentimentally claims that victims 'feel frustrated that they were not able to describe the hurt, stress and anxiety'.³⁴⁷ The entire speech expressed a strong emphasis on the victim's feeling, expectation, and interests, as it said '... this process has to be led by the victim and be on their terms'.³⁴⁸

However, the practice seems to present a quite opposite image. Both conditional caution and deferred sentencing provides victims with opportunities to speak out, but neither of them answered the question concerning the extent to which the victim's views are taken into account. One typical case stressing this problem is *R (on the application of Guest) v DPP*³⁴⁹ in 2009. In this case, John Guest, the victim, had been attacked and beaten in his own home by Christopher Watts in Dorset in April 2008, and sustained a serious injury. Later, Watts was given a conditional caution and ordered to pay Guest £200 as compensation. After being informed of such arrangement, Guest claimed 'I didn't accept it. At no stage was I going to accept it', and he sought a judicial review on this case. In September 2009 the conditional caution was overturned. Watts was sentenced to a six-month suspended imprisonment for actual bodily harm, and £1,000 compensation to Guest. Both the CPS and police officers in Dorset conceded that the conditional caution given to Watts was inappropriate.

As to offenders, one major argument against the Ministry's claim is that victims sometimes feel that they are employed to serve offenders, to help them to be rehabilitated, or to escape from harsh punishment. In other words, the person standing in the center of the stage is still offender rather than victim. In this sense, offenders can at least benefit from lenient punishment through accepting such agreements.

This is also challengeable. For instance, conditional caution shares some characteristics of administrative penalty where procedural protections for the offender are reduced in exchange for efficiency. Whether such reduction will benefit offenders is in doubt. As to 'deferred sentencing', it is too early to predict its influence on offenders in the new regime, but it seems that the Sentencing Council does not intend to make rules for judges on this issue in the short term.³⁵⁰ It means whether offenders can get a lenient sentence through making restorative agreements will continually fall to individual judges' discretion.

4.4 Summary

As Shapland *et al* once commented, 'whenever restorative justice has been linked with criminal justice, it has been found that the link can be problematic, with the priorities of referral to restorative justice tending not to be the key priorities of criminal justice practitioners and so forth'.³⁵¹ It is not difficult to detect the gap between the offender's restorative performance and the final decisions of

³⁴⁶ Joanna Shapland *et al*, 'Implementing Restorative Justice Schemes (Crime Reduction Programme), A Report on the First Year', *Home Office Online Report 32/04*, available at <http://217.35.77.12/archive/england/papers/justice/pdfs/rdsolr3204.pdf>. Accessed 27 September 2013.

³⁴⁷ See *supra* note 330, Ministry of Justice (2012).

³⁴⁸ *Ibid.*

³⁴⁹ *R (on the application of Guest) v DPP* [2009] 2 Cr App R 26, [2009] EWHC 594 (Admin).

³⁵⁰ Interview with Julian Roberts, the leading expert in sentencing guidelines in England and Wales, 12 October 2013.

³⁵¹ *Supra* note 338, Joanna Shapland *et al* (2011), p. 43.

criminal justice agencies especially when the case moves into trial proceedings. Official documents have long been silent on this issue, and therefore there is unlikely to be a single systematically constructed restoration agreement with a concrete statutory basis. However, when criminal justice agencies are required to actively encourage offenders to reconcile, it is hard to say that the sentence discount and other legal concessions, which are deemed to be the strongest incentives for cooperation in the earlier discussion, will be excluded in this situation.

Compared with the other two agreements in England and Wales, bridging the offender's restorative activities with legal concessions in the form of agreement seems to encounter several challenges. The major one is to situate restorative schemes into conventional criminal justice. In other words, it is a question of how to sentence offenders based on restorative justice principles but meanwhile 'ensure compliance with fundamental principles of proportionality, consistency and objectivity'.³⁵²

Several obstacles stand in the way. From the outset, there is a strong endogenous tendency of individualization in those victim-offender interactive schemes that may cause inconsistency and unpredictability in court judgments. As Ashworth noticed, current restorative programs are mainly implemented in localities, and 'community' is more like a 'geographical entity' rather than one based on individual factors. This means that people with similar backgrounds and committing similar offences may be treated differently in different localities.³⁵³ Such individualization may further antagonize the public in cases where lenient disposals are issued based on offenders' compensation and victims' will.³⁵⁴

Another difficulty is to balance the time limitations in criminal justice and sufficient communication in restorative programs. The quality of the reconciliation and its consequent effects such as crime prevention largely depend on sufficient communication and understandings between offenders and victims, and the processes are various in different disputes with different offenders and victims. Nevertheless, the criminal justice system establishes relatively strict limitations on periods to satisfy the 'reasonable time' requirement and to avoid unnecessary delay. Then it leads to the question of whether the victim's satisfaction and the offender's rehabilitation can be really achieved in such a limited period.

The most fundamental conflict between restorative agreements and English criminal justice concerns how to situate victims in offender-centered criminal proceedings. In the conventional criminal justice system, the allocation of roles, the check and balance of powers, the procedural protections, and the systematic operation are established based on that center, as well as fundamental rights and protections for individuals involved. Even though the current system has been criticized from several points of view about its failure in crime control, it can hardly say that its dominance can be replaced by other measures, such as restorative justice.³⁵⁵ As long as criminal justice is the fundamental way of solving crimes, it will be difficult to maintain restorative measures within that framework without its aims and ideologies being distorted.

5. Trends, Tension and Features of CPAs in England and Wales

³⁵² *Supra* note 334, Edwards (2006), p. 121.

³⁵³ Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice', 42 (2002) *Brit. J. Criminol.*, 578-595, p. 582.

³⁵⁴ *Supra* note 151, Ashworth (2010), p. 357.

³⁵⁵ See *supra* note 353, Ashworth (2002).

After examining each CPA, the discussion moves on to an overview of CPAs in England and Wales to identify the overall trends, underlying reasons, major tensions, and response from the criminal justice system.

5.1 Overall Trends of CPAs in the English Criminal Justice

What can be noted in the earlier discussion is the steady expansion of all three types of CPA in England and Wales. Such expansion can be observed mainly from two dimensions: the procedural facilitations, and the types of CPAs.

5.1.1 Dimension I: Procedural Facilitations for CPAs

The overall expansion of CPAs is firstly embodied in the enhanced facilitations and strengthened motivations from both institutional and legal aspects. This can be observed in several areas.

First of all, the predictability of criminal justice agencies' decisions has been improved. Two key elements contribute to this trend. One element is the efforts of the Sentencing Council in enhancing the consistency of the judicial decisions. The sentencing guidelines, combined with statutory obligations, establish normal rules narrowing down the discretionary power of the judiciary in these agreements, increasing the predictability of the offers from the criminal justice agencies, and encouraging offenders to cooperate. Another contributory element is the avoidance of jury trial and oral confrontation. As mentioned earlier in this chapter, this can be attributed to the recent general trends in the English criminal justice shifting away from the court trial proceedings to the pre-trial proceedings, and from the Crown Court to the magistrates' courts.

The second aspect concerns the delicately designed system of rewards for the cooperating offenders. These structures, quite often aiming at pragmatic purposes, generate strong incentives for the offenders to follow policy guidance towards better cooperation. Several common principles have been established: it is always better to plead guilty early than late; assisting offenders can always get higher concessions if the fish is big enough; and it is always better to attend restoration schemes, or at least compensate the victim, than not.

The third aspect is that the checks and balances among different criminal justice agencies have been constantly weakened. Obstacles against internal collaboration among these agencies are gradually removed. For instance, the change from *Turner* rules to the *Goodeyear* rules in guilty plea has reduced the restrictions on the participation of the judiciary in the pre-trial negotiations; the shared power in granting conditional caution between the police and the CPS as well as bypassing the DPP's consent also have lowered the threshold for making deals.

5.1.2 Dimension II: New Type of CPAs

Another indicator for the expansion of CPAs is the fact that new agreements have been introduced into the English legal system. One example of such is the newly proposed Deferred Prosecution Agreements (DPA) in the Schedule 17 of the CCA 2013.

5.1.2.1 Legal Regime of DPA

According to the CPS' consultation code of practice, DPA is defined as follows:

A DPA involves a company reaching an agreement with a prosecutor where the company is charged with a criminal offence but proceedings are automatically

*suspended. The company agrees to a number of conditions, which may include payment of a financial penalty, payment of compensation, and co-operation with future prosecutions of individuals.*³⁵⁶

This definition needs to be further clarified from three aspects. To begin with, DPA is only applicable in certain crimes, which mainly includes fraud, bribery and money laundering offences.³⁵⁷ Secondly, DPA can only be offered to ‘a body corporate, a partnership or an unincorporated association’,³⁵⁸ and therefore individual persons are disqualified. Hereinafter these bodies are abbreviated as ‘company’. Thirdly, about the attached ‘conditions’, the CCA 2013 enumerates several options. The indispensable premises for all agreements are the charged company’s self-report and the admission of guilt. Based on them the specific conditions can be categorized into three types: (1) property related, such as making compensation or donation, disgorging profits, or paying a financial penalty; (2) judiciary related, like co-operation in any investigation related to the alleged offence; and (3) self-discipline related, which is to implement or reform compliance programs.

Currently DPA is regulated mainly by the Code of Practice on Deferred Prosecution Agreements in 2014 (2014 DPA Code), jointly issued by the SFO and the CPS.³⁵⁹ According to it, there are two steps for prosecutors should adopt the ‘two stage test’ to decide whether to apply DPA. The first step is the evidential stage which guarantees that there is a ‘realistic prospect of conviction’ or at least, ‘reasonable suspicion’. The second step is to guarantee that such agreement will be in the public interest.

Derived from ‘public interest’ are two basic principles. The first principle is that ‘the more serious the offence, the more likely it is that prosecution will be required in the public interest’, and it is more unlikely to use DPA. As to the evaluation of ‘seriousness’, the 2014 DPA Code suggested several factors such as ‘the value of any gain or loss’ and ‘the risk of harm to public, to unidentified victims, shareholders, employees and creditors and to the stability and integrity of financial markets and international trade’. Another principle is that DPA can only be used when the public interest factors against prosecution clearly outweigh those tending to favour of prosecution’. By passing through the two-stage test, qualified prosecutors and companies may now enter into negotiation.³⁶⁰

Since financial penalties can be imposed under DPA, the Sentencing Council is also expected to issue specified guidance on the appropriate penalty level for relevant crimes, even though its statutory function is to instruct court’s sentence after the conviction has been confirmed. In other words, what is stipulated in the Council’s guidelines can act as reference for prosecutors in DPA.³⁶¹ The general principle is that the financial penalty in DPA should be ‘broadly comparable to the fine that a court would have imposed ...following a guilty plea’, that is, a maximum one third reduction in the penalty.

³⁵⁶ ‘Deferred Prosecution Agreements: Consultation on Draft Code of Practice’, 27 June 2013, available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/deferred-prosecution-agreements-consultation-on-draft-code-of-practice.aspx?> Accessed 13 September 2013.

³⁵⁷ According to s17 part 2 of CCA 2013, crimes where DPA is applicable are scattered in several Acts, such as Theft Act 1968, Customs and Excise Management Act 1979, Forgery and Counterfeiting Act 1981, Companies Act 1985, Value Added Tax Act 1994, Financial Service and Markets Act 2000, Proceeds of Crimes Act 2002, Companies Act 2006, Fraud Act 2006, Bribery Act 2010, and Money Laundering Regulations 2007.

³⁵⁸ S17, part 1, 4(1) of CCA 2013.

³⁵⁹ SFO and CPS, *Deferred Prosecution Agreements Code of Practice*, available at <http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf>. Accessed 28 October 2014.

³⁶⁰ About the procedure of DPA, see Appendix II, ‘Overview: DPAs in Practice’.

³⁶¹ See *supra* note 331, Sentencing council.

After DPA, the prosecutor must decide either to drop the charges, or to prosecute.. A key question here is: when agreement is not reached, or the obligations in the agreement are not fulfilled, how should the documents and information, collected prior to and during the negotiation process, be dealt with? According to the CCA 2013, answers to this question depend on two situations. If the statement of facts is obtained during DPA, then it can be treated as its admission in ‘any criminal proceedings brought against it for the alleged offence’. However, if the materials are collected before the Crown Court approved an agreement, the use of materials against the company is restricted to when either there is ‘inaccurate, misleading or incomplete information’ in its own case, or the company ‘makes a statement inconsistent with the material’ in other cases.

DPA established in the CCA 2013 has three key characteristics. First of all, by introducing self-report DPA offers higher incentives as well as pressure on the targeted companies. Second, the Crown Court is involved in the entire process, even before the suspect and prosecutor entering into an agreement, to guarantee the agreement to be fair, reasonable, and proportionate without violating the interests of justice. Moreover, there is expected to be high transparency and openness of DPA that not only the agreement itself should be published, but also the judicial reasons for approving, rejecting, revising, or finalizing it.

5.1.2.2 Motivations on DPA

DPA is expected to enhance companies’ compliance with Acts related to corruption or economic crimes, and there are several motivations lying behind. The direct incentive consists of two traits of economic crimes committed by companies. The first trait is the huge damage caused by such offences, as the Ministry of Justice explained:

*Economic crime by commercial organizations does serious damage both to its immediate victims and the economy, costing billions of pounds to the taxpayer and to those directly affected... Deferred Prosecution Agreements (DPAs) are the next instrument in the battle against economic crime.*³⁶²

According to the Statistics released by the National Fraud Authority (NFA), in 2011 fraud crimes caused the UK economy £73 billion.³⁶³ Although NFA adjusted statistic measures in 2012, it still reported a loss of £52 billion.³⁶⁴

Although the government is well aware of the seriousness of these offences, the combat against them is not easy. These crimes are difficult to uncover. Damages can be even worse as the trend of globalization is continually strengthened, and companies and their activities are becoming transnational. Even if these offences can be detected and be prosecuted, it is always a question of how

³⁶² Ministry of Justice, *Deferred Prosecution Agreements: Government Response to the Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organizations, Response to Consultation CP(R) 18/2012*, 23 October 2012, available at https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CEIQFjAC&url=https%3A%2F%2Fconsult.justice.gov.uk%2Fdigital-communications%2Fdeferred-prosecution-agreements%2Fresults%2Fdeferred-prosecution-agreements-response.pdf&ei=y11eUvDXHofL0AWLsoHABA&usq=AFQjCNHcv8-qyAPrNHhHw9vC2_qwZbBA4A&sig2=Y5mFmOGh42NypBI-MiuyCg&bvm=bv.54176721,d.d2k. Accessed 16 October 2013.

³⁶³ National Fraud Authority, *Annual Fraud Indicator*, March 2012, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118530/annual-fraud-indicator-2012.pdf. Accessed 21 October 2013.

³⁶⁴ *Ibid.*

to ascribe liability. It is not only relevant to the distribution of responsibility among different bodies and individuals, but also among civil, administrative and criminal liabilities. Moreover, with companies as criminals, the most common penalty is fines. Nevertheless, such a penalty appears to be both inefficient and insufficient to deter future delinquencies.³⁶⁵

Another incentive for adopting DPA is the comparatively successful experience from other countries especially the US. Research shows that with the promulgation of the Principles of Federal Prosecution of Business Organizations on 20 January 2003, there has been a dramatic increase in the use of DPAs in the American criminal justice system during recent years.³⁶⁶ In 2012, through 36 DPAs and non-prosecution agreements (NPA) US recovered about \$9 billion, much higher than SFO's £50 million in UK.³⁶⁷ All these elements questioned the necessity and effectiveness of applying the full-dressed criminal proceedings to solve these crimes. It seems that instead of opposing with them, the better option seems to be to turn 'enemies' into 'partners'.

Behind these motivations is the frequently mentioned claim for tougher and stiffer measures against crimes. Although DPA appears to be more flexible, it does not necessarily equate with 'leniency'. In fact, in the Ministry of Justice's report, these conditions have been described as 'tough and stringent'.³⁶⁸ The initial proposal was to drop charges once the company reported itself. Now the screw has been tightened slightly has been reduced so that more factors beyond self-reporting will be considered before the final decision.³⁶⁹ Theoretically, DPA is a tool to avoid the expensive and formal procedures (including some procedural protections), and meanwhile, to enhance the detection effect without reducing punitive effect.

5.1.2.3 Potential Risks

It is too early to predict the outcomes of using DPA. Even so, several concerns have been provoked, especially when using American practice as reference.

From the prosecutor's perspective, DPA increases its power in combating financial crimes committed by companies. However, before entering into an agreement, there can be a long period for detecting, reporting, and negotiating. The contact of the two parties during this period is not clearly regulated in current statutes and regulations, which may create grey areas for bargaining, and finally impair the overall justice. After all, current rules can only guarantee transparency after parties reach mutual-consent.

Another concern relating to the enlarged prosecutors' power is that this power might be 'too powerful'. It has been claimed that 'the consequences of indictment on a corporate entity can be dire'.³⁷⁰ It means that between indictment and cooperation there is little choice for companies, and

³⁶⁵ See Michael Bisgrove and Mark Weekes, 'Deferred Prosecution Agreements: A Practical Consideration', 6 (2014) *Crim. L. R.*, 416-438.

³⁶⁶ See, e.g., Kathleen F. Brickey, 'Perspectives on Corporate Criminal Liability', *Legal Studies Research Paper Series*, Paper No. 12-01-02, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1980346. Accessed 22 October 2013.

³⁶⁷ Lila Sujanani, 'DPAs: The Reality and the Rhetoric', 26 June 2013, available at http://www.eucriminallaw.com/storage/CO-DPA_presentation.pdf. Accessed 22 October 2013.

³⁶⁸ See *supra* note 362, Ministry of Justice (2012).

³⁶⁹ Clifford Chance Briefing Note, 'Deferred Prosecution Agreements Pass into Law in the UK', May 2013, available at http://www.cliffordchance.com/publicationviews/publications/2013/05/deferred_prosecutionagreementspassintolawi.html. Accessed 22 October 2013.

³⁷⁰ Matt Senko, 'Prosecutorial Overreaching in Deferred Prosecution Agreements', 19 (2009) *S. Cal. Interdisc. L. J.*, 163-193, p. 164.

they may be coerced into accepting all conditions propose by their counterparty, no matter if they are reasonable or not. In fact, it can be observed in the new rules of DPA in the UK that some conditions, such as making donation to charities, can be completely irrelevant to the offence, as well as outside the normal obligations of a company should bear. A relevant question here is how to assess a company's 'cooperation'. For instance, it is unclear whether to 'co-operate in any investigation related to the alleged offence' actually means to provide convenience to the investigation, or act as an informant.

5.2 Exploration into the Ideology behind Expansion

To analyze the ideology underlying the on-going expansion of CPAs, four official documents are used in this section: the SGC's 2007 Guidelines on Guilty Plea (hereinafter SGC), the Home Office's White Paper *One Step Ahead* (hereinafter HO), the MOJ's *Response to Consultation on Deferred Prosecution Agreements* (hereinafter MOJ 2012), and the MOJ's Green Paper Evidence Report *Breaking the Cycle* (hereinafter MOJ 2010). Arguments therein are categorized into six groups.

Group I: Efficiency and Expediency

- 'A guilty plea avoids the need for a trial ...[and] shortens the gap between charge and sentence ...' (plea agreement, SGC)
- '...strong cases can be progressed as quickly as possible, through encouraging guilty pleas...' (plea agreement, HO)
- 'This will speed up trials...' (assistance agreement, HO)
- '[T]he criminal justice system might be delivered more efficiently and effectively...' (restoration agreement, MOJ 2010)
- '...the DPA will allow prosecutors to hold offending organizations to account for their wrongdoing ... without the uncertainty, expense, complexity or length of a criminal trial.' (DPA, MOJ 2012)

Group II: Cost Reduction for Administration of Justice

- '... save considerable cost...' (plea agreement, SGC 2007 Guidelines)
- '... focusing on rehabilitation could ... generate significant benefit to society ... [and] there could be cost savings to government ...' (restoration agreement, MOJ 2010)
- '... the length and cost of a full-scale investigation and prosecution can give rise to uncertainty and reputational damage.' (DPA, MOJ 2012)

Group III: Crime Control

- '...increase the impact of prosecution on wider networks, drawing in major players, and increase the level of mistrust within criminal gangs.' (assistance agreement, HO)
- '... community sentences are more effective at reducing reoffending than short prison sentences, and cautions are slightly more effective than fines.' (restoration agreement, MOJ 2010)

Group IV: Victim's Interests

- '[M]any of these approaches have a positive impact on victim satisfaction...' (restoration agreement, MOJ 2010)
- '...saves victims ... from the concern about having to give evidence.' (plea agreement, SGC)

Group V: Offender's Interests

- '... more offenders becoming productive members of society.' (restoration agreement, MOJ 2010)

Group VI: Other Stakeholder's Interests

- '...saves ... witnesses from the concern about having to give evidence.' (plea agreement, SGC)

Different CPAs emphasize different objectives, and it seems that these objectives do not gain equal attention. At least one common target is shared by all agreements: the effective and efficient running of the criminal proceedings (Group I). Group II and Group III are also widely mentioned in different agreements. Comparatively, the last three groups appear to be less popular in most of the CPAs with the exception of restoration agreement.

In this sense, what can be found behind the policy maker's arguments are ideals of pragmatism and expediency; crimes are supposed to be solved faster, earlier, and cheaper, in contrast with the tedious, expensive, and delayed approaches adopted in ordinary procedure.

Behind the pragmatic considerations lie two main impact factors. One factor is relevant to the public perception that the crime problems in England and Wales are getting worse both qualitatively and quantitatively. From the 1970s to nowadays, several waves claiming the deterioration of crime problems can be detected. For instance, the outcry of 'nothing works' raised in the 1970s, assaulting the old rationale of rehabilitation. Since the 1980s there has been social panic caused by the increased crime rates, especially organized crimes and serious crimes. A series of reforms in the 1990s responded to such panic under the name 'punitive turn', where a rapid development in both plea agreement and assistance agreement can be found simultaneously. When the new century began, the focus moved from the total amount to crimes, to the seriousness and types of crimes. The change in focus led to higher requirements for multiple anticrime devices on the one hand and early prevention and detection on the other hand.

The other impact factor is the suspicion of the crime control strategies adopted in ordinary proceedings with high safeguards of offenders, restrictions of criminal justice authorities' power, low degree of differentiation among proceedings for various types of crimes, an *ex-post* rather than *ex-ante* perspective, and excessive use of expensive imprisonment.

These two factors together generate a strong preference for tough, swift and effective reactions to crimes and offenders in the current English criminal justice system. Such preference among the public and policy makers not only influences criminal policy but also reshapes the social environment of the operation of criminal proceedings.

5.3 Tension Areas

Based on the pragmatic considerations, CPAs in England and Wales inevitably create areas of tension. Among all, there are four major areas of tensions in the criminal justice system: the task of seeking the truth, the burden on the offender, the involvement of victims, and the power distribution among criminal justice agencies.

5.3.1 Task of Seeking Truth

Challenges against different types of CPAs discussed earlier have exposed a crucial tension with seeking the truth. This especially exists in plea agreement and assistance agreement where the investigator shifts parts of its duty of collecting evidence and proofing cases to the offenders.

However, if they are examined closely, slight discrepancies can also be noticed between these two agreements. A plea agreement targets the cooperating offender himself. In assistance agreement, however, the detection effect of the cooperation aims at another accused person rather than the assisting offender. Therefore it is likely that compared with plea agreement, assistance agreement provides stronger incentives for the assisting offender to distort facts.

Another discrepancy concerns the attitudes of criminal justice agencies. In plea agreement, police, the CPS and courts all have interests in using this mechanism, as a guilty plea itself can guarantee the conviction for the police and prosecutors, and meanwhile shorten the trial proceedings for the judges. This is consistent with what has been found in the English system that judges are increasingly involved in the streamlining of producing guilty pleas.

Nonetheless, in assistance agreement, it is the investigators and prosecutors rather than the court, who can benefit from the deal directly. Through using assisting offenders, the police can enhance their successful investigation rate, prosecutors have a better chance of proving their cases, but judges cannot shorten the trial proceedings directly based on the cooperation. In fact, according to the SOCPA 2005, the trial proceedings may be prolonged with the extension of the post-sentencing review procedure. So when one examines the history of assistance agreement in England and Wales, during several waves of miscarriages of justice due to the use of unreliable assisting offenders, courts always played a significant role in preserving justice.

Given these two discrepancies, it is difficult to tell in which agreement the risk against seeking the truth is higher. Nevertheless, what can be deduced from past experience is that these mechanisms may strengthen the criminal justice agencies' reliance on the cases built by the offender rather than on their own approaches, especially when they have direct interests involved in.

5.3.2 Burden on Offender

The second tension area concerns the burden on offenders. One of the major approaches adopted by ordinary procedures to protect the offender is to alleviate his legal burdens in responding to criminal justice agencies. Nevertheless, what can be observed in the English system is a counter-trend where various burdens have been imposed on the offender through CPAs.

This is actually another facet of the expansion of CPAs. Here guilty plea is used as an example, for in practice it is an indispensable element in almost all types of agreement. In plea agreement, the offender is not only required to plead guilty, but also to plead as early as possible. In assistance agreement under the SOCPA 2005, the offender is not only supposed to confess on the charged crime, but also his criminal history. In restoration agreement, a strong sense of remorse will make the effect of the confession much better. In DPA, the best opportunity for the criminal company to plead guilty is the period before investigations begin.

The burden on the offender can also be examined through its concrete forms. Given all three types of CPAs in consideration, the offender in England and Wales is expected to cooperate in various ways, as shown in Table 4.3. Most of them, however, are discouraged or not required in ordinary procedure.

Table 4.3 Burdens on the Offenders in CPAs in England and Wales

Contractual Obligation	CPA
Self-report	DPA
Plead guilty	PA, AA, RA, DPA
Report criminal history (cleansing)	AA

Withdraw legal privilege with lawyer	AA
Provide intelligence	AA, DPA
Give ‘Queen’s evidence’	AA
Participate in investigation activities	AA, DPA
Compensate the victim	RA, DPA
Attend restorative schemes	RA
Charity donation	DPA
Employee training	DPA
...	...

Note: PA: plea agreement; AA: assistance agreement; RA: restoration agreement; DPA: deferred prosecution agreement

5.3.3 Involvement of Victim

The third tension area is about victims. The outcry against indifference towards criminal victims has exerted high pressure on criminal justice agencies. Such pressure appears to be even higher in those ‘secret’ negotiations between the offender and criminal justice authorities, especially the police and prosecution. Earlier discussion shows that compared with restoration agreement where the involvement of the victim is quite often an indispensable condition, victim dissatisfaction in plea agreement and assistance agreement appears to be stronger.

Except for the discrepancies in the level of dissatisfaction, the reasons behind each agreement are also diversified. For plea agreement what victims complain about mostly is the deprivation of their rights to participate in a court trial. As mentioned earlier, there appears to be a gap between the protection claimed by the officials and the respect perceived by victims. In assistance agreement, however, victims rarely appear in both official and academic discussions. This may be due to the fact that a certain level of confidentiality is necessary to guarantee the quality of the investigation, as well as the safety of the assisting offender. In restoration agreement, although the protection of victims is always claimed in official documents, what can be detected from the practice is the fact that pragmatism has sometimes overwhelmed the need of the victim.

5.3.4 Power Distribution among Police, Prosecution, and Court

Apart from the individual stakeholders, CPAs are also challenging the conventional relationship among three criminal justice agencies. This can be analyzed at least from two perspectives. The first is a shift away from the trial proceedings to the pre-trial proceedings. There is a common characteristic in all types of CPAs that the pre-trial negotiation and cooperation become increasingly important and determinate in the final legal decisions.

This is partly due to the fact that in the English legal system, CPAs can serve as procedural diversion, especially the plea agreement and restoration agreement. Weak links have frequently occurred in the full chain of criminal proceedings, that is, from investigation to prosecution, from the court trial to execution. A relevant indication of such shift is the enhanced use of the magistrates’ courts rather than the Crown Court where a jury sits. A typical example mentioned earlier is the reform in allocation system, making cases more easily kept in the summary trial proceedings.

The second perspective concerns the check and balance among three agencies, in other words, the power distribution. The ideal design in ordinary procedure is that the CPS restricts the power of

police by separating the power to prosecute from the power to investigate; and courts are expected to be impartial and independent. This model, however, has been challenged in CPAs.

Here are two major challenges. One is the fact that judges are increasingly invited into the negotiation so that the bargain chips of the prosecution can be higher. This has been typically reflected in the evolution of the plea agreement where pre-trial indications are gradually accepted. Apart from the sign of streamlined proceedings in reaching agreements, CPAs also lead to a blurred boundary between different types of powers, that is, the power of prosecution and the power of sentencing. Take conditional caution as an example. After a decade's development, prosecutors now can attach penal conditions to caution, which is used to be monopolized by courts. Meanwhile, police now can also issue a conditional caution for adult criminals, which is actually a re-distribution of the prosecution power.

5.4 Interaction between CPAs and Ordinary Procedure

Given the inner links between CPAs and ordinary procedure, the expansion of the former would influence the latter correspondingly. Through detailed examination of the mechanisms of CPAs as well as the on-going trends, two major features of the interaction between CPAs and ordinary procedure in England and Wales can be observed: the loosened procedural safeguards for offenders, and the see-saw battle in maintaining the integrity of criminal justice.

5.4.1 Loosened Safeguards for Offenders

In the course of the interaction between CPAs and ordinary procedure, it can be observed that the procedural safeguards for offenders are becoming looser. This is consistent with the overall trend of English criminal law observed by Ashworth and Zedner. According to their research, challenges against the ordinary procedure caused changes requiring a higher use of diversion, fixed penalties, summary trials, hybrid civil-criminal processes, strict criminal liability, guilty plea, and prevention orders.³⁷¹ All these changes reflect a strong desire to avoid the more onerous procedural requirements.

These changes are, as mentioned earlier, largely the consequences of the criminal policies embracing tougher, swifter and cheaper crime control approaches. Such a claim may to some extent reflect the public's genuine expectations, but also has been amplified through political reconstruction and media re-interpretation. On the one hand, there is a strong tendency moving towards politicization in criminal justice. This can be traced back to the 1970s when the penal-welfarist consensus was gradually unravelled, and 'law and order' was increasingly moved up in the political agenda.³⁷² On the other hand, given the enhanced facilitations in information dissemination, crime and crime control have retreated from liberal elitism and become a feature of everyday life.³⁷³ Under these trends, it is not surprising to see along with the expansion of CPAs that some procedural safeguards are becoming diluted.

5.4.2 Efforts in Preserving Integrity of Criminal Justice

³⁷¹ See *supra* note 113, Ashworth and Zedner (2008).

³⁷² Tim Newburn, "'Tough on Crime": Penal Policy in England and Wales', 6(2007) *Crime and Justice*, 425-470.

³⁷³ Ian Loader, 'Fall of the "Platonic Guardians": Liberalism, Criminology and Political Responses to Crime in England and Wales', 46(2006) *Brit. J. Criminol.*, 561-586.

Despite the risks affecting the safeguards for offenders caused by using CPAs, criminal justice authorities in England and Wales constantly endeavor to play the role of what Loader called ‘Platonic Guardians’,³⁷⁴ aiming at defending the professionalism and elitism of the criminal proceedings, the links between censure and conviction and between liability and punishment, and the defendant’s rights. Such efforts can be observed in mainly three aspects.

The first aspect concerns the enhanced formalization of CPAs. Most CPAs were once deemed as informal practice and have long operated in a grey area. However, during the past decades all these CPAs have been gradually regulated under the statutory framework. The legal regimes do not only specify scopes, conditions, procedures and supplementary mechanisms of these techniques, they also in general enhance the transparency of CPAs and offer remedies for stakeholders beyond.

Take the definitive sentencing guidelines as examples. The Sentencing Council adopted a step-by-step approach to determine the final punishment of the offender, and assistance, guilty plea, and compensation are all explicitly listed.³⁷⁵ Another example is the written agreement encouraged in the SOCPA 2005 framework, which on the one hand reduced the risk of breaching contract, whereas on the other hand it enhanced the transparency of the proceedings.

The second aspect, which to some extent overlaps with the first one, relates to the improved transparency in making deals. Three major approaches are adopted in the current English criminal justice system to regulating discretions in CPAs. The first approach of this improvement is, as mentioned earlier, the written agreement between parties.

The second approach is introducing judiciary supervision into the negotiation. One typical example is DPA. In this mechanism every step is overseen by the judiciary. In addition, judges also stick to their obligation of post review on police and prosecutors’ activities. Despite those newly issued guidelines or the long-standing practice, courts are constantly proclaiming their discretion in challenging the routines in general as well as decisions in individual cases. Behind such effort is the public law nature of the criminal justice system with the fundamental task of maintaining social order. This nature is neither abstract nor irrelevant to legal practice, no matter how CPAs resemble approaches applied in the private domain.

The third approach is using victims to influence the outcomes of the negotiations. To some extent victims have become one of the major restraints on these agreements. As mentioned earlier, victims have been granted rights to be informed and respected since the very beginning of the proceedings. For instance, after the case of *Killick*, the CPS has launched a new scheme named ‘Victim’s Right to Review’ applicable for decisions after 5 June 2013, making it easier for victims to ‘seek a review of a CPS decision not to bring charges or to terminate proceedings’.³⁷⁶ If this procedure does not work, victims are still qualified to follow the practice in *Killick* and to seek a judicial review. In the trial proceedings, victims have the right to make a ‘victim impact statement’ and talk about their suffering caused by the crime. All these improvements are restrictions on the arbitrary powers of the criminal justice authorities in making hidden deals with offenders.

However, some consideration should be given to give to the role of victims in the English criminal justice. Although they have attracted much more attention from the criminal justice system than ever before, this does not mean that the victims’ role has been reversed. Here are Edwards’ comments on the victim’s role in the Sentencing Guidelines:

³⁷⁴ *Ibid.*

³⁷⁵ For more information on the nine-step approach, see e.g., Andrew Ashworth and Julian Roberts, ‘The Origins and Nature of the Sentencing Guidelines in England and Wales’, in *supra* note 79, Ashworth and Roberts (2013), pp. 1-14.

³⁷⁶ *CPS Victim’s Right to Review Scheme*, available at http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/, last visit 15 January 2014.

*'[The Coroners and Justice Act 2009] seems to indicate that victims and their experiences do have some place in sentencing guidelines. However, the inclusion of such an aim does not mean that the Council is therefore "victim-centered" and must privilege victims' interests (however defined), whereas its guidelines-developing predecessors ... were under no such obligation.'*³⁷⁷

In other words, what has happened to the victims is the enhancement of their status in an offender-centered judicial system. This means that no matter how magnificent the official rhetoric is, the victims' role in the criminal justice system is still subject to the priority of the offenders. This is exactly what can be seen in the restoration agreement discussed earlier. According to prosecutors and judges' opinions, the victims' voice will not, and should not be decisive.³⁷⁸

6. Conclusions

Through examining the evolution of three main types of CPA and their relationship with ordinary procedure in the English criminal justice system, two characteristics can be observed. From a static viewpoint, CPAs in England and Wales have stepped into a relatively mature stage of development, and adjustments in legal regime are mainly fine-tuning. Formalization has been generally recognized in each agreement, potential risks have been high-lighted by the legislator and criminal justice agencies, and corresponding principles, rules, and guidelines have been developed, attempting to minimize such risks.

Entering to this stage does not mean that every type of CPA fits into the pure model. In fact, different forms of variation can be observed. Among three types it is the assistance agreement that satisfies the elements of the pure model best. DPA also falls into this group for the mixed features of three types of CPA. Comparatively, in the case of plea agreement, especially the sentence bargaining where the offers from both parties are straight-forward, a trend towards formalization is so strong that it is likely to be transformed into a standard-form agreement. For restoration agreement, the incentives for criminal justice authorities to negotiate with offenders in individual cases are relatively weak, and therefore the bargaining character in this type is not apparent.

From a dynamic perspective, the evolution of CPAs in the English legal system consists of twists and turns. Behind it lies the conflict of interests and legal positions between various parties including the government, police, public prosecutors, judges, offenders, victims, etc. The past decades, especially the past 15 years, have witnessed a rapid expansion of CPAs in England and Wales both qualitatively and quantitatively. The procedural facilitation has been enhanced and new types of agreement are adopted. The overall trend is toward taking full advantage of offenders in speeding up the proceedings, saving legal resources, preventing crimes, and appeasing anger. Under this trend the contractual obligations on offenders have proliferated with an expectation of earlier, cheaper, and swifter cooperation.

Correspondingly, what can be further observed from the expansion of CPAs is the shifting emphasis in criminal justice from trial to pre-trial stage, from judges to prosecutors and police, and from offence to offender. This is consistent with the broader environment of the entire criminal justice system, featuring the rise of preference for tough and swift crime control, the confusion of the proper position of victims, the expedient use of procedural diversion and non-criminal sanctions, and so on.

³⁷⁷ Ian Edwards, 'Victim, Sentencing Guidelines, and the Sentencing Council', in *supra* note 79, Ashworth and Roberts (2013), p. 73.

³⁷⁸ Interviews with a Crown prosecutor and judges in a magistrates' court, 8 January 2014.

Despite the strong propulsive power, CPAs in England and Wales do not fall into disorder. Instead, every step of the expansion is carefully scheduled and guided to avoid fierce conflicts either with the fundamental principles and values respected in criminal justice, or with the interests of third parties such as victims, witnesses, and the public. In this sense, reforms in ordinary proceedings generally keep in step with the changes of CPAs so that the tension between two set of rules is kept within tolerable limits.

Chapter V Coordinate CPAs and Ordinary Proceedings: A Comparison

1. Introduction

Having examined the status of CPAs as well as their relationship with ordinary procedure in China and England and Wales, this chapter focuses on the questions of how and to what extent China can benefit from the English experience in coordinating the potential tension areas between CPAs and ordinary proceedings. It contains three sub-questions. Firstly, among all those institutional, cultural, economic and political factors, which of them are primary and decisive and how are they supposed to shape and steer the learning process? Secondly, with respect to each type of agreement, what are the similarities, differences and common tension areas in two legal systems? Thirdly, based on the former two questions, how to coordinate such tension areas? These questions are explored in this chapter through five main sections.

The first section is built on Garland's penal state theory to identify the key impact factors in comparing CPAs in different legal systems and examine the way in which they may work on the transmission from constituent elements of the penal state to specific criminal justice policies and approaches. Five dimensions are analyzed respectively: state autonomy, internal autonomy, control of the power to punish, modes of penal power, and power resources and capacities. In the following three sections similarities and differences of three types of CPA between China and England and Wales are examined to uncover the common areas of tension with respect to ordinary procedure. The final section explores principles of coordination, and, based on that, proposes concrete resolutions to the tension areas. Coordination relies on the objectives that a state expects to achieve through criminal procedure. Therefore this section commences with the exploration of the major objectives of criminal procedure in China and England and Wales. Four principles emerge and so the tension areas observed in previous sections are distributed among four groups accordingly to explore specific resolutions.

It should be noticed that although the main focus in this chapter is to improve the Chinese legal and institutional framework on CPAs, the common grounds in conflicts indicate that some coordinative approaches may function not only in China but also in England and Wales. How these approaches would take effect and what the outcomes would be largely depends on the five dimensions of a penal state.

2. Impact Factors Shaping and Steering CPAs

The analysis of any specific criminal procedural devices cannot isolate itself from the overall social and legal context. The nature and characteristics of a certain society may, to a greater or lesser extent, interfere with the concrete modality of those devices as well as their functions and effects in real world. Nevertheless, this does not mean that every aspect of a society is decisive to the employment of a specific legal instrument, and the influence of those aspects, if there is any, may not be direct. Furthermore, it is desirable to know why a certain legal device emerged but more importantly why it emerged in one society in a manner resembling that of another very much different one.

