

## Overseeing Criminal Justice

### The Supervisory Role of the Public Prosecution Service in China

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*The Chinese public prosecution service, the procuracy, is modelled on the Soviet Union system and has been accorded the controversial function of supervising other legal institutions in the criminal justice system. Drawing upon my own empirical data on the prosecution of crime in China, this article critically examines the way the power of supervision operates from an internal perspective. It argues that the power of supervision has been used as an institutional asset to secure the interests of the procuracy by analysing its oversight of police investigations and court decisions, the way prosecutors perceive themselves, and the efficacy of the supervision in a comparative context. The current status of the procuracy dictates that it is unable to undertake the role of supervision to safeguard the criminal process.*

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## INTRODUCTION

In his comparative study of prosecuting crime in Japan and the U.S, Johnson (2002) enumerates the valuable resources that Japanese prosecutors possess and argues that the authority enjoyed by them is unmatched elsewhere.<sup>1</sup> It is true that prosecutors in Japan benefit from a number of socio-political advantages (such as extensive discretionary power, low crime rates, light case-loads, quiescent politics, enabling law and the absence of juries) in facilitating their prosecution of crime.<sup>2</sup> However, when compared to their counterpart in China the prosecutorial power in Japan may still be overshadowed. Chinese prosecutors do not have the favourable resources they desire, yet they are accorded a supervisory function, which enables them to oversee all the law enforcement agencies, including the courts and the police. This supervisory role makes the Chinese prosecution service, in theory, the mightiest prosecution institution in the world.

The Chinese prosecution service, the People's Procuracy, is modelled on the procuracy system in the Soviet Union, which is not limited to a prosecution service, but is broadly defined as a legal supervisory body.<sup>3</sup> This supervisory role allows the procuracy to engage with all critical stages of the criminal process to ensure the legality of the performance of the criminal justice institutions. This supervisory function encompasses criminal case registration, investigations, trials, enforcement of criminal penalties, reviews of death penalty cases, enforcement of coercive measures, and compensation of victims.<sup>4</sup> These multiple roles have raised the question as to how the procuracy reconciles its own duties and relationships with the other core criminal justice institutions.

In China, the concept of the Iron Triangle, the coalition of the police, the procuracy and the judiciary, defines the three allies that dominate the criminal justice system. Against this background, the supervisory power of the procuracy is likely to create controversial dynamics within the tripartite relationship. Fionda (1995) observes that the relationship between public prosecutors and other key characters in the criminal justice system is subject to the underlying philosophy of the legal system and various causes of antagonism and friction.<sup>5</sup> Thus, exploring the operation of the Chinese procuracy provides an insight into intricate dynamics between the designated role of prosecutors and the quintessential characteristics of a given legal system.

This article examines this unique function of the procuracy in China and the way it exercises that power in criminal justice within a comparative context. It analyses the institutional

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<sup>1</sup> D. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (2002) ch.1.

<sup>2</sup> However it is noted that Japan has introduced the Saiban-in system since 2009, in which six lay assessors and three judges share the role of finding facts and sentencing. See T Katsuta, 'Japan's Rejection of the American Criminal Jury' (2010) 58 *Am. J. Comp. L.* 497.

<sup>3</sup> S. Shaoxia and G. Lixin, 'Lenin's Supervisory Theory of Law and Chinese Procuracy' in *Law and the Development of Society*, ed. J. Faubion (2003) 5, 6 and 8.

<sup>4</sup> K. Li and F. Zhang, 'The Research on the Mechanism of Procuracy' in *Research on the Work Mechanism of Procuracy and Practical Issues*, eds. P. Mu and Z. Zhen (2008) 9.

<sup>5</sup> J. Fionda, *Public prosecutors and discretion: A Comparative Study* (1995) 6.

relations between the procuracy, the police and the judiciary by drawing on empirical data from daily prosecutorial practices. The fieldwork was carried out by myself over a period of six months (including four and half months in 2012 and then a six weeks' follow-up revisit at the same site in 2013) in China. The data was collected through participant observations and semi-structured interviews. Given that the Chinese authority treats every piece of information regarding criminal justice as sensitive, negotiating access to the field sites was difficult. As a result, the participant observations were confined to one local procuracy (site A), which has over 630,000 residents in its jurisdiction. It is situated in an urban area of a big city, the population comprising a mixture of social classes: approximately 70 percent being working class (including migrant workers from surrounding towns and cities, and neighbouring provinces), and having a growing middle class. The procuracy in site A was the busiest prosecution service in the area, dealing with around 2,000 cases each year. I was given unmediated access to the investigative dossiers pending trial and had the opportunity to observe prosecutorial interrogation, following prosecutors' work routines. I was able to speak to the police officers, who sent new cases and required legal opinions from the prosecutors, and to observe trials. Everything I observed in the field was captured in field notes that became a voluminous record detailing the environment, behaviours and conversations of the legal personnel involved. At the end of the observational period, 28 semi-structured interviews with different legal actors (7 police officers, 7 judges, 7 prosecutors and 7 defence lawyers) were conducted in ten geographic areas (site A to J). Prior to the interview, consent was sought from the interviewees, with the consent form being explained in detail and using plain language). All interviews were tape-recorded and transcribed. Throughout this study empirical data are assigned an identification code based upon the resource from which they were collected. In general, the data were drawn either from field notes recording the observation in site A, which are given the code initiated with APU, or from interviews over the ten different sites. Interview data can be recognised with the code as a combination of the letter identifying the field sites and the abbreviation of their legal roles. For example, prosecutors are abbreviated as PS, judges from district courts (or trial courts) are abbreviated as TJ and judges from intermediate courts (or appeal courts) are abbreviated as AJ. Thus, for example, interview excerpts BPS-1 were extracted from the interview with a prosecutor working in site B. I have also monitored 64 cases from the time they were transferred to the procuracy to the final judgment. These cases can be identifiable through the code initiated *CASEA*.

This paper begins with an assessment of the historical background of the Chinese procuracy and the academic debate regarding the function of supervision. This questions the rationality of the supervisory role of prosecutors, especially the conflicting authorities between the procuracy and the judiciary. The second part, outlines the way the procuracy supervises police investigations and evaluates the efficacy of prosecutorial supervision. It moves on to analyse the strategic relationship between the procuracy and the courts, examining what the power of supervision actually means. The final part explores the ethos of prosecutors and how they perceive their role in the criminal justice system.

## THE SOVIET LEGACY AND THE INTRICACY OF THE SUPERVISORY POWER

The Soviet procuracy was the most authoritative institution in the Soviet legal system.<sup>6</sup> It was entrusted to supervise the observance of laws by all ministries, government agencies, enterprises, social organisations, and individuals (general supervision), as well as the application of law in legal processes (special supervision).<sup>7</sup> The Soviet procuracy has its roots in early 18th Century Russia, and was re-introduced by Lenin in 1922 as a centralised, hierarchal, legal institution 'to watch over the establishment in reality of a uniform conception of legality in the whole republic'.<sup>8</sup> Despite the distinctive approach of comprehensive supervision, the Soviet procuracy, with its unitary hierarchical structure, is reminiscent of the public prosecution service in Continental Europe, such as in France and Germany.<sup>9</sup> Also, the Soviet procuracy claimed to be the guardian of socialist legality, which is comparable to the role of inquisitorial prosecutor in protecting individual liberties from the abuse of state power.<sup>10</sup>

The Soviet procuracy system was widely adopted by many former Socialist countries due to political allegiance.<sup>11</sup> Transplanting the Soviet-style procuracy into the Chinese system was predominately a political choice. The fact that in 1949 the newly founded People's Republic of China was a Communist regime, isolated by Western countries, suggests that following the Soviet model was the only option available at the time.<sup>12</sup> The Soviet Union's involvement in the early construction of China's legal system, through sending its legal experts, also played an important role in building a similar procuracy system.<sup>13</sup> Like the process of many other legal transplants, copying the Soviet model was not an easy task, and it has not been transplanted into China in its entirety. Thus, in practice, the Soviet procuracy's general supervisory function has not been adopted, leaving the function of the Chinese procuracy limited to supervising the enforcement of legal institutions. Also, the procuracy has been structured to a dual leadership, subordinated to the local People's Congress at a corresponding level and the procuracy at a higher level, rather than the 'vertical leadership' of the Soviet model.<sup>14</sup> This adaptation is largely due to the lack of funding in the central procuracy and a shortage of professional staff in many deprived regions.<sup>15</sup>

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<sup>6</sup> G. B. Smith, 'The Impact of Socialism on Soviet Legal Institutions and Procedures' (1984) 23 *Colum. J. Transnat'l L.* 315, at 320-322.

<sup>7</sup> *Id.*, p.76 -77.

<sup>8</sup> Smith, *op. cit.*, n.6.

<sup>9</sup> See E Luna and M Wade, *The Prosecutor in Transnational Perspective* (2012).

