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Reforms to China's pretrial detention system: the role of the procuratorate

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Abstract

Pretrial detention in China is not subject to judicial review. The suspect is usually detained through the whole pre-trial and trial stages in the criminal proceeding. China's ongoing criminal justice reform attempts to change this practice in order to offer more protections to suspects through revising the Criminal Procedure Law. This article, framed in the theory of "living law", takes an insider approach by looking into the demarcation of power and interest among various criminal justice authorities and internal units within the People's Procuratorates along with China's detention reform. The empirical findings based on intensive interviews of "insiders" show a different picture from what outsiders may expect. The power struggles among criminal justice authorities and internal units within the procuratorate failed to achieve the purpose of detention reform. Although there have been some positive changes in Province AH's pilot project, such changes are unsustainable due to the uncertain institutional arrangement.

Keywords: Detention system reform; Judicial review; China's procuratorate; Local judicial ecology

1. Introduction: the post-arrest detention review system in China

In criminal proceedings, pretrial detention or other coercive measures often unwarrantedly damage a citizen's personal freedom. There is growing literature on the comparative study of

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pre-trial detention system.[1] However, little attention has been paid to China.[2] Existing literature on criminal justice in China focuses on criminal trial,[3] investigation[4] and lawyers.[5] There has been little research conducted on the role of the procuratorate in arrest and detention,[6] which is a stark contrast to the relevant research on the public prosecutor's office in other jurisdictions.[7]

Different from Western countries, detention in China is neither an independent, coercive measure nor constrained by the principle of "arrest before detention". Prior to the amendments made to the Criminal Procedure Law in 2012 (the CPL),[8] the decision-making agencies, the People's Procuratorates, were under no legal obligations to review the necessity of continued detention of the accused after the decision to arrest had been made. The arrest system is originally put in place to ensure that the defendants can attend the subsequent trial rather than to punish the defendants in advance without a trial. The People's Procuratorate has a stake in prosecuting criminal offences. When the Procuratorate makes a decision on arrest and detention in the pretrial phase, the key factor taken into account is whether the arrest is beneficial to the criminal investigation and prosecution.[9] Therefore, as shown in Section 2, as long as the evidence is satisfactory for the purpose of prosecuting a crime, the suspect is to be arrested and detained even if he commits a minor crime or has a low risk of escape when he/she is

[1]See P. H. P. H. M. C. Van Kempen (ed.), Pretrial Detention: Human Rights, Criminal Procedural Law and Penitentiary Law, Comparative Law, Intersentia Publishing Ltd (2012); European Commission, "Accompanying Document to the Proposal for a Council Framework Decision on the European Supervision Order in Pre-trial Procedures between Member States of the European Union: Impact Assessment", (29 August, 2006), http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/docs/sec_2006_1079_en.pdf9.

[2]Limited but helpful studies include Mike McConville et al., Criminal Justice in China: An Empirical Inquiry, Edward Elgar Publishing (2011). In this book, Chapter 3 discusses the police powers in relation to detention and arrest. However, the study here only focuses on the police power and rarely touches up the role played by the procuratorate. Elisa Nesossi, China's Pre-Trial Justice, Criminal Justice, Human Rights and Legal Reforms in Contemporary China, Wildy, Simmonds & Hill Publishing (2012); Yanyou Yi, "Arrest as Punishment: The Abuse of Arrest in the People's Republic of China", 10 Punishment & Society 2008 (1): 9. These two studies were made before the amendment to the Criminal Procedure Law and therefore are outdated and less relevant to the latest development in this field.

[3]For an account on China's court system, see generally Tom Ginsburg, "Judicial Independence in East Asia: Implications for China", University of Chicago Public Law & Legal Theory Working Paper No. 295, 2010; Randall Peerenboom (ed.), Judicial Independence in China, Cambridge University Press (2010); Ni He, Chinese Criminal Trials: A Comprehensive Empirical Inquiry, Springer (2014).

[4]For an account on China's police and police power, see generally Kam C. Wong, Police Reform in China, CRC Press (2012); Sarah Biddulph, Legal Reform and Administrative Detention Powers in China, Cambridge University Press (2007).

[5]On China's lawyers, see Ethan Michelson, "Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism", 113 American Journal of Sociology 2007 (2): 352–414; Ethan Michelson, "The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work", 40 Law & Society Review 2006 (1): 1–38; Sida Liu & Terence C. Halliday, "Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers", 45 Law & Society Review 2011 (4): 831–865.

[6]Keith Hand, "Watching the Watchdog: China's State Compensation Law as a Remedy for Procuratorial Misconduct", 9 Pacific Rim Law & Policy Journal 2000 (1): 95–138.