At first sight the Chinese and English legal systems are highly divergent. However, CPAs exist in both jurisdictions, and previous examinations demonstrate not just differences but more importantly, similarities. It means that there must be some key impact factors in both legal systems which shape the concrete modalities of CPAs and steer their evolution. This section aims to identify those major impact factors in China and England and Wales, and examine how such an impact would take effect comparatively. The inter-link between specific criminal procedural devices and the larger environment make the research inevitably step into the transmission process between social forces and

penal outcomes. What needs to be understood is ‘how larger forces shape and are shaped by the details of institutional structures and criminal procedure’.¹

To achieve this, Garland’s analytical framework on the comparative study of the penal state can be helpful. According to Garland, a penal state is defined as follows:

*I define ‘penal state’ as those aspects of the state that determine penal law and direct the deployment of the power to punish. The penal state thus includes the state legislature, executive and judiciary acting in their penal capacity ... together with the leadership of penal agencies who shape penal policy and direct its day-to-day implementation ... To refer to the ‘penal state’ is to refer to the structures and institutions of the larger state insofar as these affect the power to punish and to the leadership elites of the institutions of criminal justice that are charged with directing and deploying that power.*²

In his research, Garland argued that social forces cannot have direct penal consequences unless they engage with the state, their institutions, and their actors. It is the character of the penal state and their responses to social forces which are ‘the proximate causes of penal action and penal change’.³ This theory enables interpretations on the phenomena that similar approaches would emerge in states significantly divergent in social forces, and *vice versa*. It also serves as a useful basis for comparative research on specific penal action or decision by examining the institutional and operative features of the penal states in five dimensions: state autonomy, internal autonomy, control of the power to punish, modes of penal power, and power resources and capacities. In the following discussion, divergence and convergence in the criminal justice systems in England and Wales and China are analyzed in accordance with these five aspects.

2.1 State Autonomy

In Garland’s penal state theory, ‘state autonomy’ refers to the ‘autonomy of the state *vis-à-vis* civil society’.⁴ This dimension examines the extent to which the state officials in charge of penal powers may be independent from the public or popular preferences in one society, in other words, the strength of penal populism.

Pratt describes penal populism as the phenomenon that ‘governments have developed penal policies in line with the sentiments and aspirations of the general public rather than their own bureaucratic organizations’.⁵ Populism does not mean that public opinions, either real or perceived, overwhelm the political purposes. Instead, it emphasizes the use of public opinions as legitimizing tools for certain policies, or sometimes even the manipulation of the public opinions to serve the purposes of social control. Therefore when talking about ‘populism’, it is impossible to peel off the political characteristic. Research shows that populist thoughts quite often pressurize criminal justice authorities to depart from the ordinary criminal proceedings and to respond to crimes with more flexible and expedient crime control techniques.⁶ In addition, with such thoughts, ‘victims of crime have been drawn, willingly or unwillingly, into the war against crime’.⁷

¹ David Nelken, *Comparative Criminal Justice* (London: SAGE Publications Ltd., 2010), p.6.

² David Garland, ‘Penality and the Penal State’, 51(2013) *Criminology*, 475-517, pp. 495-496.

³ *Ibid*, p. 494.

⁴ *Ibid*, p. 497.

⁵ John Pratt, *Penal Populism* (London and New York: Routledge, 2007), p.i.

⁶ About the relationship between penal populism and harsh punishment, see e.g., David Garland, *The Culture of*

During the past decades the rise of populist ideology can be observed in both jurisdictions. In China, political slogans such as ‘the people’s administration of justice’ (人民司法), ‘administration of justice for the people’ (司法为民) and ‘mass line’ (群众路线) are constantly highlighted, overwhelming the claim for professionalism now and then.⁸ Commentators have noticed a surge of such ideology in the Chinese legal system in general in the past ten years.⁹ It is particularly embodied in the ‘Three Supremes’ campaign (三个至上),¹⁰ the overflow of mediation,¹¹ the resurgence of Ma Xiwu’s trial model (马锡五审判方式),¹² and the appraisal system primarily focusing on parties’ satisfaction. With such a trend, recent years have seen an increasing public interference with legal decisions in specific cases. One high-profile case is an example.

Case 5.1 Yao Jiaxin (药家鑫) Case

Yao Jiaxin, a 21 years’ old university student, stabbed a pedestrian to death to cover up a hit-and-run accident on 20 October 2010, in Shaanxi Province. Two days later, Yao voluntarily surrendered to local police. On 22 April 2011, Yao was convicted of murder and sentenced to death by Xi’an Intermediate People’s Court. Later the SPC approved the death penalty, and on 7 June 2011, Yao was executed.¹³

Control (Oxford and New York: OUP, 2001); Julian V. Roberts *et al*, *Penal Populism and Public Opinion: Lessons from Five Countries* (New York: OUP, 2003); *ibid*, Pratt (2007).

⁷ *Ibid*, Roberts *et al* (2003), p. 13.

⁸ For discussion on the populist impulse in the early period of socialist China, see e.g., Maurice Meisner, ‘Leninism and Maoism: Some Populist Perspectives in Marxism-Leninism in China’, 45 (1971) *The China Quarterly*, 2-36; James R. Townsend, ‘Chinese Populism and the Legacy of Mao Tse-Tung’, 17(11) (1977) *Asian Survey*, 1003-1015.

⁹ See Benjamin L. Liebman, ‘A Populist Threat to China’s Courts?’, in Margaret Y. K. Woo and Mary E. Gallagher (eds.), *Chinese Justice: Civil Dispute Resolution in Contemporary China* (New York: Cambridge University Press, 2011), pp. 269-313; ‘A Return to Populist Legality? Historical Legacies and Legal Reform’, in Sebastian Heilmann and Elizabeth Perry (eds.), *Mao’s Invisible Hand: The Political Foundations of Adaptive Governance in China* (Cambridge: Harvard University Asia Centre, 2011), pp. 165-200; Carl F. Minzner, ‘China’s Turn against Law’, 59(2011) *The American Journal of Comparative Law*, 935-984; Dongsheng Zang, ‘Rise of Political Populism and the Trouble with the Legal Profession in China’, 79(6) (2010) *Harvard China Review*, 79-99.

¹⁰ ‘Three Supremes’ refers to the supremacy of Party work, the supremacy of popular interests and the supremacy of the constitution and law (党的事业至上、人民利益至上、宪法法律至上). It was first proposed by Hu Jintao, the former President of P.R.C. at the CPC conference on 26 December 2007. This slogan was deemed as an overturn of the former legal reforms towards modernization and professionalism. For discussion, see Carl F. Minzner, ‘Riots and Cover-ups: Counterproductive Control of Local Agents in China’, 53 (2009) *U. Pa. J. Int’l L.*, 53-124.

¹¹ See discussion on ‘Restoration Agreement’ in Chapter 2. See also Benjamin L. Liebman, ‘Assessing China’s Legal Reforms’, 23(2009) *Columbia Journal of Asian Law*, 17-33.

¹² Ma Xiwu was the former Vice President of the SPC during 1954 and 1962. He invented a trial model by visiting villagers, making inquiry into facts on his own, seeking opinions of parties, and settling disputes through persuading. For discussion, see *supra* note 9, Zang (2010).

¹³ File number is (2011) 西刑一初字第 68 号 ((2011) *Xixingyichuzi* No. 68). For discussion on this case, see Michelle Miao, ‘The Politics of China’s Death Penalty Reform in the Context of Global Abolitionism’, (2013) *Brit. J. Criminol.*, 1-20.

This study does not touch upon the death penalty issue but only focus on the public interference in this case, which can be observed from the following aspects. Firstly, at the very beginning Yao's case was portrayed by mass media as a combat between the offender, a 'rich second generation' (富二代), and the victim, a poor and innocent peasant. Such a story greatly provoked the anti-wealthy sentiment among the public. Secondly, the lawyer of the victim published a blog, claiming that 'we, peasants, are reasonable... We would like to give up financial compensation... but Yao should use his life to atone for his crime'.¹⁴ Thirdly, before the court made its final sentencing decisions, 500 audiences of the first instance trial were given a questionnaire containing the question 'what is the proper sentence for Yao'.¹⁵ To what extent such an inquiry influenced the final sentencing was unknown, but for sure this practice is beyond the law. Yao was finally sentenced to the most severe punishment, even though there were several mitigating factors such as voluntary surrender (recognized by the court), proposal for financial compensation (rejected by the victim's relatives), no criminal record, young adult, and heat of passion.

In England and Wales, during the past years there has been a strong trend towards 'a more malign form of penal populism' that the electorally attractive policies were claimed to be 'unfair, ineffective, or at odds with a true reading of public opinion'.¹⁶ Before the 1990s, general criminal policy was considered as 'caution after caution'; both PACE 1984 and the establishment of the CPS in 1986 were expected to balance protections for defendants and the power of police by restricting the latter; and the Criminal Justice Act 1991 (CJA 1991) emphasized the 'just deserts' ideology and restrictions on incarceration.

However, such a trend was reversed within a few years of the passage of the CJA 1991 with a turning point towards favoring the expressed punitiveness and effective management of crimes and criminals. For instance, The 1994 Act facilitated conviction by challenging the fundamental right of the accused to remain silent, and removing the courts' warning against uncorroborated evidence; the White Paper *No More Excuses* in 1997 claimed to fill the 'justice gaps' caused by delayed and inadequate law enforcement in youth crimes;¹⁷ the White Paper *Justice for All* in 2002 limited the defendant's access to jury trials; and the CJSSS program launched in 2008 proposed a streamlined process in dealing with suspects. After enumerating several punitive turns in England and Wales, Ashworth commented that a more authoritarian state had been fuelled by the rise of populism in penal politics during the past years.¹⁸

At first sight it seems that the political rhetoric in responding to the public punitive requirement is slightly different in the two legal systems. It appears that during the past years Chinese criminal policy moved away from harshness to leniency as it placed less emphasis on SSC, and more on mediation, while in England and Wales it was the other way round. However, similarities can be observed after further exploration. First of all, both jurisdictions actually employ comprehensive measures, harshness for some crimes while leniency for others; the fluctuation between harshness and

¹⁴ Zhang Xian (the lawyer), 对药家鑫案判决的立场和意见 (Opinions on the Judgment on Yao Jiaxin), published on 25 April 2011, available at http://blog.sina.com.cn/s/blog_3e9f92340100r3qr.html. Accessed 29 October 2014.

¹⁵ See 西安法院开审药家鑫案, 现场向旁听者征量刑意见 (The Trial on Yao Jiaxin Case Begins, and Audits' Opinion on Sentencing was Requested during Hearing), Tengxun News, 14 April 2011, available at <http://news.qq.com/a/20110414/000126.htm>. Accessed 29 October 2014.

¹⁶ *Supra* note 6, Roberts *et al* (2003), p.5

¹⁷ See Home Office, *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales*, Cmnd. 3809 (London: HMSO, 1997).

¹⁸ Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions', 2(2008) *Crim. Law and Philos.*, 21-51, p. 42.

leniency is a question of extent instead of type. In addition, both jurisdictions changed their policies according to the real or perceived defects in ordinary proceedings in solving crimes. Most importantly, principles and fundamental rights in the ordinary criminal proceedings have been challenged under such a trend. In this sense, the contradictory movements in the two jurisdictions actually show that both of them are trying to coordinate the potential risks caused by the real or perceived public dissatisfaction.

Despite all these common points, one should notice that the content of the risk is actually defined differently in two jurisdictions. Roberts considered that one of the essential elements in penal populism is ‘an excessive concern with the attractiveness of politics to the electorate’. This is true in England and Wales, but not necessarily in China. Earlier discussion has already revealed that the key consideration for the Chinese government is ‘social stability’. This explains the differing approaches in the two legal systems. In China the direct involvement of citizens in criminal proceedings is encouraged. For instance, several local courts, like the Henan High People’s Court, have started in 2013 to explore a new format of collegial bench involving more people’s assessors 2013.¹⁹ In 2003 the SPP experimented in a pilot program by inviting external persons into several local people’s procuratorates to supervise their daily activities under the name ‘people’s supervisor’ (人民监督员). This practice has been expanded to the national level since 2010. Comparatively, in England and Wales the echoes of public opinions are manipulated more implicitly.

Behind this distinction is the different belief in state-citizen relationship ingrained in the two jurisdictions. The English system follows the liberal democratic traditions and emphasizes the terms ‘the elector’ and ‘the elected’, whereas the Chinese system features the authoritarian perspective and focuses on terms ‘the governor’ and ‘the governed’. The ideological divergence has at least two indications. Firstly, the compromised balance between state and citizen in China is relatively unstable and easily re-adapted, and the strategies in dealing with public opinions may waver between reconciliation and repression.²⁰ The second indication is that approaches adopted in the Chinese criminal justice system are more tangible for external forces including public opinions, and more vulnerable in complying with the procedural requirements in the ordinary criminal proceedings. It will no doubt increase the risks of implementing the relatively flexible and informal agreements.

2.2 Internal Autonomy

¹⁹ 河南高院推进庭审布局改革 (Henan High People’s Court Promoted Reforms in Court Settings), 法制日报 (*Legal Daily*), 11 December 2013, available at http://www.legaldaily.com.cn/xwzx/content/2013-12/11/content_5105843.htm. Accessed 5 November 2014. People’s assessors in China refer to lay people who participate in court hearing and make decisions together with professional judges. They are recommended by basic people’s courts in local areas, censored by the judicial-political institute of local government, and appointed by the standing committee of the people’s conference at the same level. The tenure for people’s assessor is five years, and they can hear civil, criminal, or administrative litigations. In criminal procedure, people’s assessors can join the collegial bench in a first instance trial on any level, and they bear the same responsibility as professional judges except that they cannot be the presiding judge of the bench. The latest official document on people’s assessor is the Decisions of the Standing Committee of NPC on Improving People’s Assessor System (全国人民代表大会常务委员会关于完善人民陪审员制度的决定), issued and validated on 28 August 2004. The current people’s assessor system can be traced back to 1978, and it has long been depreciated as merely a decoration. For discussion on people’s assessors in China, see e.g., Zhuoyu Wang and Hiroshi Fukurai, ‘Popular legal participation in China and Japan’, 38 (2010) *International Journal of Law, Crime and Justice*, 236-260; Di Jiang, ‘Judicial Reform in China: New Regulations for a Lay Assessor System’, 9(2000) *Pacific Rim. Law & Policy Journal*, 569-590.

²⁰ About the government strategies in dealing with social unrest and ideologies behind, see, e.g., Youngshun Cai, ‘Social Conflicts and Modes of Action in China’, 59(2008) *The China Journal*, 89-109.

Internal autonomy refers to ‘the autonomy of the penal state *vis-à-vis* the other state agencies and institutions’.²¹ It focuses on the interactive relationship between the penal state and other functions of the state, and evaluates the independence of the former. One key issue arising from this dimension is judicial independence.

Judicial independence builds itself on the premise of the separation of powers and the supremacy of law. Following the United Nations’ interpretations on the Basic Principles on the Independence of the Judiciary, judicial independence requires matters to be decided ‘impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason’.²² It is especially important in CPAs in preventing malpractice and guaranteeing sufficient and effective censorship on secret deals. Several elements may affect the degree of independence such as the legal tradition, the personnel, financial and institutional relationship with other branches, and the presence or absence of international human rights treaties.

Karlan distinguished two concepts of judicial independence: independence from certain forces, and independence to make decisions.²³ The first aspect of judicial independence is ‘independence from’. Although the English legal system has a long history of respecting judicial independence arising from resistance to the subjugation of the Crown or Parliament,²⁴ it was not put on statute until the 2005 Constitutional Reform Act (CRA 2005). The CRA 2005 aimed to provide for ‘a clearer separation of powers between the judiciary, parliament, and the elected government’s executive branch’,²⁵ and several major changes concerning judicial independence were introduced. One reform was that the power of final hearing of a criminal case was shifted away from the Lord Chancellor – ‘a speaker of the House of Lords presiding in legislative sessions’ and meanwhile ‘head of the judiciary and protector of judicial independence’²⁶ - to the Lord Chief Justice of England and Wales. Another reform was the establishment of the Judicial Appointments Commission (JAC). The JAC ended the 700 years tradition by taking the power to appoint judges away from the Lord Chancellor, and was expected to depoliticize the judicial selection and make the process more independent, objective, and open. The third important change was the establishment of the Supreme Court of the United Kingdom according to the CRA 2005 which assumed the judicial function of the House of Lords, a legislative authority, and it doubtlessly strengthened the independence of the judiciary.²⁷ Several major changes in the English criminal justice system are largely due to the expansion of the European Convention on Human Rights (ECHR) which has been incorporated into UK law since the Human Rights Act 1998

²¹ *Supra* note 2, Garland (2013), p. 498.

²² United Nations, *Basic Principles on the Independence of the Judiciary*, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>. Accessed 9 June 2014.

²³ Pamela S. Karlan, ‘Two Concepts of Judicial Independence’, 72(1999) *Southern California Law Review*, 535-558.

²⁴ For a brief review on the rise of judicial independence in England and Wales, see Irving R. Kaufman, ‘The Essence of Judicial Independence’, 80(1980) *Columbia Law Review*, 671-701.

²⁵ Judith L. Maute, ‘English Reforms to Judicial Selection: Comparative Lessons for American States?’, 34(2007) *Fordham Urb. L. J.*, 387-423, p. 389.

²⁶ Diana Woodhouse, ‘United Kingdom: The Constitutional Reform Act 2005 – Defending Judicial Independence the English Way’, 5(2007) *I.CON*, 153-165, pp. 154-155. About detailed discussion on the multiple roles of the Lord Chancellor, and its relationship with judicial independence, see Robert Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor’s Office* (New York: OUP, 1993).

²⁷ For general discussion on the latest development on judicial independence in England and Wales, see e.g., Sophie Turenne, ‘Judicial Independence in England and Wales’, in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Heidelberg: Springer, 2012), pp. 147-184.

(HRA 1998). This is consistent with Garland's argument that the existence of international human rights restrictions may enhance the power and autonomy of the penal authorities against legislators and other political institutions.²⁸

As to the Chinese criminal justice system, Peerenboom once commented that 'the Chinese judiciary is regularly criticized for the lack of (meaningful) independence'.²⁹ This can be partly attributed to the legal tradition of lacking separation of powers among legislative, executive and judicial branches. Scholars have noticed that the current judicial system in China is subject to 'a system of multi-layered supervision' that interference can be 'internal, external, law-provided or provided without a legal basis through the implementation of convention'.³⁰ Even today junior judges and prosecutors are still named, selected, promoted, and paid in a similar way as civil servants. More importantly, China is always defined as a party-state where dual interference on the judicial system exists. Compared with the interference from other state branches, the influence from the CPC is actually even more difficult to control. Apart from the slogans such as 'Three Supremes' mentioned earlier, it has long been the institutional routine (more than 90 years) that Party cells exist in the PSO, people's procuratorates, people's courts, and even domestic law firms to supervise the legal activities.³¹ It is quite normal for legal officials and professionals to be Party members who are subject to another set of disciplines apart from law, and the Party's political-legal committee (政法委员会) also supervises and directs the work of the criminal justice authorities.³² Apart from the CPC, the local judicial system is also exposed to the interference of the people's congress and government not only in general but also in individual cases.³³ The third challenge against the internal autonomy is that the restrictions from the international human rights treaties are relatively weak. Unlike England and Wales, for China there is a lack of international organizations and conventions that have equivalent binding power and impact as ECHR and ECtHR. China has signed but not ratified the International Covenant of Civil and Political Rights (ICCPR) yet. Therefore its influence on the Chinese judicial system is limited.

From the 'independent to' perspective, both academia and the government in China have admitted that corruption is a major threat.³⁴ Corruption in a legal system can be examined from two aspects: the general perception, and the concrete modalities. From the perspective of the general perception, the Worldwide Governance Indicators (WGI) of the World Bank can provide some clues. According to it, during the period between 1996 and 2013, the aggregate indicator for the control of

²⁸ *Supra* note 2, Garland (2013), p. 499.

²⁹ Randall Peerenboom, 'Judicial Independence in China: Common Myths and Unfounded Assumptions', *La Trobe Law School Legal Studies Research Paper No. 2008/11*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1283179. Accessed 14 February 2014.

³⁰ Yuwen Li, *The Judicial System and Reform in Post-Mao China: Stumbling towards Justice* (Surrey and Burlington: Ashgate Publishing Company, 2014), p. 237.

³¹ About the evolution of the control of lawyers through party cells inserted in law firms, see Elizabeth M. Lynch, 'China's Rule of Law Mirage: The Regression of the Legal Profession since the Adoption of the 2007 Lawyers Law', 42(2010) *The Geo. Wash. Int'l L. Rev.*, 535-585.

³² See Mike McConville *et al*, *Criminal Justice in China: An Empirical Inquiry* (Cheltenham and Northampton: Edward Elgar, 2011).

³³ See *supra* note 29, Peerenboom (2008).

³⁴ See e.g., Zou Keyuan, 'Judicial Reform versus Judicial Corruption: Recent Developments in China', 11(2000) *China Law Forum*, 323-351. About official report on corruption in judicial system, see Li Qiufang ed., 第二号中国反腐倡廉建设报告 No.2 (*Report on Combating Corruption and Upholding Integrity in China, No.2*) (Beijing: 社会科学文献出版社 (Social Sciences Academic Press), 2012).

corruption in China fluctuates between 31.7 and 50.7, whereas the corresponding data for the UK is between 91.0 and 96.6; the higher the values, the better the governance.³⁵

From the perspective of the concrete modalities, the corruption in the juridical system in China is largely systemic that ‘corruption is rampant across the public sector’.³⁶ This can be observed in the Zhang Hai Case mentioned previously where police, prosecutors, judges, execution officials and defense lawyers were all involved in the scandal. Scholars have summarized 11 types of judicial corruption in China:

- (1) *Fabricating rulings in exchange for money;*
- (2) *Blackmailing litigants into paying for, or excluding, evidence;*
- (3) *Making decisions based on instructions from local governments, party or senior judicial officials,;*
- (4) *Assigning, dismissing, delaying or refusing to accept cases, or refusing to properly enforce court decisions;*
- (5) *Extorting kickbacks from intermediaries for passing cases to certain judges;*
- (6) *Trading law enforcement services for personal gain;*
- (7) *Taking bribes from the plaintiff and defendant (or their lawyers), or both;*
- (8) *Manufacturing court cases;*
- (9) *Embezzling court funding;*
- (10) *Bowing to the demands of local officials, criminal networks, local clans, social networks or economic interests;*
- (11) *Abusing the power of judges to order suspension of business operations, the confiscation of property, the eviction of tenants, or fair compensation and labour rights.*³⁷

As a comparison, corruption in the English judicial system is, as observed by scholars, rarely the first consideration among the public when miscarriages of justice happen.³⁸ From previous discussion it can be observed that studies on corruption in England and Wales mainly focus on police forces.³⁹ In 2003 the Home office conducted a comprehensive research on police corruption in UK, and it categorized police corruption into two major types: (1) ‘individual corruption’ particularly in the form of ‘the leaking of police information’, and (2) ‘internally-networked corruption’ which ‘often involves corrupt relationships between detectives and their informants, and has been associated with a range of

³⁵ Country data reports on WGI of World Bank for the period between 1996 and 2013 are available at <http://info.worldbank.org/governance/wgi/index.aspx#countryReports>. Accessed 11 December 2014.

³⁶ Transparency International (ed.), *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge: Cambridge University Press, 2007), p. xxii.

³⁷ Fan Ren, ‘Calling for an Independent Judiciary’, 23(2004) *Beijing Review*, cited in Keith Henderson, ‘The Rule of Law and Judicial Corruption in China: Half-Way over the Great Wall’, in *ibid*, Transparency International (2007), 51-159, p. 155.

³⁸ See Marina Kurkchyan, ‘Judicial Corruption in the Context of Legal Culture’, in *ibid*, Transparency International (2007), 99-108.

³⁹ This can be seen in discussion in Chapter IV. For more details, see Joel Miller, ‘Police Corruption in England and Wales: An Assessment of Current Evidence’, *Home Office Online Report 11/03*, available at <http://www.belui.ru/Doc/Mejdunar/Angl/33.pdf>. Accessed 11 December 2014; Chris A. Williams, ‘Britain’s Police Forces: Forever Removed from Democratic Control?’, *History & Policy*, 05 November 2003, available at <http://www.historyandpolicy.org/policy-papers/papers/britains-police-forces-forever-removed-from-democratic-control>. Accessed 11 December 2014.

different corrupt activities'.⁴⁰ As to lawyers, either for prosecution or for defense, Macaulay's research identified four major types of corruption: (1) 'fraud, dishonesty and money laundering'; (2) 'receipt of gifts and inappropriate payments'; (3) 'conflicts of interest'; and (4) 'misuse of judicial status'.⁴¹ Comparatively, the judiciary in England and Wales receives the least criticism. According to the Transparency International's investigation, among 16 public sectors in UK the perception of corruption in the judiciary ranks 13, lower than most of the other government branches.⁴² However, this does not mean that judges are completely immune to corruption. In his research Macaulay noticed that corruption in the legal system is 'often closely linked to organized crime groups, with members of the judiciary targeted, principally through bribes, to consult or advise criminal networks on avoiding detection and investigations'.⁴³ When examining police corruption, McConville and Marsh also concluded that 'the pre-disposition of judges towards police evidence remains an open invitation to officers willing to engage in corruption and perjury'.⁴⁴

After the comparison of judicial independence between two jurisdictions some observations can be drawn. First of all, the aforementioned two aspects of judicial independence are inherently connected. The absence of the former inevitably undermines the homogeneity of the legal group, makes criminal justice officials more 'reachable', and opens the officials to either pressure or temptation. This is clearly reflected in the modes of corruption in the two legal systems. In England and Wales, it is the police and prosecutors rather than the judiciary that are threatened by the corruption problem, whereas in China such distinction seems much less obvious. Another observation is that the current Chinese criminal justice system encounters systematic or institutional defects. Moreover, state autonomy and internal autonomy is inherently linked. In China, for instance, the pressure against the former is quite often transferred to the judicial system through other institutions within the state. This interaction strengthens 'the popular perception that court decisions can be influenced by the media or by protest' on the one hand, and increases the challenge to 'achieve a balance between popular opinion and judicial authority and independence' on the other hand.⁴⁵

2.3 Control of the Power to Punish

The third dimension is about the control of the power to punish, which concerns the power distribution 'across the several agencies and decision makers that constitute the penal process'.⁴⁶ The model of power control not only has an effect on the room for negotiation, but also determines which party is capable of making agreement with offenders, and what bargaining chips can be offered. In this part the discussion mainly focuses on two areas: the power distribution within the judiciary, and that between the judiciary and other institutions such as police and prosecutors.

The first dimension is about the distribution of power to punish within the judiciary, which covers two aspects. From one perspective, the control of penal power is closely connected with

⁴⁰ *Ibid.*, p. iii.

⁴¹ Michael Macaulay, 'Corruption in the UK: Part Two, Assessment of Key Sectors', available at <http://www.business-anti-corruption.com/media/3831802/TI-UK-Corruption-LEVELS.pdf>, p. 23. Accessed 10 June 2014.

⁴² Robert Barrington *et al.*, 'Corruption in the UK: Part One-National Opinion Survey', p. 20, available at <http://www.transparency.org.uk/our-work/publications/91-corruption-in-the-uk--part-one---national-opinion-survey>. Accessed 10 June 2014. The three public sectors ranking higher are NHS, military, and education system.

⁴³ *Supra* note 41, Macaulay (2014), p. 23.

⁴⁴ Mike McConville and Luke Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Plea in Britain* (Glos and Massachusetts: Edward Elgar Publishing, 2014), p. 240.

⁴⁵ *Supra* note 11, Liebman (2009), p. 24.

⁴⁶ *Supra* note 2, Garland (2013), pp. 499-500.

different jurisdiction levels. As mentioned in previous chapters, in the English court system the two-tier structure of first instance trial is crucial because the sentencing power at different levels is restricted correspondingly.

Comparatively, in the Chinese legal system, all four levels of people’s courts (basic people’s court, intermediate people’s court, higher people’s court, and the SPC) can hold first instance trials. Most cases are heard in the basic people’s court with three exceptions: (1) offences endangering state security, terrorism offences, and offences with a possible penalty of life imprisonment or death penalty will be heard in intermediate people’s courts; (2) offences with provincial influences will be heard in higher people’s courts; and (3) offences with national influences will be heard in the SPC.⁴⁷ Nevertheless, there is no restriction on the sentencing power of each level (except for death penalty offences and life imprisonment offences). Meanwhile, for cases heard in basic people’s courts, there is also a lack of distinction of sentencing power between summary procedure and ordinary procedure. According to Article 210 of the 2012 CPL, the major difference between summary procedure and ordinary procedure in sentencing is that only the offences carrying a possible sentence lower than three-year’s imprisonment can be heard by a single judge instead of a collegiate bench.

From another perspective, the control of the power to punish also indicates areas of tension between the judiciary’s discretion and existing legal norms. As Ashworth and Roberts once noticed, the English courts enjoy large discretion in sentencing due to the very limited number of statutory provisions on the minimum and maximum penalties of certain offences,⁴⁸ and it has long been acknowledged that for common law offences such as robbery, battery, rape, etc., the Crown Court is not subject to any limitations except for the principle of proportionality.⁴⁹ In addition, it is the Court of Appeal which conventionally reviews and guides courts’ sentencing across the jurisdiction through individual cases. This, however, has gradually changed during the past two decades with the development of sentencing guidelines, under which English judges’ obligation has moved from ‘have regard to’ to ‘must follow’ under the CJA 2009.⁵⁰ The new guideline system does not necessarily remove the sentencing discretion from judges or contradict the guiding role of the Court of Appeal. Even so, the discretion of English judges has largely shrunk. For instance, under current sentencing guidelines the penalty for robbery is classified into three levels as shown in Table 5.1.

Table 5.1 Penalty for Robbery under Sentencing Guidelines and Statutes

Situations of Robbery	Sentence	
	Start Point	Range
Threat or use of minimal force and removal of property	12 months	Up to 3 years
A weapon is produced and used to threaten, and/or force is used which results in injury to the victim	4 years	2-7 years
The victim is caused serious physical injury by the use of significant force and/or use of a weapon	8 years	7-12 years
Statutory maximum penalty (s 109 of the PCC(S)A 2000)	Mandatory life sentence	

⁴⁷ Articles 19-22 of the 2012 CPL.

⁴⁸ Andrew Ashworth and Julian V. Roberts, ‘The Origins and Nature of the Sentencing Guidelines in England and Wales’, in Andrew Ashworth and Julian V. Roberts, *Sentencing Guidelines: Exploring the English Model* (Oxford: OUP, 2013), pp. 1-15, p. 1.

⁴⁹ See *Higgins* [1952] 1 KB 7.

⁵⁰ See Julian V. Roberts, ‘Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales’, 51(2011) *Brit. J. Criminol.*, 997-1013.

Source: CPS, *Sentencing Manual for Robbery*.⁵¹

Comparatively, China’s Criminal Law establishes both minimum and maximum sentences for most crimes since its first version in 1979. Also using robbery as an example, the statutory sentencing categories are listed in Table 5.2.

Table 5.2 Penalty for Robbery under Article 263 of the 1997 CL

Situations of Robbery	Sentence
Robbing public or private property using force, coercion, or other methods	3-10 years & fine
Eight aggregating situations: 1. Intruding into dwelling; 2. Robbery on public transportation; 3. Robbing banks or other financial institutions; 4. Robbery for several times or with large amount of money or other property; 5. Causing serious injuries or death; 6. Committing robbery through pretending to be police 7. Robbery with guns; 8. Robbing materials which are for military, rescue or relief uses	≥10 years, lifetime imprisonment or death penalty, in addition to fines or confiscation of property

One thing can be observed from Table 5.2 is that although the 1997 CL sets a boundary for sentencing, the space for discretion is rather broad especially when the death penalty is involved. To narrow down the space the SPC also developed the Chinese version of sentencing guidelines. Its latest version has been published in 2014, setting narrower categories for sentencing. Table 5.3 demonstrates rules set by both the 1997 CL and the 2014 Guiding Opinions for different categories of robbery.

Table 5.3 Penalty on Robbery under 2014 Guiding Opinions and 1997 CL

Situations of Robbery		Sentence	
		Start Point	Range
Robbing public or private property using force, coercion, or other methods	Once	3-6 years	3-10 years & fine
	Twice	6-10 years	
Eight aggregating situations: 1. Intruding other’s houses; 2. Robbery on public transportation; 3. Robbing banks or other financial institutions; 4. Robbery for three times or with large amount of money or other property; 5. Causing one serious injury ; 6. Committing robbery through pretending to be police 7. Robbery with guns; 8. Robbing materials for military, rescue or relief uses		10-13 years	≥10 years, lifetime imprisonment or death penalty, in addition to fines or confiscation of property
Other aggregating situations prescribed by law		Life	life imprisonment or

⁵¹ Available at http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/robbery/. Accessed 10 June 2014.

	imprisonment	death penalty, in addition to fines or confiscation of property
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Through comparing Tables 5.2 and 5.3 one can notice that, even if there were significant distinctions between the two legal systems from the outset, the approaches adopted by them in regulating the sentencing power, is converging. One key consequence is the constant erosion of judges' control of sentencing power in both jurisdictions.

The second dimension of the control of the penal power concerns the power distribution among the judiciary and other authorities, especially with police and prosecutors. This dimension can be viewed from another perspective, that is, to what extent criminal cases can be filtered out at the pre-trial stage.

The public prosecutors in England and Wales follow the principle of opportunity, and they are 'not obliged to prosecute even if they have overwhelming evidence of guilt'.⁵² Police and prosecutors enjoy not only wide discretion to end the proceeding but also the power to impose certain forms of sanctions. For instance, police can impose on suspects with penalty notices for disorder (PNDs),⁵³ and both the police and prosecutors can issue a conditional caution which even forms part of a criminal record.⁵⁴ In this sense, the court's control of penal power is actually dispersed in England and Wales.

The Chinese criminal justice system also divides prosecution power but between private persons and the people's procuratorates. As mentioned earlier, private prosecution is operated in a similar way as tort, and only applied in very limited situations. This research on China focuses on public prosecution. Different from the English practice, public prosecutors in China follow the legality-based principle that discretionary non-prosecution can only be used in exceptional situations. Meanwhile, prosecutors themselves have no independent power to impose sanctions on suspects.⁵⁵

Police in China are subject to prosecutors' supervision, and they also have no penal power in criminal proceedings. However, this does not mean the Chinese police are powerless in filtering cases and imposing compulsory measures with punitive features. Under the Chinese legal context, some illegal activities that resemble crimes can be solved through the administrative channel under the 2012 Public Security Administration Punishment Law (2012 PSAPL).⁵⁶ Cases under the 2012 PSAPL are not considered to be criminal but merely illegal, and offenders will not be given a criminal record. In this law, it is the police rather than other institutions who are granted the power to impose punishments such as caution, fine (less than 5,000 RMB), administrative detention (less than 15 days

⁵² Andrew Sanders *et al.*, *Criminal Justice*, 4th Edition (Oxford: OUP, 2010), p. 3.

⁵³ PND is a police approach against low-level, anti-social and nuisance suspects. It allows the suspect to either pay a penalty of £50 or £80 or request to be tried. See Ministry of Justice, *Penalty Notices for Disorder (PNDs)*, issued on 1st July 2013, available at <http://www.justice.gov.uk/downloads/oocd/pnd-guidance-oocd.pdf>. Accessed 11 June 2014.

⁵⁴ The financial penalty attached to conditional caution is between £20 and £150. For general guidelines on conditional caution, see Ministry of Justice, *Code of Practice for Adult Conditional Cautions*, validated on 8 April 2013, available at <http://www.justice.gov.uk/downloads/oocd/code-practice-adult-conditional-cautions-oocd.pdf>. Accessed 11 June 2014.

⁵⁵ Here I use 'independent power' because in China prosecutors can make sentencing proposals to judges.

⁵⁶ 第 67 号主席令 (Decree of President of PRC No. 67), issued and validated on 26 October 2012. PSAPL was originally issued on 28 August 2005, and revised in 2012.

for a single offence and less than 20 days for more offences), and revocation of license issued by the PSO.

Punishments imposed on the offenders are comparatively lenient through the administrative way. The original purpose of the distinction between administrative and criminal penalties is to filter minor offences from the criminal proceedings. The 2012 PSAPL, however, overlaps the scope of the 1997 CL on some offences. Table 5.4 takes ‘induces, shelters, introduces any other person to prostitute’ as an example.

Table 5.4 Comparison between the 2012 PSAPL and the 1997 CL on Specific Crime

Law	2012 PSAPL	1997 CL
Article	S1 of Article 67	S1 of Article 359
Acts	Induces, shelters, introduces others to prostitute	Induces, shelters, introduces others to prostitute
Penalty	Administrative detention between ten to fifteen days, which can be supplemented with fines no more than 5,000 RMB	Less than five-year’s imprisonment, criminal detention, or surveillance, which should be supplemented with criminal fines

More examples can be found in both laws.⁵⁷ Taking the 2012 PSAPL into consideration, then the police’s punitive power in China is actually much greater than in England and Wales, and in some situations even higher than the CPS. From this comparison a conclusion can be drawn that in both jurisdictions, the control of penal power in the criminal justice context is diluted among several authorities, and this trend is likely to continue in regard to more restrictions imposed on the judiciary, stronger disposal powers invested to pre-trial stage, and consequently higher opportunities for various authorities to be involved in the negotiation with offenders.

2.4 Modes of Penal Power

The mode of penal power is a dimension adopted for the qualitative evaluation of the penal state on issues like the different forms of penal technologies adopted by the penal state, the way the penal authorities rationalize their actions, conceptualize the challenges, and define the proper means. From a procedural perspective, a fundamental and traditional categorization on this dimension is the dichotomy between adversarial and inquisitorial legal traditions. The adversarial system features impartial and relatively passive judges, the emphasis on trial proceedings, the distribution of responsibility for investigation and collecting evidence between the defense and the prosecution, the public trial based on oral evidence and direct confrontation, and, if not all, the involvement of lay decision makers. Comparatively, the inquisitorial system is characterized by the more active judges in calling and examining witness and detecting facts, the emphasis on the pre-trial phase, the monopolized obligation in collecting and identifying evidence by the prosecution, the reliance on dossier, and the employment of professional criminal justice officials. Given such a context, the heritage of civil dispute resolutions, the contractual spirit, the lower predictability and other traits of

⁵⁷ For detailed comparison between specific provisions in two laws, see Yang Fan and Zhao Zhiqiang, 《治安管理处罚法》与《刑法》的衔接与冲突 (Connection and Conflict between Security Administration Punishment Act and Criminal Law), 4(2010) 行政法学研究 (*Administrative Law Review*), 87-92.

the adversarial system provide a greenhouse for various agreements which can hardly be imaginable under a 'pure' inquisitorial system.⁵⁸

These descriptors, though largely mixed in the real world, can still 'tell us much about the roots of a system, its organizing principles and the kinds of considerations that should govern reform in order to maintain a degree of internal coherence'.⁵⁹ Comparatively, the criminal justice system in England and Wales is a typical example of the former, whereas the Chinese system is deeply rooted in the latter. Several key characteristics of each criminal justice system are derived from this starting point, and they are categorized into two groups in the following discussion: one group covers the relationship between police, prosecutors and judges, while the other group concerns that between criminal justice authorities and the offender.

To examine the relationship among police, prosecutors and judges in England and Wales, one can start from the basic presumption among these three authorities of the distribution of powers. As mentioned earlier, the English judiciary has the long-standing tradition of independence and neutrality not only against other state branches, but also against other criminal justice authorities. This status enables the judiciary to supervise the back-stage agreements. As to the police, it is an institution that traditionally had immense power in both investigation and prosecution. This has been changed with the establishment of the CPS, an institution independent from the government, the police, and the courts.⁶⁰

The power distribution among three authorities in China is manipulated in a different manner. A key feature of the Chinese criminal justice system is emphasizing the cooperation of criminal justice agencies, which, as mentioned earlier, has been recognized since the 1982 Constitution. The collaboration is intensively embodied in the four major national SSC⁶¹ that three authorities were all participated under the name 'handling a case jointly' (联合办案), and investigation, prosecution and court trial followed a streamlined model. In this model, it is difficult to expect the judiciary to act as the final gatekeeper. In fact, according to the 1982 Constitution, it is the people's procuratorate rather than the people's court that is responsible for supervising the administration of criminal justice.⁶² This means that the people's procuratorates bear three functions in theory: instructing and supervising the police investigation, prosecuting suspects, and supervising the court trial.

The distinction between the two jurisdictions on the modes of penal power can also be observed in the layout of the court, as shown in Chart 5.1.