<sup>10</sup> T Weigend, 'A Judge by Another name? Comparative Perspectives on the Role of the Public Prosecutor' in *The Prosecutor in Transnational Perspective*, eds. E Luna and M Wade (2012) 382. See also J. Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (2005).

<sup>11</sup> H. Oda, 'The Procuracy and the Regular Courts as Enforcers of the Constitutional Rule of Law: The Experience of East Asian States' (1986) 61 *Tulane Law Review.* 1339.

<sup>12</sup> G. Xu, 'Historical Explanation and Rethink about the Procuracy as a Supervisory Institution' (2013) 10 *Dongyue Tribune*, 142, at144.

<sup>13</sup> D. Han and W. Yu, 'The Constitutional Relationship between the Courts, the Procuracy and the Police' (2011) 3 *Legal Study.* 3, at 10.

<sup>14</sup> Oda, *op. cit.*, n. 11. S. C Leng, and H. Chiu, *Criminal Justice in Post-Mao China: Analysis and Documents* (1985) 69.

<sup>15</sup> C. Xie and W. Ren, 'The Influence of the Soviet Procuracy on Our Legal System' (2010)7 *Hebei Law Science* 195, 197. X. Zhao and T. Liu, 'The Shaping and Development of the Procuracy of the People's Republic of China' (2006) 3 *The Jurist* 39, 44. Q. Sun, 'The Glory Journey of the People's Procuracy: In Memory of the Recovery of the People's Procuracy for 30 years' (2008) 11 *People's Procuracy.* 5, at 8.

The early development of the procuracy was fraught with difficulties. Socialist legality, which was highly regarded in the Soviet Union, was treated with suspicion by the Chinese Party leaders.<sup>16</sup> As China's relationship with the Soviet Union deteriorated in the late 1950s, the Soviet bureaucratic model was replaced by Maoist mass mobilisation and 'politics in command'.<sup>17</sup> During the Anti-Rightist Movement between 1957 and 1965, the procuracy's supervisory function was criticised for 'weakening and denying the dictatorship of the proletariat'.<sup>18</sup> Prosecutors were purged as 'right deviationists and revisionists' and attacked for making a 'fetishism of law'.<sup>19</sup> The procuracy ceased to function in the late 1950s and the Party Committees completely controlled the criminal process. During the Cultural Revolution, it continued to be targeted for being a hindrance to the 'proletarian revolution' and was eventually abolished in the early 1970s.<sup>20</sup>

After the Cultural Revolution, the Constitution Law 1978 restored the legal status of the procuracy and its supervisory power to oversee the criminal justice institutions.<sup>21</sup> It is tasked to detect and investigate corruption crimes,<sup>22</sup> sanction arrests,<sup>23</sup> prosecute criminality,<sup>24</sup> and check the legality of trial proceedings and courts' decisions<sup>25</sup> at different stages of the criminal process. These roles are undertaken by different departments of the procuracy. The department of anti-corruption investigation, for example, is responsible for detecting crimes related to public servants in office. The department of prosecution has the duty to bring criminal charges to trial and to have oversight of the court by counter-appealing (*kangsu*) judgments containing errors to a higher court.

This model of supervision, in addition to various procedural commitments, embodies an extraordinary concentration of power. This is justified by the distinct socialist ideology, which is considered to be divergent from the doctrine of the separation of powers.<sup>26</sup> Wang Guiwu explained that because other forms of prosecutorial power arrangements invariably belong to the capitalist discourse and thereby had to be abandoned completely, setting up the procuracy directed by Leninist legal thought was the historical destination.<sup>27</sup> The configuration of procuratorial power was believed to conform to the socialist polity of the People's democratic

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<sup>16</sup> H. Chiu, 'China's Criminal Justice System and the Trial of Pro-democracy Dissidents'(1992) *New York University Journal of International Law and Politics*, 1181. Leng and Chiu, op, cit., n.14, p.16.

<sup>17</sup> Leng and Chiu, op, cit., n.14, p.16.

<sup>18</sup> Oda, op. cit., n. 11, p.1344; Han and Yu, op, cit, n.13; Xie and Ren, op, cit, n.15, p. 197-198. Zhao and Liu, op. cit, n.15. Sun, op. cit, n.15. T. Hsia and W. I. Zeldin, 'Recent Legal Developments in the People's Republic of China' (1987) 28 *Harv. Int'l. L. J.* 249.

<sup>19</sup> Hsia and Zeldin, id., p.21.

<sup>20</sup> Leng and Chiu, op, cit., n.14, p.17-18. Han and Yu, op, cit., n.13. Min Shan, 'The historical change and rethink about the power of the procuracy' (2010) 5 *National Procuracy College Review*. 52, at 62.

<sup>21</sup> The Constitutional Law 1978, Art 43; the procuracy's legal standing has been preserved in the following Constitutional law. See Art 129 of The Constitutional Law 1982 (last amended in 2004).

<sup>22</sup> Criminal Procedure Law 2012, Art 18.

<sup>23</sup> Criminal Procedure Law 2012, Art 78.

<sup>24</sup> Criminal Procedure Law 2012, Art 167.

<sup>25</sup> Criminal Procedure Law 2012, Art 203 and 217.

<sup>26</sup> See C. Xie, 'The Nature of the Power of Procuracy' (2000) 2 *Legal Study of China* 34.

<sup>27</sup> G. Wang, *A Study of the Procuracy in the People's Republic of China* (1991) 164.



dictatorship, which should be organised through the principle of democratic centralism (*minzhu jizhongzhi*) rather than 'the hypercritical capitalist parliamentary system'.<sup>28</sup> This democratic centralism, which adopts the organisational principle of the combination of legislature and administration, suggests that communist institutions exercising sovereign power are entrusted with the protection of the general public; therefore the operation of the state should be prioritised as a matter of expediency, rather than as a question of principle.<sup>29</sup> In this regard, the procuracy is mainly concerned with enforcement of the rule of the political regime,<sup>30</sup> which is not necessarily equivalent to safeguarding the rights of individuals.

As the procuracy is simultaneously committed to several basic tasks in the criminal process, the extent to which this respects a blurring of roles is a point of tension. When Western jurisprudence was introduced into China in the 1990s, scholarly criticism was levelled at the nature of the power of the procuracy, and its triple identity of investigator, prosecutor and supervisor.<sup>31</sup> Chinese academics, such as Chen Ruihua (1999) argued that the procuracy's role as a crime investigator and prosecutor inevitably undermined its status as an independent supervisor, since it was driven by the ambition of winning cases in the courts.<sup>32</sup> Even though the procuracy is defined as an official body of supervision by the constitutional law,<sup>33</sup> this primary function is often influenced by its secondary, but dominating, role of a partisan advocate.

Concerns are also generated by the procuracy's role in court. In light of the prosecutors' supervision, issues regarding the ceremonial ritual of the courts, such as 'should the prosecutor stand up when judges enter the court', have invoked widespread discussion that begs the question of 'who is actually in charge at trial?'<sup>34</sup> Some scholars have argued that the supervision of the courts has sabotaged the authority of the court, establishing the prosecutor as 'the judge over judges' and causing uncertainty in adjudication.<sup>35</sup> As the debate has progressed, it has probed the nature of the power of supervision, begging the critical question as to who should supervise the supervisor: a paradox which seems to have no resolution under the current system. These considerations have given rise to a more general observation: the power of supervision has created an irreconcilable and fundamental conflict with the criminal prosecution principle,

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<sup>28</sup> Z. Mao, *The Selection of Mao Zedong's Works*, vol.4 (1991) 1480.

<sup>29</sup> D. Loeber, 'The Soviet Procuracy and the Rights of the Individual against the State' (1958) 1 *J. Int'l Comm. Jur.* 59, at 60.

<sup>30</sup> Oda, *op. cit.*, n. 11.

<sup>31</sup> There is a substantial body of Chinese literature discussing the nature of the power of the procuracy. See e.g. Y. Wan, 'Basic Study on the Power of Procuracy' (2008) 26 *Political Science and Law Forum* 91; Z. Long, 'The Nature of the Power of the Procuracy and the Legal Reform' (1999) 10 *Legal Studies* 2, 6. X. Hu, 'Rethink and Reconstruct the Power of the Procuracy in China' (2001) 10 *Legal Research and Exploration* 43; W. Chen, 'Rethink and Reconstruct the Power of the Procuracy in China: Based on the Prosecution Power' (2002) 2 *Legal Studies* 3; Y. Hao, 'Questioning the Power of the Procuracy' (1999) 3 *China Renmin University Review* 71.

<sup>32</sup> H. Dong, 'Thoughts about the Multiple Functions of the Judicial Institutions in China' (1997) 4 *China Legal Studies* 27. Chen Ruihua, *The Fronting Edge of Chinese Criminal Justice* (1999) 530.