[7]On the prosecutorial system in the EU, the US and Japan, see Katalin Ligeti (ed.), Toward a Prosecutor for the European Union, Beck/Hart Publishing (2013); Joan E. Jacoby, The American Prosecutor: A Search for Identity, Lexington Books (1980); David T. Anderson, The Japanese Way of Justice: Prosecuting Crime in Japan, Oxford University Press (2001) (which applies a law and sociology analytic approach to compare the role of the public prosecutor's offices in the US and Japan).

[8]Unless otherwise stated, the CPL throughout the article refers to the Criminal Procedure Law 2012.

[9]Article 3 of the PRC CPL 2012. In practice, the pretrial stage includes such steps as filing a case, investigation, and institution of prosecution, and both detention and arrest take place in this stage, which is different from the Western countries. Jianfu Chen, Chinese Law: Context and Transformation, Martinus Nijhoff Publishers (2008), 304.

guaranteed under the bail pending trial. In practice, once the suspect gets arrested and detained, he remains detained so long as the investigation, prosecution and trial procedure carries on. As a result, many suspects are "detained through [the whole pretrial and trial processes]". This practice was established in the Arrest and Detention Rules (1954 & 1979) and later confirmed by the CPL (1979 & 1996) and a series of judicial interpretations set forth by the Supreme People's Procuratorate (the SPP), such as the Tentative Rules on the Work in relation to the Review of Arrest and Prosecution of the Criminal Cases That Are Directly Accepted by the People's Procuratorates (1991), and the People's Procuratorate's Criminal Litigation Rules (Trial) (1999). In China, the phenomena of "arrest for investigation" and "excessive detention" have become common and widespread, which has led to the conventional emphasis on prosecution and punishment in criminal adjudication and reckless disregard for the protection of rights.

China's "high rate of detention" and practice of "the suspect being detained through" is apparently a striking contrast to the general principle of "having most suspects released on bail with the exception of custody" in Western countries.[10] Scholars have attributed this striking practical difference to the lack of a neutral and impartial judicial review mechanism in the pretrial detention phase and the absence of post-arrest detention review system; others have attributed this to the fact that detention has been deliberately used as a tool for punishment.[11] In 2000, academics discussed at length how to reform the pretrial detention system and the possibility of shifting the decision-making power on arrest to the courts in order to respect the suspect's personal liberty and change the practice of excessive detention.[12] The Supreme People's Procuratorate initiated a large scale of campaign to clean up those excessively-extended detention cases. These proposals were ultimately not taken up and the campaign only achieved a short-term effect. The community voiced out after the death of several suspects detained in the houses of detention in 2009.[13] There has been a widespread concern about the "detained through" and unfair treatment to the suspects.[14] In 2012, China introduced into the CPL[15] a required review system for post-arrest detention with the hope of achieving "fewer and more cautious detention[s]". This objective was further advanced in the National Human Rights Action Plan of China (2012–2015), emphasizing that, other than making significant progress in

[10]See Federal Bureau of Statistics, "Federal Pretrial Release and Detention 1996" (February 1999), http://www.bjs.gov/content/pub/pdf/fprd96.pdf; A. M. Van Kalmthout et al. (eds.), Pretrial Detention in the European Union: An Analysis of Minimum Standards in Pretrial Detention and the Grounds for Regular Review in the Member States of the EU, Wolf Legal Publishers (2009), 42.

[11]Yanyou Yi, "Arrest as Punishment: The Abuse of Arrest in the People's Republic of China", 10 Punishment & Society 2008 (1): 15.

[12]Weidong Chen and Jihua Liu, "Who Has the Power to Arrest You? [Shui You Quanli Daibu Ni]", China's Lawyer [Zhongguo Lvshi], 2000 (9), (10). Meanwhile, how to reform the detention center system through revising the Regulations on Detention Center (1990) and removing the detention center out of the jurisdiction of the public security organs were discussed by legal scholars. Zengming Fang, "Some Thoughts on Revising on Regulations on Detention Center" [Kanshousuo Tiaoli Xiugai De Jidian Sikao], Journal of Public Security [Gongan Xuekan], 2000 (3).

[13]One well-known case is called "hide-and-seek (*Duo Maomao*)". In February 2009, a 24-year-old Li Qiaoming died from a head injury while being held for illegal logging in a detention center in Yunnan Province. The officials in the detention center claimed that Li hit his head on a wall while blindfolded during a game of "Duo Maomao" with his cellmates. This explanation elicited an outcry from Chinese netizens and many of them suspected the policemen of using brutality. "Death Sparks Debate on Detention Center Operations", Dui Hua, (29 April, 2009).

[14]Cheng Lei et al., Legislative Issues on the Houses of Detention [Kanshousuo Lifa Wenti Yanjiu], China Legal System Press [Zhongguo Fazhi Chubanshe] (2014), chapter 6.