Chart 5.1 Court Arrangement in Magistrates' Court and Basic People's Court

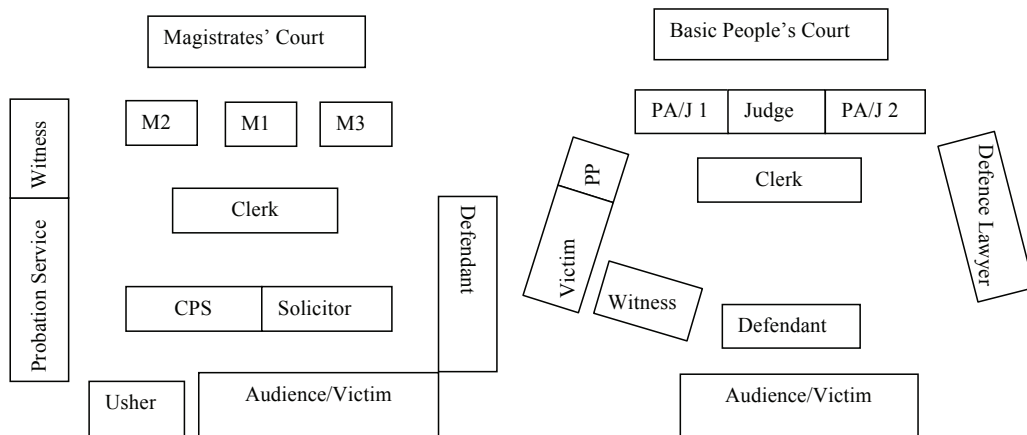
⁵⁸ For the facilitation provided by adversarial traditions to the evolution of negotiated justice, and comparison between adversarial and inquisitorial approaches on this issue, see Mirjan Damaška, 'Negotiated Justice in International Criminal Courts', 2(2004) *Journal of International Criminal Justice*, 1018-1039.

⁵⁹ See Jacqueline S. Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain', XXXV (2010) *NCJ Int'l L. & Com. Reg.*, 319-362.

⁶⁰ Andrew Sanders, 'An Independent Crown Prosecution Service?', Jan (1986) *Crim. L. R.*, 16-27.

⁶¹ For introduction on SSC, see *supra* note 31, in Chapter III.

⁶² Article 129 of the 1982 Constitution entitles the people's procuratorates the 'legal supervision institute'.



Note: (1) These two models only present the court arrangement in the ordinary criminal procedure for ordinary adult cases;

(2) 'M': magistrate; 'PA': people's assessor; 'J': judge; 'PP': people's procuratorate

The court arrangements reveal the profound differences between two jurisdictions concerning not only the relationship between courts and prosecutors, but also the relationship between criminal justice authorities and the defendants, and the roles of the defence lawyers and the victims.

The following conclusions can be drawn from the collaboration of criminal justice authorities in China. Firstly, it may easily break the balance between criminal justice authorities and offenders in CPAs as it grants too much power on one side, and weakens the restrictions from the judiciary. In this sense, CPAs in China are more likely to deteriorate into pure coercion if sufficient assistance to the other party is absent. Secondly, such collaboration also implies that it may be easier to reach an agreement as the authoritative decisions are more predictable and efficient and are less likely to be overturned by other penal authorities.

The developments of the modes of penal power in two jurisdictions during the past few decades reflect these conclusions. In England and Wales there is a shifting focus from the trial to the pre-trial proceedings with a re-distribution of powers among penal institutions. Judges in the English system are increasingly involved in the negotiation, and an implied collaboration is actually emerging. At the same time, defense lawyers and the CPS are expected to assist the courts to achieve justice. As to the relationship between the CPS and police, it has also gradually changed from the original plan of independence to 'together as never before', which is embodied by placing Crown Prosecutors in police stations.⁶³ This change was at first expected to strengthen the CPS' control over the initial charging by the police, but scholars have expressed their concerns that the pervasive 'canteen culture' of the police may influence the prosecutors' judgment and make them become too conviction-minded.⁶⁴ All these changes facilitate the use of agreements by reducing or transforming the supervision of the judiciary.

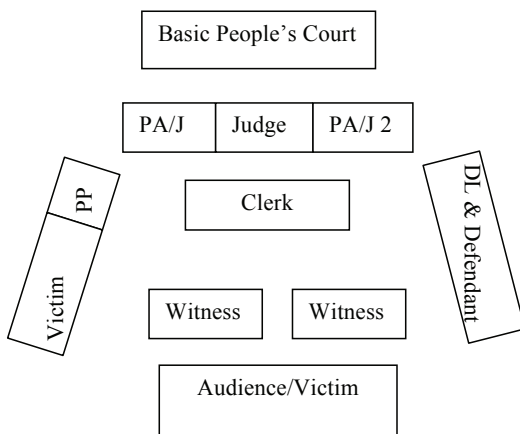
As to the Chinese legal system, what is of more concern is the over-powered criminal justice authorities. In the past decades' legal reform China has witnessed a movement towards the adversarial

⁶³ See *supra* note 59, Hodgson (2010).

⁶⁴ *Ibid.*

model of criminal proceedings by reducing the power of the police and prosecutors and expanding that of the courts. On 21 November 2013, for instance, the SPC issued Opinions on Establishing and Improving Working Mechanisms to Prevent Miscarriages of Justice in Criminal Cases (*关于建立健全防范刑事冤假错案工作机制的意见*, 2013 SPC Opinions).⁶⁵ In this document, the SPC explicitly forbids people’s courts to handle cases jointly with police and people’s procuratorates (Article 23), aiming at promoting the mechanism of check-and-balance. Some local people’s courts also started to reform the court trial arrangement. Chart 5.2 illustrates the reform proposal in the High People’s Court in Henan Province.

Chart 5.2 Proposed People’s Court Arrangement in Henan Province



Note: ‘DL’: defence lawyer; ‘PP’: people’s procuratorate; ‘PA’: people’s assessor; ‘J’: judge.

In this sense, the English system and the Chinese system again appear to be moving in opposite directions; the former is heading to the crime control values, or, the inquisitorial model, whereas the latter is heading to the due process values, or, the adversarial model. However, if one takes their stand-points into consideration, then it can be noticed that both jurisdictions are attempting to find a balance between those two concerns.

Another group of characteristics concerns the criminal justice authorities’ interaction with offenders. It is closely linked with the former three dimensions of the penal state. The streamlined corroboration among penal authorities and the absence of sufficient state autonomy and internal autonomy put Chinese offenders at a disadvantage. This can be clearly observed in Chart 5.1 that under the inquisitorial tradition, the defendant is deemed as a counterparty of the entire system, even against his own defense lawyer. Based on the ideology of discovering the absolute truth, people’s procuratorates are expected to collect all evidence not only for conviction but also for acquittal. Following this logic, it appears to be unnecessary to grant the defendant the investigating power and facilitate it in practice. This can partly explain many features of the current criminal justice system

⁶⁵ 法发[2013] 11 号 (*Fafa* [2013] No.11), issued and validated on 9 October 2013. Available at http://www.court.gov.cn/spyw/xssp/201312/t20131212_190082.htm. Accessed 31 October 2014.

such as the defendant's obligation of giving an honest confession under Chinese law, the limited power of defense lawyers, the restricted approaches for the defense lawyer to collect evidence, and the higher tolerance on flawed evidence. It also logically reduces the necessity to have the witness orally questioned in court, and constrains the development of the legal assistance system as criminal lawyers can hardly affect the judicial decisions substantially. All these factors combined together undermine the negotiation power of the offender in Chinese CPAs.

In contrast, rooted deeply in adversarial tradition, English criminal justice based itself on the confrontation between the prosecution and the defense, which is reflected in several features of the legal system, such as the distributed tasks in collecting evidence, the pre-trial evidence disclosure process, the strict censorship on the accessibility of the evidential materials, the immediate access to and high reliance on defense lawyers, and the well-developed legal aid system. These procedural designs enable the defendant to communicate with legal officials in a relatively equal status.

However, the picture can be different if it is viewed from a dynamic perspective. The past four decades have witnessed efforts towards a more balanced relationship between the prosecution and the defense in the Chinese criminal justice system. Most of these developments are embodied in the 2012 CPL. On the one hand, the prosecution power is restricted by rules like the exclusion of illegally-obtained evidence, the compulsory attendance of the prosecutors in the summary procedure, and keeping video or audio records of the interrogation. On the other hand, the defense power is strengthened by reforms such as advancing the time point of hiring defense lawyers, improving the statutory framework of legal aid, reducing the obstacles for lawyers meeting clients, facilitating the defense lawyers' access to the dossier, and establishing pre-trial meetings for exchanging evidence and other preparations.⁶⁶

In England and Wales the overall trend appears to be reversed. The enhanced emphasis on the pre-trial proceedings and summary trials indicates a progressive attenuation of defense power. Although there has long been a power struggle between police and the CPS, in general the power of investigation and prosecution has been expanding since the 1990s.⁶⁷ The increased pre-trial disposal approaches such as warnings, cautions, and PNDs mentioned earlier not only reduced the power of judges but also weakened the procedural protections for the accused. Meanwhile, since the CJPOA 1994 what is important is not only what the accused said but also what he/she did not say.

Based on these observations, it seems again that both jurisdictions are moving in different directions, and again, these movements are not linear. However, taking both the rough portrayal of the movements and the original statuses into consideration, we still can detect a force pulling two systems towards each other to adjust the balance among criminal justice agencies as well as their relationship with offenders.

2.5 Power Resources and Capacities

The last, but not the least, dimension measures the power resources and capacities of a penal state from a relatively quantitative perspective. Several factors are relative here, such as the power potential of the state, its access to resources, the means at its disposal, and its capacity for taking effective action. The operation of the penal power is always confined by the applicable resources such as financial budget, legal training, professional expertise, and data collection and accessibility. Therefore

⁶⁶ Despite all those progress, one should always bear in mind that the Chinese defense lawyers are still struggling for some minimum rights in the criminal justice system, and the modernization process of legal assistance, though it is moving, is tortuous. See discussion in Section 2 of Chapter III.

⁶⁷ About the attenuation of the defence rights and the expansion of the prosecution and investigation powers in England and Wales, see *supra* note 52, Sanders *et al* (2010), pp. 17-21. See also *supra* note 59, Hodgson (2010).

it would be difficult to evaluate the sufficiency of the judicial resources in one jurisdiction and make comparison with another.

The challenge is even stronger as China started to re-construct its legal system from nowhere less than 40 years ago, making the approachable resources comparatively limited. For instance, according to the All-China Lawyers Association's report in 2013, the total amount of certificated lawyers in China has peaked at 232,384, but every 1,000 population only has 0.16 lawyers.⁶⁸ In England and Wales, the number of solicitors has reached 2.15 per 1,000 population in 2010,⁶⁹ almost double the number of Beijing which had the highest rate of 1.17 in China in 2013.⁷⁰ Even the rate 0.16 is not representative, as there is a severe imbalance in the distribution of legal assistance in China, and five provinces have rates even lower than 0.1.⁷¹ Doubtlessly, the number of available lawyers is, if not determinant, highly relevant to the rights protection of a criminal justice system. If one considers the quality of legal assistance in criminal proceedings into consideration, then the gap between the two jurisdictions could be even wider.

What makes the comparison even more challenging is the fact that in comparison with England and Wales, China lacks systematic and thorough data collection system. In England and Wales there are multiple sources of data that do not only provide a comprehensive and dynamic view of the legal system, but also enhance the credibility of the statistics by checking upon each other. This does not mean that statistics can be absolutely useful to improve the judicial system. However, it is less arguable that the absence of a database will inevitably reduce the assessability of a criminal policy or a legal device and predict its potential consequences. This may explain why since 2010 the SPC has begun to promote data collection in the judicial system across the country.

Despite all those divergences, what we can observe from the English and Chinese legal systems is the common complaint against the shortage of judicial resources and the pressure of heavy caseloads. Because of the differences in the definition and scope of crimes, the specific criminal proceedings in dealing with various types of offences, and the way the data collected and analyzed, it is difficult to compare the burden on the Chinese and English criminal justice authorities through absolute numbers. Therefore features in common are delineated in a qualitative way. From earlier discussion one can already notice that in the Chinese judicial system there has long been a complaint of 'heavy workload, and scarce personnel' (案多人少), especially in the east cities.⁷² Since 2006 this phrase has almost appeared in every SPC annual report, indicating the severity of this problem, as well as concerns from national level.

In contrast to the Chinese version of insufficient judicial resources, the complaints in the English system focus more on the financial expenses and the cost of time. The chapter on English CPAs has presented the strong claim for swifter justice, which has led to the increased emphasis on pre-trial proceedings and the use of magistrates' courts. The financial cut in legal aid in 2013 also

⁶⁸ All-China Lawyers Association, 中国律师行业社会责任报告 (*Reports on the Social Responsibility of Chinese Lawyers*), 2013, available at <http://www.acla.org.cn/html/xinwen/20130827/11102.html>. Accessed 21 February 2014.

⁶⁹ The Law Society, *Annual Statistical Reports 2010*, available at <http://www.lawsociety.org.uk/representation/research-trends/annual-statistical-reports/>. Accessed 21 February 2014.

⁷⁰ See *supra* note 68, All-China Lawyers Association (2013).

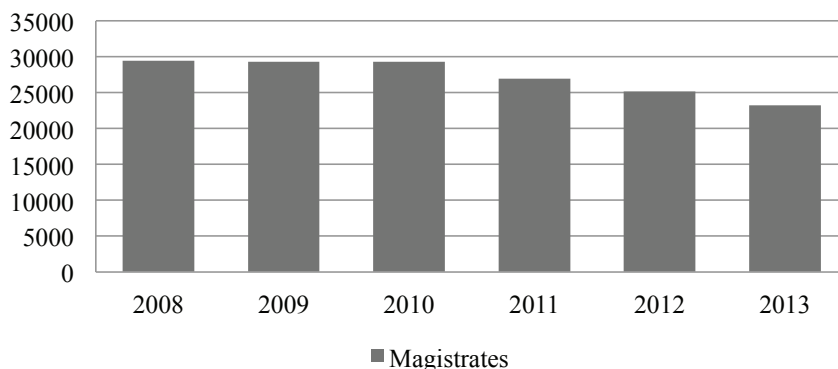
⁷¹ *Ibid.*

⁷² See Fan He, 法官多少才够用 (How Many Judges are Enough), 人民法院报 (*People's Court Daily*), 7 June 2013, available at http://rmfyb.chinacourt.org/paper/html/2013-06/07/content_64729.htm?div=-1. Accessed 24 February 2014.

showed the government concerns about the cost-benefit of the criminal justice system, which caused the first protest of barristers across England and Wales in 400 years.⁷³

The discrepancy in focus leads to different government responses. The Chinese legal system pays more attention to enhance judicial resources from a quantitative perspective, such as providing more training and recruiting more judges, whereas the English system is more concerned with the qualitative aspect and how to make the system cost-benefit balanced, which leads to approaches like reducing the budget and personnel. For instance, Figure 5.1 shows the decreasing trend in the amount of magistrates since 2008.

Figure 5.1 Amount of Magistrates in England and Wales (2008-2013)



Source: *Judiciary of England and Wales and Tribunals Judiciary, Statistics on Magistrates in Post, 2008-2013*.⁷⁴

Such a discrepancy in reactions is deeply rooted in the original gap in modernizing the criminal proceedings between the two jurisdictions: the under-development of the former, and the ‘over-development’ of the latter.⁷⁵ Nonetheless, the common features in focus still lead to the fact that the approaches adopted in the two jurisdictions overlap each other, especially through distributing responsibilities in crime control and seeking cooperation.

2.6 Evaluation on Penal State and Impact on CPAs

Through comparatively examining each dimension of the penal state between China and England and Wales, several distinctive features of the Chinese penal system can be observed. Firstly, the authoritarian character of the Chinese legal system gives rise to stability-focused instead of

⁷³ Jane Croft and Thomas Hale, ‘Barristers to State Walkout in Protest over Planned Legal Aid Cuts’, *Financial Times*, 5 January 2014, available at <http://www.ft.com/cms/s/0/7c15c55e-7626-11e3-8c8d-00144feabdc0.html#axzz2uEiOJKFm>. Accessed 24 February 2014.

⁷⁴ Available at <http://www.judiciary.gov.uk/publications-and-reports/statistics>. Accessed 24 February 2014.

⁷⁵ Whether there is a real ‘over-development’ is still arguable. But if one takes the populism in the English system into consideration, then it is understandable that at least there is a common complaint against the perceived ‘over-development’.

election-oriented penal populism, and therefore the government policy may continually sway between leniency and harshness. Secondly, judicial independence is seriously challenged particularly by the politicization of the judicial system and the systematic corruption. Among all, the CPC's control and the systematic corruption in political life are two factors which particularly threaten the internal autonomy of criminal justice. Thirdly, the penal power is dispersed mainly due to the distinction between criminal sanctions and administrative sanctions. Public prosecutors have very limited discretionary power in written law, and sentencing power is not divided in accordance with jurisdiction. Fourthly, there is a strong collaboration among PSO, people's procuratorate and people's court, and an ingrained inquisitorial feature that offenders are deemed the counterparty of the entire criminal justice. Last but not least, resources available for the administration of criminal justice are claimed as insufficient, and there is a lack of systematic statistics.

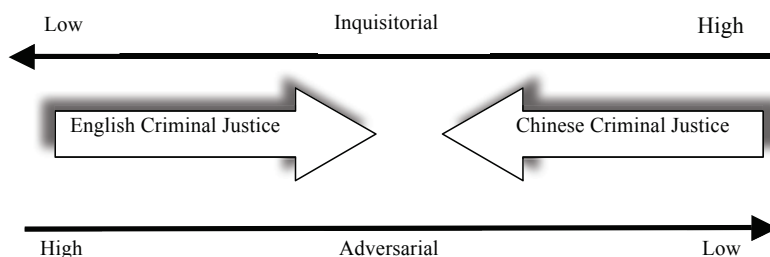
All these features may on the one hand increase the risk of miscarriages of justice through employing more flexible and less transparent and less formal negotiations in China, whereas on the other hand they reduce the possibility for the successful transplantation of English experience. Nevertheless, these features are summarized from a static perspective. The view can be quite different if a dynamic viewpoint is adopted.

First of all, both jurisdictions appear to be facing similar challenges on not only crime but also crime control. In England and Wales Sanders *et al* noticed that even though criminal statistics had shown a decrease, the English government still claimed the seriousness of the crime problems and stuck to the aggressive approaches in dealing with them.⁷⁶ In China, concerns on criminal problems are reflected in official propaganda especially when national campaigns were launched against crimes.

In addition, public doubts on ordinary procedure surged in both legal systems. The obsession in the extra-legal channels towards justice in Chinese society indicates deteriorating public confidence; whereas the cry for harsher punishment in English society shows a strong impatience with the expensive, 'bloated', stiff, and exclusive formal approach. The concern about criminal problems and the doubt about the formal crime controls in both jurisdictions create the condition of necessity for CPAs.

Furthermore, both Chinese and English legal systems are making efforts to reach a balance among various values. Among all, there are two major trends which can be observed from previous discussion. The first trend concerns the mode of criminal procedure where there is a movement towards a convergence of adversarial and inquisitorial elements in both systems, which can be simplified into a convergence in Chart 5.3.

Chart 5.3 Dynamic Convergence in the Chinese and English Systems



⁷⁶ *Supra* note 52, Sanders *et al* (2010), pp. 20-21.

Another trend is about the relationship between Parker’s two models: crime control and due process.⁷⁷ What can be observed from the latest developments in the two criminal justice systems are the common interests in crime control on the one hand, and the contrasting movements in due process on the other hand.

Table 5.5 Movements in Crime Control and Due Process

Jurisdictions	Crime Control	Due Process
China	Adjusting	Enhancing
England and Wales	Enhancing	Adjusting

In Table 5.5 ‘adjusting’ rather than ‘reducing’ is used because the comparison with penal state, especially the prevalence of penal populism in both jurisdictions, indicates a strong preference for crime control approach through adjusted common strategies.

What both trends have in common is a convergence that enables the employment of CPAs in China. They give rise to three further observations. The first is that through introducing adversarial elements, China is continually improving the proportion of the due process elements in criminal proceedings. Even though in recent years there are complaints on ‘China’s turn against the law’ in the political atmosphere,⁷⁸ the latest legislation has still improved the safeguards for the offenders and restricted the discretion of the criminal justice authorities, which constitutes the condition of possibility for CPAs.

The second observation is that Chinese criminal justice has strong inquisitorial roots, and the crime control power of the state is greatly strengthened through the authoritarian regime, irrationalized by the populist ideology, and informalized by the absence of internal and external checks and balances. These elements will doubtlessly create more challenges in the coordination of CPAs and the integrity of the criminal justice system. It also indicates that at this stage the pure CPA model that is characterized in the mutually-beneficial state-citizen cooperation based on free will and negotiation can hardly be fully developed.

Thirdly, the English system itself is not the ‘ideal model’ and it is also adjusting itself constantly to find the ‘golden ratio’. Two more issues can be derived from this observation. For one thing, what has existed in the English system is not necessarily appropriate to be introduced into the Chinese system. For another, when constructing CPAs in China through learning from the English experiences, the latter must be viewed from a comprehensive and dynamic perspective. The convergence does not eliminate the persistent reluctance in criminal justice authorities to negotiate with criminal offenders in China. One of the most conspicuous signs of such discomfort is that the Chinese legislator facilitates the negotiated exchange of benefits between authorities and offenders on the one hand, whereas it either refuses to make explicit acknowledgment (plea agreement for instance), remains silent on procedural design (assistance agreement), or restricts the scope (restoration agreement) on the other hand. Despite all those developments, the contractual approaches adopted in the English legal system clash with the gradually weakened but still standing fundamental assumptions in Chinese criminal law, and inevitably bruise sensibilities in the latter more than in the former.

All these indications together lay the foundation for China to improve her own CPA system through learning from the English experience. But more importantly, they have also drawn barriers

⁷⁷ About Parker’s analysis on the crime control model and due process model, see his most notable book *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).

⁷⁸ See *supra* note 9, Minzner (2011).

around CPAs with the idea that the current Chinese criminal justice system should still focus on constructing the ordinary criminal procedure and restrict the use of flexible, informal, and discretionary agreements. Again, this does not mean the boundaries are fixed or that all elements are clear cut. On the contrary, they are constantly being adjusted according to the changed internal and external elements. This requires the Chinese legislator on the one hand to be more prudent in designing CPAs, while on the other hand to be open-minded at the same time.

Based on all observations raised in this section, this discussion moves on to the comparison of each CPA to examine the similarities and differences between the two jurisdictions. Plea agreement, assistance agreement and restoration agreement are analyzed respectively to identify the common and particular areas of tension where coordination with ordinary proceedings is needed.

3. Plea Agreement

3.1 Similarities

From previous chapters it can be observed that the exchange between an offenders' guilty plea and criminal justice agencies' lenient treatment is hardly new in both legal systems, and several similarities can be detected.

To begin with, the historical review on plea agreement in each jurisdiction reflects a common zigzag pattern. Both the Chinese and English criminal justice systems experienced a period when the guilty plea was marginalized or discouraged. Despite the discrepancies in legal norms, institutional structures and other specific elements, such an attitude was derived from the common backgrounds that the offender enjoyed few procedural rights on the one hand, and the ordinary procedure was, compared with criminal procedural rules nowadays, less complex, tedious and expensive on the other hand.

The second similarity is that in spite of the tortuous evolution, statistics in both jurisdictions show that there is a high proportion of guilty pleas among convictions in current criminal justice systems. The key motivation is efficiency. Plea agreement was born in quite a similar rhetorical context. What can be observed in both jurisdictions – in the 1970s in England and Wales and 2000s in China - are similar claims on the rise in caseloads and the shortage in judicial resources. Among all other channels for dealing with growing numbers of criminal cases, plea agreement is just one of the responses.

This leads to the third similarity that both jurisdictions, though without developing special and separate proceedings for plea agreement, have gradually enhanced procedural facilitations to simplify the procedures and to accommodate this mechanism. In England and Wales what can be observed are reforms in allocating proceedings and a shift of emphasis from the Crown court to magistrates' courts, while in China the typical example is the changes from ordinary proceedings to the summarized procedure, and then to the legitimized summary procedure for guilty plea cases. Reforms in both jurisdictions, however, did not establish plea agreement directly. Rather, they started with the point of filtering simple and minor cases out of criminal proceedings.

To legitimize such facilitations, both China and England and Wales attempted to justify the exchange of benefits by translating it into other words, which is the fourth similarity. The justification at first used by the English criminal justice system 'remorse', which was later gradually substituted by a concept with broader connotation, 'public interest'. This resembles the standard phrases formulated in the Chinese judicial verdicts, 'plead guilty with good attitude' (认罪态度较好).

The fifth common point also derives from the efficiency argument by grading lenient disposals in accordance with the time for guilty pleas. It is evident in earlier discussion that in plea agreement both jurisdictions follow the general rule of 'the earlier, the better'. In England and Wales

such rule is reflected in the distinction between ‘first reasonable opportunity’ and a late guilty plea, while in China it is the differentiated concessions for pre-trial confession and a guilty plea in court. As long as there are claims for swifter and more effective crime control tools, the trend towards encouraging an earlier guilty plea is unlikely to be reversed. For instance, in DPA in England and Wales, the requirement of ‘self-report’ actually has advanced the start point of offenders’ cooperation to a similar level as voluntary surrender in China: that is, before the criminal activity has been detected by investigators.

The last key similarity between England and Wales and China is that the major reward from criminal justice authorities is sentence reduction. Although three forms of plea agreement can be found in England and Wales, the major pattern is the sentencing bargaining. With sentence guidelines developed in both jurisdictions in recent years, the possible rewards for guilty plea become more predictable, and therefore the influence of the pre-trial negotiation on the final judicial decision is more certain. Thus what can be observed in plea agreement in both jurisdictions is a streamlined factory-style production of more co-operative offenders with higher incentives.

3.2 Differences

3.2.1 Modus Operandi

The first difference between China and England and Wales is about the *modus operandi* of plea agreement. This is closely linked to the control of the power to punish mentioned in the first section. In England and Wales, the two-tier structure of judiciary and corresponding sentencing power transforms a selection of courts into a selection of sentencing, which can be used as bargaining chips of criminal justice authorities in the negotiation, especially in either-way offences. Comparatively, the broad scope in case selection and sentencing power of summary procedure in the Chinese judicial system makes such a selection unlikely to happen.

In addition, the power distribution between the judiciary and the prosecution also affects the way plea agreement functions. In England and Wales, the wide discretion enjoyed by the CPS does not only facilitate the negotiation between the prosecution and the accused on charges and facts but also enables courts to maintain the image of neutrality and independence. In China, however, charge bargaining or fact bargaining are not possible at least in explicit form due to the restricted procuratorate discretion and the streamlined relationship among criminal justice agencies.

3.2.2 Effect of Pre-Trial Deals

A more subtle distinction in plea agreement relates to the influence of the pre-trial deals on judiciary decisions. In England and Wales judges are theoretically more immune to such influence. However, during the past few decades this presumption has been challenged from various directions. Among all, the sentencing guidelines play a crucial role in relieving the tension at the expense of judicial discretion.

In contrast, the streamlined structure in China facilitates the cooperation between the judiciary and the prosecution. In plea agreement, Chinese prosecutors can influence judges mainly through two channels. The first channel concerns the filtering procedure. In China, summary procedure for guilty plea cases can be initiated with the people’s procuratorate’s proposals (Article 208 of the 2012 CPL). The second channel is sentencing proposal. According to the 2012 SPP Regulations, people’s procuratorates can make sentencing proposals in all public prosecution cases (Articles 399 and 400). The promulgation of Sentencing Guidelines has greatly facilitated this practice.

From another perspective, in China the judiciary can also influence the decisions of public prosecutors. Unlike England and Wales where the scope of court hearing is restricted by charges

formulated by prosecutors, in China judges have larger discretion in modifying charges, especially when the conviction is separated from the sentencing decisions. This can be observed in the 2012 SPC Interpretations that when facts are clear and evidence is sufficient, judges are authorized to modify accusations if they disagree with crimes charged by prosecutors (Article 241). When judges notice new facts which may influence conviction, they can suggest that prosecutors amend charges (Article 243). If refused by prosecutors, judges may again change accusations directly. This indicates that as opposed to the English legal system, charge agreement may be less useful in China. Another way for the Chinese judiciary to interfere with prosecutors' work is its power in collecting evidence. English judges are bound by the evidential materials presented and debated in courtrooms by defense and prosecution, and they themselves do not have the power to collect evidence directly. In China, however, judges may inform prosecutors to collect materials based on Article 72 of the 2012 SPC Interpretations. Previous examples also indicate that Chinese judges can even conduct investigations in certain situations.

3.2.3 Best Time for Cooperation

The third discrepancy concerns the desirable start point for a guilty plea. Confession in Chinese law is expected much earlier than the 'first reasonable opportunity' in English law. The former is supposed to be offered once the offender is under official control during investigation; whereas the latter normally refers to the first time the defendant appears before the court and has the opportunity to plead guilty. Given that under the 2012 CPL, the suspect can employ defense lawyers the first time he is interrogated by the investigator, or, has compulsory measures imposed on him, for offenders there is actually a gap between the best opportunity to cooperate and the proper time to obtain legal advice.

This distinction reflects different modes of penal power. Chinese criminal proceedings with strong inquisitorial features emphasize the pre-trial stage, making cooperation during that period more constructive in saving judicial resources. In England and Wales, however, the main emphasis of criminal proceedings is court trial, and consequently the earliest time for a guilty plea is normally the initial appearance in magistrates' courts. Thus it seems that mechanisms like DPA in the English criminal justice system have moved even further than current Chinese practice.

3.2.4 Content of Guilty Plea

Under the English legal system, pleading guilty can be a single word 'yes' or 'no' towards charges. It also happens that offenders plead guilty on some charges or some facts rather than admitting the whole accusation completely. In China, a guilty plea actually requires offenders to make full confession on the details of the charges.

Behind this distinction is the different nature of the offender's act of self-incrimination. A guilty plea in England and Wales, borrowing Damaška's analysis, 'resemble[s] the failure of defendants to contest the plaintiffs' claims in civil cases', while in China it is a type of incriminating evidence.⁷⁹ Because of the differentiated nature of the guilty plea, the English system pays more attention to the factual basis of self-incrimination, while the Chinese criminal justice authorities focus on its reliability. Although they overlap each other, these two aspects are not completely the same.

This further leads to differing corroboration rules. In England and Wales, the general rule is that corroboration of evidence is not required, and therefore judges are not obliged to give warnings to jury against uncorroborated admission of guilty. Chinese law adopts a quite different approach. It is

⁷⁹ Mirjan Damaška, 'Negotiated Justice in International Criminal Courts', 2(2004) *Journal of International Criminal Justice*, 1018-1039, p. 1026.

since the 1979 CPL that corroboration of confession has been required for convicting a defendant.⁸⁰ As discussed previously, this rule is designed mainly to eliminate extracting confessions through torture and consequently to avoid miscarriages of justice.

3.2.5 Exceptions for Concession

As mentioned in previous chapters, in England and Wales there are two major groups of restrictions on rewarding guilty plea: those where a guilty plea cannot contribute to efficiency, like ‘red-handed’ rule and ‘tactical plea’; and those where the value of public protection is overwhelming, such as murders cases and dangerous offenders. These restrictions are based on the presumptions that (1) plea agreement serves a utilitarian purpose, and (2) such a purpose cannot overwhelm the interest of justice.

In China, however, the summary procedure for plea agreement seems applicable to all offenders in all types of offences heard in the basic people’s court. For cases which are disqualified from being heard summarily, the law does not ban the exchange of confession and concession. All restrictions given in the current legal regime are that the rewards should be based on a comprehensive evaluation of offence and offender. This is relevant to the presumption that a guilty plea implies the offenders’ remorse, and consequently all offenders who truly and sincerely ‘feel sorry’ should be given a second chance. This appears to conflict with the utilitarian purpose which evaluates a guilty plea from an objective perspective on whether it can increase efficiency.⁸¹ Related to the different exceptions are different ways in which plea agreement (especially sentencing agreement) increases efficiency. In England and Wales, a guilty plea serves efficiency in accordance with the two-tier nature of criminal courts. In magistrates’ courts the proceedings have already been ‘summarized’. After a guilty plea, the prosecutor will give an opening speech on the case, and the defense lawyer will not contest conviction issues, but only present mitigating factors like good character and ask for lenient disposals. No witness will be called, nor will evidence be presented or examined. Sometimes the probation officer’s opinion will be inquired before sentencing. In the Crown Court, a guilty plea will directly exempt the need to empanel a jury, and lead the Court to the sentencing stage. After a guilty plea in the Crown Court, all that prosecutors need to provide in ordinary cases is the evidence of an offender’s antecedents and criminal record.⁸² In a contrasting way, the Chinese court trial does not separate conviction and sentence, meaning that irrespective of the level of jurisdictions, judges make decisions on these two issues simultaneously. Accordingly, a summary procedure simplifies not

⁸⁰ Article 35 of the 1979 CPL; Article 46 of the 1996 CPL; and Article 53 of the 2012 CPL.

⁸¹ It should be noticed here that in death penalty cases, especially homicide cases, confession or guilty plea is quite often used to justify the use of suspended execution instead of immediate execution. But the ideology behind it is different from normal cases, as it reflects the general policy of ‘killing less, and killing cautiously’ (少杀、慎杀). See e.g., (2014) 鲁刑四复字第 17 号 ((2014) *Luxingsifuzi* No. 17). For discussion on the death penalty policy in China, see Susan Trevaske, ‘China’s Death Penalty: The Supreme People’s Court, the Suspended Death Sentence and the Politics of Penal Reform’, 53 (2013) *Brit. J. Criminol.*, 482-499.

⁸² This is delicately adjusted in the Attorney General’s guidelines that prosecution advocates are obliged to ‘assist the court to reach its decision as to the appropriate sentence’ through ‘drawing the court’s attention’ to several pieces of information. On the first sight, requirements listed in the guidelines appear to assist judges to build their sentencing decisions on a more solid but meanwhile neutral basis. However, the whole guidelines base themselves on a preference for victims rather than offenders. See Attorney General’s Office, *The Acceptance of Pleas and the Prosecutor’s Role in the Sentencing Exercise* (Revised 2009), available at <https://www.gov.uk/the-acceptance-of-pleas-and-the-prosecutors-role-in-the-sentencing-exercise>. Accessed 26 March 2014.

only conviction but also sentencing. Therefore, Chinese summary procedure appears to contribute to judicial efficiency in a similar way to that in magistrates' courts in England and Wales.

3.3 Major Tension Areas between Plea Agreement and Ordinary Procedure

3.3.1 Waiving Rights: Free Will v Coercion

One of the key challenges against plea agreement in both jurisdictions is that this mechanism circumvents procedural safeguards on offenders by encouraging their waiver of rights, and consequently enhances the risk of coercion. Previous discussion has revealed the phenomenon of false guilty pleas by innocent people. The sources of pressure, however, are differentiated due to either the features of the penal state examined earlier, or the specific mechanism of ordinary procedure. It can be seen that in England and Wales the pressure is manipulated in a relatively subtle and implicit manner, and the main controversies center on the way judges give sentence indication, the 'prosecution-minded' CPS and barristers' own interests.

In the Chinese criminal justice system, in comparison, this conflict appears to be more intractable. This is because of not only the nature of plea agreement but also the relevant legal rules. So if there are two steps of waiving rights in plea agreement – empowerment as step one and proper disposal as step two, then the Chinese system is still struggling in the former while the English system has moved on to the latter. The prosecution and the defense in China can hardly be deemed as 'equally armed' when the latter lacks the right to remain silent and bears the obligation of giving a truthful confession.

3.3.2 Quality of Procedure: Summary v Full-Dressed

Both jurisdictions attempt to connect guilty plea to their own version of 'summary procedure', and it raises the question of to what extent the 'due process' can be abbreviated. This question has been discussed in England and Wales as to in a plea agreement, whether the quality and fairness can be guaranteed in either summary procedure in magistrates' courts or the summarized procedure in the Crown Court.⁸³ Debates in England and Wales mainly concentrate on two issues: one is the competence of magistrates and magistrates' courts, and the other is the competence of solicitors compared with barristers.

This issue appears to be less discussed in China, as the distinctions in the qualifications of both lawyers and judges do not exist in its criminal procedure. In summary procedure, all cases need to be heard by a collegiate bench consisting of three adjudicators (at least one is a professional judge) except for those carrying a possible maximum of three-year's imprisonment. In contrast to the English experience, the major challenges in summary procedure for a guilty plea in China are procedural issues. One example of such is that most guilty plea cases are excluded from the compulsory legal aid system which is provided mainly to physically or psychologically disabled offenders or those carrying possible sentence higher than life imprisonment (Article 34 of the 2012 CPL). Another challenge is the undistinguished simplification. Before the 2012 CPL it was quite common for prosecutors to be absent in summary trials. This has been changed so that appearing in court now is compulsory for prosecutors (Article 210). Even so, most due processes are still dispensable except for the defendants' closing statement (Article 213), regardless of the seriousness and complexity of the case. This undistinguished simplification increases the risk of sacrificing due process protections, especially when due process itself in China is weak.

⁸³ See *supra* note 52, Sanders *et al* (2010), pp. 536-549.

3.3.3 Definition of Truth: Real v Accepted

The third tension area gives rise to the question of the definition of truth. If one takes the truth which is sought through ordinary procedure as the most close to ‘real’ truth, then in plea agreement another definition can be detected: accepted truth. Under the English legal system a guilty plea serves a less evidential function, and this leads to a greater simplification in its procedure, and less scrutiny on its reliability. Thus the legal regime of plea agreement in England and Wales shows higher tolerance for an ‘accepted truth’, and it is by itself a source of deviation from the ‘real truth’.

Comparatively, the evidential role of guilty plea in China gives rise to two implications. On the one hand, guilty plea would not remove the burden of proof on prosecutors, whereas on the other hand it tends to induce legal officials to malpractice such as torture, causing serious miscarriages of justice. As a response, a practice of ‘zero confession’ (零口供) was developed in judicial practice. It means that even though having been obtained during investigation, an offender’s confession would be excluded from the decisions of prosecutors or judges. This practice was firstly invented by the District People’s Procuratorate in Fushun City, Liaoning Province in 2000, to build the case on the basis of all evidence except for confessions.⁸⁴ In other words, it is not corroboration, but exclusion of confession. What is implied in this ‘exclusionary rule’ is introspection on over-reliance on confession. However, it is only an expedient approach employed when sufficient protections for offenders are absent. Similar to over-reliance on confession, excluding confession also goes to extremes by ‘throwing out the baby with the bath water’.

Despite the divergence in the function of the guilty plea, both jurisdictions actually face a common challenge of coordinating different concepts of truth. Both checking the factual basis of a guilty plea through approaches like ‘Newton Hearing’ in the English system and guaranteeing the reliability of confession through corroboration rules in the Chinese system are making efforts to fulfill the common purpose of keeping the differences between accepted and real truth to a minimum.

3.3.4 Impact of Plea Agreement Internal Arrangement v Public Law Nature

By its very character plea agreement is an arrangement based on the mutual assent of offenders and criminal justice agencies. This character is one of the sources of the tension areas with respect to the public law nature of criminal justice. There are two issues frequently touched upon. The first issue concerns victims. Previous discussion shows that victims are considered as the beneficiary of plea agreement on the one hand, while they are also depicted as being re-offended against by the exclusive and private negotiation on the other hand. This tension raises not only the question of the role of victims in plea agreement but also the extent to which they can influence the criminal justice decisions. Another issue is relevant to public confidence. Such arrangements may undermine the transparency of criminal procedure, and consequently threaten public confidence in the administration of criminal justice especially in high-profile cases.

Discussion on the English legal system shows that both issues have raised heated debate about the theory and the practice. For the role of victims, increasing attention has been paid to their rights to know, but questions still remain as to how much judicial reliance should be given to their opinions. As to public confidence, under the English legal tradition, jury trial is not merely a way of seeking the truth but also a means to enhance public confidence in criminal proceedings. One major effect of plea agreement, however, is sparing the need of empanelling a jury.

⁸⁴ Jiancheng Wang and Yuan Sun, 关于‘零口供’规则的思考 (A Reflection on the Rule of ‘Zero Verbal Confession’), 5(2001)人民检察 (People’s Procuratorial Monthly), 5.

Comparatively, both issues are less touched upon by the Chinese legislator. For cases involving direct and individual victims, their participation is mainly discussed in criminal reconciliation instead of plea agreement. This is because a guilty plea is an indispensable premise for criminal reconciliation in China. However, it leads to the question as how to assign proper credits for each type of agreement without double counting. For the second issue, since the 1954 Constitution China has established the people's assessor in the judiciary, serving the purpose of consolidating public confidence in justice.⁸⁵ Such a purpose can hardly be influenced by plea agreement because, as mentioned earlier, only cases carrying a possible sentence of less than three-year's imprisonment can be heard by a single judge. For the rest of the first instance trials, there must be a collegiate bench with at least one people's assessor. The use of plea agreement would not prevent this procedural requirement.