<sup>33</sup> Pursuant to Art.129 of the Constitutional Law, the People's procuracy is the institution responsible for legal supervision.

<sup>34</sup> Z. Long, 'Should the Prosecutor Stand Up? Some Thoughts about the Court Rituals' (1997) 3 *Legal Studies* 44, 45; W. He, 'The Surprising Question of Whether the Prosecutor Should Stand Up: A Discussion with Mr Long Zongzhi' (1997) 2 *Legal Studies* 58.

<sup>35</sup> Chen, *op. cit.*, n. 31.

both in theory and in practice. Apparently, this tension is derived from the Soviet legacy. As Chen Ruihua (1999) put it:

It is a Utopian-like myth that a State institution with the responsibility to prosecute and detect crimes is given the mission to supervise and guarantee the uniformity of the enforcement of law, and to rectify the wrongs that are made by other legal institutions.<sup>36</sup>

Facing this theoretical dilemma, effort has been directed towards reframing the power of supervision, and academic views have differed on the actual nature of the power of the procuracy. Hitherto, four categorizations have been advanced to define the nature of the procuracy:

(i) an executive power. This school of academics believes that the power of the procuracy should belong to the executive. Compared to judicial power, this proposition argues that the procuracy lacks an independent status; its decision is not legally binding, nor does it have the effect of a final resolution.<sup>37</sup>

(ii) a judicial power. Directly opposed to the aforementioned position, this viewpoint believes that prosecutors serve as guardians of the criminal justice system; their prosecutorial decisions are based upon evidence and facts, the function of which should place it alongside the judiciary.<sup>38</sup>

(iii) double ascriptions. This view argues that the power of procuracy embodies the characteristics of both the executive and the judiciary: the vertical leadership of the procuracy makes it closer to the executive and its activities concerning prosecution resemble the judicial power.<sup>39</sup>

(iv) a supervisory power. This proposition affirms that the power of the procuracy should preserve its Soviet heritage and operate as a supervisory body. It argues that the function of supervision should be perceived as a unique form of state power, despite it presenting certain features similar to the executive and the judiciary.<sup>40</sup> As Zhang Zhihui argued:

The fundamental reason why the constitutional law juxtaposes the procuracy's power of supervision with the power of government and the power of adjudication is not because it wants the procuracy to share the power of the executive with the government, nor does it want the procuracy to share the power of the judiciary. The constitutional law does so purely because it wants the procuracy to supervise the government and the judiciary.<sup>41</sup>

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<sup>36</sup> Chen, op. cit., n. 32, p.531.

<sup>37</sup> Chen, op. cit., n. 31.; Hao, op. cit., n. 31.

<sup>38</sup> Long, op. cit., n. 31.

<sup>39</sup> Y. Wan, 'Some basic theoretical issues on the power of the prosecution: Returning to the starting point of the doctrine of the procuracy' (2008) 3 *Tribunal of Political Science and Law* 91, 92.

<sup>40</sup> See S. Tan, *The Research of the Chinese Judicial Reform* (2000); C. Xie, 'The Nature of the Procuracy' (2000) 2 *Legal Studies* 34; Z. Zhang, *A Study of the Power of the Procuracy* (2007) p. 34.

<sup>41</sup> Z. Zhang, 'The Power of Procuracy and its Supervisory Nature' (2004) 3 *The Procuracy of Shanxi* 76, 76.



While these proposals might be useful in exploring the controversial function of the procuracy, some crucial issues, such as the independence of the procuracy, have been side-lined in the debate. *UN Guidelines for Prosecutors (UN Guidelines)* and *The Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (The Standards)* require that prosecutors perform their duties without prejudice, favour or intimidation.<sup>42</sup> Regarding this standard, how to adjust prosecutors' affiliation to different branches of the state, so that prosecutors can maintain neutrality, has often been a focal point in Western academic discussion. For example, criticism has been levelled at the affinity between prosecutors and judges in Italy after the Constitutional law severed the link between the prosecution and political bodies and attached the power of the prosecution to the judiciary.<sup>43</sup> In France, academic attention has been given to a conflict between the independence of *procureurs* and the requirement that prosecutors be democratically accountable to the Minister of Justice, thereby being susceptible to interference in sensitive cases.<sup>44</sup> In England and Wales, prosecutors' impartiality is projected in articulation between the long established police force and the relatively new creation of the Crown Prosecution Service (CPS). Even though the CPS has a sphere of responsibility, which is independent, it has been criticised for a lack of objectivity due to its subordination to the police.<sup>45</sup>

In China the procuracy's independence from executive bodies, organisations or individuals, is explicitly stated in the Constitutional Law.<sup>46</sup> Yet the procuracy's 'dual subordination' has placed the procuracy in a vulnerable position to deal with various political bodies whilst maintaining its independence. For instance, the procuracy's subordination to the local congress is reflected in the reality that the local council controls the personnel and the operational budget of the procuracy.<sup>47</sup> Local influences are able to interfere with prosecutors' actions in individual cases via higher ranked officials within the procuracy.<sup>48</sup> Meanwhile the procuracy's political accountability to the Communist Party also allows certain Party institutions to intervene in prosecutors' decision-making. Thus the Political-legal Committee, a Party institution responsible for coordinating the relationship between different legal institutions, has, historically, created a tension between the independence of the procuracy and the requirement that the procuracy follow the Party's leadership.<sup>49</sup> This has been demonstrated most clearly in the exercise of the Political-legal Committee's power to issue directions to prosecutors in influential cases that resulted in miscarriages of justice. After a negative social response, in

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<sup>42</sup> *UN Guidelines*, 4 and 13; *The Standards*, 3.

<sup>43</sup> M Caianiello, 'The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?' in *The Prosecutor in Transnational Perspective*, eds, E Luna and M Wade (2012) p. 255.

<sup>44</sup> J. Hodgson, 'Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations' (2002) 29 *Journal of Law and Society* 236. See also Hodgson, op. cit., n.10.

<sup>45</sup> See B. Hancock and J. Jackson, *Standards for prosecutors: An Analysis of the United Kingdom National Prosecuting Agencies* (2006) ch 4. F. Belloni and J. Hodgson, *Criminal Injustice: An Evaluation of the Criminal Justice Process in Britain* (2000) ch 6. A. Sanders et al., *Criminal Justice* (2010) ch7.

<sup>46</sup> The Constitutional Law, Art. 131.

<sup>47</sup> Y. Du and J. Zhang, 'Research on the Personnel Management of the Procuracy', the 13th Annual Conference Paper of Shanghai Social Science 2015. C. Yuang, 'The Financial Safeguards of the Procuracy' (2014) 4 *Legal System and Society* 229.

<sup>48</sup> See Y Mou, 'Beyond Legitimate Grounds: External Influences and the Discretionary Power not to Prosecute in the People's Republic of China' in *Discretionary Criminal Justice in a Comparative Context*, eds. M. Caianiello and J. Hodgson (2015)121.

<sup>49</sup> *Id.*

recent years the Political-legal Committee has gradually suspended its power to issue instructions in individual cases, but in practice Party institutions still have an overriding authority over the procuracy, and influence the procuracy in a less formal way.<sup>50</sup>

## SUPERVISING THE POLICE INVESTIGATION

If a role of supervision accords with the logic of the criminal procedure, it would be best demonstrated in its oversight of the police. Supervision over the legality of the police investigation has been perceived as an essential part of the function of the prosecution in many countries and is endorsed by the International Association of Prosecutors. For example, *The Standards* require prosecutors to 'ensure that the investigation services respect legal precepts and fundamental human rights' when supervising the police investigation.<sup>51</sup> Prosecutors' control of police over investigation is a common feature in countries with the inquisitorial tradition. Prosecutors in adversarial systems do not have any substantive involvement in the phase of investigation.<sup>52</sup> Nevertheless, in some jurisdictions such as England and Wales, the police may seek appropriate advice from prosecutors to facilitate the effectiveness of an investigation and prosecution.<sup>53</sup>

In countries with an inquisitorial influence, the level of prosecutors' involvement in the police investigation varies, depending on the specific police-prosecutor relationship mandated by law. Thus, Dutch prosecutors are responsible for 'all aspects of criminal investigation', ensuring the police comply with law.<sup>54</sup> Likewise in France, the *procureur* oversees the majority of the police investigation, including questioning suspects held in police custody (*garde à vue*).<sup>55</sup> Although the effectiveness of this supervisory model over the conduct of investigations has been criticised, it is designed to provide a safeguard to suspects, preventing intrusive infringements of an individual's liberty.<sup>56</sup> The Italian prosecutor's involvement with police investigation is less prominent compared to other inquisitorial countries; yet they can still exercise authority over certain units among the police corps.<sup>57</sup> Japanese prosecutors perhaps possess the highest level of control over investigation, and routinely 'interact with the police during the pre-charge

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<sup>50</sup> Id. See also 'Self-reform of the Central Political-Legal Committee: No Interference with Individual Cases' (*News.ifeng* 14/07/2013) < [http://news.ifeng.com/mainland/detail\\_2013\\_07/14/27479910\\_0.shtml](http://news.ifeng.com/mainland/detail_2013_07/14/27479910_0.shtml) > accessed at 3/11/2014.