[15]CPL, Art. 93.

the field of human rights, the Chinese government is to set forth higher and more specific criteria in human rights promotion and protection.

Although the CPL assigns the power of detention necessity review to the People's Procuratorates, the issue of "which internal unit(s) shall own the power" is not crystal clear. This has also aroused much controversy in various operating lines within the procuratorial system. The SPP, with the aim of resolving the controversy, stipulated in the amended Rules on the Criminal Procedure of the People's Procuratorate (Trial Implementation) (2012) (the Rules) that the power shall be executed by the (operating lines of) case-handling units within the procuratorates.[16]

In the practice of China's People's Procuratorate, the case-handling units usually refer to: the investigation supervision unit, which possesses the power to make decisions on arrest; the public prosecution unit, which is responsible for the decisions over indictment and prosecution; and duty crime investigation units, which investigate duty crimes (including corruption and bribery crimes and malpractice crimes). As this article studies the detention review system, the case-handling units throughout the article mainly refer to the investigation supervision unit and the public prosecution unit.

What needs to be pointed out is that various local procuratorial agencies have proposed different pilot schemes for the allocation of the power. For instance, the People's Procuratorates in some provinces attempt to assign the power of detention necessity review to the non-case-handling unit, that is, the prison and detention center supervision unit (the PD supervision unit) in the local procuratorates. The PD supervision unit is responsible for supervising the legality of the public security organ's detaining suspects in the detention centers rather than dealing with criminal cases. For the three units, the investigation supervision unit and the PD supervision unit mainly function during the investigative stage, while the public prosecution unit executes its power during both prosecution and trial stages just like the public prosecutors in other countries. Apparently, the meaning and effect may be different when different units within the People's Procuratorates execute the power. It is worth thoroughly thinking about why China's CPL allocated the power over the detention necessity review to the People's Procuratorate (instead of the People's Court), why the SPP in turn allocated the review power to the case-handling units, and what the operating effect of the local pilot scheme is. These questions not only concern the effective and efficient distribution of power for the post-arrest detention review but also illustrate China's logic of criminal justice reform.

The conventional research approach is a rule-centered normative analysis through a literature review by investigating the legal prescriptions in the CPL and the Rules and analyzing the key characteristics, advancements, and restrictions of the detention review system. Alternatively, a comparative study can be deployed to compare the detention review system in China's new CPL with the judicial review model adopted in some other jurisdictions, and then a series of legislative suggestions may be made to improve China's detention review system. The "living law" theory convinces us of the difference between the law in black letters and law in reality. The success of any reform to improve the protection of the suspects' rights is not only determined by how law is formulated but also by how law is implemented by the actors. A more appealing but challenging way of solving these puzzling, yet practically important, questions is a so-called insider approach through the field research consisting of both participatory observation and in-depth interview. By doing so, we are in a better position to know the front line of procuratorial practice and therefore

[16]Article 617, the Rules.

to understand the on-the-ground reality of lower-level procuratorial agencies when reformative measures are designed and deployed. China's legal system is a closed regime, which is not transparent or well-known to outsiders. Against this background, any field research in China is bound to be limited in terms of the generality. One of the authors was able to work in AH's Procuratorate for one year (April 2013–April 2014). During this period of time, this author became a participating observer in a provincial-level procuratorate, witnessing how the detention review system was discussed, debated and implemented in AH, and how the review power was bargained for, allocated and balanced among various internal units within the procuratorates. The advantages of this insider approach are obvious in the sense that a close and intimate familiarity with a given group of individuals and their practices as well as their environment can be gained. Further, 47 criminal law experts were interviewed during the same period, and these interviewees included 27 procurators, 6 judges, 3 criminal lawyers, 5 scholars, 4 police officers, 1 official in the political-legal committee and 1 local congress member, whose background and relevant experience are listed in the table in the end.[17] The major source of empirical research was from AH (36 interviewees), an eastern coastal province. Some other experts were interviewed in Province BJ (the other eastern coastal province), Province CS (a western inland province), Province DT (a northern province), Province EY (a central-inland province) and the SPP. But the number of these interviewees outside AH (11 interviewees) is limited. Selecting AH as the key locality for research has merits. AH was pointed out by the Communist Party of China (the CCP) as the key trial province for the new round of judicial reform in China. It was the intention that any experience or lesson obtained in AH's pilot program would be observed and taken up by other provinces at a later stage. In the field of law and sociology, selecting a representative court or law firm in a specific province[18] or locality[19] in pursuit of some empirical evidence is quite common. In order to address the generality issue, the interviewees in AH included those who participated in the formulation and implementation of the detention review system in AH. Most interviewees were from the procuratorates at all levels in AH and were heavily involved in this reform scheme. The interviewees included some heads of the local-level procuratorates and prosecutors without any administrative duties. Lawyers and scholars are also important in this reforming process and some of them were interviewed. Some second-hand information is also cited where relevant.