3.3.5 Justification: Remorse v Efficiency

Both jurisdictions have adopted several justifications for the exchange between confession or guilty plea and legal concessions, and there are two words frequently mentioned in common: remorse and efficiency. The argument of 'efficiency' demands classification of offences and restricted scope to avoid excessive sacrifice of either due process or public interests. On the contrary, the argument of 'remorse' requires exploration into the moral or emotional status of the offender, and denies the possibility of making a deal on it regardless of the procedural cost. Under the argument of 'remorse' negotiation is unnecessary and can hardly be justified. Comparatively, efficiency can be evaluated through objective criteria in a fixed period, while remorse can hardly be detected, not to mention be evaluated.

Distinctions between efficiency and remorse explain the English experience that the emotional rhetoric is gradually peeled off from the objective act of admission of guilt, and rewards for a guilty plea are gradually formalized. This is explicitly expressed in the 2007 SGC Sentencing Guidelines that 'the sentence should address separately the issue of remorse, together with any other mitigating features, before calculating the reduction for the guilty plea'.⁸⁶ In China, however, these two arguments are still packed together. As mentioned earlier, the expression 'plead guilty with good attitude' frequently appears in the indictments. It is the same with the verdicts of people's courts that a 'guilty plea' is not enough unless it is accompanied by a 'good attitude'.

4. Assistance Agreement

From previous chapters one can notice that in both jurisdictions rewarding assisting offenders is well-accepted in their legal frameworks. To better understand the similarities and distinctions between the Chinese and English legal regimes and identify the areas of tension, criminal verdicts published on Judicial Opinions of China (*中国裁判文书网*)⁸⁷ concerning meritorious service in China are used as

⁸⁵ This has been removed from the 1982 Constitution but confirmed in the 1983 Organic Law of People's Court, and remained in procedure laws. For introduction on the people's assessor system in China, see Di Jiang, 'Judicial Reform in China: New Regulations for a Law Assessor System', 9(3) (2000) *Pacific Rim. Law & Policy Journal*, 569-590.

⁸⁶ S2.4 of SGC, *Reduction in Sentence for a Guilty Plea (Definitive Guideline)*, available at http://sentencingcouncil.judiciary.gov.uk/docs/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf. Accessed 14 April 2014.

⁸⁷ Judicial Opinions of China, available at <http://www.court.gov.cn/zgqepsw/>. Before 2010 most verdicts were not available to the public in China. It was in that year the SPC launched the scheme of publishing the court's

samples. These samples are selected through four steps. Step one is to set a period between 1 July 2013 (the starting point of this website) and 31 March 2014, with nine months in total. Step two is to screen out verdicts containing ‘meritorious service’, and there are 6321 feedbacks. Step three is to narrow down the scope by only examining the first 200 verdicts appearing in the list. They are listed according to the date when they were published on the website, so the selection is random. The last step is to filter out verdicts among the 200 which refer only to relevant legal documents but not meritorious service itself.

After four steps, there are 62 qualified verdicts, involving 101 offenders, 69 for the first instance trial and 32 for the second instance trial, as shown in Figure 5.2. Among all involved offenders, 65 of them provided meritorious service.

Figure 5.2 Statistics on 62 Verdicts (1 July 2013 – 31 March 2014)

No. of Verdicts	No. of Offenders			Content of Assistance					A		R
	1 st	2 nd	MS	RA	CA	RO	CO	Rest	N	M	
62	69	32	65	5	15	30	18	0	43	2	20

Note:

(1) ‘1st’: first instance trial; ‘2nd’: second instance trial; ‘RA’: report on accomplice; ‘CA’: assist to catch accomplice; ‘RO’: report on other offenders; ‘CO’: assist to catch other offenders; ‘A’: meritorious service acknowledged by court; ‘N’: normal meritorious service; ‘M’: major meritorious service; ‘R’: meritorious service rejected by court.

(2) All numbers here refer to offenders except for ‘no. of verdicts’.

4.1 Similarities

Assistance agreement in both jurisdictions serves common targets: facilitating the investigation, prosecution, and conviction of other crimes. This does not necessarily lead to the conclusion that the more crimes that are detected, the better. Rather, what is desirable in both jurisdictions is that the more convictable crimes that are detected, the better. All relevant procedural designs are derived from this premise, leading to similarities on the specific aspects of the institutions of assistance agreement.

First of all, neither jurisdiction distinguishes between assisting accomplice and supergrass when issuing rewards. Assistance can be either against a co-offender or suspects involved in other crimes. As mentioned in previous chapters, the judicial attitude towards supergrasses in English criminal justice experienced a progression from disapproval to acceptance. Comparatively, Chinese criminal law has not specially distinguished between these two types since 1979. In fact, the term ‘meritorious service’ *per se* implies Chinese legislator’s intention of making criminal offenders useful, which now is a shared rationale between the two jurisdictions.

The major reason behind this rationale is that in the case of assistance agreement, the first and foremost consideration for Chinese and English criminal justice systems is the value of the assistance. What criminal justice authorities care most about is whether or not such assistance can break down other crimes rather than where the information or testimony originates from. This explains the second

verdicts on-line, and it was not implemented on a national level until the end of 2013 when the SPC promulgated 人民法院在互联网公布裁判文书的规定 (*Regulations on Publishing Verdicts of People’s Courts on Online*). According to this document, verdicts of people’s courts on every level should be published online except for those (1) involving state secrets or individual privacy; (2) involving juvenile delinquencies; (3) resolved through mediation; and (4) other improper situations (Article 4).

similarity that both jurisdictions adopt the seriousness of the targeted crime as one of the major criteria on evaluating the assistance.

What also derives from the first similarity is the fact that not all assisting offenders are facing the dilemma of incriminating themselves by cooperating. It then leads to the third similarity: the pragmatic consideration in assisting agreement especially when supergrasses are involved. It results from the fact that in both Chinese and English criminal justice systems, giving testimony, either in court or not, is a legal obligation for witnesses. In England and Wales this obligation has long been accepted in common law rules, while in China it was firstly established in Article 37 of 1979 CPL (now Article 60 of 2012 CPL).

Such an obligation is, however, less effective in guaranteeing both the quality and the quantity of the assistance in practice. It is difficult to detect what an offender knows and to what extent he knows about other crimes, and punishing the stubborn offender for refusing cooperation can only produce a situation where everyone loses. Though targeting at different crimes, criminal justice agencies in both jurisdictions are urged to find a more effective approach to crime control. The SOCPA 2005, DPA and several official documents published previously are examples of such. In China, given the fact that pre-trial proceedings are more emphasized both in law and in practice, the validity of the obligation to give testimony is less certain, and consequently the gap between legal provisions and practice becomes even wider.

The fourth similarity is the combination with the guilty plea. This can be analyzed from two perspectives. On the one hand, both jurisdictions establish separate rewards for guilty plea and assistance, and the guilty plea itself is not necessarily an indispensable condition for assistance agreement. On the other hand, however, what can be observed from Chinese and English criminal justice systems in common is that the connection between the admission of guilt and assistance agreement is increasingly strengthened. As discussed in the English chapter, although the common law rules leave space for assistance agreement without self-incrimination, the SOCPA 2005, ‘cleansing’ procedure and DPA all build assistance agreement on the foundation of confession.

The convergence of plea agreement and assistance agreement also exists in Chinese legal practice. This can be observed from the high proportion of various types of admission of guilt in 65 offenders who gave meritorious service.

Figure 5.3 Amount and Proportion of Guilty Plea among 65 Assisting Offenders

VS		Confession		PG in Court		Total	
No.	%	No.	%	No.	%	No.	%
12	18.5	36	55.4	4	6.2	52	80

Note: ‘VS’: voluntary surrender; ‘PG’: plead guilty

From Figure 5.3 one can notice that the normal stage for assisting offenders to admit guilt is at the pre-trial proceeding, which is consistent with the English practice. Again, establishing assistance agreement at this stage largely relies on the collaboration of criminal justice agencies. However, a slight difference exists due to the pattern of criminal proceedings. In England and Wales, the normal start point for guilty plea is when the case enters into trial proceedings. It makes little difference from a judiciary perspective with respect to sentencing if the offender confesses even earlier,⁸⁸ and

⁸⁸ Here reference is to the normal form of assistance agreement. Situations where the CPS or Police have diverging power, like DPA, are not covered.

therefore pre-trial confession serves primarily the convenience of investigators and prosecutors, and consequently is subordinate to assistance agreement.

In China, the law and relevant judicial documents do not mention the link between guilty plea and assistance agreement. However, when examining the 62 samples carefully, an interesting phenomenon can be noticed: some offenders' meritorious service was rejected (among 20 rejections) by people's courts because such an act was regarded to be part of voluntary surrender or confession, see Table 5.6.

Table 5.6 Meritorious Service Deemed as VS or Confession and Rejected

Type	Case No.	Content of MS
MS as VS	(2014)沪二中刑终字第 243 号	Report on accomplice
	(2014)筑刑二终字第 68 号	Report on graft
MS as Confession	(2014)粤高法刑二终字第 13 号	Report on accomplice

Note: 'VS': voluntary surrender; 'MS': meritorious service

These three cases reveal two conditions for meritorious service to be merged with confession. One is that the form of the assistance is 'reporting' rather than 'helping to catch', and the other is that either the targeted suspects or the targeted crimes are relevant to the assisting offender's own case. The 'targeted suspects' normally refers to an accomplice, and the 'targeted crime' normally refers to correspondence offences (对合犯) like the crimes of offering and taking bribery. As mentioned earlier, the offender's offer in plea agreement in China is expected to uncover all relevant details of the case. It means that when being charged of a joint offence or a crime of offering bribery, the full confession of the assisting offender is expected to include the information on the accomplice or persons who took the bribery..

The fifth similarity between the two jurisdictions on assistance agreement is that they all have experienced serious doubts about the risk of miscarriages of justice. As mentioned earlier, the English criminal justice system has been challenged both in the 1980s and in recent years for using unreliable assisting offenders. Criticisms alike also exist in China. A typical example of such is the *Li Zhuang* case in 2009.⁸⁹ In this case, in order to get lenient sentencing, Gong Gangmo, the defendant, turned against his defense lawyer Li Zhuang and reported to investigators on Li's crime of suborning perjury. Later Li was convicted and sentenced to one year and six months' imprisonment in 2010, and Gong's meritorious service was confirmed, thus enabling him to be exempted from the death penalty. This case latter provoked fierce attack from legal practitioners and academia because further details indicated that the charges against Li was manipulated by prosecutors with the cooperation of Gong.⁹⁰

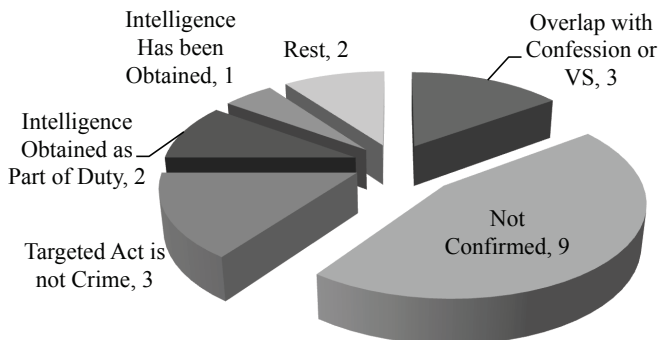
Given the flaws in assistance agreement, both jurisdictions appear to be prudent in using assisting offenders, which is the sixth similarity. The encouragement of written agreement, admission of guilt, and post-sentence review introduced in the SOCPA 2005 are typical examples of such in England and Wales. In China, earlier discussion has shown that several conditions are imposed on

⁸⁹ (2010) 渝一中法刑终字第 13 号 ((2010) Yuyizhongfaxingzhongzi No. 13)

⁹⁰ For detailed discussion on this case, see e.g., Vincent R. Johnson and Stephen S. Loomis, 'The Rule of Law in China and the Prosecution of Li Zhuang', 1(2013) *The Chinese Journal of Comparative Law*, 66-83; Elizabeth M. Lynch, 'China's Rule of Law Mirage: The Regression of the Legal Profession since the Adoption of the 2007 Lawyer's Law', 42 (2010) *Geo. Wash. Int'l L. Rev.*, 535-585; Li Enshen, 'The Li Zhuang Case: Examining the Challenges Facing Criminal Defense Lawyers in China', 24 (2010) *Colum. J. Asian L.*, 129-170.

such agreement, such as ‘the verification of intelligence by criminal justice authorities’ (Article 68 of 1997 CL). In fact, among 20 rejections on meritorious service, the argument of ‘have not been confirmed’ is quite often used, as shown in Figure 5.4.

Figure 5.4 Reasons for Rejection of Meritorious Service



4.2 Discrepancies

4.2.1 Targeted Crime

As discussed in previous chapters, the rise of assistance agreement in England and Wales is directly linked with new developments in different types of crimes threatening society. It was violent gang crimes in the 1970s and 1980s; organized crimes in the 1990s; and terrorism-related crimes, as well as organized crimes (especially in the SOCPA 2005), since 2000. DPA introduced in 2013 targets of corporate crimes and financial crimes. It should be noticed that this only means that there are special targets for using assisting offenders in a certain period, and it does not deny the use of assistance agreement at other times such as for drug-related crimes. The only restriction in statutory rules is that assistance agreement can only be used in relation to serious offending, that is, indictable offences.⁹¹

Comparatively, China generally does not match meritorious service with certain types of crimes with one exception: corruption. Two Articles in the 1997 CL are relevant to it. One is Article 164 on offering bribery to company and enterprise personnel, and the other is Article 392 on introducing bribery. Offenders in both crimes would receive sentencing mitigation or exemption if they take the initiative to give full accounts on their criminal acts before prosecution. As mentioned earlier, ‘give full accounts’ is a term much broader than simply ‘yes’ or ‘no’ on bribery. Offenders in both crimes are also expected to tell on the grafters who are actually involved in other crimes. Correspondingly, in 2009 the SPC and the SPP jointly issued judicial interpretations on duty-related crimes especially graft, embezzlement and duty-negligence.⁹² These laws and judicial interpretations reflect the central government’s particular concerns on the phenomenon of corruption.

⁹¹ CPS Guidance on *Queen’s Evidence – Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005*, available at https://www.cps.gov.uk/legal/p_to_r/queen_s_evidence_-_immunities_undertakings_and_agreements_under_the_serious_organised_crime_and_police_act_2005/. Accessed on 3 April 2014.

⁹² The SPC and SPP, 关于办理职务犯罪案件认定自首、立功等量刑情节若干问题的意见 (*Opinions on Several Issues Concerning the Determination of Voluntary Surrender, Meritorious Service and Other*

4.2.2 Patterns of Assistance

In England and Wales the assistance from offenders mainly contains two types: turning in Queen's evidence during court trial, and giving intelligence during pre-trial proceedings. The general rule is higher rewards for the former than the latter. In China, however, whether the assistance is provided in the form of testimony or merely clues does not affect the rewards from criminal justice agencies. From Table 5.1 it can be noticed that assistance in none of the 65 samples is provided through giving testimony in court. Although Article 59 of the 2012 CPL requires that a witness statement cannot be used as a basis for deciding a case until it has been cross-examined in court by both parties, it does not require the statement to be made by the witness himself in court unless (1) parties have disputes on the statement; (2) the statement may significantly influence conviction and sentencing; *and* (3) the people's court deems it necessary (Article 187 of the 2012 CPL).

4.2.3 Form of Agreement

As aforementioned, the current assistance agreement mechanism in England and Wales is regulated by both statutes and common law rules, which means that written agreement is not required in all situations. Even so, it appears that the overall trend moves towards formalization with a written agreement, which can be observed in the SOCPA 2005 and rules for DPA. Comparatively, assistance agreement in China has not developed into any concrete shape. What is proposed and agreed on both sides still remains in the dark. Currently the only channels to observe such deals are judicial verdicts published on-line and mass media. This is partly due to the fact that in the Chinese criminal justice system the offender does not have a strong position in the negotiation *vis-à-vis* criminal justice agencies. In an environment of inequality, assisting offenders with insufficient legal aid and desperation for leniency can be easily cornered, at the mercy of decisions from the powerful agencies. Given such context, a written agreement appears to be less desirable and necessary for Chinese criminal justice agencies.

4.2.4 Patterns of Concession

Under the framework of the SOCPA 2005, assisting offenders in England and Wales can get four major types of rewards from criminal justice agencies: restricted undertakings, prosecution immunity, sentence discount, and post-sentencing review. In the Chinese criminal justice system, neither the 1997 CL nor the 2012 CPL specify the patterns of rewards for meritorious service apart from the sentencing reduction. 'Restricted use undertakings' do not exist in current Chinese legal framework. Prosecution immunity in China is restricted to, as discussed in previous chapters, minor offences where punishments for offenders are unnecessary or can be exempted according to Criminal Law.

Furthermore, unlike the double-channel structure in post-sentencing review in England and Wales, reviewing and evaluating assistance after sentencing in China is conducted through appeal. Among 65 assisting offenders in the samples there are 22 involved in the second instance trial. Within this latter group, five of them received commuted sentence,⁹³ and all sentencing reductions were based on newly offered meritorious service instead of reviewing the previous assistance.

Sentencing Factors in Handling Duty-related Criminal Cases), 法发[2009]13号 (*Fafa* [2009] No. 13), available at http://www.china.com.cn/policy/txt/2009-03/23/content_17488175.htm. Accessed 3 November 2014.

⁹³ Case no. for these five cases are: (2014) 阜刑终字第 00045 号 ((2014) *Fuxingzhongzi* No. 00045); (2013)

As to sentencing reduction, the most important factor is, as mentioned earlier, the value of the assistance. However, there is still slight difference in the criteria. In England and Wales the targeted offences under the SOCPA 2005 are expected to be those triable in the Crown court, that is, the serious offences. In China, however, the law does not exclude minor offences from targeted crimes. As long as assisting offenders have successfully helped criminal justice agencies, they will receive some credit in return. Another key difference concerning sentencing reduction is that the English common law rules have expressed objections on full exemption from punishment for assistance. Similar principle does not exist in current Chinese legislation.

4.3 Major Tension Areas between Assistance Agreement and Ordinary Procedure

4.3.1 Nature of Assistance: Contribution v Obligation

As mentioned earlier, one key conflict between assistance agreement and ordinary criminal proceedings is the nature of giving testimony by supergrasses: is it an obligation, or is it a contribution, or both? Despite the discrepancies in the scope of the obligation of giving testimony in court, both jurisdictions establish punishments for an un-cooperative witness, regardless of whether he is a supergrass or not. In England and Wales, such an act is deemed as perverting the course of justice and can be summarily punished under the charge of contempt of court. In China, refusing to give testimony in court is not a crime by its nature. However, according to Article 188 of the 2012 CPL, now such an act can be punished with at most ten days' administrative detention if other compulsory measures have been exhausted.

Nevertheless, punishing the un-cooperative offender is beneficial neither to the offender himself nor to the fluent flow of criminal proceedings. As a comparison, a more appropriate approach would be to enhance facilitations for fulfilling this obligation. This question has received little attention in China now. However, the current trend in reforming criminal proceedings has been moving towards higher reliance on court hearing, which can be observed in the revisions on witness in the 2012 CPL. Therefore it is predictable that this conflict may gradually become more troublesome.

4.3.2 Cooperation Value v Cooperation Dilemma

The second conflict exists in both jurisdictions and it is more relevant to an assisting accomplice who has been involved in the targeted crime. It seems that the more serious the crime that the assisting accomplice was involved in, the higher the chance for him to get better rewards. This conflict is particularly obvious in organized crimes, terrorist crimes, drug crimes or other crimes where information is difficult to collect without assistance from insiders.

Here are two key issues related to the question of how to mitigate the cooperation dilemma. The first issue is about restrictions on the rewards. It can be further analyzed from two perspectives. One perspective is the restriction on immunity, which does not exist in the current Chinese legal system. The other concerns assessing and comparing the seriousness of targeted crime and that of the crime of the assisting offender. The preference for catching 'bigger fish' can be observed in both jurisdictions.

The second issue is about the impact factors in issuing concessions. One key difference between the Chinese and English systems is that the former takes no consideration of the risk encountered by the assisting offender. What is reflected here is a public rather than an individual

淮刑终字第 00016 号 ((2013) *Huaxingzhongzi* No. 00016); (2013) 南市刑二终字第 188 号 ((2013) *Nanshixing'erzhongzi* No. 188); (2013) 沪二中刑终字第 1074 号 ((2013) *Hu'erzhongxingzhongzi* No. 1074); (2014) 池刑终字第 00010 号 ((2014) *Chixingzhongzi* No. 00010).

oriented value system where the attention is mainly laid on the effect of the assistance. However, even from the pragmatic perspective, it appears to be more reasonable to include personal risk into the calculation, for it is a key obstacle against effective assistance from those involved in serious organized crimes. Currently China has no reliable statistics on this issue, but according to the Ministry of Justice in the UK, one motivation to establish a national witness protection scheme was because in 2012 about 27 per cent of the collapsed prosecutions were caused by witnesses' reluctance to give evidence.⁹⁴

4.3.3 Provide Assistance v Right against Self-Incrimination

Similar to plea agreement, in assistance agreement there exists also conflict between cooperation and self-incrimination especially for an assisting accomplice. This is because it is inevitable for this group of assisting offenders to expose their own wrong doings when reporting on their accomplices. From earlier discussion it can be seen that in England and Wales the requirement on self-incrimination in assistance agreement is enhancing, leading to further merging of plea agreement and assistance agreement. The conflict in China now appears to be less controversial, but it is mainly due to similar causes as that in plea agreement that incriminating oneself is not fundamentally against the law. Furthermore, the absence of procedural protection and the opaqueness of the pre-trial negotiation undermine the offender's negotiation position *vis-à-vis* criminal justice agencies. As mentioned earlier, in China the content of meritorious service offered by an assisting accomplice quite often overlaps with confession, making the coordination of this tension even thornier.

4.3.4 More Justice v Miscarriages of Justice

Discussions on both Chinese and English practice on assistance agreement have exposed the risk of formulating truth by either assisting offenders or criminal justice agencies, or the collaboration of the two. Assistance agreement is supposed to enhance the detection effect and consequently to strengthen crime control. However, selfish incentives from both parties have caused serious doubts on such mechanism in both jurisdictions. Challenges against unreliable supergrasses in England and Wales and cases like the Zhang Hai Case mentioned earlier in China indicate that even if an assistance agreement may bring more justice by enhancing detect effect, it is also likely to increase the risk of miscarriages of justice.

One thing needs to be noticed is that due to the different characteristics of the penal states in both jurisdictions, the specific forms of miscarriages of justice appear to be differentiated. In England and Wales the malpractice mainly happens in pre-trial stage and judges can still act as the gatekeeper of justice. In China, however, what can be observed is another type of 'collaboration' in such malpractice, as showed in Zhang Hai's Case.

5. Restoration Agreement

Although reasons behind the rise of the restoration agreement can be various, what is in common in two jurisdictions are challenges against the *ex post*, short-term, instant and rigorous reactions to crimes and criminals through ordinary proceedings. One key feature of restoration agreement is that it intends to remove the exclusive environment in ordinary procedure by introducing individuals, institutions, and mechanisms endorsing the idea of repairing the offender-victim relationship,

⁹⁴ See Ministry of Justice, 'National Witness Protection Scheme Announced', 28 December 2012, available at <https://www.gov.uk/government/news/national-witness-protection-scheme-announced>. Accessed 7 April 2014.

restoring victims and rehabilitating offenders. It, however, also creates obstacles in importing restoration agreement into criminal justice, which can be observed in both jurisdictions.

Through the same strategy as that employed in analyzing assistance agreement, 60 verdicts containing criminal reconciliation and involving 80 offenders were collected randomly among verdicts published online from 1 July 2013 to 8 April 2014 to analyze patterns of this legal device, as shown in Figure 5.5.

Figure 5.5 Statistics on 62 Verdicts (1 July 2013 – 8 April 2014)

No. of Verdicts	No. of Offenders			Offences			Content		R		A
	1 st	2 nd	CR	II	T	Rest	FC	Rest	V	C	
60	74	6	71	34	11	35	69	2	4	1	66

Note:

- (1) 'CR': criminal reconciliation; 'II': intentional injury; 'T': traffic-related offences; 'FC': financial compensation; 'R': rejection; 'A': approval; 'V': victim/victim's family; 'C': court
- (2) All numbers here refer to offenders except for 'no. of verdicts'.

5.1 Similarities

From previous chapters one can easily notice that the first and most important challenge facing Chinese and English legislators on restoration agreement is how to insert restorative schemes into the ordinary flow of criminal proceedings. For one thing, there is a gap between restorative schemes' taking effect and the reasonable time required in ordinary procedure. Restoration agreement in both jurisdictions is expected to reform the offender, recover the victim, and repair the relationship. However, these requirements can hardly be achieved or assessed in the short term, especially when both criminal justice systems are complaining of shortage of judicial resources. The consequence is that these schemes are either postponed and attached to the execution stage, or simplified into some instant measures with objective criteria such as financial compensation so that they can stay in pre-sentencing proceedings. Compared with the English experience, the simplification of restoration measures into financial compensation seems to be more common in the Chinese system, for the latter has not established institutions like the probation service in the former to give full and professional evaluation and corresponding correction schemes for the offender.

The second factor is that the ordinary procedures in both jurisdictions are centering on offenders. From investigation to prosecution and then to court trial, it is the offender, rather than other parties, who are under the spotlight, assisted, challenged, protected, contested and trialed by various agencies. In fact, when tracing back the historical development of criminal proceedings in the two jurisdictions, it is in common that the power of investigation and prosecution gradually shifted away from individuals to professional and specialized state institutions to avoid inconsistency, unpredictability, irrationality, low efficiency and low capability for the private implementation of punishment. Re-introducing victims and other stakeholders into criminal proceedings, even though in a changed context, may re-awaken some old concerns especially with respect to individualization and horizontal equity as well as tension areas with the current legal regime.

Consequently, in both jurisdictions a divergence between what is claimed in official documents and what is implemented in the real world can be observed. In the middle of it stands the victim. This is the second similarity. Policies and statutes in both jurisdictions emphasize enhancing victims' satisfaction in the criminal justice system. In England and Wales, although in every stage

legal authorities are required to inform or consult with victims when applying restoration agreement, they are also obliged to make decisions on their own. In China, victims seem to have substantial influence on criminal justice authorities' decisions. However, as mentioned in previous chapters, victims in practice are sometimes pushed into agreements with offenders, for what matters for criminal justice agencies is not restoration but 'solve the case and end the dispute'.⁹⁵

The third similarity on restoration agreement in the two legal systems is also derived from the first one that the argument of efficiency is employed by both proponents and opponents. An interesting phenomenon is that on the one hand, restoration agreements are, especially those in pre-trial proceedings, deemed as procedural diversions with the expectation of enhancing criminal justice efficiency; whereas on the other hand, this argument is quite often challenged in practice. In England and Wales, mechanisms containing restoration agreement once encountered the government's benign neglect due to their departure from the diversion purpose. The English legislator's attitude has been changed in recent years, especially under the international trend towards restorative justice. However, this does not mean that the tension has been eliminated at the same time. Criminal reconciliation in China is also facing the problem of low efficiency. What is different from the English experience is merely the fact that the Chinese government pushed the criminal justice authorities much harder.

The reasons behind this phenomenon are varied, but the key source still lies in the mismatch between the purposes of restoration schemes and procedural diversion. Rehabilitating offenders, restoring victims and repairing social relationships, all require flexible, sometimes long-term and individualized programs with the cooperation of multiple institutions from both government and society. Procedural diversion, however, is employed to filter out minor, clear and simple cases from the ordinary criminal proceedings through standardized patterns as early and quickly as possible.

The fourth similarity is that behind restoration agreement are governments, either in England and Wales or in China, seeking to enhance their legitimacy and popularity through maintaining crime control. The English criminal justice system has been challenged by the question of 'what works' and been shaken by cries for more punitive and efficient measures against crimes. China in recent years has witnessed an explosion in the number of petitions to the government (partly proposed by victims) and mass protests triggered in famous criminal cases. Under such circumstances, the political pressure is passed on to the criminal justice system, and restoration agreements in both jurisdictions are actually targeting criminal offences with respect to either reducing their quantity, or preventing them from evolving into more serious social unrest.

By introducing restoration agreements into the context of criminal procedure, what both jurisdictions expect is to alter the latter into one 'reactivating the social response, making it faster, more efficient, more effective'.⁹⁶ Restoration agreement in fact enlarges criminal justice authorities' discretionary power and flexibility in dealing with crimes, and meanwhile obfuscates the theoretical values of restorative justice, that is, rehabilitation for offenders, reparation for victims, and restoration for communities.

It leads to the final similarity that despite of all those tension areas between restoration agreement and ordinary criminal proceedings, this device can be implemented in every stage of criminal justice in both jurisdictions. In both legal systems, police, prosecutors and judges are

⁹⁵ For detailed discussion on the consequentialism in Chinese criminal reconciliation, see Wei Pei, 'Criminal Reconciliation in China: Consequentialism in History, Legislation, and Practice', 3(3-4) (2014) *China-EU Law Journal*, 191-221.

⁹⁶ Françoise Tulkens, 'Negotiated Justice', in Mireille Delmas-Marty and J. R. Spencer (eds.), *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002), 641-687, p. 652.

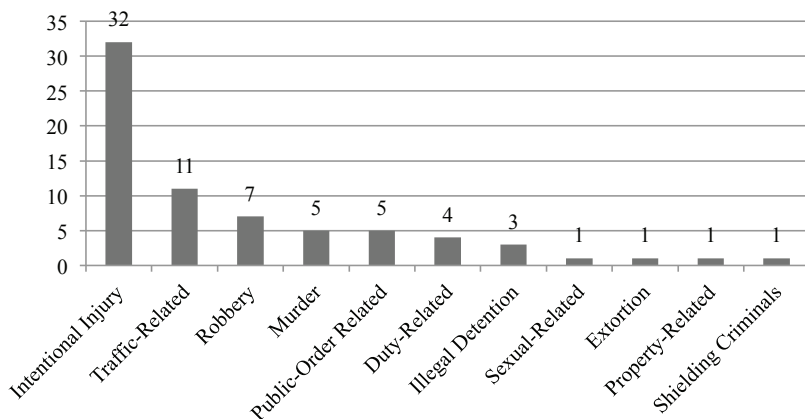
involved in this mechanism and expected to present the image of respecting victims and caring for other stakeholders.

5.2 Discrepancies

5.2.1 Scope of Restoration Agreement

Compared with the English practice, the scope of criminal reconciliation in China appears to be narrower. It is common in both jurisdictions for minor cases under this mechanism to be diverged away in pre-trial proceedings by either police or prosecutors. The major difference exists in trial proceedings. In the English legal system, neither the probation service report nor deferred sentencing for restorative schemes, are limited in their scope by the seriousness and types of crimes. In the Chinese legal context, however, criminal reconciliation under the statutory framework has been attached to several conditions and it mainly targets minor and simple crimes. This can be observed in the samples that among 71 offenders involved in criminal reconciliation, 62 received penalties lower than three-year's imprisonment and, among this latter group, 40 received probation. Meanwhile, criminal reconciliation is mostly applied in intentional injury and traffic-related offences, as shown in Figure 5.6.

Figure 5.6 Offences Committed by 71 Offenders Involved in Criminal Reconciliation



The narrow scope of criminal reconciliation in the legal regime in China can be attributed to several considerations such as the concerns on inconsistencies or miscarriages in justice, the expectation of procedural diversion, and the purpose of ending disputes. However, most of these concerns can also be found in the English system and therefore are insufficient to interpret the discrepancy. After examining the two legal systems carefully, one can notice differences in the content of the agreement, which is the second distinction and will be discussed later.

It should be noted that the practice sometimes departs from legal rules. By examining the 71 offenders it can also be observed that despite the restrictions in the 2012 CPL on the seriousness of the crimes, in practice the victim-offender reconciliation and legal concession for that have already been used in serious crimes such as murder and robbery. It is also employed in cases with

organizations as the victim.⁹⁷ Furthermore, the confusion between criminal reconciliation and mediation in incidental civil proceedings mentioned in the previous chapter appears again in these samples, which facilitates a broader implementation of restoration agreement in China.

5.2.2 Conditions in Restoration Agreement

The conditions required in restoration agreements are different in two jurisdictions. Table 5.7 takes the restoration part of DPA, conditional caution by the CPS and criminal reconciliation by the people’s prosecutor as examples to illustrate the differences.

Table 5.7 Conditions in DPA, Conditional Caution and Criminal Reconciliation

Type	RA in DPA (CCA 2013)	CC by CPS (CJA 2003)	CR by PP (2012 CPL)
Conditions	Self-report	Proportionate response	Sincerely remorse
	Compensate victims, or/and donate money to charity	Reparation to victim/community	Compensation/apology to victim
	Implement compliance programme	Rehabilitative service for offender	Victim’s forgiveness

Note: ‘RA’: restoration agreement; ‘CC’: conditional caution; ‘CR’: criminal reconciliation; ‘PP’: people’s prosecutor

Table 5.7 reveals several distinctions through comparing restoration agreement at the prosecution stage. First of all, compared with DPA and conditional caution in England and Wales, criminal reconciliation appears to be more emotional and subjective. This is particularly apparent in the condition concerning offenders’ responses to the charges. Secondly, apart from victims, criminal reconciliation in China pays little attention to other stakeholders like offenders, the community, or society as a whole. This leads to the third distinction that in criminal reconciliation in China offenders’ obligation is relatively simple. Among 71 offenders studied here, only two of them reached reconciliation with victims without providing financial compensation. In the rest of the cases, financial compensation was always paid before sentencing. Last but not least, criminal reconciliation is the only one that adopts victims’ response as an indispensable condition for successful agreements. From previous chapters one can notice that in both conditional caution and DPA victims’ involvement has been restricted to being informed and consulted.

All these distinctions actually point to one key feature of Chinese criminal reconciliation: the scope of this mechanism is restricted with respect to participants but also approaches. The term ‘community’ is by its nature vague in China, and meanwhile other institutions are either less developed or marginalized in criminal proceedings so that they cannot support long-term or professional restorative schemes. Against this background, it is difficult for criminal reconciliation in China to function in other ways apart from compensating victims through a fast-food style. This to some extent explains the distinction in scope on restoration agreements in the two jurisdictions.

One thing that should be noticed here is the role of the guilty plea. Although Table 5.7 indicates that at the pre-trial stage pleading guilty is expected in both jurisdictions, this is not necessarily true in a court trial. Given the fact that some agreements are made during the period of post-conviction and pre-sentencing in England and Wales, a guilty plea is not an indispensable

⁹⁷ See, e.g., (2014) 金永刑初字第 158 号 ((2014) *Jinyongxingchuzi* No. 158)

condition for a successful restoration agreement. In China, however, offenders participating in criminal reconciliation are required not only to plead guilty, but also plead guilty sincerely with remorse. This is at least partly due to the facts that in Chinese criminal proceedings conviction and sentencing are delivered together in one process.

5.2.3 Criminal Justice Agencies' Disposals

Both jurisdictions encourage the restoration agreement to be applicable in every stage of criminal proceedings, and different criminal justice agencies can make various types of lenient disposals, which are presented in Table 5.8.

Table 5.8 Lenient Disposals in Restoration Agreements

Stage	China	England and Wales
Police	<ul style="list-style-type: none"> • Proposal to prosecutors for Leniency 	<ul style="list-style-type: none"> • ARD • Conditional Caution
Prosecution	<ul style="list-style-type: none"> • Non-Prosecution • Sentencing Proposal 	<ul style="list-style-type: none"> • Conditional Caution • Deferred Prosecution • Financial Penalty
Court Trial	<ul style="list-style-type: none"> • Lenient Punishment 	<ul style="list-style-type: none"> • Lenient Punishment • Deferred Sentencing

Table 5.8 reveals distinctions in formalized approaches in the two jurisdictions. The first distinction is that compared with the English experience, disposals based on restoration agreement are less diversified in China. As discussed in previous chapters, police in the 2012 CPL are deprived of the power to cease the proceedings based on criminal reconciliation; deferred prosecution for now can only be applied to juvenile offenders in China; prosecutors have no power to impose penalties or attach conditions to non-prosecution decisions; and deferred sentencing is not a legal option for Chinese judges under current legislation.

The shortage of options on the one hand indicates a more prudent attitude towards procedural diversions, whereas on the other hand it reflects again the collaboration of criminal justice agencies, which is the second distinction revealed in Table 5.8. From investigation to prosecution and then to court trial, there is a relatively clear route throughout the proceedings that the earlier stage is expected to be the foundation of the later. This again echoes the major feature of being dossier-centered instead of court-centered in Chinese criminal proceedings.

It leads to the third distinction that in restoration agreement, the power to punish is allocated in different ways. In England and Wales, what can be observed is direct and explicit distribution of punitive power so that not only judges but also prosecutors and police can impose punishment, though limited, on criminal offenders. In China, restrictions on diversions present an image that the punitive power is still centralized in the hands of the judiciary. Nevertheless, given the fact that a court trial much relies on the pre-trial preparations, the judiciary power to punish has actually been diluted. If one takes the administrative penalty mentioned in plea agreement into consideration, then this dilution seems even stronger.

5.2.4 Bonus for Victims and Offenders

Based on former distinctions, through restoration agreement offenders and victims in two jurisdictions may receive different bonuses. The word 'bonuses' is used because offenders in both legal systems

can receive lenient disposals and victims can at least get compensation either from the offender or from the state. What makes the difference here is whether they can benefit more from a restoration agreement. This can be further specified as two issues: whether victims can be restored, and whether offenders can be rehabilitated.

For the former, both jurisdictions deem restoration agreement as an approach to restore victims by improving their involvement and amplifying their voices. In England and Wales such expectation can be found in the Ministry of Justice's official documents and confirmed in academic research conducted by Shapland's team as mentioned previously. In China, victims' restoration is quite often portrayed by the mass media as providing '100 per cent satisfaction'. One feature of Chinese practice is that verdicts on offenders involved in criminal reconciliation normally mention victims' forgiveness due to the requirements in 2012 CPL. In 60 samples the frequently-used expressions were of the following types:

(2013) Songxingchuzi No. 2090 ((2013) 松刑初字第 2090 号)

- *'The victim withdrew claims on incidental civil procedure, and expressed forgiveness towards the offender.'*

(2014) Hexingchuzi No.8 ((2014) 河刑初字第 8 号)

- *'The victims submitted written statements on understandings and forgiveness to the people's court.'*

(2013) Qinxingchuzi No. 140 ((2013) 秦刑初字第 140 号)

- *'The offender ... obtained the victim's forgiveness and they had their case reconciled voluntarily.'*

(2014) Baoxingchuzi No. 000271 ((2014) 包刑初字第 000271 号)

- *'The victim provided written statements on forgiveness, requiring the judiciary to dispose the case with leniency.'*

A key similarity of these statements is that in the verdicts, they are stated just following the financial compensation and sincere apology offered by offenders. In this context, it presents a simple equation that 'compensation + apology = forgiveness = satisfaction of the victim'.

As to the offender, community service and correction schemes have long been developed in the English system with collaboration between criminal justice agencies and external institutions. For instance, based on probation officers' pre-sentence assessment, offenders can receive proper penalties and, when it is necessary, detailed post-trial trainings or rehabilitating programs. In China, however, criminal reconciliation quite often ends along with the court trial. As discussed in the previous chapter, sometimes criminal justice agencies endeavor to reconcile parties before delivering the final decisions. This may help to restore the relationship and reform the offender. Apart from that, offenders can rarely receive further assistance at the post-trial stage. Discussions above have mentioned that since 2003 China has started to promote community correction. Nevertheless, among 71 offenders involved in criminal reconciliation, only two of them were sentenced to correction schemes.⁹⁸

5.2.5 Involvement of Non-Criminal Justice Institutions

Given the narrower scope of application and lower expectation of extra bonus for individual parties, it is not difficult to detect the fifth distinction between the two jurisdictions with respect to the

⁹⁸ Case no. for these two offenders are (2014) 安法刑初字第 24 号 ((2014) Anfaxingchuzi No. 24) and (2014) 安法刑初字第 50 号 ((2014) Anfaxingchuzi No. 50).

involvement of institutions. In England and Wales, apart from police, public prosecutors and judges, more institutions, either within or beyond the government, have been involved in mechanisms relevant to the preparation, implementation, and facilitation of restoration agreement. Many of these institutions are constituents of the Ministry of Justice, such as the probation service that prepares pre-sentence reports and oversees offenders released from prison on license or those on community service, National Offender Management Service (NOMS) that is responsible for rehabilitation services for prisoners and for stopping re-offending, and Criminal Injuries Compensation Authority (CICA) that deals with compensation claimed by victims who have been physically or mentally injured in violent crimes. Some are independent organizations, like Restorative Justice Council (RJC)⁹⁹ and Victim Support.¹⁰⁰

As a comparison, criminal reconciliation in China is mainly operated by police, prosecutors and judges. From previous discussion one can notice that the scope of participants of this mechanism has been expanded to PMC, villagers committee, residential committee, parties' family, friends, and employers by the 2012 SPC Interpretations, the 2012 SPP Regulations and the 2012 MPS Regulations. Nevertheless, the major function of these participants is to facilitate reconciliation rather than provide post-trial assistance for offenders, victims or other stakeholders.