<sup>51</sup> *The Standards*, 4.2 (b). See also 'The Role of Public Prosecution in the Criminal Justice System' in Council of Europe Recommendation (2000) 19, 22(a).

<sup>52</sup> Hancock and Jackson, op. cit., n. 45. Belloni and Hodgson, op. cit., n. 45, ch 2-4. D. Harris, 'The Interaction and Relationship Between Prosecutors and Police Officers in the United States, and How this Affects Police Reform' in *The Prosecutor in Transnational Perspective*, eds. E Luna and M Wade (2012) p. 56.

<sup>53</sup> CPS, 'Prosecution Policy and Guidance' < [http://www.cps.gov.uk/legal/a\\_to\\_c/cps\\_relations\\_with\\_the\\_police/](http://www.cps.gov.uk/legal/a_to_c/cps_relations_with_the_police/) >.

<sup>54</sup> Although in practice, the police are in charge of most investigation due to the limited prosecution resource. See P. J. P. Tak, 'The Dutch Prosecutor: A Prosecuting and Sentencing Officer' in *The Prosecutor in Transnational Perspective*, eds. E Luna and M Wade (2012) p.141.

<sup>55</sup> See also Hodgson, op. cit., n.10. p.144.

<sup>56</sup> Id., p. 146.

<sup>57</sup> Caianiello, op. cit., n. 43., p.252.

investigation', rather than simply relying on the police for information.<sup>58</sup> Their proactive stance illustrates that prosecutors are the dominant partners in the police-prosecutor relationship.

Comparative empirical research suggests that the effectiveness of the public prosecutors' authority to direct the investigation should not be overstated. Mathias' (2002) study of prosecutorial supervision in Germany, Belgium and France reveals that prosecutors can do little about the investigation, because the police seldom inform them until the inquiry is almost over.<sup>59</sup> Chinese prosecutorial supervision, similar to this practice, is also passive and has an 'after-event' model. Most police investigations are carried out solely by the police.<sup>60</sup> Only when the police have completed their investigation and have transferred the case to the procuracy can prosecutors intervene, and issue further directions and guidance to the police if evidence requires, thereby prolonging the investigative phase.<sup>61</sup> This procedural arrangement cuts short the prosecutorial supervision, leaving the main police investigation free from any sort of direct external scrutiny.<sup>62</sup> Rather than monitoring how the investigation is conducted, the prosecutorial oversight focuses upon the end product of the police work, mostly through examining the investigative dossier and interrogating suspects. Prosecutors are also allowed to gather evidence, such as interviewing the victim and witnesses, to evaluate the case independently, but this is restricted to limited categories of circumstances.<sup>63</sup>

Hodgson's (2005) research indicates that the French prosecutor's oversight is merely a paper exercise, as the *procureur* is mostly concerned with the result of the investigation. Since the *procureur* aligns herself with the police, the police are given a free hand in constructing the case against suspects.<sup>64</sup> The oversight of the police in China is very similar to their French counterparts in that their primary concern is not about the actual process, but rather about the end product of investigations, that is whether the basic written evidence is completed and whether the formalities of the evidence comply with legal requirements. However, the Chinese prosecutor goes further to assist the police in various ways to achieve this outcome.

Reviewing the investigative dossier is regarded as fundamental to the prosecution's work. In China, witnesses are rarely called to testify at trial;<sup>65</sup> as a result, the investigative dossier containing written evidence *de facto* determines the ultimate issue of the guilt or innocence of

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<sup>58</sup> Johnson, op. cit., n.1., p.51-55.

<sup>59</sup> E. Mathias, 'The Balance of Power between the Police and the Public Prosecutor', in *European Criminal Procedures* eds. D Mireille and J Spencer (2002) 459-487.

<sup>60</sup> W. Chen and Y. Hao, 'A Study of the Integration of the Investigation and the Prosecution: On the Necessity of Reforming the Criminal Justice System in China' (1999) 1 *China Legal Studies* 58, at 64.

<sup>61</sup> According to CPL 2012, Art. 171, the procuracy can require a maximum of two further investigation conducted by the police to gather further evidence.

<sup>62</sup> Although the police must request the authorisation from the procuracy in order to remand suspects in custody, the procuracy does not monitor other police work.

<sup>63</sup> This is often subject to local practices. For example, at site A, prosecutors only interview the victims in rape and assault cases.

<sup>64</sup> Hodgson, op. cit., n.10.

<sup>65</sup> It is generally believed that in less than 5 per cent of the cases, witnesses appear at court to provide testimony in China. The reasons for the absence of witnesses (including both witnesses for the prosecution and for the defence) at trial is multifaceted, which is beyond the analysis of this article.

the accused in the vast majority of instances. For example, the prosecutors at site A spent much time chasing a missing notification of the victim's rights from the police,<sup>66</sup> correcting a statement in which the critical date fell outside of the legal period,<sup>67</sup> or providing consultancy as to how to fix a suspicious interrogation record that was not signed by the accused.<sup>68</sup> As long as the written evidence appears lawful in format and conforms to legal requirements, the police case is approved by prosecutors, disregarding the methods of construction. In a drug trafficking case (*CASE A 47*), the prosecutor discovered that a record of the quantity of the drug had not been made. This procedural mistake seemed impossible to rectify due to the lapse of time. Nevertheless, a record of the quantity of the drug with a perfectly matched date and the suspect's signature was subsequently sought and obtained by the procuracy.

The tactics employed by the police to resolve all sorts of procedural mistakes were familiar to the prosecutors, who rarely demonstrated any desire to investigate the legality of the process of evidence collection. The authenticity of the legal documents was never questioned by prosecutors. Prosecutors constantly gave constructive legal advice to enhance the probative value of the written evidence, and to make a procedurally flawed case appear persuasive. When an unlawful issue was identified by the prosecutors, they assisted the police in legitimising the tainted evidence. On one occasion, a senior prosecutor addressed two police officers who distorted the details of the witness' testimony, resulting in all of the written statements in the dossier being suspiciously identical:

I have to warn you that if you keep making all the details of different accounts exactly the same, the truthfulness of these statements will be doubted. In many circumstances, witnesses cannot remember the exact time. [...] So if you just keep the details roughly the same and leave some reasonable discrepancies, the evidence is more convincing. If you try to match everything in the dossier, the effect may be contrary. (Field note APU-55)

In reviewing the police work, the objective of the prosecutor is to offer professional guidance, so that the construction of a legally coherent dossier can withstand the scrutiny of the court. Nevertheless the prosecutor's supervisory power should not be overemphasised in terms of the way in which prosecutors can influence the police investigation. Prosecutors can give instructions to the police regarding evidence gathering to fulfil the prosecution's criteria, after they have reviewed the case dossier. However, the police did not always respond to the prosecutor's instructions.<sup>69</sup> Despite prosecutors' heavy workloads, occasionally they had to undertake evidence gathering themselves, partly because 'the quality of the police case was not up to scratch', and partly because the police ignored their advice.<sup>70</sup>

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<sup>66</sup> Field note APU19.

<sup>67</sup> Field note APU18.

<sup>68</sup> Field note APU19.

<sup>69</sup> Field notes APU-37, 38 and 41. See also M. McConville et al., *Criminal Justice in China: An Empirical Inquiry* (2011) 385.

<sup>70</sup> Field notes APU-41, 42, 60 and 62.

Pursuant to Article 168 and 170 of Criminal Procedural Law 2012 (CPL 2012), prosecutors have the duty to interrogate suspects in order to verify the veracity of the accounts and to supervise the investigation process. Yet in practice, prosecutorial interrogation is largely routinised, and hardly shows any zeal for exploring potential anomalies in the police-dominated investigation. It was often carried out in a way that validated the statements contained in the investigative dossier. Questions were deliberately formulated to lead suspects to confess and to dovetail with the police case. The interrogating questions, such as 'how did you conduct the theft?', rather than 'did you conduct the theft?', implied that the crime in question had been acknowledged.<sup>71</sup> Likewise, the suspect was asked how much profit she had received from the transaction, rather than asking whether the illegal transaction generated any profit.<sup>72</sup> Suspects were dissuaded from giving a story that was inconsistent with the case dossier. Most of the prosecutors' records of interrogation were pre-typed by copying suspects' previous statements in the investigative dossier as a general practice. When suspects pleaded guilty, the 'ready-to-sign' interrogation record was produced to complete the process.

Confessions are the primary source of evidence in China, upon which the police construct their case and the prosecution relies for disposal at court.<sup>73</sup> Hence when confessions were retracted or disputed during prosecutorial interrogation, suspects were subject to a range of coercive tactics, from tough lectures, oppressive abuse, such as being shouted at, or the prosecutor slamming furniture,<sup>74</sup> to psychological threats, such as threatening to prosecute suspects' close family or deliberately delaying the case,<sup>75</sup> depending on how suspects responded. In one case, a suspect refused to confess, and the prosecutor decided to educate him:

Let me tell you, the crime you committed does not carry a heavy penalty. If you confess, you can get out of the prison very quickly, possibly before the Spring Festival. It will make our work much easier. [...] This is purely for your own benefit. You can look after your child if you get out [of the prison] earlier. Think about your child, your wife and your parents. Be responsible! (Field note APU- 62)

On this occasion, the prosecutor's advice was not appreciated. The suspect insisted that the whole process was set up by the police, the drug was planted and he was innocent. Not believing his story, the frustrated prosecutor's tension escalated. He thumped the desk and shouted at the suspect:

You deserve to be locked up for a very long time. Let's see who is right. You deserve it. I can make your stay in the prison as long as possible!<sup>76</sup>(Field note APU- 62)

The prosecutorial interrogation provides an opportunity for the prosecutor to oversee the legality of the investigation, ensuring the proper treatment of suspects, but in reality this

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<sup>71</sup> Field note APU-34.

<sup>72</sup> Field note APU-12.

<sup>73</sup> See McConville et al., *op. cit.*, n.69, Ch.4.

<sup>74</sup> Field note APU-12, 13 and 62.

<sup>75</sup> Field note APU-34, 37, 38 and 62.

<sup>76</sup> The prosecutor did honour his words in this instance. He recommended a sentence at the top of the tariff which was adopted by the court. Field note APU- 62.



function is largely overlooked. Illegally obtained evidence and malpractice reported by suspects are routinely disregarded and are rarely investigated by prosecutors. The alleged maltreatment of suspects during the prosecutorial interrogation was simply disregarded when the issue of torture and the use of other illicit methods were brought up by suspects. Where a suspect made such assertions, the reaction of the prosecutor was either outright scepticism or to ignore it. In *CASE A 34*, when the suspect complained, 'I was hung up and beaten by the police', it was greeted with indifference by the prosecutor; and when suspects reported police cruelty towards other witnesses in *CASE A 42*, 'the police poured hot chilli-pepper water into the nostrils of the prostitutes', the response was an accusation that the suspect was lying. Although a substantial number of cases involved such allegations,<sup>77</sup> in only one case was the claim of torture taken seriously, and one confession was excluded by prosecutors at site A. The exclusion of one statement did not make much difference to that case, as suspects were invariably forced to make multiple confessions (usually between three and eleven). In other cases, no further action was initiated.

#### OVERSEEING THE COURTS

The relationship between prosecutors and judges varies from country to country, subject to its legal tradition. Prosecutors working in a hierarchical model usually maintain a superior position, on a par with the adjudicator.<sup>78</sup> This exalted position is derived from the complex role of adjudication, which has a far-reaching consequence of judicial independence. In France the judicial function has historically encompassed a prosecutorial and investigative role, as well as one of adjudication. The office of public prosecutor, created out of the multiple roles of the judge, is inherently close to that of judges. The two legal actors belong to the broadly defined *magistrature*, and partake in investigative and judicial functions.<sup>79</sup> Their status as *magistrates* means that they have received a common training background and can move between the two roles seamlessly.<sup>80</sup> In Germany and the Netherlands, influenced by the French system, judges and prosecutors are also trained together and are able to switch between the two roles. They also have an overlapping history that develops a natural bond.<sup>81</sup> The similar ties of collegiality and exchangeable career paths of the two roles have also extended to Japan.<sup>82</sup> However, this close relationship between the two legal actors stems from a divergent historical origin, in which the prosecutor played a dominant role, 'controlling all budgetary and administrative matters of the judiciary',<sup>83</sup> whereas the court was a 'semi-independent organ' in the Ministry of

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<sup>77</sup> Out of the 64 cases that I followed, 27 cases were alleged to have involved serious malpractice (from overbearing behaviours to torture) of the police.

<sup>78</sup> M.R. Damaska, *The faces of justice and state authority* (1986) 18-23.

<sup>79</sup> Prosecutors have a quasi-judicial role in the pre-trial stage and the trial judge adopts an interventionist stance, actively questioning the participants for information. This also includes *juge d'instruction*, the *magistrate* responsible for investigating serious cases through the procedure known as *instruction*. See Hodgson, *op. cit.*, n.10., ch. 3.

<sup>80</sup> *Id.*

<sup>81</sup> Fionda, *op. cit.*, n.5, p.159. Weigend, *op. cit.*, n.10, p.382.

<sup>82</sup> Although Japan was influenced by the United States after World War II, it embodies features from inquisitorial traditions, especially Germany. Johnson, *op. cit.*, n. 1., p. 65.

<sup>83</sup> *Id.*, 61.



Justice run by prosecutors.<sup>84</sup> This historical development has created a compliant judiciary that tends to be co-operative with the prosecution.<sup>85</sup>

Adversarial systems are founded on the rationale that the trial resembles a contest between two parties. The prosecutor, as a party, is distant from the arbiter of facts, who plays a passive and neutral role. In this aspect, the adversarial model readily complies with the international standards that require the prosecutorial role to be kept separate from the judicial role.<sup>86</sup> Within adversarial systems, the prosecutorial power and judicial review are not equally matched. For example, the judicial review in the United States has been criticised as not being strong enough to check the prosecutor's power in affecting sentences in guilty plea cases.<sup>87</sup> This is often justified by the belief that prosecutors are entrusted by the local voters to act responsibly as neutral quasi-judicial officers, who are accorded the discretion to divert a case from the court.<sup>88</sup> In contrast, England and Wales have a stronger judicial review. Judges not only have sole responsibility for sentencing,<sup>89</sup> but are also able to scrutinise the CPS's discretion regarding the prosecution of a certain case and whether it constitutes an abuse of process.<sup>90</sup>

In China, the prosecutor-judge relationship is less influenced by the historical development of the two institutions, but is determined by the political-legal context. The procuracy has the power to supervise the courts through counter-appealing an erroneous judgment pursuant to Article 217 of CPL 2012.<sup>91</sup> When mistakes regarding the ascertaining of fact or application of law are identified,<sup>92</sup> the prosecutor can initiate a re-trial by submitting the case to a higher level. Here the case in question will be reviewed and the prosecution supported at the higher court. If the suspected error is confirmed by the court, the responsible judges will be subject to disciplinary sanctions.

This power to counter-appeal, however, has been disputed by some academics, who have questioned whether the action of counter-appealing is a real *power* of supervision. For example, Li Guimao (1997) argues that since this prosecutorial action does not compel the court to conform to the proposition of the procuracy, and the ultimate decision rests in the hands of the judge, the power to counter-appeal should be better framed as a prosecutorial suggestion.

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*, 62.

<sup>86</sup> *UN Guidelines*, 17.

<sup>87</sup> See Alissa P Worden, 'The Judge's Role in Plea Bargaining: An Analysis of Judges' agreement with prosecutors' sentencing recommendations (1995) 12 *Just.Q.* 257. Albert W Alschuler, 'The Prosecutor's Role in Plea Bargaining' (2015) 36 *U. Chi.L.Rev.* 50. Stephanos Bibas, 'Plea Bargaining Outside the Shadow of Trial' (2003) 117 *Harv.L.Rev.* 2464.

<sup>88</sup> See Ronald Wright and Marc Miller, 'The Worldwide Accountability Deficit for Prosecutors' (2010) 67 *Wash. & Lee L. Rev.* 1587. Candace McCoy, 'Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform' (2005) 50 *Crim. L.Q.* 67. Gregory M Gilchrist, 'Plea Bargains, Convictions and Legitimacy' (2011) 48 *Am. Crim. L.Rev.* 143.

<sup>89</sup> However, prosecutors do have a significant input on sentencing through prosecution and charging decisions. See Barry Hancock and John Jackson, *Standards for prosecutors: UK analysis: An analysis of the United Kingdom National Prosecuting Agencies* (Wolf Legal Publishers 2008) 107.

<sup>90</sup> See e.g. *R v Croydon Justices, ex Parte Dean* [1993] 3 All ER 129.

<sup>91</sup> Loeber, *op. cit.*, n.29.

<sup>92</sup> Normally, the counter-appeal should be initiated before the judgment becomes final. However, according to articles 242 and 243, a re-trial can also be launched if an error in terms of the verdict or sentence is identified.

<sup>93</sup>Despite this academic dispute, prosecutors interviewed in this study have indicated that they are pleased with the power to check the work of the court, which gives them a sense of control of the outcome of cases.<sup>94</sup> However this type of supervision is sparingly used in practice and oversight is not a central theme in the relationship. Prosecutors are more concerned with building mutual trust with judges than causing any friction.