5.3 Major Tension Areas between Restoration Agreement and Ordinary Procedure

5.3.1 The Role of Attitude v Objectiveness

The first tension area concerns the role of attitude. Similar to plea agreement and compared with ordinary criminal proceedings, importing subjective elements such as remorse and forgiveness into criminal proceedings not only undermines the certainty and predictability of penalties in individual cases, but also challenges the overall consistency in legal disposals. Such conflict leads to questions of how and to what extent the subjective elements can be allowed to influence the final decisions of criminal justice agencies. Given distinctions between two jurisdictions towards the attitudes of offenders and victims, the following discussion will analyze these parties separately.

From the offenders' perspective, their personal attitudes towards the criminal acts and relevant restorative schemes appear to be crucial for criminal justice agencies to make decisions. This is especially obvious in Chinese legislation where the term 'sincere remorse' is adopted. However, such a rule creates a dilemma by itself. Criminal reconciliation is inevitably a mechanism containing imposition because the penal power of the state is behind the reconciliation. Despite the fact that some offenders are willing to express remorse, there exists the possibility that attitudinizing is compelled by the imposition or induced by the judicial rewards rather than motivated by 'sincere remorse'. In this sense, the rule of expressing attitude may compel offenders to 'express views or attitudes that one may not actually hold'.¹⁰¹ So, on the one hand it takes the effect of the rule away from its intention, whereas on the other hand, as argued by Von Hirsch, it undermines the human dignity of the offender.¹⁰² In England and Wales, by comparison, the word 'remorse', though it exists in the judge's

⁹⁹ For more details on the RJC, see their official website http://www.restorativejustice.org.uk/about_the_rjc/. Accessed 11 April 2014. RJC aims to provide quality assurance and the national voice for the field of restorative justice.

¹⁰⁰ Official website for Victim Support is <http://www.victimsupport.org.uk/>. Accessed 11 April 2014. Victim Support is a national charity providing free and confidential help to criminal victims, witnesses, their family and anyone else affected by the crime in England and Wales.

¹⁰¹ Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: OUP, 2005), p. 122.

¹⁰² See Andrew Von Hirsch, 'Degradingsness and Intrusiveness', in *Censure and Sanctions* (Oxford and New York: OUP, 1993), chapter 9.

argument in specific cases, rarely appears in statutes. For instance, the CCA 2013 only mentions offenders' awareness of the impact and consent to undertakings to restorative schemes.¹⁰³

From the victims' perspective, their satisfaction in restorative agreement is not only praised as a main value but also adopted as a key impact factor in evaluating the success of such mechanism. However, differences still exist. In England and Wales, the satisfaction of victims is frequently mentioned as a principle in regulations or in official documents. For instance, in the CPS' Guidance on Restorative Justice, the first and main purpose of relevant schemes is 'to reduce the fear of the victim and ensure they feel "paid back" for the harm that has been done to them'.¹⁰⁴ When it comes to the detailed procedural design, however, the term 'satisfaction' is quite often replaced by objective descriptions such as 'speedy reparation', 'attendance', 'to reflect and secure the interests', and 'an opportunity ... to talk about'. Behind such expressions lies the consideration that although victim's satisfaction can be claimed as an aim for restoration agreement, it can hardly be guaranteed through formalized and standardized proceedings or be detected and evaluated in practice. This is different from the Chinese legislation. For instance, in the 2012 CPL and relevant regulations, victims' forgiveness and request for lenient disposals are indispensable steps of the reconciliation proceedings.

5.3.2 Privatization v Publicity

The second conflict concerns the trend of privatization embodied in restoration agreement. Ordinary criminal proceedings in accordance with the recidivism ideology are designed to express public censure as well as authoritative responses towards certain injurious and reprehensible acts. They convey such a message not only to standing offenders and victims but also to potential offenders and victims in society. By introducing private parties like victims, restoration agreement seems to privatize the response and weaken the public law nature of ordinary procedure. In both jurisdictions restoration agreement presents an image that it is the individual victim rather than society who is primarily affronted by the criminal act.

As Von Hirsh and Ashworth once commented, one of the major drawbacks of such privatization is that 'it tends to blur the distinction between wrongdoing and harming'.¹⁰⁵ In other words, it may dilute the moral judgment and common values expressed in criminal legal norms, and may reduce the severity of such act into tort. Whether there is a clear boundary between tort and criminal acts remains debatable, but under current structures of criminal justice in both jurisdictions, it is quite a challenge to deny the distinction and break down the fences.

From earlier discussion one can notice that this problem in China may be less severe because of the limited scope of criminal reconciliation. If there exists a grey area between wrongdoings in civil and public spheres, then it is the minor crimes rather than severe crimes which are covered in this area. This can be further embodied in the comparison between the 2012 PSAPL and the 1997 CL that the majority of acts in these two laws are distinguished in quantity rather than in quality.

The restricted scope in Chinese criminal reconciliation is in accordance with the strong emphasis on victims, as in serious crimes it would be more difficult to ease their anger or compensate their loss. However, if the scale of restoration agreement is tipped more towards offenders such as focusing on their rehabilitation, then the scope can be widened, as shown in the English system. This is consistent with the 'making amends' model proposed by Von Hirsh *et al* which switches the

¹⁰³ See also CPS Guidance on Restorative Justice, available at http://www.cps.gov.uk/legal/p_to_r/restorative_justice/. Accessed 14 April 2014.

¹⁰⁴ See 'General Principles', in CPS Guidance on Restorative Justice, available at http://www.cps.gov.uk/legal/p_to_r/restorative_justice/. Accessed 14 April 2014.

¹⁰⁵ *Supra* note 101, von Hirsch and Ashworth (2005), p. 123.

initiative from victims to offenders by emphasizing the latter's introspection and undertaking reparative tasks.¹⁰⁶

5.3.3 Concession for Compensation v Fairness

The third tension area is about the role of financial compensation. Discussions above have shown that compared with English practice, the approaches available for offenders in the Chinese legal context are quite limited, mainly in the form of financial compensation. From the previous chapter one can notice that such procedural designs have given rise to several drawbacks such as 'buying one's way out' and disqualification for poor offenders. They challenge the fairness required in criminal justice that penal censure should be conveyed in accordance with the degree of reprehensibility of the conduct.

The heavy reliance on financial compensation in Chinese criminal reconciliation is not only for satisfying the victim's needs under the political claim of maintaining social stability, but also a consequence of the absence of other sources of restitution towards victims. These two factors are interactive, and it seems that the introduction of other restitution mechanisms in the current situation indicates that the financial burden of offenders could be reduced.

5.3.4 Administrative Sanction v Fair Trial

Another tension is more subtle compared with others: the relationship between administrative sanction and fair trial. The tension can be also observed in different types of CPA. It is mentioned here because it is directly exposed in the restoration agreement. The use of administrative sanctions does not necessarily infringe the offender's right to a fair trial as long as options are available. In England and Wales, this tension seems to be more obvious because of the gradually diluted penal power of the judiciary. Punitive sanctions, especially fines, can now be imposed on offenders bypassing the safeguards provided in ordinary procedures.

From previous discussion it can be noticed that in the Chinese legal system there also exist administrative sanctions especially based on the 2012 PSAPL. Nevertheless, the procedural gap between administrative sanctions and criminal sanctions is rarely touched. Through administrative channels, suspects are charged with similar, if not the same, accusations with that in criminal law and deprived of either freedom or property without access to competent, independent and impartial tribunals, as well as attached fundamental rights such as the rights to counsel and to a public hearing. Through examining the verdicts mentioned earlier, it is common that both administrative penalties and criminal punishments are listed together in the first paragraphs of these verdicts, indicating the defendant's previous wrong-doings. This practice further blurs the boundary between the two types of punishment, and inevitably leads to substantive influence on judges' decisions on the standing case. More importantly, unlike the English practice such as the conditional caution, offenders under the 2012 PSAPL have no choice to be heard in a criminal court. They may appeal against the administrative decisions, but this is different from having their own criminal cases examined through a fair trial.

6. Coordinating Tension Areas: Procedural Objectives and Corresponding Proposals

6.1 Objectives of Criminal Procedure

¹⁰⁶ See Andrew von Hirsch *et al*, 'Restorative Justice: A "Making Amends" Model?' in *supra* note 101, von Hirsch and Ashworth (2005), 110-130.

All those tension areas between CPAs and ordinary procedure in China and England and Wales reflect the coexistence of multiple values which sustain the mansion of criminal justice as well as tension among them under certain circumstances. The relationship among different values is not static, but variable. The essence of the coordination between CPAs and ordinary procedure is actually the question of to what extent and in what form a state can employ offenders to implement its responsibility in processing crimes and to fulfil the goal of crime control. More specifically, in this research it is the question of what are the fundamental tasks which should be preserved and undertaken by the state through a set of criminal proceedings.

Answers to this question, again, are diversified in accordance with the characteristics of the penal state in China and England and Wales, but still some common features can be detected in their description of the objectives of criminal procedure. In China the objectives are illustrated in Articles 1 and 2 of the 2012 CPL:

Article 1 This Law is enacted in accordance with the Constitution and for the purpose of ensuring correct enforcement of the Criminal Law, punishing crimes, protecting the people, safeguarding State and public security and maintaining socialist public order.

Article 2 The aim of the Criminal Procedure Law of the People's Republic of China is: to ensure accurate and timely ascertainment of facts about crimes, correct application of law, punishment of criminals and protection of the innocent against being investigated for criminal responsibility; to enhance the citizens' awareness of the need to abide by the law and to fight vigorously against criminal acts in order to safeguard the socialist legal system; to respect and protect human rights; to protect citizens' property rights, democratic rights and other rights; and to guarantee smooth progress of the cause of socialist development.

In England and Wales the overriding purposes of criminal procedure is explicitly expressed in rr1.1 of the Criminal Procedure Rules 2013 (CPR 2013), as follows:

1.1 The overriding objective

- (1) The overriding objective of this new code is that criminal cases be dealt with justly.*
- (2) Dealing with a criminal case justly includes -*
- (a) acquitting the innocent and convicting the guilty;*
 - (b) dealing with the prosecution and the defence fairly;*
 - (c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;*
 - (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;*
 - (e) dealing with the case efficiently and expeditiously;*
 - (f) ensuring that appropriate information is available to the court when bail and sentence are considered; and*
 - (g) dealing with the case in ways that take into account –*
 - (i) the gravity of the offence alleged,*
 - (ii) the complexity of what is in issue,*

- (iii) the severity of the consequences for the defendant and others affected,
and
(iv) the needs of other cases.*

Rules listed here reveal some divergences in states' priorities with respect to the task of crime control. One typical example is the order between 'punish the criminals/convicting the guilty' and 'protect the innocent/acquitting the innocent'. But more importantly, these statements also present common objectives of criminal procedure in both jurisdictions, which can be categorized into the following four groups: (1) correct conviction and acquittal; (2) proper sanction; (3) human rights protection especially for the accused; and (4) consideration for interests of other stakeholders. The main question is when, in conflicts with the use of CPAs, how and to what extent to preserve the four objectives with the purpose of maintaining the integrity of criminal justice. Through examining the debates, tension areas and corresponding resolutions in two legal systems, four guidelines that echo the four objectives emerge and they are analyzed respectively in the following discussion.

6.2 Correct Conviction and Acquittal: Seeking Truth as Priority

From previous discussion it can be noticed that the use of CPAs may have conflicts with the task of seeking the truth, leading to wrongful conviction and acquittal. The violation can result from various sources such as coercion, offenders' strategy, criminal justice agencies' malpractice, or simply the hasty decision-making process. It is particularly problematic in plea agreement and assistance agreement, and both jurisdictions have developed some mechanisms for mitigating such a defect. All the conflicts mentioned previously, which threaten the objective of seeking the truth, are centered on three main issues: the offender's statement as evidence, criminal justice agencies' malpractice, and procedural simplification. They are examined in the following discussion respectively. One thing which needs to be noticed here is that although coercion is one source of the violation of seeking the truth, it is mainly caused by the problems in balancing the offers of contractual parties, and thus it will be discussed in the next section.

6.2.1 Offender's Statement as Evidence

Whether an offender's statement can be used as evidence is at the center of seeking the truth in CPAs. Previous discussion shows that the reliability of such a statement is open to challenge in various situations, regardless of self-incrimination evidence, intelligence against the targeted suspects or offences, or merely indication of remorse or introspection.

Through examining the responses of the two criminal justice systems some common approaches can be observed to mitigate the risk. The first approach refers to the adoption of corroboration rules. As mentioned earlier, the different function of a guilty plea in China and England and Wales leads to the discrepancy in official focus between its 'factual basis' and 'reliability'. Nevertheless, the common question behind this is whether such a statement reveals facts. In this sense, the use of a Newton hearing in England and Wales and the requirement of evidential corroboration in China commonly aim at reinforcing the evidential grounds of conviction.

Although both jurisdictions attempt to achieve a balance between utilizing a guilty plea and guaranteeing its reliability in statutory rules, the actual effects of such rules are not always the same. To some extent, the inquisitorial tradition of Chinese criminal justice makes the balance even thornier as confession has long been deemed as 'king of evidence'. Several serious wrongful convictions in China during the past few years have revealed the high risk of interrogators' reliance on eliciting

confessions from criminal suspects under such a tradition.¹⁰⁷ Confronted with this situation, the 2013 SPC Opinions have reiterated the importance of corroborating confession in preventing wrongful convictions.

In assistance agreement the key question is how to prevent the targeted suspect from being wrongfully convicted because of inaccurate or fabricated statements provided by the assisting offender. An interesting phenomenon is that both jurisdictions do not require corroboration. As mentioned before, in England and Wales, the corroboration rules were considered to have several defects, such as artificiality, inflexibility, and causing unfairness between the prosecution and the defense.¹⁰⁸ These arguments actually reflect the high confidence in the criminal justice agencies and the independence of the judiciary in England and Wales, which does not appear to be equally guaranteed in the Chinese legal system.

Previous chapters have shown that with respect to the objective of seeking the truth, there is no evidence confirming that the risks caused by assisting offenders is lower than that by self-incrimination. Martin once argued that the inherent dangers of assisting offenders made the English system in urgent need of corroboration rules.¹⁰⁹ Furthermore, it can also be observed from previous analysis in assistance agreement the malpractice of criminal justice agencies is more likely to happen. Given all these factors, both legal systems should consider to attach corroborating evidence to the assistance offered by offenders.

Previous research shows that, compared with other conventional approaches in collecting evidence, an assistance agreement may not only facilitate investigation but also increase the procedural official's reliance on such a mechanism.¹¹⁰ Therefore, both legal systems may consider to require the assisting offenders to be used as a last resort in solving other cases.

Apart from corroboration, another approach used in both legal systems to enhance the reliability of cooperation is to increase the burden of the assisting offender. In England and Wales this approach receives increasing popularity especially in assistance agreement and DPA.¹¹¹ From previous discussion it can be noticed that both the 'cleansing' in the former and the self-report in the latter serve such function. These approaches, however, can hardly be introduced into the Chinese legal system due to the disequilibrium between offenders and the criminal justice authorities. Even without such requirements offenders in practice are already vulnerable compared with criminal justice agencies. Furthermore, the wide scope of 'confession' and the mechanism encouraging voluntary surrender are a comparatively heavier burden. Therefore what Chinese offenders need is not more obligations but more protections.

Another issue relevant to the reliability of the offender's statement is remorse. As discussed previously, remorse appears to be problematic especially in plea agreement and restoration agreement.

¹⁰⁷ The latest high-profile case is Qoysiletu (呼格吉勒图) Case in Inner Mongolia. In 1996 Qoysiletu was accused of rape and murder after he reported the case to local police. Within 61 days the accused was convicted, sentenced to death penalty, and executed. In 2005, Zhao Zhihong (赵志红), an offender who had murdered 10 people, confessed that it was he who had committed the rape and murder case in 1996. Nine years later, news was released in October 2014 that Qoysiletu's case would be reheard. See Chen Yifei, 'Retrial May Start for Man Wrongly Executed for Murder, Rape', 南华早报 (*South China Morning Post*), 30 October 2014. Available at <http://www.scmp.com/news/china-insider/article/1628398/retrial-may-start-wrongly-executed-man>. Accessed 3 November 2014.

¹⁰⁸ See Roderick Munday, *Evidence*, 7th Edition (Oxford: OUP, 2013), pp. 45-46.

¹⁰⁹ See Richard Martin, 'The Recent Supergrass Controversy: Have We Learnt from the Troubled Past?', 4(2013) *Criminal Law Review*, 273-289.

¹¹⁰ See e.g., Martin Innes, "'Professionalizing" the Role of the Police Informant: The British Experience', 9(2000) *Policing and Society*, 357-383.

¹¹¹ See Table 4.3 in Chapter IV.

The gap between the psychological status of the offender and the objective observation of the criminal justice agencies not only sets obstacles in formalizing and then regulating negotiating activities, but also makes it difficult to draw a boundary for the scope of negotiation. With such a gap, equations like 'remorse = guilty plea' or 'remorse = compensation' are likely to be adopted in practice. From this perspective, it would be more proper to remove emotional and moral color from the guilty plea, and assess and regulate the agreement with objective criteria.

6.2.2 Formulating Truth by Criminal Justice Agencies

The second phenomenon in CPAs which threatens seeking the truth, concerns criminal justice agencies' malpractice. This is especially severe in an assistance agreement in both jurisdictions, but it is also relevant to the fact bargaining in an plea agreement in the English system. The analysis starts with fact bargaining as it can be a direct violation of seeking truth conducted by criminal justice agencies. Although there are various readings on the nature of 'truth' in criminal procedure,¹¹² it is the corner stone of today's criminal justice, as well as 'common-sense notions of daily life',¹¹³ that truth is discoverable and it is the precondition for justice. In fact, from previous discussion it can be noticed that fact bargaining, though it exists in English legal practice, encountered fierce attacks in reality. Based on this, 'facts' can hardly be negotiable, and fact bargaining should be avoided in both legal systems.

As to the miscarriages of justice in assistance agreement, China has not established systematic prevention mechanisms. Comparatively, the English legal system has struggled against this problem for a long period, and some of their explorations, though not perfect, can provide Chinese legislator with some inspiration. A major approach is to formalize agreement. This is not only to secure the quality of the assistance offered by the offender, but also to record the promise of the counterparty. It may also enhance procedural transparency. The PACE 1984 Codes of Practice, the SOCPA 2005 and newly established DPA are all encouraging formalization and higher transparency. Currently Chinese practice remains behind the screen, which opens back doors for dirty deals. Given the thought of encouraging all kinds of meritorious service in Chinese criminal justice, it may be unrealistic to require formal written agreement in all situations. However, this approach can at least be applied to some special crimes such as corruption-related crimes, organized crimes or other serious crimes.

The second effort made by the English legal system is to enhance judicial review on the negotiation process, which is intensively embodied in DPA. Nevertheless, given the collaboration and streamlined relationship among criminal justice agencies in China, this approach can hardly take full effect. What can be observed in Zhang's case is dysfunction of checks and balances within criminal proceedings. Even so, the independence and neutralization of Chinese judiciary is an irreversible trend, and judges should be at least given such responsibility in censoring the pre-trial deals.

Apart from these approaches, reconsideration on the limitations on the range of sentencing reduction may also be effective. Previous discussion has proved that the current structure of the Chinese penal state cannot sustain broad application of all types of agreements, so it may be more reasonable to establish a detailed reduction range for special crimes like corruption-related crimes or serious and organized crimes. Amendment VIII of the 1997 CL has established restrictions on

¹¹² For the debates on the meaning of truth and its relationship with criminal procedure, see Mirjan Damaška, 'Truth in Adjudication', 49(1998) *Hastings Law Journal*, 289-308. In this article the author examined different theories concerning truth such as post-modern theory and social constructionism, and insisted that the conventional presumptions in criminal justice should be retained. See also Thomas Weigend, 'Is the Criminal Process about Truth? A German Perspective', 26(2003) *Harvard Journal of Law & Public Policy*, 157-173.

¹¹³ *Supra* note 79, Damaška (2004), p. 1029.

sentencing reduction for offenders who are sentenced to death with two years' suspension. A similar mechanism could be considered, to be applied to other situations where meritorious service is involved.

Last but not the least, the elimination of official misconduct also relies on, as argued by Greer, 'effective channels of accountability'.¹¹⁴ Nevertheless, the questions of what kind of channels is needed and how they can be effectively operated in reality, remain unanswered. As Martin once noticed in Ireland, the malpractice was hardly under control even when some new mechanisms as well as an independent supervision institute were imported.¹¹⁵ Nor did those restrictions in China deter miscarriages of justice in cases like Zhang Hai. In this sense, accountability is merely a remedy and its effectiveness actually relies on the former approaches.

6.2.3 Procedural Convenience

Damaska once used 'differential calculus' as a metaphor of the process of discovering truth in adjudication.¹¹⁶ This is actually a common intrinsic nature of criminal proceedings, either adversarial or inquisitorial, to get closer to the truth by enhancing accuracy and avoiding errors through a series of interwoven procedural designs. CPAs, nevertheless, are likely to circumvent those means for the purposes of efficiency or expediency, which may threaten the objective of seeking truth.

In previous discussion this is particularly debated in plea agreement in both jurisdictions. Through different ways, a plea agreement may result in summarized procedures. Some common approaches can be observed to guarantee the quality of the procedure. For instance, both legal systems preserve the judicial supervision as well as the offenders' consent in selecting summary procedure. However, challenges exist. It is common for both jurisdictions to encourage pre-trial negotiations when the evidential materials have not been adequately disclosed and sufficiently examined. Procedural abbreviation, building on such unstable foundations, jeopardizes the accuracy in adjudication, and its solution relies on the judicial evaluation of the basis and legality of such negotiations. This examination should not only cover the content of the charge and the guilty plea, but also the factual basis as well as the overall environment of the negotiation.

As mentioned earlier, a key difference between the two jurisdictions is that the abbreviation of bypassing conviction in English adjudication can hardly work in the Chinese legal system due to its unified court trial. It actually gives rise to the question of to what extent Chinese adjudication can be simplified. From previous discussion it seems the Chinese version of summary procedure does not have specific procedural distinctions for various types of crimes. This would be problematic as summary procedure which is adequate for drink-drive offences, may not be sufficient to guarantee seeking the truth in serious or complex fraud. Consequently, what is required now in Chinese criminal procedure is to categorize different levels of simplification, classify crimes, and refine steps accordingly.

6.3 Proper Sanction: Proportionality as Principle in Balancing Cooperation and Concession

The second key task of the state through criminal proceedings is to determine proper sanctions for the offender. The evaluation on 'proper' is largely formulated by the rationales of state-dominated

¹¹⁴ Steven C. Greer, *Supergrasses: A Study in Anti-Terrorist Law Enforcement in Northern Ireland* (Oxford: Clarendon Press, 1995), p. 275.

¹¹⁵ See Richard Martin, 'The Recent Supergrass Controversy: Have We Learnt from the Troubled Past?' 4(2013) *Criminal Law Review*, 273-289.

¹¹⁶ *Supra* note 112, Damaška (1998), p. 297.

punishment such as consequentialism and retributivism. This research does not aim at exploring the best format for sentencing. Instead, it focuses on how to maintain equilibrium between the cooperation offered by the offender and the concession offered by the criminal justice authorities. To achieve such equilibrium, the principle of proportionality is essential.

6.3.1 Proportionality in the Context of Mutually-Beneficial Cooperation

In CPAs a key question is how to maintain proportionality between cooperation and concession during the mutually-beneficial exchange. From previous chapters it can be seen that two issues are crucial here: one is the proper credit for each type of cooperation, and the other is the situations where such a credit should be altered or even withheld.

For the proper credit, an interesting phenomenon can be observed that both legal systems have developed sentencing guidelines in recent years to distribute credit for offenders' cooperation. The latest version is the 2014 Guiding Opinions which consist of five parts: principles, approaches, 14 sentencing factors, guidelines for 15 crimes, and supplementary provisions. They also employ a roadmap for sentencing through three steps: (1) setting the baseline according to the fundamental constituents of a crime; (2) establishing the start point according to the amount, times, consequences or other facts relevant to the crime; and (3) adjust the sentence by considering the mitigating and aggregating factors and the comprehensive situation of the case. The sentencing adjustment for CPAs falls into step three.

In England and Wales the efforts towards framed sentencing though guidelines can be traced back to the mid-1970s, but the SGC was not established until the CJA 2003, regardless of the long period of discussion and preparation in both government and academia. During the following decades several changes was introduced especially under the CJA 2009.¹¹⁷ The English version of sentencing guidelines follows an offence-specific structure and adopts a step-by-step approach. The first two steps determine the offence category through referring to an exhaustive list of factors, and set the starting point and category range. The other steps deal with various aggregating and mitigating situations as well as calculation and explanation.

Generally speaking, two versions of sentencing guidelines employ similar strategies and steps for the purposes of consistency and fairness. Both of them require comprehensive evaluation of the sentencing and meanwhile leave space for discretion. Furthermore, sentencing discounts in both systems are scheduled in a gradual-scaled fashion through several key steps such as identifying the crime, setting the start point, and adjustment in accordance with mitigating and aggregating factors.

Despite all these common features, there is a key difference in the guidelines concerning the credits for CPAs. In the English guidelines, relevant mitigating and aggravating factors are simply listed in the guidelines. The decision as to how much weight each factor should carry is left entirely to the discretion of individual sentencers.¹¹⁸ The one exception is the reduction for a guilty plea. The Chinese guidelines, however, break with this tradition and provide clear numerical guidance regarding the impact of specific factors. The 2014 Guiding Opinions provide a percentage-based sentencing range for each factor. In this sense, when talking about the proper credits for CPAs, in England and Wales the decision is still largely preserved for the judiciary, which is different from the Chinese situation where guidelines have started to take over the power. Given the weakness especially in

¹¹⁷ For the historical review on the sentencing guidelines in England and Wales, see *supra* note 48, Ashworth and Roberts (2013).

¹¹⁸ For instance, see Sentencing Council, *Fraud, Bribery and Money Laundering Offenders: Definitive Guideline*, available at http://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf. Accessed 26 January 2014.

judicial independence mentioned in the comparison of penal states, the explicit range for sentencing may not just regulate judicial discretion, but more importantly, assist the judiciary to resist interference from other state institutions.¹¹⁹

A relevant issue here is, as mentioned earlier, the different factors considered in the two legal systems when prescribing the credits. For instance, in assistance agreement in China the level of the risk faced by the assisting offender is not relevant. Such rules contrast with higher appreciation for offenders who risk themselves to assist the judicial system in the English system. It does not only encourage more substantial cooperation, but also urges the government to improve witness protection schemes. It may appear less urgent in the current Chinese legal system, as witnesses are still not obliged to give oral testimony in an open court, which may reduce the risk of exposing the identity of the assisting offenders. However, giving testimony in private cannot rule out the risk. Meanwhile, the overall trend in Chinese criminal justice is moving towards oral confrontation in court. Given these two considerations, the risk for assisting offenders in cooperation should be listed as a mitigating factor in assistance agreement.

Another example is that in restoration agreement the Chinese guidelines are distinguished from the English version by explicitly attributing higher sentence discount for financial compensations. Since 2003 China has started to experiment community correction schemes in selected local areas. After 10 years' exploration, in 2012 the SPC, SPP, MPS, and MOJ jointly issued Measures on Implementing Community Correction (社区矫正实施办法)¹²⁰ which can be applied across the country. Under this trend, the SPC may consider to distribute some weight to the offender's restitution when drafting sentencing guidelines.

The second issue concerns the situations where the credits should be altered or withheld. Proportionality does not deny the possibility that judges may depart from the statutory rules and to withdraw any discount in certain situations. It concerns two questions: (1) whether full exemption should be avoided at least in principle, and (2) whether full penalty should be imposed in certain situations. About the first question, although there is no overall principle against full exemption in England and Wales, both sentencing guidelines and case law set limitations for CPAs. For instance, the maximum discount for guilty plea is one third, whereas full exemption in assistance agreement is generally avoided.

The Chinese sentencing guidelines do not establish such principles and they permit penal exemption for all three types of cooperation in minor crimes. However, two restrictions can be found in the 1997 CL and relevant judicial interpretations on full exemption. Firstly, the 1997 CL set a sentencing range for most crimes that is further clarified through judicial interpretations. Here forcible seizure (抢夺罪) is taken as an example (Article 267 of the 1997 CL). In 2013 SPC and SPP issued Interpretations on Applying Law in Solving Forcible Seizure Cases (关于办理抢夺刑事案件适用法律若干问题的解释).¹²¹ Article 1 of this document defined 'large amount', 'huge amount' and 'extreme huge amount' concerning the value of the subject. Combined with the 2014 Guiding Opinions, the current sentencing scheme for forcible seizure is shown in Table 5.9.

¹¹⁹ To some extent the 2014 Guiding Opinions share the similar functions with other reforms proposed by the SPC during the past decade especially to maintain the professionalism of the judicial system. Another example is the guiding cases mechanism mentioned earlier. See e.g., Björn Ahl, 'Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court', 217(2014) *The China Quarterly*, 121-139.

¹²⁰ 司发通[2012] 12号 (*Sifatong* [2012] No. 12), issued on 10 January 2012, validated on 1 March 2012, available at http://www.moj.gov.cn/index/content/2012-02/15/content_3351799.htm?node=7337. Accessed 4 May 2015.

¹²¹ 法释[2013] 25号 (*Fashi* [2013] No. 25), issued on 11 November 2013, valid on 18 November 2013, available at http://www.court.gov.cn/qwfb/sfjs/201311/t20131119_189813.htm. Accessed 27 February 2014.

Table 5.9 The 1997 CL (Level & Range), the 2013 Judicial Interpretations on Forcible Seizure (Value), and the 2014 Guiding Opinions (Start Point)

Level	Value (RMB)	Start Point	Range
Large Amount	≥ 1,000/3,000	3M detention – 1Y Imprisonment	≤ 3Y Imprisonment, detention, or control
Extra Large Amount	≥ 30,000/80,000	3 – 4Y Imprisonment	3Y – 10Y Imprisonment
Huge Amount	≥ 200,000/400,000	10 – 12Y Imprisonment	> 10Y Imprisonment, or life imprisonment

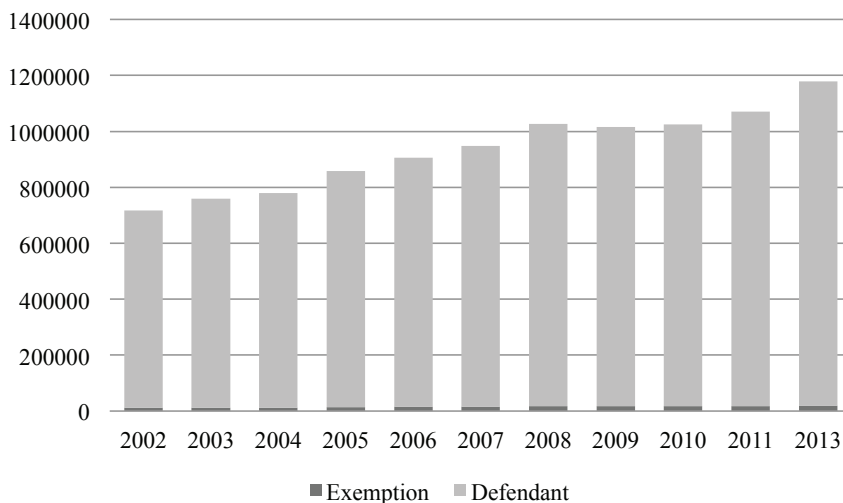
Note:

(1) M: month; Y: year;

(2) Local jurisdictions may set their own start point within the SPC range according to local economic and social situations.

Secondly, sentencing reduction in the lower range for offenders’ three types of cooperation is restricted. Normally the 1997 CL set several ranges for a certain crime in accordance with different levels of seriousness. In the case of forcible seizure, there are three ranges mainly based on the value of the property involved, as shown in Table 5.9. Only in two situations can the sanction for a certain criminal act, which belongs to a higher level, be reduced to the next lower range. One situation is that such a reduction is explicitly recognized in the 1997 CL,¹²² and the other is, when there is no such permission, the SPC’s approves such reduction for that specific offender (Article 63 of the 1997 CL). In fact, full exemption in criminal sanction is rare, as shown in Figure 5.6.

Figure 5.6 Amounts of Defendants and Those with Sentencing Exemption in Criminal Trials



¹²² See discussion of Plea Agreement in Chapter III.

Source: (1) Statistics from 2002 to 2009 are from the *Law Yearbook of China (1987-2010)*. (2) Statistics after 2009 are from the SPC's *Statistics on the Decisions of People's Courts on Criminal Defendants* (全国法院审理刑事案件被告人判决生效情况表).

Note: statistics in 2012 is missing in the SPC database.

Figure 5.6 shows that the percentage of cases with full exemption is merely about 1.6 per cent. From this perspective, it seems unnecessary to add the principle against full exemption into the current Chinese legal regime on CPAs.

For the second question, the normal approach adopted by the English criminal justice authorities is, as mentioned earlier, 'public interests'. Although the content of public interests is quite ambiguous, it is a strong weapon for the English court to tailor the sentence according to specific factors. However, this approach functions with at least two conditions: one is sufficient protection of the offender's interests, and the other is the check and balance among criminal justice authorities. These two conditions can better prevent 'public interests' from deterioration into excuses for arbitrariness or unfairness. In this sense, it is less appropriate for China to introduce some concept with lavish connotations.

A recent approach adopted in the Chinese legal system may serve the function of rejecting credits for offender's cooperation. In 2011 the SPC launched a legal reform scheme of regulating judicial practice through guiding cases,¹²³ and until 1 February 2015 verdicts and the SPC's opinions on 44 cases have been published.¹²⁴ These opinions impose restrictions on rewarding cooperation. For instance, in the Wang Zhicai case (case no.4) the offender pleaded guilty, compensated the victim and was willing to reconcile. However, the Court raised two arguments to restrict mitigation: (1) the crime was committed in an extremely cruel manner, and (2) the victim's family refused mediation and were against any mitigation. The first argument is consistent with the principle of comprehensive evaluation. The second argument is quite clear and frequently used (for example, case No. 12, Li Fei case), and it is directly linked to the restoration agreement under the Chinese legal context.

One related question here concerns the principle of 'treating like cases alike'. It is sometimes argued that taking cooperation into consideration would impair this principle and creates inequality in sanctions. As Tasioulas once stated, that 'how offenders are dealt with in relevantly similar cases will depend on the vagaries of judicial temperament'.¹²⁵ Similarly, Bowers identified three sets of reasons for prosecutors to shape charges: 'legal reasons, administrative reasons, and equitable reasons'.¹²⁶ Among all influential factors, the offender's collaboration is only a reason for lenient disposal. 'Treating like cases alike' contains the meaning that as long as there is a lack of other countervailing factors, a similar reduction should be accepted.

¹²³ 最高人民法院关于案例指导工作的规定 (The SPC Regulations on Guiding Cases), 法发[2010] 51 号 (Fafa [2010] No. 51), issued and valid on 26 November 2010, available at <http://www.lawinfochina.com/display.aspx?lib=law&id=9266&CGid=>. Accessed 28 February 2014. For analysis on the function of guiding cases system in China, see *supra* note 120, Ahl (2014). In her research on death penalty in China, Trevaske also regarded the guiding cases as important approaches for the SPC to regulate sentencing in capital cases. See Susan Trevaske, 'China's Death Penalty: The Supreme People's Court, The Suspended Death Sentence and the Politics of Penal Reform', 53(2013) *Brit. J. Criminol.*, 482-499.

¹²⁴ For the English Version of each verdict and relevant discussions and comments, see Stanford Law School, China Guiding Cases Projects, available at <http://cgc.law.stanford.edu/guiding-cases/>. Accessed 2 March 2014.

¹²⁵ John Tasioulas, 'Mercy', CIII (2003) *Proceedings of the Aristotelian Society*, 101-132, p.129.

¹²⁶ Josh Bowers, 'Legal Guilt, Normative Innocence and the Equitable Decision Not to Prosecute', 110(7) (2010) *Columbia Law Review*, 1655-1726, p. 1655.

6.3.2 Prevention against Punishment of Non-cooperation

Another issue of proper sanctions is against an excessive penalty for non-cooperation. It is closely related to proportionality, but from a practical perspective. This issue centers the question of how to prevent the mutually beneficial ‘concession for cooperation’ exchange, a comparatively fair deal, from being down-graded into ‘punishment for non-cooperation’, a pure use of authoritative coercion. Answers to this question rely on systematic procedural design as well as concrete safeguards for the accused especially through sufficient and proper advocacy. The latter is closely connected with the human rights protection of the offenders, which will be discussed later. This part focuses on the procedural elements.

In England and Wales, cooperation is generally not a legal obligation for offenders (except for testifying in court). ‘Punishment for non-cooperation’ is manipulated in a relatively implicit manner, and restrictions largely depend on corrections in individual cases instead of statutory instructions. For cases disposable by the police and the CPS, this issue is less important as the cases themselves are generally minor crimes, simple and clear. The real challenge is how to prevent the deterioration in trial proceedings. English judges have a strong sense of independence and impartiality, which can be seen from the constant struggle between the guidelines and the Court of Appeal.

During the past years two trends can be observed in the English judiciary. First of all, the validity of sentencing guidelines is increasing. For instance, the rhetorical expression on judges’ proper reaction to sentencing guidelines has changed from ‘have regard to’ to ‘follow’ since the CJA 2009. This trend indicates on the one hand an increased predictability with respect to different sentencing factors, while on the other hand a decreased flexibility of the judiciary. The second trend is the constantly reduced protection for non-cooperative offenders. The typical example of such is the CJPOA 1994 that allows a court to draw an adverse inference from a defendant’s silence in circumstances as set out in sections 34 to 37. Another example is the ‘cleansing’ process in the assistance agreement where the offender is expected to confess to not merely the facts of the standing case but also other previous wrong-doings. These changes reflect a general negative attitude towards non-cooperation. Thus the English experience shows reinforcement in both motivation and coercion for obtaining an offender’s cooperation, in other words, a ‘carrot and stick’ strategy.

Given these two trends, however, one can still observe some counter-approaches adopted in the English criminal justice system. The English judiciary is making every effort to maintain its discretion in individual cases such as *R v Blackshaw* in 2011.¹²⁷ In this case Lord Judge C.J. quoted the principle summarized in *R v Height and Anderson*¹²⁸ that ‘even when the approach to a sentencing decision is laid down in an apparently-detailed and on the face of it intentionally comprehensive scheme, the sentencing judge must achieve a just result’. This principle of ‘interests of justice’ enables judges to depart from the statutory rules.¹²⁹ Other approaches include the constantly enhanced formalization in negotiation, and the employment of an independent and neutral party, usually the judiciary, to supervise the negotiation process or censor the final decision.

Besides these approaches, what helps the English system to avoid undue punishment is the long standing practice: clearly, logically, and sufficiently reasoned verdicts. Through these verdicts, the court gives explanations on the credits assigned to relevant sentencing factors, which helps the

¹²⁷ *R v Blackshaw*, [2011] EWCA Crim 2312. In this case, ten adult offenders who were involved in the riots in different ways and different places between 6th August and 11th August 2011 appealed against the Court’s departure from the sentencing guidelines.

¹²⁸ *R v Height and Anderson*, [2008] EWCA Crim 2500,

¹²⁹ For discussion on the principle of ‘interests of justice’, one can refer to Andrew Ashworth, ‘Departures from the Sentencing Guidelines’, 2(2012) *Crim. L. R.*, 81-96.

stakeholders (not only offenders, but also victims and the public) to understand and challenge judicial decisions. Here the judgment of *R v Kiely*¹³⁰ in 2009 is used as an example:

First Instance: The Crown Court at Manchester

[Start Point] ‘... the seriousness of the offences individually and taken together were such as to justify the imposition of a sentence of life imprisonment ... the notional determinate sentence after a trial for these offences would have been 20 years.’