Until 2015, the prosecutor's work performance was evaluated by the Appraisal System (*jixiao kaohe zhidi*) that connected the prosecutors' bonuses and promotion opportunities within their ranks to performance indicators, such as the conviction rate of prosecuted cases.<sup>95</sup> It was a managerial framework devised to incentivise prosecutors to engineer the success of prosecutions; high conviction rates would bring benefits, whereas an acquittal would lead to a disadvantaged position. Although the abolition of the Appraisal System has officially been announced,<sup>96</sup> it has a long-lasting impact on the practice of the prosecution. My recent follow up interviews with prosecutors illustrate that the conviction rates have continued to be used as a reference to measure the achievements of the leaders of the procuracy. According to these prosecutors, 'no essential change has been made' and avoiding acquittals remains their focus.<sup>97</sup>

The Appraisal System, together with a host of external factors (such as undue interference and media manipulated public opinion) has constituted a systematic body of 'hidden rules' (*qianguizi*), playing like the 'invisible hand' of the criminal justice system.<sup>98</sup> These 'hidden rules' are the embodiment of cultural values that emphasise the importance of deference to authority and hierarchical structures. In many ways they function as conventions in directing the criminal justice system, thereby undermining the legitimacy of enacted laws. Fang Baoguo (2011) has noted that these rules are a reflection of the internal power struggles of criminal justice institutions.<sup>99</sup> The existence of such implicit rules indicates the limited efficacy of law in regulating the system. These implicit rules are routinely obeyed and constantly invoked to resolve the conflicts of interest that develop in practice. Over time, they have become working norms which regulate the behaviour of state officials. Non-compliance leads to consequences

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<sup>93</sup> See Li Guimao, 'The Reform of the Supervisory System of Chinese Legal System' (1997) 2 *Chinese Social Science* 122.

<sup>94</sup> Interview BPS-1, APS-4 and APS-3.

<sup>95</sup> Zhu Tonghui, 'The Appraisal System in the Criminal Justice System' (2009) 1 *Law and Social Science* 5; Li Enshen, 'The Li Zhuang Case: Examining the Challenges Facing Criminal Defence Lawyer in China' (2010) 24 *Columbia Journal of Asian Law* 129, 164.

<sup>96</sup> On 20th January 2015, the Political and Judicial Commission under the Central Committee of the Communist Party mandated all the central and local criminal justice institutions to overhaul the performance indicators and to 'resolutely' cancel unreasonable appraisal items, including criminal detention rate, arrest rate, prosecution rate, conviction rate and case trial clear-up rate. 'Abolishing the four rates: Delightful Improvement in Human Rights Protection' (China News, 22/01/2015) <<http://www.chinanews.com/sh/2015/01-22/6995633.shtml>>.

<sup>97</sup> Interviews APO-14, APS-18 and APO-15, conducted in December 2015 and April 2016.

<sup>98</sup> Liu Lei, 'Miscarriages of Justice made by the hidden rules' (2015) 15 *Journal of Fujianjiangxia University* 33, 35. See also Chen Ruihua, 'The hidden Rules in Chinese criminal justice' (2016) *Sina Weblog* <<http://www.chinalaw124.com/sifajujiao/20160514/15451.html>>. Wang Haiyan, 'Reasonable explanation: Undermining the defence provisions and safeguards of alienation' (2012) 6 *Tribune of Political Science and Law* 25, 27.

<sup>99</sup> Fang Baoguo, *The Hidden Rules of Criminal Evidence in China* (2011) ch.1

for the relevant state official (including punishment) and affects the interests of the criminal justice institutions within which he or she works.<sup>100</sup>

Against this backdrop, prosecutors have strategically aligned themselves with their neighbouring court<sup>101</sup> in the same institutional hierarchy. When a case was likely to be acquitted by the court, the court would inform the prosecutor proactively, and the prosecutor would withdraw the case immediately,<sup>102</sup> or secretly replace the case with a different one prior to the court hearing.<sup>103</sup> If the application of the law was controversially subjective, a discussion would be initiated by judges and negotiation would be conducted privately to reach a common understanding.<sup>104</sup> In exchange, prosecutors would courteously give a hint to the court if errors were found in judgments, rather than launching a counter-appeal.<sup>105</sup> In this mutually beneficial relationship, co-operation has replaced oversight. A relationship has been developed which enables their respective interests to be reconciled so as to avoid confrontation and loss of face.

Despite this alliance, the procuracy has never relinquished its power of supervision, and if needed, the counter-appeal remains a useful bargaining chip in securing the interests of the procuracy. This is exemplified by a 'crisis' caused by a potential acquittal witnessed by the author.<sup>106</sup> During my fieldwork, the court intended to acquit a defendant due to an inappropriate charge of 'public provocation and picking quarrels (*xingxun zishi zui*)'.<sup>107</sup> When the procuracy received the news, it was too late to withdraw the case; and to minimise the damage, they offered to trade the acquittal for two potential counter-appeals arising from mistakes found in two previous judgments.<sup>108</sup> An agreement was eventually reached that the court would convict the defendant on the condition that the procuracy would drop the two counter-appeals.<sup>109</sup>

It is noted that such 'trade-off' negotiation is not conducive to their co-operative relationship, and is therefore not commonly seen in daily practice. Nevertheless, it reflects the interplay of the dynamic relations between the two institutions. As a senior prosecutor commented, the two institutions are not just bound in a bureaucratic alliance, but are involved in interrelationships that are in the nature of a game:

I think we should call this 'mutual games playing'. [...] The two [the procuracy and the court] have some devices and mechanisms to control each other, yet they also have some mutual interests between themselves. The game playing has led to a very special type of relationship. (Interview APS-5)

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<sup>100</sup> Id.

<sup>101</sup> In China, many buildings of the procuracy and the court are adjacent, and prosecutors are given free access to the offices of judges.

<sup>102</sup> Withdrawing a case to avoid acquittal is a normal practice. See Huang Qiusheng, 'The Research on the Quality of the Cases Prosecuted by Taizhou Procuracy' (2007) 5 *Zhejiang Procuracy* 87, 89.

<sup>103</sup> Field note APU-59.

<sup>104</sup> Field note APU-5.

<sup>105</sup> Field note APU-24.

<sup>106</sup> Field notes APU-6, 7, 8, 9 and 10.

<sup>107</sup> This is a type of public disorder offence.

<sup>108</sup> Field notes APU-6 and 7.

<sup>109</sup> Field notes APU-9 and 10.

The two institutions constantly think about each other's actions and rationalise their own functioning to preserve their interests, either in the form of privileges awarded for achievement or the respect in which they are held by the other.

China has a very high conviction rate, with acquittals being seen as anomalies in the criminal justice system.<sup>110</sup> When a rare acquittal occurs, the case will be subject to strict scrutiny by the procuracy. In extreme instances, the procuracy would initiate an investigation against responsible judges, searching for potential corruption or judicial misconduct.<sup>111</sup> The procuracy's power of supervision is not only embodied in counter-appealing erroneous judgments, but by the proactive power to investigate crimes committed by government officials, including judges. Some prosecutors have suggested that judges' fear of the investigative power contributes to their harmonious relationship.<sup>112</sup>

It has been acknowledged that the capacity to initiate a counter-appeal and to investigate corruption and misconduct has been 'an important weapon in the power struggle' within the criminal justice system.<sup>113</sup> This may explain the reason why the courts show extraordinary tolerance of prosecutors' sometimes inappropriate behaviour at trial. During my fieldwork, prosecutors were observed to make speeches of denunciation that were so emotionally charged, they could be classified as oppressive.<sup>114</sup> Foul language used by the prosecutor to address the defendant was so inappropriate that it fell below professional standards, and when the defence protested, the judge remained silent.<sup>115</sup> The court's acquiescence in such prosecutorial behaviour occasionally led to poorly controlled proceedings. Thus, in one instance two defence lawyers were told by a prosecutor to 'shut up' when it was their turn to proffer an argument.<sup>116</sup> The prosecutor's usurpation of the judge's role clearly suggested who was really in charge of the trial.

The prosecutors' aggressive behaviour at trial, on the one hand, demonstrated the reality that they and the court were *de facto* on the same side, and furthermore, it demonstrated 'a degree of equivalence' between these two.<sup>117</sup> As far as many judges are concerned, prosecutors have never been treated as ordinary parties in the courtroom: they are an authority. A senior judge illustrated this through an example:

There are many things that have happened in China that you can never imagine occurring in other countries. Many years ago, when I was still a court clerk, one day in the trial, a prosecutor found that after the cross-examination and evidence were adduced, the result of the case was adverse to him. So he stood up, took

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<sup>110</sup> According to the available official statistics of China, the conviction rates in recent years are: 99.86 per cent (the year of 2008), 99.98 per cent (the year of 2009), 99.9 per cent (the year of 2010). See *Law Yearbook of China* (2009) 166; *Law Yearbook of China* (2010) 159; *Law Yearbook of China* (2011) 202.