[Reduction for Guilty Plea and Assertions] ‘... the appellant’s late guilty plea and the assertions in his subsequent defence statement, the judge allowed a 20 per cent reduction ...’

[Reduction for Assistance] ‘... a further 30 per cent reduction would be allowed to reflect ... assistance which the appellant had given the prosecution in relation to other matters.’

[Calculation] ‘... the starting point of 20 years was reduced by 50 per cent to ten years, which had to be divided by two because the early release provisions do not apply to this sentence.’

[Final Sentence] ‘... life imprisonment pursuant to section 225 of the Criminal Justice Act 2003 with a minimum term of five years, less 360 days spent in custody on remand, concurrent on each count.’

Second Instance: Court of Appeal (Criminal Division)

[Justification of Life Imprisonment] ‘... life imprisonment pursuant to section 25 [of the CJA 2003] should now be reserved for those cases where the culpability of the offender is particularly high or the offence itself is particularly grave. In this case the robberies were premeditated and very serious.’

[Reduction for Assistance] ‘We agree that overall insufficient discount was given for the assistance that was given ...’

[Reduction for Guilty Plea] ‘We consider that, given the timing and the circumstances of the plea, the 20 per cent recognized by the judge was generous and may have reflected a desire to wrap up the matter of his co-operation.’

[Calculation] ‘The decision in *P and Blackburn* [2008] 2 Cr App R (S) 16 suggests that in these cases while a mathematical approach should not be taken ...’

[Final Sentence] ‘... the appropriate discount is a discount that produces a minimum term of four years less 360 days spent in custody.’

Compared with the English system, the Chinese criminal justice encounters stronger resistance in preventing punishment for non-cooperation. The greatest challenge is the legal obligation of cooperation of Chinese offenders. From the slogan of ‘leniency for those who confess, and harshness for those who resist’, one can hardly ignore the fact that there is no middle area in between. Such a slogan significantly influences the procedural design and justifies harsher punishment once the offender refuses to cooperate.

Even so, there are some movements shifting away from the old practice in recent years. Firstly, the 2012 CPL has acknowledged offenders’ right against self-criminalization (Article 50). The

¹³⁰ *R v Kiely* [2009] EWCA Crim 756

co-existence of this right and the obligation of confession becomes a feature during legal transformation, showing fierce conflict between two types of ideologies.

Secondly, the new scheme of publishing courts' verdicts online offers an opportunity to explore judges' reasoning in making decisions, and what is relevant here is the consideration of the offender's cooperation.¹³¹ Nevertheless, several drawbacks exist, as shown in the following example.

(2014) Ehanyangweixingchuzi (鄂汉阳未刑初字第 00034)

*The court considers that together with others, defendant Wang's act caused one slight injury, which satisfies the constituents of the crime of intentional injury. The court concludes that the charge of an intentional injury crime against Wang is proved. Wang was interrogated by police because of his suspicious behavior and he voluntarily confessed his criminal acts and pleaded guilty in court. **Behavior as such satisfies voluntary surrender and can be dealt with by lenient punishment.** In the joint offence Wang played a less important role, **which can lead to lenient punishment.** According to section 1 of Article 234, section 1 of Article 25 and section 1 of Article 67 of the 1997 CL, and Article 1 of the SPC Interpretations on Several Issues on Applying Law on Dealing with Voluntary Surrender and Meritorious Service (最高人民法院关于处理自首和立功具体应用法律若干问题的解释), the court's decisions are as follows:*

Wang is convicted of the crime of intentional injury and sentenced to ten months' imprisonment.

First of all, the main body of a verdict focuses on illustrating facts rather than making legal reasoning. The people's courts arguments on conviction and sentence are normally compressed into one paragraph after the description of facts and evidence. Secondly, aggregating factors and mitigating factors are mingled together within one paragraph, and verdicts do not mention the calculation. Thirdly, for those sentencing factors, there is a lack of specific discounts for each of them. Fourthly, verdicts do not mention the start point of the calculation. Given the fact that the 1997 CL prescribes a rather broad sentencing scope for certain types of criminal activities, the absence of a start point in the verdict reduces the chances of evaluating judicial rewards for cooperation.

Sometimes the rewards for specific cooperation can be observed from the judicial decisions in the second instance trial, where the original sentence is modified due to re-evaluation of the cooperation. For instance, in the *Li X* case in 2013, the sentence was reduced from three years' imprisonment to two years and nine months imprisonment, about 10 per cent reduction, due to the recognition of voluntary surrender in the appeal proceedings.¹³² This is, however, still quite distant from the maximum 40 per cent prescribed in the 2014 Guiding Opinions. Given these facts, the next step in improving the quality of verdicts in China may well be to specify the calculation equation, and narrow down the reward scope for each form of a certain type of agreement.

6.4 Human Rights Protection as Safeguards for Cooperative Offenders

Safeguards on offenders' human rights not only provide the possibility for the existence of CPAs as discussed in Chapter II, but also guarantee the fulfillment of the former two objectives. 'Human rights'

¹³¹ See *supra* note 123, Trevaskes (2013).

¹³² See (2013) 二中刑终字第 1987 号 ((2013) *Erzhongxingzhongzi* No. 1987)

is a phrase with rich connotations and in constant evolution, and here are three key issues relevant to CPAs: waiving rights in criminal procedure, legal assistance, and administrative penalty. Considering the great impact of the ECHR on the administration of English criminal justice, discussion in this part makes reference to the ECtHR decisions especially concerning Article 6 of the ECHR.

6.4.1 Waiving Rights in Criminal Procedure

As discussed previously, CPAs are built on the premise that criminal offenders are endowed with and protected by a series of fundamental human rights. These rights enhance the possibility of fairer negotiations between criminal justice agencies and offenders on the one hand, and provide offenders' with bargaining chips on the other hand. From previous discussion one can notice that some rights have not been acknowledged in the Chinese criminal justice system yet, which becomes one of the major defects of its CPA system. In this part those defects will not be repeated, and the focus lies on the proceedings through which offenders waive such rights. It can also be observed that among all those rights, the right against self-incrimination is the one most frequently waived in all types of CPAs, thus the following discussion mainly centers on it.

Both English domestic laws and the ECtHR decisions have paid attention to waiver in criminal procedure, and discussions mainly focused on the conditions for such act. On the ECHR level, rules restricting waiver are gradually developed through a series of cases,¹³³ and the general principle has been stated as follows:

*'... a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance ... A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.'*¹³⁴

Generally, under ECtHR rules a waiver in criminal procedure should satisfy at least three key conditions: (1) the waiver should be made unequivocally (2) the offender should be entitled to minimum safeguards; and (3) the waiver should be made voluntarily with reasonable foresight of the consequences. Two key concepts need further interpretation: 'minimum safeguards' and 'reasonably foresee the consequences'. The previous judgments provide some instructions. For 'minimum safeguards', at least the reasonable opportunity for approaching two mechanisms should be guaranteed: one is to be informed, and the other is legal assistance.¹³⁵ For 'reasonably foresee the consequences', the ECtHR does not require all consequences of a waiver to be foreseen. It is decided case by case, but at least the essential consequences known generally should be covered here.

To construct the Chinese version of waiving rules, the legislator may take three benchmarks mentioned above into consideration. The first one is unequivocal waiver. Under English law, the requirement of unequivocality has long been recognized through case law,¹³⁶ and it is generally

¹³³ See e.g., *Colozza v Italy*, ECtHR 12 February 1985, no. 9024/80, § 28; *Kremzow v Austria*, ECtHR 21 September 1993, no. 12350/86, § 66;

¹³⁴ *Pishchalnikov v Russia*, ECtHR 24 September 2009, no. 7025/04, § 77. Similar expressions see also *Şaman v Turkey*, ECtHR 5 April 2011, no. 35292/05, § 32; *Sejdovic v. Italy*, ECtHR 1 March 2006, no. 56581/00, § 86.

¹³⁵ See e.g., *Yoldaı v Turkey*, ECtHR 23 February 2010, no. 27503/04.

¹³⁶ See e.g., *Saunders v R.* [2012] EWCA Crim 1380 (right to legal advice);

guaranteed through rules on ‘ambiguous plea’. In a court trial a guilty plea attached with defense requires the court to interpret relevant laws and seek to ascertain the offender’s real intent. If such clarification fails, then a plea of not guilty may be entered (s6(1) (c) of Criminal Law Act 1967).

The 2012 CPL in China also requires judges to inquire about defendant’s opinion on the charges and inform him about relevant rules on summary procedure (Article 211). When the defendant pleads guilty but, after the judges’ preliminary examination, his activity is no longer considered to be criminal, the summary procedure should be disqualified (Article 290 of the 2012 SPC Interpretations). Here one key distinction between two systems can be observed. In the English system the benchmark for an unequivocal guilty plea mainly relies on the offender’s statement, whereas in China, it depends on the judge’s examination.

Behind this distinction are, again, different focuses between ‘willingness’ and ‘reliability’, which is also reflected in the appealing procedure. In England and Wales, the sentence based on imperfect, unfinished or ambiguous guilty plea would mount to mistrial, resulting in either re-trial or quashed conviction by the Court of Appeal. While in China there is no explicit rule on whether an equivocal guilty plea can amount to a sufficient challenge against the original judgment.

From this perspective, the two legal systems actually establish different rules on ‘unequivocal manner’ in accordance with the different role-setting of guilty plea. A more crucial issue here is how to make sure that such waiver is made knowingly and intelligently. As mentioned earlier, informing and legal assistance are two useful approaches. These two are inter-connected, as one key component of the former is informing the offender of the latter. Under English law it has been established that the offender brought to a police station should be informed of his rights to consult legal advice,¹³⁷ and, as Lord Justice Clerk once commented in *Jude v HM Advocate*, it would be unreasonable to expect any offenders ‘could waive that right when, *ex hypothesi*, he had no reason to think that he had any such right and had not had access to legal advice on the point’.¹³⁸

Comparatively, in China the notice of such a right is given during the first time of interrogation or when the suspect is imposed on compulsory measures¹³⁹ (Article 33 of the 2012 CPL). However, the risks of infringing fundamental rights have emerged at the very beginning of the process, and the offender should be informed or reminded of such rights at their first appearance in the police station. As to the content of the notice, both systems now cover not only the right to consult lawyers but also the right to free legal aid if certain conditions are satisfied.

A relevant issue here is the right to remain silent. This is a key premise for CPAs especially when the admission of guilt is involved. As aforementioned, in England and Wales, the CJPOA 1994 allows a court to draw an adverse inference from a defendant’s silence when he is questioned under caution prior to charge (section 34(1)(a)), or he is silent on charge (section 34(1)(b)). This provision was later adjudicated by the ECtHR in the case of *Murray v. UK* in 1996.¹⁴⁰ The Court held that s.34 could be consistent with Article 6 as it did not criminalize or withdraw the offender’s right to remain silent. As prescribed in the PACE Code of Practice C, a premise of adverse inferences is offender’s access to a legal representative before he is charged and questioned. In addition, cautions must be

¹³⁷ See *Code C of practice for the Detention, Treatment and Questioning of Persons by Police Officers*, validated on 27 October 2013 and revised in 2014, available at <http://www.dojni.gov.uk/de/index/publications/publication-categories/pubs-policing-community-safety/policing/pace-code-c-june-2014.pdf>. Accessed 4 November 2014.

¹³⁸ *Jude v HM Advocate* [2011] UKSC 55, para 32.

¹³⁹ In Chinese criminal justice, compulsory measures refer to measures used by criminal justice authorities to restrict or deprive the suspect or defendant of his freedom with the purpose of guaranteeing the administration of criminal procedure. Chapter VI of the 1997 CL recognizes five compulsory measures: (1) compelled appearance by warrant; (2) residential surveillance; (3) bail; (4) arrest; and (5) pre-trial detention.

¹⁴⁰ *John Murray v The United Kingdom*, no. 18731/91, ECHR 25 January 1996

given if ‘either the suspect’s answers or silence may be given in evidence to a court in a prosecution’.¹⁴¹ Comparatively, the right to remain silent has not been acknowledged in the 2012 CPL. Therefore under the current Chinese legal system, this issue is not covered by the information given to offenders. Given the vulnerable status of offenders and for the purpose of avoiding torture, this right should be acknowledged in law.

The third benchmark is the reasonable foresight of consequences, and the key point here is the reasonable scope of ‘consequences’. In the English legal system this is still under debate.¹⁴² In China, knowing the consequence of a guilty plea is listed as one condition for simplifying court hearings (Article 227 of the 2012 SPC Interpretations). Through examining the legal frameworks of CPAs in both legal systems, ‘consequences’ may be relevant to the following issues: (1) the absence of full-dressed trial proceedings; (2) possible dispositions from the criminal justice agencies; (3) scope of validity of agreements; and (4) risks, such as the likely objections from the judiciary. The second issue is debatable as it may conflict with judge’s discretion. However, the other three issues should be covered explicitly.

As mentioned earlier, an interesting modification in the 2012 CPL is that the interrogator should inform the suspects on rules according to which concessions can be offered based on their honest confession (s2 of Article 118). This provision can hardly be interpreted within ‘foresee consequences’, as the negative but substantial consequences are not covered by Article 118. Such informing does not suggest prudent decisions of offenders but encourage more reckless acts. In this sense, this provision actually goes against the spirit of waiving rules.

It should be noticed that waiving rules can become even more complicated when third parties are involved, and it leads to questions of whether the effect on third parties should be taken into account, and if yes, to what extent. However, as Stuntz once commented, ‘this complication may mean little in practice, for other legal tools may protect the third parties’ interests’.¹⁴³ Indeed mingling different rules serving different interests may not maximize the overall interests but substantially disserve the interests of the right-holders. Thus in this research, the protection of offenders and that of other stakeholders are discussed separately.

6.4.2 Legal Assistance

The avoidance of coercion in CPAs largely relies on sufficient and proper legal assistance. Sufficient assistance depends on the timely and adequate accessibility to both the dossier and offender, and the proper assistance mainly concerns the consistency between lawyer’s strategies and the offenders’ interests.

In China and England and Wales, concerns about effective advocacy appear to be with different focuses. In the Chinese criminal proceedings, defense lawyers are facing challenges against sufficient advocacy. Sufficient legal advocacy demands support from various aspects such as the accessibility to lawyers, the accessibility to case materials, the capability in collecting evidence, and the legal privilege on confidentiality. All these elements need to be nourished through the legal aid system, which is also crucial to sufficient advocacy.

¹⁴¹ See s.10.1 of *Code C of practice for the Detention, Treatment and Questioning of Persons by Police Officers*, validated on 27 October 2013 and revised in 2014, available at <http://www.dojni.gov.uk/de/index/publications/publication-categories/pubs-policing-community-safety/policing/pace-code-c-june-2014.pdf>. Accessed 4 November 2014.

¹⁴² See Lord Brown’s argument against Lord Hope in *Jude v HM Advocate* [2011] UKSC 55.

¹⁴³ William J. Stuntz, ‘Waiving Rights in Criminal Procedure’, 75(1989) *Virginia Law Review*, 761-842, p. 769.

It has been discussed previously that Chinese lawyers' performance has long been undermined by difficulties in meeting clients, collecting evidence, and obtaining access to the dossier. These obstacles have been reduced in the 2012 CPL. However, some procedural designs may still threaten the validity of legal assistance in CPAs. A major challenge is the information asymmetry between the defense and the prosecution. Despite the fact that suspects can employ defense lawyers on the day when they are interrogated for the first time or from the first day of a compulsory measure, defense lawyers cannot consult, extract and duplicate case materials and verify relevant evidence with their clients until people's procuratorates examine the case for prosecution.¹⁴⁴ Considering the courts' reliance on the pre-trial dossier in China, such procedural arrangement leaves little space for defense lawyers to challenge the prosecution case. The situation can be even worse due to defense lawyer's limited ability in collecting evidence. For instance, if the defense lawyers believe that materials capable of proving innocence or reduced liability have been collected by investigators but not submitted for prosecution or court trial, Article 39 of the 2012 CPL grants them the power to request people's procuratorates or people's courts to obtain such materials. The question here is: how can the defense lawyer be aware of such a situation when there is no discovery procedure? Apart from statutory defects, studies also show that the 'inertia' of providing only major evidential materials (主要证据) to people's courts in the 1996 CPL still exists in some local criminal justice agencies.¹⁴⁵

The second challenge against sufficient assistance concerns defense lawyer's privilege. One modification in the 2012 CPL is the acknowledgment of the lawyer-client privilege (Article 46). However, several drawbacks still exist. To begin with, the privilege in Article 46 attaches to the defense lawyer rather than to the offender, which is contrary to the principle in England and Wales. What can be derived from this provision is that it is the lawyer rather than the defendant who can waive this privilege and report to authorities on the defendant's suspicious activities. In England and Wales, similar proposals were raised before. A typical example of such is part 7 of Proceeds of Crime Act 2002 (POCA 2002) where solicitors are obliged to report to the relevant authorities without notifying their clients once there are suspicions in legal proceedings against their clients' involvement in money laundering. Considering its violation of both EU laws and English domestic rules, however, in 2005 the Court of Appeal confirmed in *Bowman v Fels*¹⁴⁶ that the POCA 2002 cannot override legal professional privilege.

If one follows the English logic, then defense lawyers are obliged rather than privileged in confidentiality, and this obligation can hardly be overturned. Comparatively, Article 46 of the 2012 CPL in China allows the privilege to be rejected when there is suspicion of activities (1) compromising national security; (2) compromising public security; and (3) seriously damaging the personal safety of others. When noticing such activities or preparation for such activities, defense lawyers in China are *obliged* to inform criminal justice authorities. The Law does not mention key issues such as whether the defendants should be notified or not, how long should the privilege be valid, or the scope of confidentiality.

Apparently, legal professional privilege in the Chinese criminal justice system is still at its initial stage. Nevertheless, without this privilege, the right to remain silent can hardly survive. If

¹⁴⁴ Articles 37 and 38 of the 2012 CPL.

¹⁴⁵ In 2013 Shangquan Law Firm (尚权律师事务所) in Beijing issued a report on the implementation of 2012 CPL based on empirical research among 318 Chinese defence lawyers. This report thoroughly examined obstacles encountered by lawyers after the new law, and one of them is the restrictions on the accessible evidential materials. See Shangquan Law Firm, 新刑事诉讼法实施状况调研报告 (Report on Empirical Research on Implementing New Criminal Procedure Law (2013)), available at http://www.sqxb.cn/content/details16_1644.html. Accessed 19 March 2014.

¹⁴⁶ *Bowman v Fels* [2005] EWCA Civ 226

combined with the first challenge, then one can easily draw the conclusion that removing the obligation to confession alone cannot protect the offender. All aspects mentioned above need to be improved simultaneously.

The third challenge is about the legal aid system for offenders who either cannot afford or are unable to hire counsel. In 2003 China issued Regulation on Legal Aid (法律援助条例), and since then the legal aid system gradually developed across the country. In 2013 the total amount of legal aid cases reached 1,150,000, ten times of that a decade previously.¹⁴⁷ The overall growth in legal aid also influences its development in criminal litigations, which can be observed in the 2012 CPL.

Nevertheless, compared with the English system, gaps still exist. First of all, there is a significant gap in financial support for legal aid between two jurisdictions. In 2012 the government financial support for legal aid across China mounted to ¥1.4 billion (about £136 million).¹⁴⁸ Comparatively, in England and Wales there is great pressure to reduce the financial budget for legal aid, which was embodied in the MOJ's consultation paper *Transforming Legal Aid: Next Steps* in 2013.¹⁴⁹ Even so, the Legal Aid Agency's Business Plan 2013/14 still provides £1,828 million for legal aid, £887 million for civil cases and £941 million for criminal cases.¹⁵⁰

Other gaps may directly derive from the financial deficiency. For instance, all criminal offenders in England and Wales are entitled to getting legal assistance once they are arrested by police on suspicion of criminal offences. The offender is supposed to be informed of such a right, and he can implement it either through the police station duty solicitor system without any fee and any delay in most situations,¹⁵¹ or through employing his own solicitor. In China, however, criminal legal aid is only applicable to those (1) who are poor; (2) who proved to be with first or second class of mental disability; (3) whose accomplice has defense lawyers; (4) in whose case the people's prosecutor appeals; and (5) whose case has significant social influence.¹⁵² The first two situations actually require certain proof and formality, which may delay the legal assistance.

This does not mean that the English system may rest easy. Compared with sufficient advocacy, what is more debatable in the English legal system concerns proper advocacy, especially on the issue of 'barrister's incentives'. The challenges against proper advocacy in the English criminal justice system are partly raised with respect to the 'agency costs'. A criminal case is firstly entrusted to a solicitor, and then it is for the solicitor to choose barristers and encourage their performance on behalf

¹⁴⁷ Zhou Bin, 去年我国办理法律援助案超 115 万件 (Last Year the Amount of Legal Aid Cases Has Exceeded 1,150,000), 法制日报(*Legal Daily*), 27 February 2014, available at <http://www.chinacourt.org/article/detail/2014/02/id/1220676.shtml>. Accessed 5 November 2014.

¹⁴⁸ See 我国办理法律援助案件数已逾百万, 去年保障经费达 14 亿 (The Number of Legal Aid Cases Has Exceeded 1 Million, and Financial Support 1.4 Billion RMB), 人民网 (*People*), available at <http://legal.people.com.cn/n/2013/1129/c42510-23695177.html>. Accessed 19 March 2014.

¹⁴⁹ Ministry of Justice, *Transforming Legal Aid: Next Steps*, issued on 5 September 2013, available at <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps>. Accessed 19 March 2014.

¹⁵⁰ See Legal Aid Agency, *Business Plan 2013/14*, available at <http://www.justice.gov.uk/downloads/publications/corporate-reports/legal-aid-agency/laa-business-plan-2013-14.pdf>. Accessed 19 March 2014.

¹⁵¹ Access to legal advice can only be postponed by at most 36 hours in certain serious offences, or 48 hours in a suspicion of terrorism.

¹⁵² Article 2 of 关于刑事诉讼法律援助工作的规定(Provisions on the Legal Aid in Criminal Action), issued on 4 February 2013 and validated on 18 February 2013 by the SPC, SPP, MPS and MOJ, available at http://www.moj.gov.cn/index/content/2013-02/18/content_4205827.htm?node=7337. Accessed 19 March 2014.

of the offender. This double layer structure in the English defense system leads to the co-existence of three stakeholders whose interests are not always consistent.¹⁵³

Based on the two layers' representative structure, academic studies have made efforts to explore whether barristers' selfish incentives may bend their service to their own goals at the clients' expense.¹⁵⁴ Two factors may influence the outcomes: attracting works and maximizing income.¹⁵⁵ The key factor of the former is building reputation especially through performance in court trial. Whereas in the latter the Advocates' Graduated Fee Scheme (AGFS) creates counter economic incentives against guilty plea and cracked trials. According to the Criminal Legal Aid (Remuneration) Regulations 2013, fees and uplifts in guilty pleas and trials crack for Queen's councils (QC) in the last third, for instance, consist of basic fee (between £ 2,324 and £ 1,232) and evidence uplift (based on pages). If the guilty plea is obtained during the first third of the proceedings, then the fee will be even lower. While in a full trial within 40 days, QC may charge basic fee (between £2,856 and £1,514), daily attendance fee (between £979 and £612), evidence uplift and witness uplift.¹⁵⁶ In this sense, barristers may not benefit more from offenders' cooperation and accelerated proceedings.

In recent years proper legal assistance has gained increasing attention in China largely due to the rise of 'diehard' criminal lawyers (死磕派律师). Up to now there was no unified definition of such lawyers, but some common features can be summarized such as 'combative', 'dramatic', 'have a flair for social media', 'not be intimidated by authority', and 'be willing to spend time under house arrest or in jail'.¹⁵⁷ Behind the 'diehard' phenomenon is the increased tension between defense lawyers and criminal justice agencies. If it is examined more closely, it is the tension between citizens and the government. 'Diehard' reflects the self-awakening of Chinese lawyers and their transforming status in criminal justice on the one hand, whereas it also implies their helplessness and powerless in protecting offenders' interests through normal approaches on the other hand. As the leading criminal law scholar Chen Xingliang once commented, 'diehard' lawyers are promoting the rule of law in China through self-sacrifice; they do not act as lawyers, but this is because judges do not act as judges.¹⁵⁸ Given such a context, a political complexion can be observed in the surge of 'diehard'. This phenomenon may promote the rule of law in China, but whether the 'diehard' strategy is in favor of the offenders' interests is another question.

Financial elements in China may also influence lawyers' behavior. The current financial system on advocacy fees in criminal cases is prescribed on a provincial level, following the local government pricing system. Here Beijing is used as an example. According to the Beijing government's guidance, the fee scheme for local criminal defense lawyers contains three levels: (1)

¹⁵³ For analysis on the agent role of barristers in England and Wales, see Peter W. Tague, 'Guilty Pleas and Barristers' Incentives: Lessons from England', 20(2007) *The Georgetown Journal of Legal Ethics*, 287-320.

¹⁵⁴ See e.g., John Baldwin and Michael McConville, *Negotiated Justice: Pressures to Plead Guilty* (London: Martin Robertson, 1977); Mike McConville *et al*, *Standing Accused: The Organization and Practices of Criminal Defence Lawyers in Britain* (New York: OUP, 1994). These two researches argued based on empirical studies that barristers or solicitors were motivated by selfish incentives, and they benefited from an offenders' guilty plea. Peter Tague, however, argued against these findings by comparing the UK practice with that in USA. See *ibid*, Tague (2007).

¹⁵⁵ *Ibid*.

¹⁵⁶ See *The Criminal Legal Aid (Remuneration) Regulations 2013*, available at <http://www.legislation.gov.uk/ukxi/2013/435/made?view=plain>. Accessed 20 March 2014.

¹⁵⁷ Alexa Olesen, 'Meet China's Swaggering, "Diehard" Criminal Lawyers', *Foreignpolicy*, 16 May 2014, available at http://www.foreignpolicy.com/articles/2014/05/16/meet_chinas_swaggering_diehard_lawyers_crew. Accessed 4 November 2014.

¹⁵⁸ See Ye Zhusheng, 死磕派律师 ('Diehard' Lawyers), 11(2013) 人民文摘 (People Digest), available at http://paper.people.com.cn/rmwz/html/2013-11/01/content_1354207.htm. Accessed 4 November 2014.

investigation: ¥2,000– ¥10,000 (£195 - £973); (2) prosecution: ¥2,000 – ¥10,000 (£195 - £973); and (3) court trial for each instance: ¥4,000 – ¥30,000 (£389 - £2919).¹⁵⁹

Similar to England and Wales, this structure may also encourage lawyers to take full trial instead of procedural diversions, but it has at least two major flaws. Firstly, unlike the English legal system, Chinese criminal proceedings emphasize more the pre-trial stage rather than the court hearings and they largely depend on dossier. It means that more substantive work is required in pre-trial proceedings. After the 2012 CPL, defense lawyers' pre-trial participation has been improved, but the fee structure does not match this change. The second flaw is the imbalance between advocacy fees and the complexity and seriousness of cases. Different from the two dimensions adopted in the AGFS in England and Wales on proceedings and the classification of offences (from A to K), advocacy fees listed in Beijing does not distinguish and classify offences. Nevertheless, the common situation is the more serious or complex the case, the more important the pre-trial proceedings. This worsens the tension between workloads and government prescribed advocacy fees.

As a conclusion, what can be observed in current Chinese criminal proceedings are two facts. On the one hand, the role and function of advocacy is constantly enhanced in legislation. On the other hand, how these improvements in law are implemented on the institutional level and supported by necessary resources is the main challenge to effective advocacy. In these circumstances, offenders in China are still the relatively weaker party in the negotiation *vis-à-vis* criminal justice agencies, making rigorous restrictions on the scope of CPA indispensable.

6.4.3 Administrative Penalty

The third issue concerning human rights protection is administrative penalty. As mentioned earlier, in CPAs there is a common trend of shifting the penal power from the judiciary to pre-trial authorities. In England and Wales, this is especially obvious in restoration agreement and DPA that the CPS is entitled to impose penalties on offenders. In the Chinese criminal justice system whether the offenders' cooperation would lead to a reduction from crimes to civil wrongdoings under the 2012 PSAPL is unclear. However, through comparing the scope of administrative penalties between the two legal systems it is clear that the current structure of controlling penal power in China imposes higher risk of violating the right to a fair trial.

ECtHR has established a series of criteria on whether the ECHR restrictions on criminal charges should be applicable to certain administrative sanctions.¹⁶⁰ The core idea here is that the fundamental rights of the individuals should be equally and sufficiently protected as long as they are imposed on criminal sanctions. To assess whether a sanction is criminal or not, three major criteria have been developed: (1) 'classification under domestic law'; (2) 'scope of the norm and purpose of the penalty'; and (3) 'nature and severity of the penalty'.¹⁶¹ After the long period of development in case law, the first criterion has declined into a preliminary and superficial point in the examination. The other two standards are crucial. The English practice follows the ECHR rules, and the penalties imposed by institutions other than the judiciary in CPAs are based on the violation of criminal norms. The following discussion focuses on China's situation with respect to the three criteria.

¹⁵⁹ See 北京市律师诉讼代理服务收费政府指导价标准(试行)(Government Pilot Guidance on Fees Charged by Lawyers in Litigation in Beijing), 京发改[2010] 651号(*Jingfagai* [2010] No. 651), issued and validated on 15 May 2010. Available at <http://www.bjpc.gov.cn/tztg/201005/t590190.htm>. Accessed 5 November 2014.

¹⁶⁰ A cornerstone case on this issue is *Engel and Others v The Netherlands*, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, ECHR 23 November 1976.

¹⁶¹ See Pieter van Dijk *et al* (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th Edition (Mortsel: Intersentia Publishers, 2006).

The first criterion asks the question of whether the sanction belongs to criminal law or administrative law under the domestic legal system. In China, activities under the 2012 PSAPL are decriminalized. However, previous discussion has revealed that there are actually overlaps between the 2012 PSAPL and the 1997 CL, which makes the classification between administrative and criminal unclear. Chinese domestic law fails to draw explicit lines between the two types of legal norms, and this is a violation of the first criterion. In this sense, the initial step for the Chinese legal system to coordinate administrative sanction and criminal procedural protections is to establish clear classification.

The second criterion contains two parts. The first part asks whether the norm violated has general binding force. In China the 2012 PSAPL has a general binding force without targeting specific offences or offenders. The second part of this criterion is the purpose of penalty. According to *Öztürk v. Germany*, a penalty would still be deemed as criminal as long as it keeps a ‘deterrent’ and ‘punitive’ character.¹⁶² Article 5 of the 2012 PSAPL expresses such a character by stating that ‘solving public security cases should comply with the principle of combining education and punishment’. As a conclusion, under the second criterion the nature of penalties in the 2012 PSAPL is actually criminal, and therefore individuals involved should have an equal opportunity to obtain a fair trial.

The third criterion examines the nature and severity of the penalty, which is described as ‘ultimately decisive criterion’.¹⁶³ Under the Chinese legal system this is no longer relevant as the second criterion has been satisfied. However, it still can be used to measure any deviation of the administrative sanction from human rights protection. As mentioned earlier, the police are authorized to impose detention up to 15 days. The deprivation of freedom can hardly be excluded from criminal sanctions. While in England and Wales, a fine is the only punitive measure the non-judiciary can issue.

Given the three layers of examination, the current administrative sanction system in China is problematic as it deprives individuals’ of the opportunity to have their cases heard in a fair trial. Furthermore, discussion above has shown that in the current legal system the bridge between the 2012 PSAPL and the 2012 CPL is missing. Given such a mismatch between administrative sanctions and criminal procedure, the following aspects in the 2012 PSAPL should be reformed. First of all, offenders should generally have their access to court guaranteed. A sequent question is: which court? The current law only rules that individuals who object to decisions on administrative sanctions may apply for an administrative review or issue an administrative litigation (Article 102 of the 2012 PSAPL). Nevertheless, the main object of administrative litigation in China is the legality of a concrete administrative decision or activity rather than the wrong doings of the offender. In this procedure it is the individual person who has been given an administrative sanction instead of special prosecution institutions acting as plaintiff and bearing the burden of proof.¹⁶⁴ Although the 2012 PSAPL is bridged with administrative litigation, the case and the parties have actually been changed. Given the unchanged nature of administrative litigation under the 2013 Draft of ALL, it is hardly to foresee a sharp turn on this issue in the near future. An expedient option is to channel the 2012 PSAPL with criminal procedure: once the offender challenges the police decision, he should not be punished or compulsorily imposed with sanctions but be transferred to criminal proceedings and have

¹⁶² See *Öztürk v. Germany*, no. 8544/79, § 28, ECHR 21 February 1984

¹⁶³ *Supra* note 162, von Dijk *et al* (2006), p. 548.

¹⁶⁴ On 31 December 2013 the Standing Committee of NPC published the draft of the revision of Administrative Litigation Law (2013 Draft of ALL). In this draft all those features mentioned here remained. The draft is available at http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2013-12/31/content_1822050.htm. Accessed 26 June 2014.

his case prosecuted and tried correspondingly. Secondly, the legislator should reject the police as a qualified body to issue detention. According to Article 37 of the 1982 Constitution, ‘no citizen can be arrested except with the approval or by decision of a people’s procuratorate or by decision of a people’s court’. Detention is much severer than merely ‘arrest’, and it should be used on with higher rather than lower restrictions.

6.5 Safeguards on Stakeholders and the Prevention against Negative Impact

CPAs in both jurisdictions are frequently challenged for their negative influence on other stakeholders’ interests due to the opaque and self-interested negotiations. Criminal procedure as a mechanism operated by the state and aiming at protecting the society requires certain types of interests to be respected and protected. Among all, there are three groups of stakeholders who are vulnerable in CPAs: victims, witnesses, and the accused person who is targeted in an assistance agreement. In the following discussion the coordination between CPAs and the protection of these three groups are analyzed respectively.

6.5.1 Safeguards on Victims

From previous discussion two major tension areas can be observed in CPAs concerning victims. One is the extent to which victims’ can participate in criminal procedure, and the other is the over-simplified equation of ‘reconciliation = financial compensation’.

For the extent of participation, in England and Wales several approaches have been adopted to maintain a balance such as the victim impact statement during sentencing, the CPS Victim Focus Scheme (VFS) which assist victims and their family to understand prosecution procedures as well as prepare statements to court,¹⁶⁵ and the victim’s advocates scheme serving common objectives with the VFS. The similarities of all these approaches are that they open channels for victims to observe, understand, and express on the one hand, whereas they constantly remind criminal justice agencies to make independent decisions based on their professional knowledge and skills on the other. In CPAs the major question is not whether ‘justice has been done’, but whether ‘justice has been seen to be done’.

In China this question appears to be less problematic mainly because victims are deemed as an independent legal participant of criminal proceedings and they are entitled to numerous rights under the 2012 CPL. Victims can hire lawyers when the case is submitted for prosecution (Article 44); they should be informed during every stage of the proceeding; their statement is a separate type of evidence (Article 48); they can confront witnesses in court (Article 59); they are the plaintiff in the incidental civil litigations and private prosecutions (Article 99); they can prosecute directly when the people’s procuratorate refuses to do so (Article 176); they can give a statement on the charged crime in court (Article 186); they can question the defendant in court (Article 186); they can request the people’s procuratorate to appeal (Article 218), and so on. Whether these rights are sufficiently implemented in practice is questionable, but they at least reflect that the legislator has given much consideration on victims.

However, what can be observed from these provisions is the confusing and difficult role of victims in Chinese criminal procedure. In the current legal regime, victims are not only victims but also prosecutors and witnesses. As prosecutor, victims are less professional, neutral and resourceful

¹⁶⁵ The general introduction on CPS Victim Focus Scheme is available at [http://www.cps.gov.uk/legal/assets/uploads/files/VFS%20\(Bereavement\)%20-%20nov%2009.pdf](http://www.cps.gov.uk/legal/assets/uploads/files/VFS%20(Bereavement)%20-%20nov%2009.pdf). Accessed 26 June 2014.

than public prosecutors; and as witness, they play no more function than normal witnesses. Compared with other procedural participants, victims may carry more personal bias and individualized emotion towards offenders. Being directly infringed by crimes qualifies victims to be informed and heard in criminal proceedings. Nevertheless, their low capability in investigation, prosecution and making judgments disqualifies them as decision-makers and procedure-operators.

In this sense, when the English legal system is attempting to expand victims' rights in criminal proceedings, the Chinese legal system should pay more attention to how to narrow down those rights and make them realistic. This task would be more urgent with the growth of ordinary procedure, and at least two issues need to be reformed. The first one is the victim's identity as special witness. According to Article 60 of the 2012 CPL, 'witness' refers to any person with information regarding the case. If the content of the victims' statement is no more than the facts, then it is unnecessary to separate them from normal witnesses. If its content is even broader than facts, for instance, personal feeling, then it requires higher prudence to let such information influence judicial decisions. A more rational choice may be to establish a mechanism with twin approaches similar to the English legal system. When victims provide evidence, they are transformed into witnesses and should comply with relevant rules; and when they demand to express personal emotion, they can be allowed to give a statement after court examination and before the defendants' closing statement.

The second issue is the victim's right to confront witnesses and defendants in court. Confrontation is a delicate task requiring not only knowledge but also skills. It is a process designed not for emotional catharsis but approaching the truth. Whether victims can fulfil this task is very much in doubt. Furthermore, the prosecution-minded procuratorates and the streamlined criminal proceedings in China have already tipped the scale between the prosecution and the defense, and weight needs to be added to the latter rather than the former.

Another tension area concerns the equation between reconciliation and financial compensation. Both jurisdictions have exposed some controversies on it, but a gap can be observed with respect to state compensation for victims. In England and Wales the current compensation program is regulated by The Criminal Injuries Compensation Scheme 2012 (2012 Scheme).¹⁶⁶ Under the 2012 Scheme, injuries compensation covers blameless victims of violent crimes. Qualified victims are entitled to compensation on mental or physical injury, sexual or physical abuse, loss of earnings, special expenses payments, and relevant payments when fatalities caused by crimes of violence. The 2012 Scheme also includes a detailed tariff of injuries providing reference to the calculation of the payment. Apart from injuries listed in the tariff, victims who suffered from other minor injuries can also get temporary relief from the Hardship Fund introduced by the Government.¹⁶⁷

The national program on state restitution¹⁶⁸ for victims in China can be traced back to 2006 when the SPC selected 10 higher people's courts across China for experiment. After three year's exploration, in 2009 eight national institutions jointly issued Several Opinions on Promoting Relief of

¹⁶⁶ Ministry of Justice, *The Criminal Injuries Compensation Scheme 2012*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243480/9780108512117.pdf. Accessed 14 April 2014. Criminal injuries compensation in UK was first introduced in 1964. In 1995 the Criminal Injuries Compensation Act was promulgated, requiring a statutory scheme to be established. As a result, in 1996 the first Tariff based scheme was made, and then updated in 2001, 2008 and 2012.

¹⁶⁷ Introduction on the operation of the Hardship Fund is available at <https://www.gov.uk/financial-support-victim-of-crime>. Accessed 14 April 2014.

¹⁶⁸ Here the term 'state restitution' instead of 'state compensation' is used to avoid the confusion with the State Compensation Law (国家赔偿法) in China. The latter aims at providing compensation for individuals whose legal interests are infringed by state officials mainly by their malpractice or miscarriages of justice.

Criminal Victims (关于开展刑事被害人救助工作的若干意见, 2009 Opinions).¹⁶⁹ Several conditions are attached to state restitution. First of all, state restitution is in principle only applicable to victims suffering from serious injury or disability caused by serious violent crimes. Secondly, the restitution cannot be launched unless the judicial remedy has been blocked or exhausted. Thirdly, the amount of restitution is expected to be calculated comprehensively, but the maximum amount is supposed to be within 36 months of the average monthly salary in a specific local area. The 2009 Opinions do not mention whether psychological damage is included or not.

Through a comparison it seems that the Chinese state restitution for criminal victims is limited in scope and amount. Because there is no consistent national legislation on state restitution for criminal victims, current implementation of such a scheme mainly relies on local authorities. According to Song Yinghui's empirical research in four cities from June 2008 to November 2009, the amount of restitution for a victim was normally less than ¥10,000 (about £961); only in exceptional cases can the amount reach ¥30,000 (about £2883).¹⁷⁰ Comparatively, the start point of restitution listed in the tariff of injuries under the 2012 Scheme in England and Wales is £1,000 and the highest level can reach £250,000. Each year CICA handles about 40,000 applications and pays about £200 million to victims.¹⁷¹

Given the fact that there are still regions in China where state restitution for criminal victims is unavailable, the gap between the two jurisdictions on compensation can be even wider. The pattern of relying on merely local governments seems to be insufficient in providing adequate restitution for criminal victims, and two approaches may be helpful by making reference to the English experience. The first approach is to introduce more institutions either in or beyond the government to enrich sources of restitutions for criminal victims. Another approach is to establish national schemes on both financing and implementing state restitution. Since 2012 NPC representatives have started to propose national legislations on state restitution for victims,¹⁷² and it is one of the issues worth watching in the coming years.