<sup>111</sup> See, for example, Xu Yu, 'A Criminal Judge Committed Perjury and Was Convicted' (2000) <<http://www.people.com.cn/GB/channel11/20000517/66927.html>> accessed on 23/04/2016.

<sup>112</sup> Field note APU 62.

<sup>113</sup> Id.

<sup>114</sup> Field note APU-43, 44, 46 and 47.

<sup>115</sup> Field note APU-61.

<sup>116</sup> Field notes APU-12 and APU-64.

<sup>117</sup> This has also been discussed in Mike McConville et al.'s study. See McConville et al., op. cit., n.69, p.388.

all the dossiers and stormed away from the court. [...] Then, the court had to adjourn the trial and communicate with the prosecutor afterwards. In the end, the case was settled, but the prosecutor's behaviour was really surprising. [...] In our country, the prosecutors are really powerful. (Interview GAJ-1)

These instances may not represent all prosecutors in China; yet these examples raise concerns regarding the professional standards of the prosecutor, and how the supervisory power has been exercised. Since the question of 'who should supervise the supervisor' remains unanswered in the Chinese context, it is crucial to understand who the prosecutors are, and how they understand their own role.

### THE ETHOS OF CHINESE PROSECUTORS

International norms require that prosecutors must be individuals of integrity and ability, with appropriate education and training, and must be selected according to objective factors on a non-discriminatory basis according to fair and impartial procedures.<sup>118</sup> In civil law jurisdictions, such as Germany, France, Italy, the Netherlands and Spain, the recruitment of career prosecutors is bureaucratic and is conducted in a similar way to that of judges. The prosecutors-to-be have to pass judicial examinations and undergo a period of practical training before being assigned to take on the prosecutorial function.<sup>119</sup> Prosecutors, as quasi-judicial figures, are expected to observe ethical standards in relation to impartiality, integrity and diligence.<sup>120</sup> Common law countries do not have a separate profession of prosecutor, rather they are drawn from ranks of practising lawyers. Thus, the CPS in England and Wales recruits from qualified solicitors and barristers, and runs its own legal trainee scheme.<sup>121</sup> Qualified Crown Prosecutors are required to follow ethical standards specified in the Code for Crown Prosecutors and the Civil Service Code, as well as the standards set out by the Bar and The Law Society.<sup>122</sup>

Entrance to the career of prosecutor in China follows an approach similar to that in Continental European countries. Candidates intending to join the professions of lawyers, judges and prosecutors are required to hold a graduate degree and pass the National Justice Examination introduced in 2001.<sup>123</sup> Prospective prosecutors must also take civil servant examinations according to the post and may have to satisfy further preconditions, such as a postgraduate degree, before they are appointed. The recruitment of prosecutors is identical to

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<sup>118</sup> *UN Guidelines*, 1, 2 (a) and (b).

<sup>119</sup> See G. D. Federico, *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain* (2005).

<sup>120</sup> *Id.*, 65-66.

<sup>121</sup> Hancock and Jackson, *op. cit.*, n. 45, p.89.

<sup>122</sup> *Id.*, 91-92.

<sup>123</sup> X. Sun, 'The Dilemma of the Legal Education and How to Break Through: An Report on the Connection of Legal Education and The National Justice Examination System' (2012) 9 *Legal Study* 108-116. M. Qian, 'Problems on the 7-year Implementation of the National Justice Examination' (2009) 4 *Research of Rule of Law* 98. X. Zhang and L. Xu, 'Research on the National Justice Examination' (2011) *Justice of China* 77-78.



that of the judiciary, although it is generally believed that holding a post in the courts is more attractive than being a prosecutor at the same level.<sup>124</sup>

The educational background and competitive examinations create an almost familial bond between the two branches of the legal profession.<sup>125</sup> Judges and prosecutors at the same level often develop a good working relationship, or even friendship.<sup>126</sup> A few prosecutors expressed their wish to become judges, and entitled to a better salary and bonuses.<sup>127</sup> Aside from the income, their dissatisfaction was particularly geared towards the heavy caseloads and deadline pressures with which they have to cope. It has become a repeated pattern that a few years after new recruits have settled into the job of prosecution, waning enthusiasm and a limited salary prompts many to seek less stressful positions. The leader of the procuracy at Site A explained:

We put the most vigorous and talented young staff in the position of prosecution. However, the problem is that the turnover of the prosecutors is very fast. Once those able and talented young prosecutors have shown their ability, they tend to leave for other departments. Therefore, we are an unsettled army. (Field note APU-2)

Prosecutors can become disillusioned, cynical or even depressed over time, suffering from 'burnout', as many American public defenders with similar work conditions have experienced.<sup>128</sup> Those who have remained in prosecution for a long time have found excuses to justify the slippage in the quality of cases and their mindless work style. This dissatisfaction is demonstrated in complaints lamenting their low payment.

You can understand why we don't have the passion for our work now. For a whole month, we have to process about 15 cases, but we are paid so little. Defence lawyers charge 10,000 yuan for one case, and we are paid 3,000 yuan for an average of 15 cases each month. How can we guarantee the quality? If we are paid as much as the defence lawyers, I will work so hard on each case. (Field note APU-47)

Resentment against the 'drudgery' of work has been a constant theme in office conversations. Prosecutors often dismissed themselves as 'working machines' and 'paperwork slaves'.<sup>129</sup> This is contrasted with the authoritative image projected by legal rhetoric. The disparity of salary between prosecutors and judges seems to contradict the claimed superior position. Over time, the inadequate financial recognition has led to low self-worth. McConville et al (2011) suggest that this loss of personal esteem is largely attributable to a lack of professionalism, which if present, could provide a sense of competence.<sup>130</sup> Indeed, professionalism was rarely emphasised or apparent in their daily practice. The procuracy at site A was regarded as 'a model unit (*shifan danwei*)', receiving good practice awards and demonstrating prosecution

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<sup>124</sup> Interviews ATJ-1, GAJ-1, 2.

<sup>125</sup> See McConville et al., *op. cit.*, n.69., p.386-390.

<sup>126</sup> Field notes APU-23, 24, 36 and 45.

<sup>127</sup> Interviews BPS-1, APS-5 and 6.

<sup>128</sup> See C. J Ogletree, 'Beyond Justifications: Seeking Motivations to Sustain Public Defenders' (1993) 6 *Harvard Law Review* 1239; B. S Otey, 'Buffering Burnout: Preparing the Online Generation for the Occupational Hazards of the Legal Profession' (2014) *South California Interdisciplinary Law Journal* 147; L Norton et al, 'Burnout and Compassion Fatigue: What Lawyers Need to Know' (2015) 84 *UMKC.L Rev.* 987.

<sup>129</sup> Field notes APU-2, 11 & 44, and interview BPS-1.

<sup>130</sup> McConville et al., *op. cit.*, n.69., p.390.



techniques to neighbouring procuracies,<sup>131</sup> yet there were few useful training programmes available for the prosecutors. The majority of courses offered to the prosecutors were focused on Party propaganda, rather than providing useful skills, or cultivating professional values. In one instance, a prosecutor commented that an organised mock trial competition in which he took part was helpful in advancing his legal arguments; but he soon added that better 'legal theories' cannot guarantee success in real life.<sup>132</sup> Some prosecutors commented that most training was 'totally a waste of time'.<sup>133</sup> Few of them were willing to participate in further training or education due to a heavy caseload.

As a type of apprenticeship, the prosecutor's skills and experiences are largely derived from the direction and guidance of the experienced main prosecutor (*zhusu jianchaguan*) in the office.<sup>134</sup> When a junior prosecutor is allocated, the main prosecutor is accountable for all of the cases processed by the inexperienced prosecutor. The main prosecutors are responsible for distributing cases to the prosecutors in their offices, giving directions, and checking the progress and relevant issues in the cases. The main prosecutors are influential figures in the procuracy and their performance and personal values largely shape their professional competence. Nonetheless, working experience does not always correlate with the level of professionalism. In fact, main prosecutors have been observed to be antagonistic and tactical in manipulating the system and in dealing with the accused. On one occasion, a suspect confessed to a prosecutor an undetected crime of theft, during a prosecutorial interrogation. The junior prosecutor had never encountered such a situation before, noted down the new crime and reported it to the main prosecutor. It was expected that the prosecutor would liaise with the police and supervise the investigation. However, the main prosecutor was angry that the junior prosecutor had increased their workload by recording the new crime:

Why did you write it down? Don't you think we have enough cases to handle? If the victims or the police did not file the case, we do not bother to investigate. Now, since you have written it down, you have to send the case to the police. You are looking for your own troubles. (Field note APU-16)

Prosecutors are depicted in legal rhetoric as being able to impartially review the case, treating inculpatory and exculpatory evidence equally.<sup>135</sup> When asked how they perceived their role as prosecutors, a few of them responded to me that 'they were objective' and 'fair to suspects',<sup>136</sup> although a number of prosecutors distinguished between 'what they were supposed to be' and 'what they actually were'.