There are plenty of reasons to enhance victims' status in criminal proceedings, but whether this is the same as to allow their personalized and emotional opinions to interfere with official criminal justice decisions remains in doubt. In fact, by examining the legal regimes in the two jurisdictions, one can notice that in some cases offenders who took the initiative to compensate victims still got a sentence discount despite the latter's attitude.¹⁷³ In this sense, to maintain the consistency between restoration agreement and ordinary criminal proceedings in an offender-centered scenario, and to avoid the gap between official propaganda and practical implementation, victims'

¹⁶⁹ The eight national institutions are the Committee of Political and Legislative Affairs in the Central Committee of CPC, the SPC, SPP, MPS, the Ministry of Civil Affairs, MOJ, the Ministry of Finance, and the Ministry of Human Resources and Social Security. 法发[2009]10号 (*Fafa* [2009] No. 10), issued and validated on 9 March 2009.

¹⁷⁰ Song Yinghui, 特因刑事被害人救助实证研究 (Empirical Research on Relief on Most Needy Criminal Victims), 5(2011) 现代法学 (*Modern Law Science*), 95-109.

¹⁷¹ See CICA's official website, available at <https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority/about>. Accessed 14 April 2014.

¹⁷² See, e.g., Zheng Henan, 全国人大代表: 刑事被害人救助亟待国家立法 (NPC Representatives: Relief on Criminal Victims is in Urgent Need of National Legislation), 检察日报 (*Prosecutorate's Daily*) available at http://news.jcrb.com/jxsw/201208/t20120806_920621.html. Accessed 14 April 2014.

¹⁷³ (2012) 高新刑初字第407号 ((2012) *Gaoxinxingchuzi* No. 407), (2014) 潮安法刑初字第85号 ((2014) *Chao'anfaxingchuzi* No. 85).

involvement should be restricted to participation and expression rather than the basis for determining how offenders are treated.

6.5.2 Safeguards for Witnesses

The second group of stakeholders is witnesses especially in assistance agreement. The English experience has shown that assistance agreement, especially the employment of a supergrass, is a product of pragmatism. It is a compromise to reality due to various obstacles in collecting evidence and proving cases in practice. The criminal justice system can enhance facilitations for witnesses but it can hardly eliminate all those obstacles. Among them, at least two mechanisms should be particularly considered: financial compensation for witnesses, and witness protection schemes. Both mechanisms have gained special attention in the 2012 CPL in China.

In England and Wales the CPS is responsible for allowances and expenses to witnesses, and the amount is calculated, approved and paid by the National Finance Business Centre, Wakefield (NFBC). According to the CPS Guidance on Witness Expenses and Allowances, expense claims should be estimated within 10 working days of receipt and be fully paid.¹⁷⁴ The formulation and specific amount for each type of expenses and allowances under each category of witness have been clearly stated in NFBC's leaflets based on current rates. The financial compensation mainly covers (1) 'expenses for costs incurred while travelling to and from court', and (2) 'loss of earnings while attending court to give evidence'.¹⁷⁵ The CPS Guidance also specifies that people necessarily accompanying or accommodating witnesses may receive allowances.

In China, current financial compensation for witness is regulated by Article 63 of the 2012 CPL. According to this provision, compensation should cover expenses of travel and accommodation for the witness, and should be guaranteed by the treasury of the government at the same level as for involved criminal justice agencies. This is one of the major improvements in the new law, but both the 2012 SPP Regulations and the 2012 SPC Interpretations assign only one provision for the financial compensation,¹⁷⁶ and inevitably several issues are not touched upon yet. For instance, Article 63 does not mention either the amount of the compensation, the calculating formula, or the detailed procedure to claim for it. The current scheme restricts the compensation to expenses rather than to include allowances, and meanwhile it pays no attention to people assisting witnesses' attendance in court. All these issues need to be further specified in future so that the compensation can be operative and practical.

As to the witness protection schemes, China is at the very initial stage, making it necessary to refer to other jurisdictions. The current English practice is mainly regulated by a series of Acts¹⁷⁷ concerning special measures,¹⁷⁸ reporting restrictions,¹⁷⁹ investigation anonymity,¹⁸⁰ and other

¹⁷⁴ *CPS Guidance on Witness Expenses and Allowances*, available at https://www.cps.gov.uk/legal/v_to_z/witnesses_expenses_and_allowances/#P144_6833. Accessed 7 April 2014.

¹⁷⁵ Ministry of Justice, *The Witness Charter*, issued in December 2013. Available at http://www.cps.gov.uk/victims_witnesses/witness_charter.pdf. Accessed 5 November 2014.

¹⁷⁶ Article 207 of the 2012 SPC Interpretations and Article 77 of the 2012 SPP Regulations.

¹⁷⁷ For comprehensive introductions on these Acts and mechanisms, see *CPS Guidance on Witness Protection and Anonymity*, available at https://www.cps.gov.uk/legal/v_to_z/witness_protection_and_anonymity/. Accessed 7 April 2014.

¹⁷⁸ Ss23 to 30 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999)

¹⁷⁹ S46 of the YJCEA 1999, enabling the prohibition against any matter relating to the witness to be published during his lifetime if the publication may expose the witness' identity.

¹⁸⁰ Ss74 to 85 of the CJA 2009

protections such as relocation and change of identity.¹⁸¹ Individuals protected under these schemes are not limited to witnesses but also persons risking their safety due to their involvement in investigations or proceedings. The previous chapter has shown that the English legal system deems witness protection as largely a police function, and protections schemes are operated in a dispersed manner. Such a design has generated some inconsistencies in both quality and quantity between local areas, and given rise to the risk of malpractice. As a result, on 28 December 2012 a UK wide witness protection scheme was announced to unify the protections for witnesses under the collaboration between the police service and the National Crime Agency.¹⁸²

In the Chinese legal system, protections for witnesses and their close relatives have gained a legal basis in Articles 61 and 62 of the 2012 CPL, and been further interpreted in Articles 209 to 210 in the 2012 SPC Interpretations and Article 76 of the 2012 SPP Regulations. The current system mainly focuses on serious crimes such as crimes threatening national security, terrorism-related crimes, mafia-like organized crimes, and drug-related crimes. Applicable approaches mainly include, among others, anonymity, restricted exposure on look or voice, prohibited contact from particular persons, and special personal and residential protections. These approaches are supposed to be implemented by corresponding criminal justice agencies in accordance to the stage of the proceedings.

The current scheme for witness protection in China lacks concrete proceedings for the application of these protecting approaches. Although the 2012 CPL requires *ex post* criminal or administrative penalties to follow those revenging or threatening to take revenge on witnesses, the question of how to implement those *ex ante* approaches remains unanswered. It concerns not only the responsible institutions for implementation and supervision, but also the financial supports for their operation. Based on current patterns, protection and corresponding financial sources are allocated locally, which could result in similar risks as that experienced in England and Wales. What China needs now is to specify the concrete steps to implement these protections on the one hand; whereas to devise unified and consistent national witness protection schemes on the other hand.

6.5.3 Safeguards on The Accused Targeted in Assistance Agreement

In assistance agreement, protection for the accused that is targeted by such an arrangement and for the assisting offender is not always reconcilable. Controversies around assistance agreement mainly focus on the miscarriages of justice due to the violation of seeking truth. Solutions on this problem have been discussed previously. Comparatively the procedural rights of the accused person are less debated in both jurisdictions. However, some protective measures for the assisting offenders, especially anonymity, may undermine the rights and interests of the accused by, for instance, undermining his right to oral and public confrontation.

As stated in cases such as *Khawaja and Tahery v. the United Kingdom*, Article 6 of ECHR ‘enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument’.¹⁸³ Regarding the Court’s case-law, three requirements should be examined before the use of an

¹⁸¹ Witness protections in very serious cases are mainly regulated in Part 2, Chapter 4 of the SOCPA 2005.

¹⁸² See Ministry of Justice, ‘National Witness Protection Scheme Announced’, 28 December 2012, available at <https://www.gov.uk/government/news/national-witness-protection-scheme-announced>. Accessed 7 April 2014.

¹⁸³ *Khawaja and Tahery v. the United Kingdom*, ECtHR 15 December 2011, nos. 26766/05 and 22228/06, § 118; see also *Barberà, Messegué and Jabardo v Spain*, ECtHR 6 December 1988, no. 10590/83, § 78.; *Al-Marcus ELLIS and Rodrigo SIMMS and Nathan Antonio MARTIN v the United Kingdom*, ECHR 10 April 2012, nos. 46099/06 and 46699/06.

anonymous witness: (1) whether there are good reasons to keep the identity of the witness secret; (2) whether the evidence of the anonymous witness is the sole or decisive basis of the conviction; and (3) where a conviction is based solely or decisively on the evidence of anonymous witnesses, the Court must subject the proceedings to the most searching scrutiny.¹⁸⁴ Next to that, the Court must judge whether or not the handicaps under which the defense labored were counterbalanced by compensating procedures.

In England and Wales, full disclosure has been designated as ‘the golden rule’,¹⁸⁵ and offenders’ right to confront witnesses in court can only be subject to certain exceptions and statutory qualifications.¹⁸⁶ The current rules on anonymous witness evidence are prescribed by ss88(2)-(6) of the CJA 2009. According to them, the court should not order such evidence unless three conditions are satisfied. The first condition is risk, which means that an anonymity order is to prevent harm to the witness or another person, serious damage to property, or real harm to public interest. The second condition concerns the effect of such an order that it should be consistent with the defendant receiving a fair trial. The third condition is about necessity. That is, the witness’ testimony is highly important for the interests of justice, but without anonymity he would refuse to testify or real harm to public interest would occur. To guarantee effect and necessity, the court is required to consider (1) the credibility of the witness; (2) whether the evidence might be sole or decisive; (3) whether the evidence could be properly tested; (4) any tendency to be dishonest; and (5) whether anonymity is the last resort.¹⁸⁷

Among all five considerations under English rules, it can be noticed that terms (1) (2) and (4) serve the effect condition by enhancing the credibility of the evidence, which can be achieved through measures mentioned previously. The other two considerations aim to fulfill the necessity condition, and the rationale behind it is the principle of subsidiarity. In other words, when there are more than two measures to achieve a purpose, the one must be chosen that infringes the individual rights the least. Comparatively, this issue so far again attracts little attention in the Chinese legal system, as in the 2012 CPL witnesses are still not obliged to give evidence in court, not to mention to be cross-examined in person. Therefore the first task of the Chinese legislator is to recognize the right of the accused to summon and examine witnesses orally in court. Article 62 of the 2012 CPL brings up the risk issue, but none of the considerations of necessity and effect has been touched. It may be unrealistic to arm the targeted suspect with a full suite of armor in a short period in China. However, at least the principle of subsidiarity should be acknowledged in the criminal justice system. On this issue, as long as there are other approaches to protect the witness or to prove the case, the targeted suspect’s right to a fair trial should be preserved.

7. Conclusions

Based on the comparative analysis, some answers can be developed to questions raised at the beginning of this chapter. Five dimensions of the penal state that may steer the direction of CPAs and shape their concrete modalities in a given legal context show both convergence and divergence in China and England and Wales. The divergence is observed mainly from a static perspective where the distinctions between the two legal systems largely rest on the ingrained legal traditions and institutional structure. From a dynamic perspective, however, such divergence has been constantly

¹⁸⁴ *Marcus ELLIS and Rodrigo SIMMS and Nathan Antonio MARTIN v the United Kingdom*, ECtHR 10 April 2012, nos. 46099/06 and 46699/06, §§ 76-79.

¹⁸⁵ See e.g., *H* [2004] 2 AC 134

¹⁸⁶ *R v Davis* [2008] UKHL 36

¹⁸⁷ S89 of the CJA 2009.

narrowed down by the trend of convergence particularly in aspects of the merging adversarial and inquisitorial legal traditions, the enhancing influence of penal populism, and the challenges in trial and pre-trial power distribution.

Under this trend, it is predictable that the expansion of CPAs in quantity and quality will continue, and the two jurisdictions can share each other's experience in regulating CPAs especially on maintaining the equilibrium between the scope of CPAs and the robustness of ordinary procedure. The word 'equilibrium' is used here with the meaning of maximizing the utility of CPAs within a certain legal context without undermining the fundamental objectives of criminal procedure. The fulfilment of this task relies on conditions such as sufficient supports from evidence rules, internal check and balance among criminal justice agencies, and formalized and transparent procedural design.

The quality of these conditions determines the level of the tension caused by CPAs, and then further defines the scope of these agreements. For instance, given the streamlined relationship among criminal justice agencies in China, internal checks and balances are difficult to maintain, and consequently the risk of 'off-track' deals might be higher. It may lead to the conclusion that the scope of CPAs in China should be limited. On the one hand, only in certain types of crimes can these mechanisms be applied; whereas on the other hand, more restrictions should be imposed on the process of utilizing these agreements. Both approaches of regulating the application of CPAs can be found in the two jurisdictions.

From another perspective, the quality of these conditions is in turn dependent on that of the overall criminal justice system. Apart from procedures that are directly relevant to the process of making deals, mechanisms such as witness protection, state restitution, legal aid, and evidence corroboration are also crucial in maintaining the quality of negotiation and the integrity of criminal proceedings. Sometimes impact factors beyond the criminal law scenario are also engaged in this process. The coordination between administrative penalty and criminal penalty in China is one typical example of such.

One must always bear in mind that the manifestations of these conflicts can be quite different due to the discrepancies existing in different criminal justice systems. For instance, the role of defense lawyers in CPAs receives criticism in both jurisdictions but with quite different focuses. Meanwhile, the diversity in the manifestation of conflicts leads to that in corresponding solutions. It means that experiences in one jurisdiction, though valuable as reference, can hardly be directly and rigidly transplanted in another. For instance, for a jurisdiction with civil law traditions like China, it is difficult to follow the English practice of combining case laws with complex and fast-changing statutes and other official documents. The latter may be more flexible and capable of keeping pace with times. Nevertheless, it challenges stability, feasibility and clarity required in written law, and consequently may cause confusion in practice.

Chapter VI Conclusions

It takes back with one hand what it seems to exclude with the other. It saves everything, including what it punishes. It is unwilling to waste even what it has decided to disqualify.

— Michel Foucault¹

1. Introduction

In this research, based on the pure model of criminal procedural agreement, three major types of agreements between offenders and criminal justice authorities in the administration of criminal justice are examined comparatively. During the past decades CPAs have emerged or expanded in both the Chinese and English criminal justice systems. These developments, however, exemplify not so much best practice, but rather areas of tension where the integrity of criminal justice might be undermined. The aim of this study is to contribute to the discourse of these agreements by comparing the legal regimes of CPAs in China and England and Wales. It makes efforts to uncover the common nature of different types of agreements and, based on that, to provide answers to the questions of what a CPA is and how could different types of CPAs be integrated into criminal justice systems, especially that in China.

These answers have been gradually developed in the previous four chapters where the concept of agreements, the current status of CPAs in the two legal systems and the coordination of tension areas are analyzed. This chapter aims to draw together some thoughts emerging from this comparative research in a systematic form. To achieve that, two key questions are answered in the first two parts of this chapter: (1) what is a CPA? And (2) what is the position of CPAs? Based on answers to these questions the third part provides recommendations to the Chinese legislator and legal practitioners to improve CPAs both in general and specifically for each major type.

Before doing so, it is necessary to mention some cautionary notes that may affect both the nature of the conclusions that can be drawn and the possible wider implications to which some of the findings might give rise. As stated at the beginning of this research, conclusions drawn here are restricted by the comparability between the two legal systems and the availability of resources. The two-sample based comparison and the asymmetry in statistics may be inadequate to reveal some important features of CPAs, and therefore may have limited application for similar practice in other jurisdictions. In this sense, this research does not aim to propose the best or definite guidelines but possible resolutions towards some common problems.

2. What is CPA?

Agreements in criminal procedure which were examined in earlier studies, did not provide a coherent concept for different types of agreements in criminal proceedings. However, there is a common kernel in each type of agreements and the role of these agreements is largely aspirational in criminal justice. This research has argued that, through observing from the perspective of the offenders' offer, it is possible to develop a pure CPA model for different types of cooperation between offenders and criminal justice authorities. This model helps to uncover the nature of various types of agreements with regard to the state-citizen relationship. It also facilitates systematic exploration on the correlation

¹ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Vintage Books, 1977), p. 301.

between CPAs and ordinary procedure, and therefore provides recommendations on coordination for not only existing agreements and variants but also future devices in criminal procedure that satisfy the core essence of the model: the mutually-beneficial cooperation between offenders and criminal justice authorities.

Under the pure model, CPA is first and foremost an agreement. It is an arrangement of rights and obligations based on the participatory and interactive activities between at least two parties. However, the institution of CPA is far more than merely an agreement. It is a set of legal norms on who can participate, how to negotiate, what can be arranged, and what consequences would be. More importantly, this institution is embedded in a process where the criminal culpability and corresponding penalty of one party is assessed and determined by another. Within this context, the parties of an agreement are given another set of identities: offender on one side, and criminal justice agencies on the other side. Derived from these identities are a series of rights and obligations pre-set in criminal justice. Therefore in CPA there exists a dual-track legal relationship between the two parties: a contractual relationship, and a criminal procedural relationship. Correspondingly there are also two sets of legal norms in charge of these relationships. The dual relationships are not parallel but interwoven in the administration of criminal justice. CPA is not mechanically inserted into criminal proceedings, but it may have an impact upon, or even alter, the final outcomes of the procedure.

Therefore, a pure model of CPA is an agreement within the administration of criminal justice with offenders and criminal justice authorities as its main contractual parties, and the mutually beneficial exchange between offender's cooperation and legal concession as its content. However, variants exist, not only because of the concrete social and legal environment but also because of the dynamic evolution of these agreements. From previous discussion one can already notice that in practice the negotiation process may involve more than two parties, the bargaining chips may be pre-fixed, the presumption of equality between negotiating parties can be transformed into a top-down reward, and more importantly, some variants may gradually evolve into the pure model, and *visè versa*. In this sense, when talking about a specific CPA in practice, one needs to understand its relationship with the pure model by making reference to the context in which such an agreement is situated, and the phase that it has reached.

In this study it is argued that the birth of CPA is closely connected with the civilization of criminal procedure which on the one hand empowers offenders with weapons and wills for negotiation and shames the legal actor's employment of direct, public and exorbitant coercion especially in physical form, while on the other hand raises demands such as expediency and restoration from both parties in solving crimes. From this perspective, two characteristics of CPAs can be detected. For one thing, CPAs play a subordinate role to the ordinary procedure in processing criminal cases. Their functions are supposed to either fill in the justice gap or correct the defects in ordinary procedure. For another, CPAs appear to be necessary, even though without proper restrictions they may threaten the fundamental principles valued in criminal justice.

Derived from such characteristics are five general findings on the nature of CPAs as well as their relationship with ordinary procedure:

- i. *There is a positive correlation in robustness between CPAs and ordinary procedure. The values respected and guaranteed in the latter are the fundamental safeguards for the well function of the former.*
- ii. *The higher the tolerance for departure from retributivism in manipulating penal power, the more likely the bargaining chips of legal authorities in negotiation are greater.*
- iii. *The more rights, privileges and immunity for the offenders in ordinary procedure, the more likely they are to be powerful in negotiation with the state.*

- iv. *The longer the period of uncertainty and the more variables there are in ordinary procedure, the more likely it is that the incentives for both parties will be stronger.*
- v. *The stronger the restrictions and pressure, either external or internal, on legal authorities, the more likely it is that the incentives for them to negotiate will be greater.*

Apart from these general findings, the exploration into the pure model of agreements in criminal proceedings also clarifies two specific issues. To begin with, it is likely for judges to be involved in the negotiation process and play an important role in ‘inducing’ offenders’ cooperation. Such involvement may improve the quality of CPAs by judicial review, but it may also give rise to a type of collaboration among police, prosecutors and judges. In the latter situation, the pressure on offenders can be systematic. It does not mean that judges are incapable of supervising and restricting pre-trial negotiations. What it reveals here is a risk caused by CPAs with respect to the role and function of judges, and more prudence is necessary in order to reach equilibrium.

The second issue is that under the pure model the victim is not the fundamental party of CPAs even though he or she may sometimes participate in the negotiation process, have impact on the final terms and conditions, and have their interests influenced, either positively or negatively, by such agreements. For plea agreement and assistance agreement this is easier to understand, and some points need to be re-emphasized on the role of victims particularly for restoration agreement. First of all, not all restorative justice schemes fall into the formulation of CPA, and therefore not all of them are qualified for this research. Secondly, for those qualified, not all of them involve victims, such as schemes focusing on offenders’ rehabilitation. Thirdly, for those with victims’ participation, the reconciliation between victim and offender does not and should not touch upon conviction and sentencing issues. Its impact on criminal justice decisions does not come from the private arrangement on civil issues, but from the arrangement on criminal issues between the offender and criminal justice agencies. Therefore victims are merely a stakeholder in the pure CPA model.

Some may raise objections: in practice it does happen that private parties reconcile first and then, based on that reconciliation, legal officials issue lenient disposals on offenders. In this situation it seems that no negotiation happens between offenders and criminal justice agencies, and therefore no CPA exists. This argument is closely connected with the variants of the pure model, which is the third issue to be clarified. Although the pure model contains the element of bargaining, it is not necessarily the case that in every single case the offender’s contractual obligation is established or even fulfilled after direct negotiation with criminal justice agencies. The exchange of cooperation and concession may have originated from case by case negotiation. However, bargaining costs and inherent requirements on predictability and the principle of legality in criminal justice make such a strategy not always desirable. What can be observed from this study is the fact that when the contents of cooperation and concession are relatively simple and clear, such as in the case of plea agreement, it is likely for such negotiation to gradually become routine, the terms and conditions are gradually fixed, and finally, statutory rules are established. Once achieving the last step, the pure model of CPA is more or less transformed into a ‘standard agreement’, decreasing the necessity for direct negotiation in every single case. In this sense, *quid pro quo* in CPAs does not merely refer to the daily operation of criminal cases on judicial level, but also the general distribution of responsibility in crime control between state and citizen on the legislative level.

The consequent question is: what is the difference between CPAs and other pre-set mitigation factors in law, such as personal mitigation? This is the fourth issue touched upon in previous discussion and some key points are summarized here. To avoid all-inclusiveness, I adopt Lovegrove’s concept of personal mitigation. According to him there are four categories: (1) reduced culpability

such as recklessness and negligence; (2) absence of prior convictions; (3) equity mitigation such as advanced age or ill health; and (4) equality of impact, like chronically ill.² The common feature of these factors is that they either already existed or were predictable at the very moment the crime was committed, or were beyond the offender's control. Furthermore, they either reduce the blameworthiness of the offender or aggregate the potential negative effect of criminal sanctions on him.

From this perspective, CPAs are different mechanisms. The offender's cooperation is based on his own free will after the crime has been committed and the criminal procedure has been initiated. This is the key character of all types of CPA: future-targeted. It means that such a mechanism focuses on the offender's future performance rather than the criminal acts he or she may have committed in the past, or the situation the offender is in now. When initiating CPAs, the cost of criminal acts has become a 'sunk cost', and the maintenance of social control will not become more approachable if one merely refers to sanctions. The pragmatist thoughts in CPA essentially encourage a 'better use' of criminal offenders. A plea agreement encourages the offender to contribute to judicial efficiency, an assistance agreement to detect effect, and a restoration agreement to rehabilitation, reparation, and, of course, restoration.

In this sense, Foucault's 'new economy of power' emerges, along with a changing strategy in manipulating penal power, a re-distributed task or burden in crime control, and a transforming contestation on state-citizen relationship. Following this line, CPAs are not merely modifying the concrete way in which criminal cases are dealt with, but more importantly they reflect and in turn reshape the scope of criminal law and the nature and use of criminal procedure in general.

Yet the discussion is not ended, as we may immediately encounter more questions: without violating the demands of civilizing criminal justice, will there be margins of the state's demands on offenders? Or, does the increased demand itself constitute the definition of 'civilization' in the criminal justice field? These questions have exceeded the scope of this study, and therefore further exploration is needed. Nevertheless, these questions by their nature reveal the fact that CPA is an open and dynamic system and the boundary is not fixed as long as people's understandings of criminal justice is transforming. The pure model of CPA and its variants examined in this research can be merely the tip of the iceberg, and 'cooperation' from offenders can be further proliferated both qualitatively and quantitatively in future. In this context, the pure model of CPAs established in this study is neither the standard nor the ultimate form of the cooperation between offenders and criminal justice authorities. Rather, it is the kernel of a comprehensive cooperative system and its functions are to reveal the nature of such cooperation and set baselines for its coordination with criminal justice systems.

3. What is CPAs' Position: Separately and Comparatively

Based on the CPA model the position of three major types of CPAs in China and England and Wales has been examined separately and comparatively. CPAs in each jurisdiction are imprinted with their own historical, social and cultural characteristics, and therefore their orbits are neither synchronous nor always homodromous.

For China this study has shown how the on-going but limited civilization of ordinary procedure has given rise to CPAs' prevalence on the one hand, while at the same time threatened their quality substantially on the other hand. The past two decades have witnessed enhanced facilitation on each type of CPAs: summary procedure has been modified for confession offenders, criminal

² Austin Lovegrove, 'Proportionality Theory, Personal Mitigation, and the People's Sense of Justice', 69 (2) (2010) *The Cambridge Law Journal*, 321-352, pp. 322-323.

reconciliation has been approved by the legislator, and Criminal Law has also been amended for the convenience of meritorious service. Furthermore, sentencing guidelines have been introduced into the legal regime, promising that cooperation would be worthwhile. With all these reforms the majority of criminal offenders are qualified for some kind of concession as long as they cooperate. A *quid pro quo* relationship seems to bloom between offenders and criminal justice agencies in China.

However, this is not the whole story. The obligation of honest confession is still valid in the 2012 CPL, and many facts have proved the existence of coerced confession. Meritorious service is too easy to be driven by the selfish interests of both parties and manipulated behind closed doors, and at the same time giving oral testimony in court is still occasional. Criminal reconciliation focuses mainly, or even merely, on financial compensation, and parties are sometimes pressurized into agreements to serve the consequentialist goal of maintaining social stability.

Given the whole picture, there are two key findings concerning the current position of CPAs in the Chinese criminal justice system. First of all, as the entire legal system was just re-developed at the end of the 1970s, both CPAs and ordinary procedure in China are at a preliminary stage. The slowly accumulated procedural rules have given some space to the shadow of agreements. With the development of ordinary procedure such shadow may gradually become more substantial in the future, but apparently now their broader application can hardly be either supported or restricted by ordinary procedure.

In such a context, the tension between CPAs and ordinary procedure sometimes appears to be less fierce in many aspects compared to that in a more civilized criminal justice system, which is the second finding. For instance, by emphasizing the suspects' obligation of giving an honest confession, questions on the tension between CPAs and the right against self-incrimination are unlikely to be raised.

Compared with China, the English criminal justice system has a relatively richer experience in handling CPAs. English practice has higher compliance with rules and principles accepted on the international level. Therefore what can be observed in England and Wales is fine tuning rather than a great leap in both CPAs and ordinary procedure during the past a few years.

The patterns of negotiation process in England and Wales have been constantly formalized and become routine with relatively fixed terms and conditions. But the seesaw battle between those agreements and ordinary procedure carries on in several fields, such as the extent to which judges can be involved, the guarantee of fulfilling contractual obligations by both parties, the power appropriation between the judiciary and prosecutors and police, and the validity of the victim's voice. Every reform of CPAs in the English system is always attached with detailed conditions, and a system of 'exception of exception' is gradually developing.

Many of those controversial issues in the English legal system may appear to be inadequately debated in China nowadays. This is not because they are less problematic, but, as mentioned earlier, because the ordinary procedure in Chinese criminal justice is still at a preliminary stage, and therefore the friction in-between remains implicit. By comparing the evolution of CPAs in the two legal systems an interesting phenomenon can be noticed: the current status of different agreements in China more or less reflects the past of that in England and Wales. Some of the problems that China is facing now are the ones that were once dealt with by England and Wales. For instance, legal authorities have similar doubts about plea agreement and attempt to justify it with other excuses; assistance agreement is operated in the dark, causing high risks of miscarriages of justice; and restoration agreement is having troubles in embedding itself into the ordinary procedure. Furthermore, in exploring the proper position of CPAs, both systems are asking a common fundamental question: how much tolerance should be given to such an internal, flexible, individualized and expedient arrangement when other interests, valued in criminal justice and sustained mainly by ordinary procedure, are threatened?

It is not a coincidence for China and England and Wales to encounter similar challenges and propose the same question, although they are highly differentiated in social, legal, political and cultural contexts. In fact, through comparatively examining the five dimensions of David Garland's model of the penal state – state autonomy, internal autonomy, control of the power to punish, modes of penal power, and power resources and capacities, a trend of convergence can be observed between the two legal systems. The authoritarian or 'Party-state' feature of the state does not turn Chinese criminal procedure into one aiming at convicting the innocent and acquitting the guilty. It also does not glory torture or despise justice. This explains why homogeneous objectives can be found in both Chinese and English law on criminal justice.

During the past decades Chinese criminal procedure has been reformed consciously, though stumblingly, towards modernization.³ The first tide of reform took place in the 1980s when China began to reconstruct its legal norms and institutions, and to restore the authority of the judicial system. Several fundamental principles in criminal justice such as the principle of legality were established during this period.

After about a decade of recovery, a new reform was launched in the middle of the 1990s with the backgrounds of adjusted economic policy and enhanced involvement in international affairs. The signal of this reform was the 15th National Congress of CPC in 1997 in which the slogan of 'promoting judicial reform' was proclaimed,⁴ and rule of law was acknowledged as a fundamental general plan for governance.

In 2001 China became a member of the World Trade Organization (WTO), bringing new challenges to the Chinese legal system. This led to the third round of reform with the promulgation of the report in the 16th National Congress of CPC in 2002.⁵ This report reclaimed 'fairness' and 'justice' as two major targets, stressing judicial independence and underlining the segregation between judicial and administrative branches. Following this route, in 2007 the 17th National Congress of CPC reiterated this proposal and requested to 'deepen reforms in the judicial system',⁶ aiming at optimizing the allocation of judicial resources, regulating judicial activities, and constructing a just, authoritative, and efficient judicial system.⁷ The 2012 revision of the 1996 CPL, the standardization of sentence, the transparency and publicity of justice, the reform of legal assistance system, the exclusionary rule of illegally obtained evidence, and so on, are all the content of this reform.⁸

³ See Randall Peerenboom, *China's Long March toward Rule of Law* (New York: Cambridge University Press, 2002). See also Yuwen Li, *The Judicial System and Reform in Post-Mao China: Stumbling towards Justice*, (Surrey and Burlington: Ashgate Publishing Company, 2014).

⁴ Jiang Zemin, 高举邓小平理论伟大旗帜, 把建设有中国特色社会主义事业全面推向二十一世纪 (Holding High the Great Banner of Deng Xiaoping Theory for an All-Round Advancement of the Cause of Building Socialism with Chinese Characteristics into the 21st Century), at the 15th National Congress of CPC on 12 September 1997, available at <http://cpc.people.com.cn/GB/64162/64168/64568/65445/4526285.html>. Accessed 21 May 2014.

⁵ *Ibid.*

⁶ Hu Jintao, 高举中国特色社会主义伟大旗帜, 为夺取全面建设小康社会新胜利而奋斗 (Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society in All Respects), at the 17th National Congress of CPC on 15 October 2007, available at http://www.chinadaily.com.cn/language_tips/2013cnencpctps/2007-10/31/content_17141195.htm. Accessed 21 May 2014.

⁷ Tan Shigui, 中国司法改革的回顾与反思 (Review and Introspection of Chinese Judicial Reform), 9(2010) 法治研究 (*Research on Rule of Law*), 3-8.

⁸ Xu Xin *et al*, 中国司法改革年度报告 (2011) (Annual Report on Chinese Legal Reform 2011), 30(2) (2012) 政法论坛 (*Tribune of Political Science and Law*), 97-115.

On 23 October 2014, the fourth Plenary Session of the 18th CPC Central Committee (CCCPC) issued the Decision of the CCCPC on Some Major Issues Concerning Comprehensively Promoting the Rule of Law (中共中央关于全面推进依法治国若干重大问题的决定, 2014 CCCPC Decisions).⁹ This is the first time since 1949 that ‘rule of law’ becomes the keyword of the CCCPC plenum’s decision. Among all this there are several points directly relevant to the administration of criminal justice and they are summarized as follows:

Ensuring the independent exercise of the judicial and procuratorial power in accordance with the law: establish mechanisms to resist interference from government officials and protecting judicial workers;

Optimizing the allocation of judicial resources: segregate the judicial and the administrative systems; unify the execution of criminal sanctions, reforming the management of finance and personnel in the judicial system; improve the authority of judicial decisions; improve internal supervision and accountability system; improve the management of intelligence in corruption-related offences, clarify the relationship between CPC disciplinary inspection and criminal justice; improve the mechanism of concession for guilty plea;

Promoting rigorous administration of criminal justice: improve and formalize judicial interpretations and guiding cases; make court trial the center of criminal proceedings; improve the collection, preservation, examination and use of evidence; improve the system guaranteeing witness to testify in court;

Guaranteeing the public participation in the administration of criminal justice: improve the people’s assessor system; promote transparency in every stage of the proceedings; publishing verdicts on-line and enhancing the persuasiveness of judicial decisions;

Improving the judicial system to protect human rights: improve mechanisms against wrong cases; prohibit extorting confession by torture; implement rules against illegal evidences; segregate letters and visits from litigations; fulfil the requirements of *nulla poena sine lege* and *in dubio pro reo*; improve legal aid system;

Strengthening the supervision of judicial activities: improve the mechanism of people’s supervisor especially in corruption-related offences; prohibiting the secret contact between judicial workers and litigants and their legal representatives; avoid the unspoken rules in the administration of criminal justice

Ups and downs in Chinese legal reforms are not simple mechanical movements. Rather, it is a process of upward spiral, reflecting the on-going power competition and re-allocation among different stakeholders – horizontally among the Party, government, the judicial system and the public, and vertically between central and local – in transforming and civilizing criminal justice. The 2014 CCCPC Decision set the tone for reforms in the coming years. Under this trend, the convergence

⁹ Available at http://news.xinhuanet.com/politics/2014-10/28/c_1113015330.htm. Accessed 11 November 2014. For discussion on the 2014 CCCPC Decision, see Jerome A. Cohen, ‘China’s Socialist Rule of Law Still Offers Real Hope of Improvements to Legal System’, *South China Morning Post*, 5 November 2014, available at <http://www.scmp.com/comment/insight-opinion/article/1631895/chinas-socialist-rule-law-still-offers-real-hope>. Accessed 11 November 2014.

between ordinary procedures in the two legal systems on fundamental values is likely to be strengthened instead of weakened, and no less so for the procedural complexity and the fence between offenders and criminal justice agencies.

The trend of convergence can also be observed in several specific issues. Both legal systems are under increasing populist pressure, and they have attempted to seek a balance between harshness and leniency in crime control tactics. The collaboration among police, prosecutors and judges is strengthening in both jurisdictions, regardless of the divergence in their own theoretical presumptions. Adversarial and inquisitorial features can be found simultaneously in each system, and the same as the complaints about the gap between legal resources and caseloads.

The convergence in the penal state homogenizes not only the incentives for adopting CPAs but also the potential risks. However, such risks can be either exacerbated or mitigated by particular features of a system. What is uncovered in this comparison of penal state is that China's weakest point is judicial independence, which is also the key distinction between a liberal democratic state and an authoritarian state. Combined with the intrinsic deficiency of current ordinary procedure in China, the shortage in judicial independence – either internal or external – would inevitably deteriorate the tension areas and enhance the risk of miscarriages of justice.

4. Situating CPAs in Chinese Criminal Justice: Policy Recommendations

Two issues need to be clarified before giving policy recommendations to China. As mentioned at the very beginning of this study, England and Wales is chosen as a comparative sample for it is a 'parent model' instead of an 'ideal model'. Previous discussion has seen defects of the English legal system in situating CPAs and coordinating the tension areas. Some of its problems are unique and domestic, whereas some successful resolutions of common problems may be situated in specific legal regimes. Therefore the English experience is not ready to solve all problems in China, and even if it is to some, the validity and effect can be different. In most situations, the English experience provides ideas rather than concrete solutions.

It further indicates that recommendations mentioned in this part can also be suggestive for English practice. The tendency in England and Wales towards some features of the current Chinese criminal justice such as the shifting emphasis to pre-trial stage, the enhancing cooperation among criminal justice agencies, the increasing expansion of administrative penalties, and the overall criminal policy emphasizing swiftness and harshness would generate new problems. From previous discussion it can be observed that some serious consequences have already happened in China due to those features. It is crucial to be fully aware of the potential risks and to adjust the tendency cautiously.

Another issue concerns the broad picture in which CPAs are expected to be situated and shaped. The pure model of CPAs has revealed the impact of the robustness of ordinary procedure, and the penal state theory has also highlighted the interaction between these agreements and factors steering the manipulation of penal power. Hence when talking about 'situating CPAs', it means to situate them into the already existing legal regime with relatively stabilized patterns, rules, values and defects; whereas when talking about 'situating CPAs better', it refers to much more than these agreements *per se* but systematic and comprehensive improvement in criminal justice. Bearing this in mind and to avoid all-inclusiveness, recommendations will focus on CPAs themselves. Broader issues may be touched upon, but they are not the priority of this study.

4.1 General Propositions

The vulnerable ordinary procedure in China requires a prudent attitude when applying CPAs. Through examining the objectives stated in the 2012 CPL in China and the CPR 2013 in England and Wales in Chapter Four, I have proposed four fundamental principles in situating CPAs:

Principle I: *when in conflict with pragmatic requirements embodied in CPAs, seeking the truth should be given priority and any risks which threaten this task should be minimized within the available resources and without intolerable delay;*

Principle II: *proportionality between offenders' cooperation and criminal justice agencies' concessions should be maintained and be assessable;*

Principle III: *the human rights of the cooperative offender should be protected with minimum safeguards;*

Principle IV: *special concerns should be paid to other stakeholders, especially victims and the targeted suspects or defendants in assistance agreement, to minimize negative externality of CPAs.*

Derived from these principles are several propositions that are applicable to all types of CPAs in China. The most urgent task is to promulgate more detailed procedural rules on the negotiation. As mentioned earlier, current Chinese legislation mainly focuses on the post-negotiation stage. Issues such as how to initiate, how to negotiate, how to terminate, how to modify, how to execute and how to remedy are rarely mentioned in law. Criminal procedure law in China was just revised in 2012, and it is less likely to change again in a short period. Given the function of the SPC, SPP and MPS in interpreting and detailing legal rules in reality, procedural issues mentioned above can be regulated through judicial interpretations, semi-judicial interpretations and joint decisions of criminal justice authorities.

Secondly, transparency and formalization are two useful weapons to regulate contractual parties and to avoid miscarriages of justice. Therefore the negotiation process should be recorded as much as possible. Written agreement can be used to guarantee the cooperation's clarity, transparency, *bona fides*, and voluntariness.

Thirdly, the offender's 'right to know' should be guaranteed. Article 118 of the 2012 CPL should be revised so that criminal justice agencies are obliged to inform the accused person not just of the policy on concession for cooperation, but more importantly the consequences and remedies, either substantial or procedural, of the cooperation. The offender's consent should be made in unequivocal manner with full understanding of the terms and conditions. Lawyers are indispensable to preserve such a right, and therefore the opportunity for access to legal assistance should be guaranteed from the very beginning of the negotiation. Given the defects of the current legal aid system, it would be unrealistic to suggest a lawyer's participation in every single agreement. More practical proposals may be on the one hand making the revised Article 118 obligatory, whereas on the other hand making legal assistance available in cases where offenders may be given sanctions higher than three-year's imprisonment.