Our role is defined as an accusing party. However, during the criminal procedure, we should try our best to be fair with all cases. (APS-2 interview)

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<sup>131</sup> Field notes APU-45 & 46.

<sup>132</sup> Field note APU-5.

<sup>133</sup> Field note APU-12.

<sup>134</sup> The title may vary depending on different areas. In some parts of China, the main prosecutors were simply called '*jianchaguan*'.

<sup>135</sup> CPL 2012, Art 7, 8 and 50.

<sup>136</sup> Interviews APU-1, 4, 6, 13 and 5.

Frankly speaking, as a prosecutor in China, it is impossible to be a neutral officer. Our job is to accuse and charge suspects. It is very hard to be neutral, because our workload is very heavy, and we feel under pressure all the time. (APS-3 interview)

My observations suggested that despite the awareness of the neutral role and their legal duty to be 'fair' with suspects, this is not always the case. A junior prosecutor explained that he was shocked at the way prosecutorial interrogation 'should' be conducted. He described how, after his first visit with the main prosecutor in the detention centre, his supervisor taught him to make the suspect confess:

At first, the suspect did not plead guilty. The prosecutor was so angry. He thumped the desk and threatened the suspect. Then, the suspect was scared. He said his wife was beaten up by the police. He was too angry to tell the truth. But eventually, he confessed and pleaded guilty. (Field-note APU-32)

It became apparent that the ability to subjugate suspects was an essential skill for prosecutors. Senior prosecutors often stereotyped suspects as 'sly and despicable'.<sup>137</sup> Thus, 'competent prosecutors' are expected to overawe suspects with their 'aura of authority' by the way they behave and talk.<sup>138</sup> This image of authority is regarded as important, because 'it can make the suspect speak the truth', thereby processing the case in a cost-efficient manner.<sup>139</sup> As all prosecutors, both male and female, are supposed to be iron-handed when confronting the suspect during the interrogation, this has the effect of shaping the character of the individual. This point was elaborated by a senior prosecutor, who opined that female prosecutors must lose their femininity to become capable prosecutors:

I don't think ladies should work as prosecutors. [...] This work will cause a personality change. Just have a look at the able female prosecutors I know. They are all very aggressive and talk like trumpeting. [...] I still remember A (a female prosecutor) when she was just recruited into our department, such a sweet girl! But now, I don't even think she is a woman. (Field-note APU-63)

Every prosecutorial interrogation is a test for prosecutors. In order to prove their ability to obtain confessions, tough cases are often handled with inappropriate determination. In a drink and driving case (*CASE A 38*) the suspect, claimed that it was his wife who had driven the car, and they had just swapped seats when the police found them. The prosecutor did not believe the story, and threatened that the suspect would 'definitely be sent to prison'. However, none of the evidence could prove that the suspect actually drove the car, apart from the recanted confession of the suspect, who alleged that it was given under the effect of intoxication. Nevertheless, the prosecutor still decided to charge the suspect. He sent a message to inform the suspect that a perjury case would be filed against his wife if he refused to plead guilty, which would result in both being sent to prison. Unable to cope with the pressure, the suspect confessed. When asked why the prosecutor persevered despite a lack of evidence, he answered:

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<sup>137</sup> Field note APU-4.

<sup>138</sup> Field note APU-14.

<sup>139</sup> Field note APU-23; Interview APS-1.

According to the law, this case can be withdrawn, but our work is not just the law.<sup>140</sup> [...] Sometimes, it is about what I believe. [...] It used to be that we were allowed to beat suspects in the interrogations. Now, it is a shame that we cannot. But I understand why the police beat suspects. They simply do not tell the truth. Those people deserve punishment, and I just want to teach them a lesson. (Field-note APU-47)

This account is a manifestation of force, with little concern for professionalism. Yet it is noted that prosecutors' use of the power available to threaten the accused who refuses to plead guilty, is not restricted to China. In the United States, for example, public prosecutors can charge suspects with draconian sentences in retaliation for their lack of cooperation.<sup>141</sup> The Chinese prosecutors' decision to prosecute, as with their American counterparts, is within their discretion and is essentially unreviewable. Their overbearing behaviour towards suspects during prosecutorial interrogations suggests that there is a shared presumption of guilt between the police and prosecutors, in which case prosecutors are unlikely to constrain the police effectively. With little professional training in place, prosecutors' endorsement and understanding of police malpractice is entrenched through the apprenticing of new recruits in the prosecutor's office.

## CONCLUSION

The Chinese procuracy's responsibility for overseeing the enforcement of law by other criminal justice institutions is undoubtedly controversial in the light of democratic legal rationales. As an approach divergent from Western legal systems, the construction of the procuracy in China and its Soviet prototype were designed to facilitate the centralised Socialist authority and the highly controlled justice system in their particular socio-political contexts. In this perspective, the judiciary, the police and other legal institutions are treated equally as law enforcement agencies, despite their distinctive functions, whereas the procuracy, with a superior position, is entrusted as a guardian of justice. This special legal status of the procuracy embodies a remarkable confidence of the State in the procuracy's ability in maintaining Socialist legal order and ensuring strict observance of law.

However, the role the procuracy performs in supervising other criminal justice institutions is, in practice, rather different from the expectation given through official rhetoric. This has been particularly demonstrated by the fact that prosecutors control neither the police nor the courts. Their oversight of the police investigation is perceived as essential to ensure quality of the police case and compliance with legal procedure. Nevertheless, the review of the procuracy, as an after-event model, is unable to direct the investigation effectually until the police inquiry is over, leaving the police investigation insulated from external review. More problematically, prosecutors' actions are driven by a concern with the presentation of investigative dossiers which can withstand the scrutiny of the court, rather than the actual process, or the reliability

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<sup>140</sup> It is noted that all prosecutors in China have the absolute power to prosecute the case; however, they have very limited discretion in deciding not to prosecute. The power to decide not to prosecute suspects resides in the hands of the chief prosecutor of the procuracy. See Mou, op, cit., n. 48.

<sup>141</sup> See e.g. *Bordenkircher v Hayes* 434 U.S. 357, 365 (1978). When Paul Hayes, a defendant with previous felony convictions who forged a cheque for a small amount, refused to plead guilty in exchange for a five-year sentence, he was sentenced to life imprisonment. See also N. Vamos, "Please don't call it "plea bargaining"" (2009) *Criminal Law Review* 620.

of the evidence produced. Since prosecutors are aligned with the police in their common objective of securing a conviction, their actions are geared towards shoring up the case prepared by the police, such as providing legal advice to cover up illegally obtained evidence, or procuring guilty pleas from suspects to confirm their earlier confessions gained through a range of oppressive tactics if necessary. Oversight in this context is helping the police conceal or legitimise their malpractices, even to the extent of educating them in how to falsify evidence. In this regard, prosecutors, by failing to intervene in the face of apparent and persistent procedural irregularity, are subservient to the police who are supposed to be supervised by them.

While the procuracy's supervisory power over the courts has in theory given rise to quandaries, this power has rarely been exercised to challenge a court's authority. Yet this by no means implies that the power of supervision has been relinquished. In fact, it has been used sparingly, not for the purpose of ensuring the correct application of law by the courts, but as a bargaining chip, both to pursue the interests of the procuracy and to maintain its authoritative façade. In this setting, the procuracy-court relationship is discreetly calculative, driven by the 'hidden rules' to maximise its interests. On the one hand, the procuracy has strategically maintained close cooperation to obtain the support from the courts in fulfilling its institutional target. On the other hand, the supervisory function will be deployed, in the name of law, to pressurise the courts when judicial decisions are detrimental to the procuracy. The result of this special relationship is the impaired autonomy of the court in performing its independent function, which is demonstrated in judges' assistance of the procuracy in maintaining a high conviction rate, and the court's failure to protect the procedural rights of the defendant, even in public proceedings.

It is clear that the superior legal status derived from their supervisory function fails to translate into the self-esteem of prosecutors and make them totally commit to their duties. Many prosecutors have experienced burnout due to high caseloads, constant time pressures, inadequate legal training and limited funding. With a lack of motivation, their dissatisfaction is sometimes vented on suspects, through aggressive demands for guilty pleas in prosecutorial interrogations. Their coercive-compliant interrogative style is no different from that of the police, casting doubt on their capacity to fulfil the supervisory role. As prosecutors fail to comply with rules, or safeguard the rights of suspects themselves, they are unlikely to request other institutions to do so. There is little doubt that the role that the procuracy plays in achieving the correct enforcement of law is far from having any real substance. Mainly being used as an asset to secure its institutional interests, the unique supervisory function of the procuracy, makes it an instrument of the political regime, rather than of justice.