Fourthly, the considerations and outcomes of the agreement should be reflected in detail in the final verdicts or other legal decisions unless sufficient and proper reasons such as public interest are given. Based on the three steps of sentencing in the 2014 Guiding Opinions, the following issues should be mentioned in the final verdict: the starting point of sentencing (量刑起点), the baseline of sentencing (基准刑), the final sentencing (宣告刑), and credits given to each type of cooperation. Reasons should be given if normal credit is reduced or rejected. Furthermore, equation and restrictions should be established in dealing with the cross-type agreements. The SPC's sentencing

guidelines may consider prescribing maximum sentencing reduction for the offender's cooperation. For situations containing multiple types of cooperation, the principle of totality should be upheld and, in principle, full exemption should be avoided.

Fifthly, emotional factors such as remorse, repentance or forgiveness should be marginalized in legal norms. Instead of being emphasized in written law, a better option is to have them evaluated in individual cases. Moreover, they should be separated from CPAs. The offender's cooperation has independent value for criminal justice, and previous discussion has shown the chaos of mingling two sets of factors together.

Sixthly, remedies should be available to situations where either party refuses or fails to fulfill contractual obligations. In situations where offenders are breaching the agreement, they should be offered the opportunity of facing the ordinary procedure and again be protected with full procedural protection. Legal dispositions should not be enhanced even when offenders intentionally violate contractual obligations. This is mainly because of the unbalanced relationship between the two parties that 'the more the offender's default would involve risk of deterrent or incapacitating sanctions, the more offenders will feel compelled'¹⁰ to participate in CPAs. Evidence collected during cooperation and against the offender is valid in principle. For criminal justice agencies, the breach of contract should give sufficient legal ground for appeal. Whether such breach would initiate disciplinary sanctions depends on the nature and seriousness, but malicious default should be forbidden in the disciplinary rules of criminal justice agencies, followed by effective channels of accountability.

The seventh proposition may appear less discussed on this topic and in this research. That is, the reforms in administrative penalty. However, given the huge power of police and the overlaps with criminal sanctions in the 2012 PSAPL, tension between CPAs and ordinary procedure in this area would be gradually strengthened with the development of the latter. On this issue two recommendations are proposed. For one thing, the access to a criminal trial for the offenders falling into the commands of the 2012 PSAPL should be guaranteed. Their rejection should qualify the procedural transfer. For the other, the police should be disqualified from imposing detention on offenders. The power of making decision on the deprivation of freedom should be preserved for the judiciary.

Finally, there is an urgent need to establish comprehensive and in-depth data collection at both national and local levels, and to develop systematic empirical research on the practical implementation of CPAs in China. The premise of such research, again, relies on full record of the process and outcomes of CPAs. Therefore, these mechanisms are interwoven, and any one of them cannot effectively function without the support from others.

4.2 Plea Agreement

The main purpose of plea agreement in China is to enhance judicial efficiency. Bearing it in mind, legal concessions from criminal justice authorities should depend on not only the time of the cooperation but also the complexity of the case. Therefore two criteria can be used in deciding corresponding concessions: (1) the earlier the guilty plea, the higher the concession; and (2) the more complex the case, the higher the concession. A guilty plea in minor cases with clear facts or red-handed offenders can hardly save judicial resources, and consequently either they should be excluded from plea agreement, or the concession should be relatively lower. Accordingly, the 2014 Guiding Opinions on guilty plea or confession may consider prescribing lower credits for minor crimes (with less than three-year's imprisonment).

¹⁰ Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: OUP, 2005), p. 125.

A relevant question here is whether the concession should be withheld in certain types of cases. In England and Wales the murder case is an exception to plea agreement with a mandatory life sentence.¹¹ Similar rules can also be found in other jurisdictions. For instance, rape is normally excluded from the Australian version of plea bargaining.¹² In India three cases – offences against women, children below the age of 14 years, and socio-economic offences – are disqualified.¹³ The 2014 Guiding Opinions have required higher sanctions on offences involving serious violence or seriously infringing social security. It can be used as criteria to exclude certain types of offences from plea agreement as long as full explanations are given in official decisions.

Also derived from the purpose is the way the procedure can be summarized. As mentioned earlier, the current summary procedure uses three-year's imprisonment as the watershed between cases heard by a single judge and that by full bench. Rules on procedural abbreviation can be differentiated correspondingly to guarantee expediency in minor crimes and minimum safeguards in serious offences.

Furthermore, the value of confession or guilty plea should, though discreetly, be recognized. Practices such as 'zero confession' cannot eliminate torture unless the right to remain silent and the right against self-incrimination are acknowledged both in law and in practice. From another perspective, the content of a guilty plea should be clearly stated in law. From previous discussion it can be noticed that there is a grey area between confession and meritorious service under Chinese law. Considering the distinct functions and the accordingly differentiated procedural rules, it is better to homogenize the content of confession at the pre-trial stage and guilty plea at the trial, and limit it to the admission of charges against offenders themselves.

4.3 Assistance Agreement

Assistance agreement is employed to solve crimes where other key evidence cannot be obtained at all or efficiently. Correspondingly it should be attached with the following conditions. First of all, assistance agreement should be applied in crimes 'serious *mala in se* and significant in number'.¹⁴ It normally covers organized crimes, drug-related crimes and other serious crimes. One special situation in China is corruption-related offences. The successful investigation against this type of offences largely relies on the testimony given by the person who offered bribery, and therefore they should receive special attention to in assistance agreement.

Secondly, given the high risk of systemized perjury, the weak procedural prevention against that in China, the potential cooperation dilemma, and the effect of 'rewarding betrayal, penalizing loyalty',¹⁵ assistance agreement should be applied as the last resort in cases where (1) the other key evidence against certain criminals is unlikely to be collected, or (2) the cost, either in finance or in time, for collecting such evidence is extravagant. These two thresholds should be examined case by case. Therefore the necessity of using an assisting offender should be examined before the reliability of the evidence, and the burden of proof rests on public prosecutors.

¹¹ Barry Michell and Julian V. Roberts, 'Sentencing for Murder: Exploring Public Knowledge and Public Opinion in England and Wales', 52 (2012) *Brit. J. Criminol.*, 141-158, p. 141.

¹² Paul Gerber, 'When Is Plea Bargaining Justified?' 3(1) (2003) *Queensland U. Tech. L. & Just. J.*, 210-215.

¹³ Anubhuti Dumdung, 'Plea Bargaining: The Indian Experience', available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049826. Last visited on April 2013.

¹⁴ Richard L. Lippke, 'Rewarding Cooperation: The Moral Complexities of Procuring Accomplice Testimony', 13 (2010) *New Crim. L. Rev.*, 90-118, p. 118.

¹⁵ Richard L. Lippke, *The Ethics of Plea Bargaining* (Oxford: OUP, 2011), p. 149.

Thirdly, corroboration rules should be introduced into the application of meritorious service. The general rule is that the targeted defendant should not be convicted merely based on the evidence provided by assisting offenders.

The fourth proposal also derives from the concern on miscarriages of justice. Given the current evidence rules in China, the requirement of testifying in court should be higher in assistance agreement than that in normal cases. Oral confrontation in court between assisting offenders and the targeted defendant should be required at least in judicial interpretations by the SPC. Exceptions can be allowed in individual cases on the condition that the risk against the assisting offender overwhelms.

Fifthly, this mechanism should target mainly and primarily ‘bigger fish’. For assisting accomplice, the accused person who is targeted by assistance agreement should be the prime culprit in the joint crime; while for ‘supergrasses’, the targeted suspect should, if convicted, risk a sentence higher than that for the assisting offender. When a potential assisting offender fails to fulfil this condition, criminal justice agencies should not consider entering into an agreement unless the targeted crime is serious. To avoid over reliance on assistance agreement, exceptions of this rule may be limited to the targeted defendants carrying, if convicted, at least life-time imprisonment.

As to the scope of legal concession, four criteria should be adopted. That is, the consequence of the assistance, the value of the assistance, the form of the assistance, and the risk against the assisting offender. Current Chinese criminal justice focuses mainly on the first one by distinguishing normal meritorious service and major meritorious service. However, earlier study has argued that more attention should be paid to the next three to enhance the quality of the assistance. Firstly, assistance providing primary evidence should get higher concession. Secondly, a witness in court should be rewarded more than that for pre-trial intelligence. Thirdly, the higher the risk faced by the assisting offender and his relatives and friends, the bigger the reward.

4.4 Restoration Agreement

Restoration agreement in China now is mainly used to restore offender-victim relationship. As community correction is gradually developing and gaining increasing support, it is reasonable to expand the current purpose to the rehabilitation of offenders.

Based on the current purpose, restoration agreement should be applicable in principle to all cases where offenders have knowingly and voluntarily offered or entered into reconciliation with the specific victim(s). This is mainly due to the fact that the confusion between criminal reconciliation and mediation in incidental civil litigation in China has already expanded the *de facto* application of restoration agreement even in death penalty cases, and it is of little help to ignore the gap between law in books and law in action. From this perspective, the criteria for filtering reconcilable cases should be changed from the seriousness of the offences to the possibility and necessity of reconciliation.

What about victimless crimes? From previous discussion it can be noticed that one major motivation of employing criminal reconciliation is to end disputes and to maintain social stability. Therefore cases in which no direct victim involved, like tax evasion, or the direct victim has passed away, either because of the crime or other reasons, should be generally excluded.

Another special situation is where the offender is a legal person. It is quite possible that direct injury towards a specific victim is caused by an institution. DPA in England and Wales shows a trend of accepting such a situation, and reconciliation with institutions indeed exists in Chinese legal practice. In this type of cases, there is hardly ‘rehabilitation’ of offenders but purely restitution for victims. Nor is there emotional reconciliation between two parties. Therefore financial compensation and victims’ satisfaction can be the key criteria in restoration agreement in these cases.

As to legal concession on restoration agreement, it should primarily focus on offenders’ initiatives rather than victims’ satisfaction. Considering the deficiency in national judicial relief

towards victims in China, financial compensation may continue to play an important role in legal practice. However, sentencing parity should be maintained between offenders capable of satisfying victims' requirements and those not unless specific reasons such as malicious refusal are given.

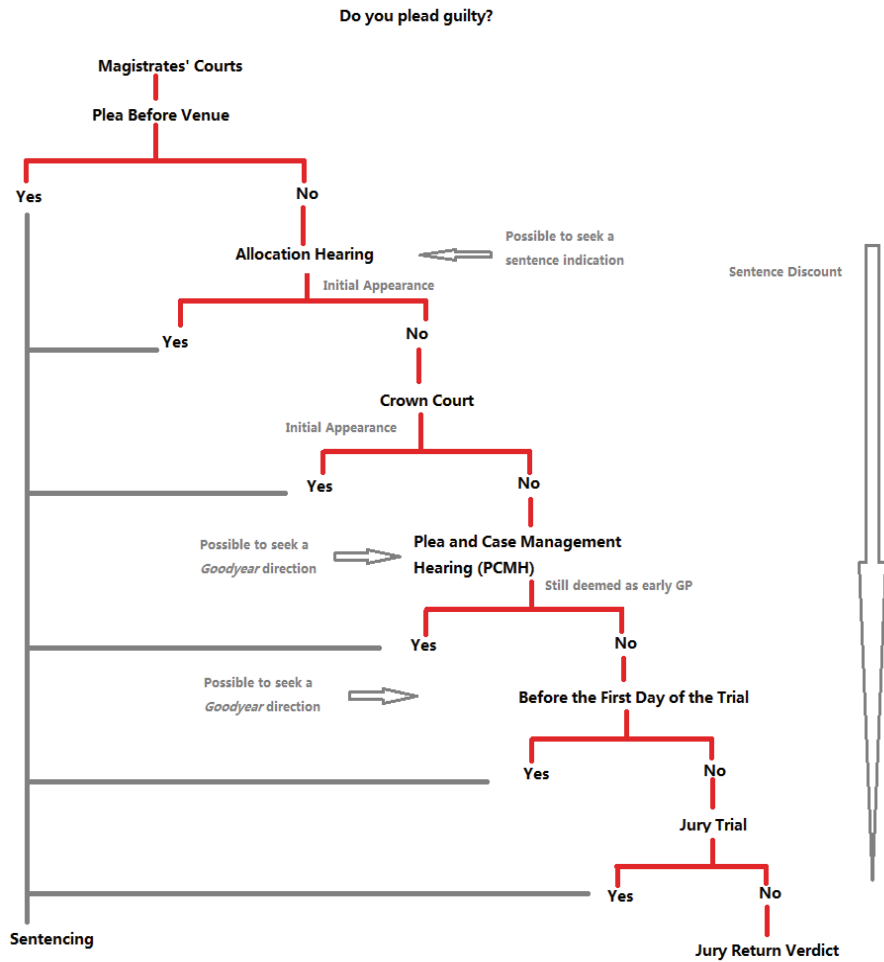
5. Final Remarks

Legal reforms towards civilization have given rise to CPAs in the Chinese criminal justice. However, a society in transition always encounters various tensions among different social classes and social norms, which generates short-term demands for instant reactions from the government. The swift changes in the society also give rise to tension among different participants in society and generate new problems. In such a context criminal justice in China is facing increasing challenges not only from the sharp rises in crimes both quantitatively and qualitatively, but also from decreasing public confidence. CPAs are adopted in China with strong instrumentalist features, and they quite often depart from the long-term targets towards civilization, varying between legal and illegal, formal and informal. The consequence of the tension between long-run and short-run targets is that the legality and validity of the criminal justice system may be impaired.

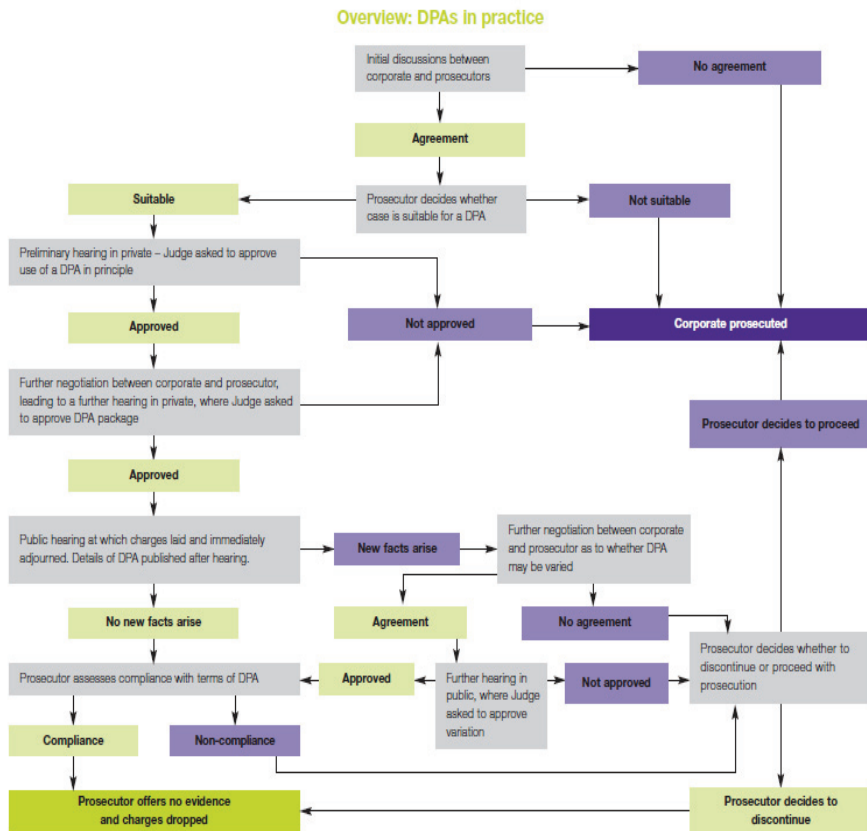
The Chinese legal system is constantly endeavoring to find a balance by constructing a theoretically rational and reasonable legal framework on the one hand, and meanwhile adopting ambiguous or general rules on certain issues as a compromise to reality on the other hand. CPAs in China epitomize the tension, making up for the weak ordinary procedures but at the same time creating new risks. Such a situation can hardly be improved over a short period of time, for the ultimate resolution relies on overall improvements in the criminal justice system. Patience is necessary, and short-sighted expediency and rashness should be avoided. At this stage, when situating CPAs in the Chinese criminal justice system, the most important rule should be, quoting Ashworth and Zedner, 'to insist that where the conduct is criminal and the consequences are punitive the protections of criminal procedure and trial must be upheld'.¹⁶

¹⁶ Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions', 2 (2008) *Crim. Law and Philos.*, 21-51, p. 21.

Appendix I How Many Times Can Defendants be Requested on Pleading Guilty (Either-Way Cases)

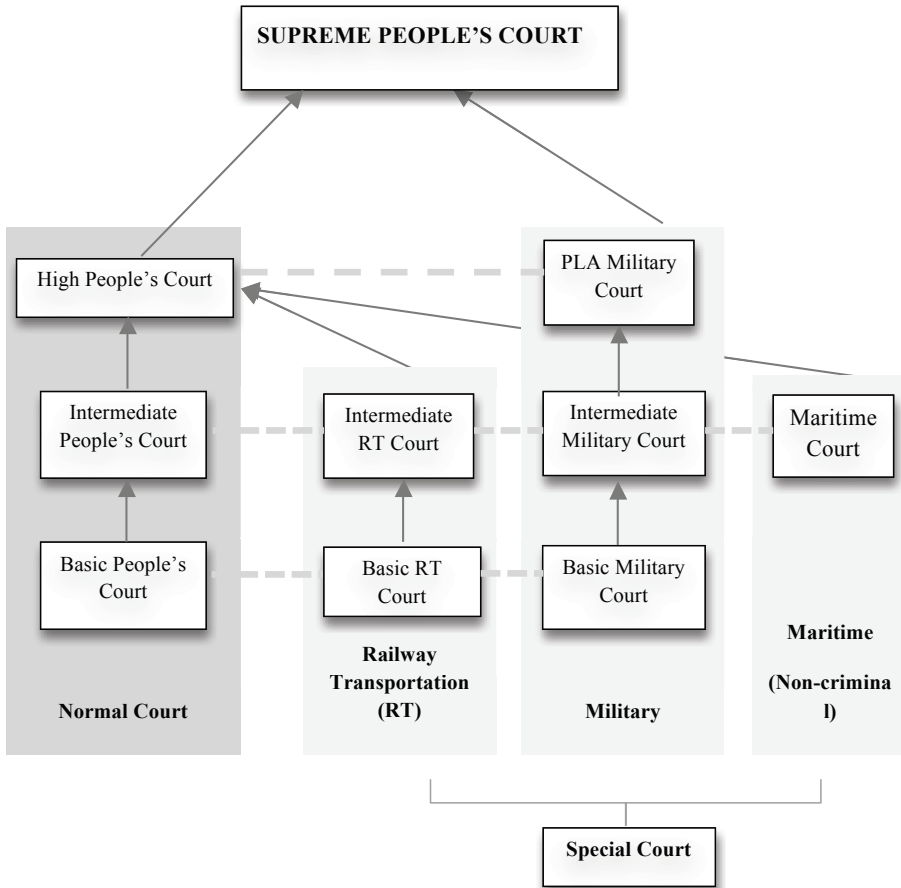


Appendix II The Procedure of DPA



Source: 'Deferred Prosecution Agreements Pass into Law in the UK', Clifford Chance, 10 May 2013, available at http://www.cliffordchance.com/publicationviews/publications/2013/05/deferred_prosecutionagreementspassintolawi.html. Accessed 16 October 2013.

Appendix III People's Court System in China



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Summary

With the purpose of improving the Chinese legislation, and by comparing the legal regimes in China and England and Wales, this study focuses on various types of agreement reached between suspects, defendants or offenders, and criminal justice authorities, where the former agrees to implement certain forms of cooperation in exchange for lenient treatment from the latter. This mutually beneficial cooperation, entitled ‘criminal procedural agreements’ (CPAs), is the subject of this research. In this study, ‘offender’ is generally used to describe a person who is accused, charged or convicted of committing certain crimes in criminal proceedings, while ‘criminal justice authorities’ mainly refers to police, public prosecutors, and judges. According to the content of the cooperation offered by the offender, three main types of CPAs are studied: plea agreement, assistance agreement, and restoration agreement.

Irrespective of the differences in legal traditions, systematic models and organic structures in criminal justice, China and England and Wales have both developed practices where criminal cases are disposed of by informal, negotiable and mutually beneficial state-citizen cooperation. However, these approaches do not represent ideal solutions to crimes but areas of tension where the integrity of the criminal justice system is under challenge. Looking at the overall trend of CPAs and their involvement in the two specific legal systems, a key question emerges: what is the position of CPAs in criminal justice? It contains three sub-questions: (1) what is CPA? (2) What is the current status of CPAs as well as their relationship with ordinary procedure in China and England and Wales? And (3) how and to what extent can the tension areas between CPAs and ordinary procedure be managed?

To answer these questions, this study begins with conceptualizing CPA (Chapter II). A pure model is established to facilitate the systematic analysis of various types of agreements. However, grey areas exist in criminal proceedings and they are crucial in understanding not only the nature of the cooperation in the form of agreement, but also the evolution of CPAs. Therefore the relevant variants of the pure model are also covered in this study. Furthermore, the three groups of conditions for the existence of CPAs are analyzed to reveal the nature of such mutually beneficial cooperation.

Based on the model, the current statuses of CPAs in the Chinese and English legal systems are examined in the following two chapters (Chapters III and IV). In each chapter, plea agreement, assistance agreement and restoration agreement in the specific legal system are examined respectively from the perspectives of historical involvement, current legal regimes, legislative motivations and tension areas. Following that, the characteristics and the overall trends of CPAs are analyzed.

Given the observations drawn in the former chapters, this study moves on to explore how and to what extent China can benefit from the experience of England and Wales in coordinating the relationship between CPAs and ordinary procedure (Chapter V). By referring to David Garland’s ‘penal state’ theory, the foundation and boundaries for comparison are established. Within this framework, three types of CPAs are examined comparatively to uncover the main tension areas between CPAs and ordinary procedure. The coordination of their relationship depends on the objectives that a state expects to achieve through criminal procedures. Correspondingly, four principles are proposed based on the common objectives in the two criminal justice systems to manage those tension areas.

Through four chapters’ exploration, in the concluding chapter answers are provided to the questions of what CPA is, and what the status of CPAs is in each criminal justice system. For the first question, this study emphasizes that a pure model of CPAs is an agreement embedded in the administration of criminal justice with offenders and criminal justice authorities as its main contractual parties, and the mutually-beneficial exchange between offender’s cooperation and legal concession as its content. The evolution of CPAs is correlated with the civilization of criminal

procedure, and the well-functioning of former relies on the fundamental values and principles respected and guaranteed in the latter.

Despite the theoretical pure model, in reality the negotiation process may involve more than two parties, the bargaining chips may be pre-fixed, the presumption of equality between negotiating parties can be transformed into a top-down reward, and more importantly, some variants may gradually evolve into the pure model, and *vice versa*. The exchange of the offender's cooperation and legal concessions may have originated from case by case negotiation. However, bargaining costs, requirements on predictability, and the principle of legality make such a strategy not always desirable. When the contents of cooperation and legal concession are relatively simple, direct and explicit, such as in the case of plea agreement, the pure model of CPA is likely to be transformed into a 'standard agreement'. In the situations where the benefits for parties are implicit or indirect, such as restoration agreement, the negotiation in individual cases is also likely to be transformed into a top-down reward.

As to the second question, in China a rough legal framework for the *quid-pro-quo* relationship between offenders and criminal justice agencies has been gradually developed. However, the procedural rules that regulate the negotiation process are vague. In addition, some fundamental principles such as the right to remain silent have not been fully acknowledged in the Chinese criminal justice system, increasing the risk of miscarriages of justice when using CPAs. While in England and Wales, what can be observed is fine tuning rather than great leaps in both CPAs and ordinary procedure during the past a few years. The patterns of negotiation process have been constantly formalized with relatively fixed terms and conditions. Every reform of CPAs is always attached with detailed conditions, and a system of 'exception of exception' is gradually developing.

Despite these differences, the comparison on the five dimensions of penal state in the two legal systems also shows a trend of convergence. In fact, the current status of CPAs in China more or less reflects the past of that in England and Wales. During the past decades the Chinese criminal procedure has been reformed consciously, though stumblingly, towards civilization. Ups and downs in Chinese legal reforms are a process of upward spiral, reflecting the on-going power competition and re-allocation among different stakeholders – horizontally among the Party, government, the judicial system and the public, and vertically between central and local – in transforming and civilizing criminal justice. With this trend, the convergence between the two legal systems is likely to be strengthened instead of weakened.

Following the answers to these two questions, policy recommendations are provided to the Chinese legislator on situating CPAs into the current criminal justice system. Firstly, at the current stage the scope of CPAs should be restricted due to the limited civilization in ordinary procedure, and the four principles established in Chapter V should be complied with. Secondly, the legislator should pay more attention to the procedural issues in CPAs, especially with respect to enhancing the transparency and formalization of the bargaining process, revising Article 118 of the 2012 CPL to guarantee the offender's right to know, revising the 2012 PSAPL to safeguard the offender's right to a fair trial, reflecting the credits for cooperation in the legal decisions, giving reasons if the normal credits are rejected, and providing remedies when either party refuses or fails to fulfill contractual obligations. Thirdly, for each type of CPAs, the legislator should reconsider its actual goals and functions in the current legal context, and based on that, establish corresponding criteria for filtering offenders and cases and build the detailed proceedings.

Samenvatting

In dit boek staan verschillende typen overeenkomsten centraal die worden gesloten tussen verdachten of veroordeelden aan de ene kant en strafrechtelijke instanties aan de andere kant en waarbij de eerstgenoemden akkoord gaan met bepaalde vormen van samenwerking in ruil voor een milde behandeling door de laatstgenoemde. Deze vormen van strafprocessuele overeenstemming, samenwerking, 'strafrechtelijke procedurele overeenkomsten' (SPOs) genoemd, vormen het voorwerp van dit onderzoek. De benadering is een rechtsvergelijkende. De systemen van China en Engeland en Wales worden met elkaar vergeleken, waarbij de vraag wordt gesteld in welke opzichten de Chinese wetgeving kan worden verbeterd. In deze studie wordt de term 'delinquent' gebruikt om een persoon te beschrijven die wordt beschuldigd, vervolgd of veroordeeld voor het plegen van bepaalde misdrijven in de strafprocedure, terwijl de term 'strafrechtelijke instanties' vooral verwijst naar politie, openbare aanklagers en rechters. Drie SPOs zijn nader onderzocht: de "pleidooi-overeenkomst", "medewerkingsovereenkomst" en de "herstelovereenkomst".

Ongeacht de verschillen in juridische tradities en strafprocessuele stelsels, hebben zowel China als Engeland en Wales procedures ontwikkeld waar strafzaken worden afgedaan via informele, onderhandelbare en wederzijds gunstige staat-burger samenwerking. Deze benadering biedt echter niet de ideale oplossing van misdrijven, maar levert spanningsvelden op waarbij de integriteit van het strafrechtelijke systeem onder druk staat. Wanneer wordt gekeken naar de ontwikkeling van de SPO's binnen de twee specifieke juridische systemen, rijst de centrale vraag: Wat is de positie van SPOs binnen het strafrecht? Deze vraag omvat drie deelvragen: (1) Wat is SPO? (2) Wat is de huidige status van SPOs, mede in relatie tot de gewone procedure in China en Engeland en Wales? En (3) hoe en in welke mate kunnen de spanningsvelden tussen SPOs en de gewone procedure worden ondervangen? Teneinde een antwoord op deze vragen te kunnen geven, begint deze studie met het conceptualiseren van SPO (Hoofdstuk II). Hiervoor is een basismodel ontwikkeld dat het karakter van de verschillende type overeenkomsten weergeeft. Er bestaan echter grijze gebieden in strafrechtelijke procedures en die zijn cruciaal om niet alleen de aard van de samenwerkingsovereenkomst te begrijpen, maar ook de ontwikkeling van SPOs. Derhalve zijn de relevante varianten van het basismodel ook opgenomen in deze studie. Verder worden de drie groepen voorwaarden voor het bestaan van SPOs geanalyseerd om de aard van een dergelijke samenwerking aan het licht te brengen.

Gebaseerd op het basismodel, wordt de huidige status van SPOs in de Chinese en Engelse juridische systemen in de volgende twee hoofdstukken (Hoofdstuk III en IV) onderzocht. In elk hoofdstuk, worden pleidooi-, medewerkings- en herstelovereenkomsten in het specifieke juridische systeem onderzocht vanuit respectievelijk de perspectieven van historische ontwikkeling, huidige juridische systemen, wetgevende motieven en spanningsvelden. Vervolgens worden de eigenschappen en ontwikkeling van SPOs geanalyseerd.

Gezien de bevindingen uit de voorgaande hoofdstukken, wordt in dit proefschrift vervolgens gekeken hoe en in welke mate China baat kan hebben van de ervaringen van Engeland en Wales met het coördineren van verhouding tussen SPOs en de gewone procedure (Hoofdstuk V). Door de verwijzing naar David Garland's 'penal state' theorie worden de basis en grenzen voor vergelijking vastgelegd. Binnen dit raamwerk worden drie typen SPOs vergelijkend onderzocht teneinde de belangrijkste spanningsvelden tussen SPOs en de gewone procedure naar boven te krijgen. Hun verhouding hangt af van de doelstellingen die een staat denkt te bereiken via strafrechtelijke procedures. Vervolgens worden vier uitgangspunten voorgesteld op basis van de gemeenschappelijke doelstellingen in de twee strafrechtelijke systemen om deze spanningsvelden te beheersen.

Als resultaat van vier hoofdstukken worden in het afsluitende hoofdstuk antwoorden gegeven op de vragen wat SPO is en wat de status van SPOs in elk strafrechtelijk systeem is.

Voor wat betreft de eerste vraag benadrukt deze studie dat een basismodel van SPOs een overeenkomst is die is ingebed in het strafprocesrecht en waarbij delinquenten en strafvorderlijke autoriteiten als belangrijkste contractpartijen zijn. Inhoudelijk gaat het om een uitwisseling tussen de medewerking van de delinquent en de juridische tegemoetkoming. De ontwikkeling van de SPOs hangt samen met de civilisatie van het strafprocesrecht en het goed functioneren van de eerste is gebaseerd op de gerespecteerde en gegarandeerde fundamentele waarden en principes van de laatste. In de realiteit kan het onderhandelingsproces meer dan twee partijen omvatten, kunnen de onderhandelingspunten te voren zijn vastgesteld, kan de vooronderstelling van gelijkheid tussen de onderhandelingspartijen onjuist zijn en, nog belangrijker, kunnen sommige varianten geleidelijk opgenomen worden in het basismodel en *vice versa*. De uitwisseling van de medewerking van de delinquent en juridische concessies kunnen zijn ontsproten uit case by case onderhandelingen. Echter, onderhandelingskosten, eisen van rechtszekerheid en het legaliteitsbeginsel maken dat zo'n strategie niet altijd wenselijk is. Wanneer de inhoud van de samenwerking en de juridische concessie relatief simpel is, direct en expliciet, zoals in het geval van een pleidooi-overeenkomst, dan zal het basismodel van SPO naar alle waarschijnlijkheid worden omgevormd tot een 'standaardovereenkomst'.

Wat de tweede vraag betreft, heeft zich in China geleidelijk een globale wettelijke regeling voor de verhouding van de verdachte tot de strafvorderlijke autoriteiten ontwikkeld. De procedurele voorschriften ten aanzien van het onderhandelingsproces zijn echter vaag. Bovendien zijn sommige fundamentele beginselen, zoals het zwijgrecht, in het Chinese strafprocesrecht niet volledig erkend. Dat verhoogt het risico van justitiële dwalingen bij de toepassing van SPO's. Terwijl in Engeland en Wales in de afgelopen paar jaar eerder een fine tuning dan grote sprongen bij zowel SPOs als de gewone procedure kan worden bespeurd. De patronen van het onderhandelingsproces zijn steeds verder geformaliseerd in relatief vaststaande voorschriften en voorwaarden. Elke aanpassing van SPOs gaat altijd gepaard met gedetailleerde voorwaarden en er ontwikkelt zich langzaam een systeem van 'uitzondering op de uitzondering'.

Ondanks deze verschillen laat de vergelijking van de vijf dimensies van de penal state in de twee juridische systemen ook een tendens tot overeenstemming zien. De huidige status van SPOs in China weerspiegelt zelfs min of meer het verleden hiervan in Engeland en Wales. In de afgelopen decennia is het Chinese strafprocesrecht bewust geciviliseerd, zij het met vallen en opstaan. De ups en downs in Chinese juridische hervorming zijn een proces van een opwaartse spiraal, die de constante machtsstrijd weerspiegelt – horizontaal binnen de Partij, regering, het rechtssysteem en het publiek, en verticaal tussen centraal en lokaal – in het proces van omvormen en civiliseren van het strafrecht. Door deze ontwikkeling is het waarschijnlijker dat de overeenstemming tussen de twee juridische systemen wordt versterkt dan verzwakt.

Aansluitend op de antwoorden op deze twee vragen, worden beleidsaanbevelingen gedaan voor de Chinese wetgever om SPOs in het huidige strafrechtssysteem te plaatsen. Ten eerste zou in de huidige situatie het kader voor toepassing van SPOs beperkt moeten zijn vanwege de beperkte civilisatie van de huidige normale procedure, en dienen ze in overeenstemming te zijn met de vier uitgangspunten zoals vastgesteld in hoofdstuk V. Ten tweede zou de wetgever meer aandacht moeten besteden aan de procedurele kant van SPOs, vooral met betrekking tot het versterken van de transparantie en formalisering van het onderhandelingsproces. Ook zou Artikel 118 van de 2012 CPL herzien moeten worden met het oog op het recht van de delinquent op informatie. Herziening van de 2012 PSAPL wordt bepleit om het recht van de verdachte op een eerlijk proces te waarborgen. Ook zouden de voordelen van samenwerkingen moeten worden verankerd, voorwaarden worden opgenomen voor het weigeren van de reguliere voordelen en oplossingen gegeven wanneer een van de partijen weigert of niet in staat is om aan de contractverplichtingen te voldoen.

Ten derde zou de wetgever voor elk type SPOs de eigenlijke doelstellingen en functie binnen de huidige juridische context moeten overwegen en hierop gebaseerd navenante criteria voor de selectie van delinquenten en zaken vaststellen en gedetailleerde procedures opstellen.

简介

本文以中国和英国为研究对象，以改进中国相关立法为目标，对于刑事合意制度进行了深入研究。刑事合意制度是指在刑事诉讼进行过程中，由犯罪嫌疑人与司法机关为协议双方，以前者提供多种形式的协作和后者作出从轻、减轻甚至免除刑事处罚决定为内容的互利式、协商式合作协议。根据犯罪嫌疑人的合作内容，本文主要研究三种形式的刑事合意：认罪合意、协助合意及恢复性合意。

中英两国的刑事司法体系尽管存在法律传统、制度模式以及机构设置等方面的差异，二者均逐渐演变出了一系列司法制度，使得刑事案件在某种程度上可以通过非正式的、可协商的、以及互利的国家——公民合作模式加以解决。然而，这些制度并非处理刑事案件的最佳模式；相反地，它们的适用与司法体系的完整性之间存在着紧张关系。通过审视刑事合意制度在两种司法体系中的发展脉络，本文致力于探讨如何在刑事司法体系中合理定位这种合意制度。它包含三个主要问题：首先，什么是刑事合意制度？其次，刑事合意制度在中英两国目前的模式以及它们与普通刑事诉讼程序之间的关系是怎样的？再次，基于两国司法制度和实践，如何协调这些合意制度与普通诉讼程序之间的紧张关系？

除第一章的简介及第六章的结论外，本文通过四章内容回答以上问题。第二章通过建立刑事合意制度的标准模型，并检视该模型的相关变形，从而将刑事合意制度概念化。以该模型为基础，本文第三章和第四章分别对中英两国三种类型的刑事合意制度进行探讨，分析角度主要涉及历史沿革、现行法律制度、立法动机及其与普通程序的冲突。基于对中英两国刑事合意制度的观察，本文第五章旨在探索中国立法者如何就协调刑事合意制度与普通程序之间的关系一题，从英国司法制度和实践中汲取经验教训。本章首先以 David Garland 的刑罚国家理论为分析框架，探讨中英双方互相借鉴的可能性及借鉴程度。基于该框架，本章进一步对三种主要合意制度在两国刑事司法体系中的异同进行比较，并由此识别出每种制度与普通刑事诉讼程序的主要冲突点。本章的最后一部分探讨协调这些冲突点的具体措施。该部分从国家运用刑事诉讼程序的目的出发，总结出协调冲突的四项基本原则。

基于以上四章的探讨，本文最后对研究问题作出回答。首先，针对什么是刑事合意制度这一问题，本章强调标准模型下的刑事合意以犯罪嫌疑人和司法机关为核心合意双方，以互惠模式下的前者的合作和后者的轻缓处罚为合意内容。同时，本章认为合意制度在刑事司法体系中的产生与该体系的文明化紧密相连。一方面，刑事司法的文明化持续强化犯罪嫌疑人的权利意识和手段，同时不断否认直接的、公开的以及野蛮的强迫手段的正当性。另一方面，诉讼程序的文明化又催生了国家对于司法程序运行便宜性、恢复性等方面的需求。

本文建立起的标准模型在现实中存在多种变形。合意过程可能涉及多方当事人，用于协商的筹码可能已预先确定，协商双方的地位可能不平等。更重要的是，标准模型和它的变形之间存在相互转化的过程。刑事合意制度最先产生于个案。然而考虑到交易成本、案件处理结果的可预知程度、以及合法性原则等因素时，个案协商并非理想模式。当合作的内容相对直接明了时，刑事合意就有可能从标准模型转化为格式合同，这一点在认罪合意中尤为明显。而当合意所涉及的利益是间接且模糊时，个案中的协商就有可能转化为自上而下的奖励，典型的例子就是恢复性合意。

第二个问题涉及刑事合意制度在两国刑事司法体系中的位置。从中国来看，持续完善的诉讼法律规范使得中国刑事司法得以勾勒出合意的轮廓。随着普通程序的不断发展，未来这种轮廓可能会被进一步充实。但是很明显当前的司法体系尚不足以支撑或规制合意的大范围适用。在英国，过去几十年的经验显示出合意制度在刑事司法领域已经进入到微调阶段。协商模式逐

步正规化，并且合意双方的互动逐渐演变为具有稳定模式的格式化条款。因此在英国，合意制度的每次变革都伴随着详细的附加条件，由此演变出一种以“例外的例外”为特征的体系。

尽管中英两国在具体制度上存在差异，两国刑罚国家五个层面的比较揭示出一种趋同的发展态势。本文认为，中国当前的刑事合意的发展状况在某种程度上与英国的过去相类似。在过去几十年中，中国刑事诉讼程序发生了一系列变革，并由此逐步迈向司法文明化。中国司法改革中的起伏并非简单的机械运动。相反地，这是一种螺旋向上的过程。这一过程反映出不同利益相关人之间持续进行的权力竞争和再配置：横向上表现为党、政府、司法机关以及社会公众之间的互动，纵向上表现为中央和地方的互动。基于这样一种趋势，中英两国之间的刑事诉讼程序的融合会持续加强。

在此基础上，本章进一步对在中国构建刑事合意制度提出具体立法建议。总体而言，中国当前尚未建立起完善的刑事诉讼程序，因而立法者应以审慎的态度在有限的范围内适用刑事合意制度，并且适用该制应当遵守第五章提出的四项原则。其次，立法者应当给予程序事项更多关注，这其中包括提高协商过程的规范性和透明性，修改 2012 年《刑事诉讼法》第 118 条以保障犯罪嫌疑人的知情权，修改 2012 年《行政处罚法》以保障犯罪嫌疑人接受公正审判的权利，在司法决定中注明合意双方的对价，并在拒绝从轻处理时给出合理解释，以及在协议失败时提供必要的救济措施等。最后，对于每一种合意而言，立法者应当重新审视该项合意在当前司法体系下的现实功能和目标，并基于此划定该合意的适用范围，建立具体程序。

Curriculum vitae

Wei Pei was born on the 2 March 1987 in Shanxi Province, China. In 2005 she started studying Law at China University of Political Science and Law in China (CUPL). In 2008 she passed the national bar examination, and one year later, obtained the Bachelor's Degree in Law and was recommended to postgraduate program in Law also in CUPL. In 2011, she obtained her Master's Degree in Procedure Law and was selected by the Chinese Scholarship Committee for studying in the Netherlands. From September 2011 until June 2015 she did her Ph.D. research at the Erasmus University Rotterdam. Pei's current research involves criminal procedure law, penal law and criminology.