The rest of this article proceeds as follows. Part 2 briefs the pretrial detention system and its legal basis outlined in the CPL. Major problems of the current system and the reform measures introduced by the CPL are outlined as well. Part 3 looks into how the power struggle among various units within the procuratorate fails to achieve the objective of the review scheme, and the SPP's tactical solutions. Local experiments were investigated in Part 4, showing a "local

[17]The codes of interviewees are formatted to be "P14AH01": "P" refers to the authority for which the interviewee works (e.g., I, police officers; P, Procurators; J, Judges; S, scholars; L, lawyers; Z, official in the political-legal committee; C, local congress member); "14" refers to the year of interviews; AH refers to the provinces (SPP, abbr. S) where the interviewees are working; "01" refers to the interviewee's serial number in the same group of interviewees with the same occupation and the same interview year.

[18]E.g. Xin He & Yang Su, "Do the 'Haves' Come Out Ahead in Shanghai Courts?", 10 Journal of Empirical Legal Studies 2013(1): 121–146; Ni He, Chinese Criminal Trials: A Comprehensive Empirical Inquiry, Springer (2014), Chapter 5; Sida Liu, "Client Influence and the Contingency of Professionalism: The Work of Elite Corporate Lawyers in China", 40 Law & Society Review 2006 (4): 751–782.

[19]E.g. Sida Liu, "Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court", 31 Law & Social Inquiry 2006(1): 75–106; Xin He, "Black Hole of Responsibility: The Adjudication Committee's Role in a Chinese Court," 46 Law & Society Review 2012 (4): 681–712; Xin He, "Debt-Collection in the Less Developed Regions of China: An Empirical Study from a Basic-Level Court in Shaanxi Province," 206 The China Quarterly 2011: 253–275.

judicial ecology", which refers to a dynamic interactions amongst judicial actors such as prosecutors and the judicial environment that re-shapes the way that reformative measures are implemented. Part 5 concludes the article by integrating the structural and political roots of China's reform of its current detention system, and its legal system in general.

2. Pretrial detention and the CPL

Criminal justice in China has always over-stressed prosecution and punishment. This is heavily affected by the crime control ideology[20] and by the conservative philosophy of offering limited rights protection to the presumably guilty who are accused during the pretrial stages. A pre-determination of guilt means that there is no "presumption of innocence" at work. Criminal defendants are presumed guilty until found innocence.[21] Once a suspect is arrested, he is regarded as a criminal. To a great extent, it is also associated with the long-time and frequently-adopted pretrial detention law and practice. Detention or arrest is used to penalize the suspects rather than ensure the smooth litigation proceeding.[22]

2.1. Pretrial detention: "procuratorate review" and "detained through"

The general characteristics of pretrial detention, procuratorate review and an "overlapped period of detention/litigation", were pre-set by the CPL (1979 and 1996). There are five legal coercive measures to restrict or deprive the personal liberty of the accused: compulsory summon (or forced summon), guarantor pending trial, residential surveillance, custody and arrest. Compulsory summon, guarantor pending trial and residential surveillance are coercive measures that are far less frequently used to restrict personal liberty of citizens, while criminal custody and arrest are the main coercive measures related to detention. Due to limited space, this article mainly focuses on detentions attached to arrest rather than those caused by custody. To clarify, pretrial detention in this article refers to detention after arrest, if no special emphasis or clarity is given; the necessity review system for the post-arrest detention discussed in this article focuses on detention attached to arrest.

Pretrial detention is reviewed by the People's Procuratorate rather than the People's Court. According to Article 37 (1) of China's Constitution, "[f]reedom of the person of citizens of the People's Republic of China is inviolable"; and as ruled by Article 37(2), "No citizen shall be arrested except with the approval or by the decision of a people's procuratorate or by a decision of a people's court, and arrest must be made by a public security organ". The CPL (1996) further sets out the dual-track arrest and review model, i.e., arrest in investigation shall be approved and decided by a people's procuratorate whereas arrest during trial shall be decided by a people's court. To be specific, in the phase of investigation, when a public security bureau or procuratorate exercises its power of investigation in its own case, arrest of a criminal suspect shall be reported and submitted to the investigation supervision unit of the procuratorate at the

[20]For the historical account of the crime control ideology, see generally H. von Senger, "Ideology and Law-Making", in Jan Michiel Otto et al. (ed.), Law-Making in the People's Republic of China, Kluwer Law International (2000), 47–63.

[21]Timothy A. Gelatt, "The People's Republic of China and the Presumption of Innocence", 73 The Journal of Criminal Law & Criminology, 1982 (1): 261–262; Jonathan Kaiman, "China Suspects Presumed Guilty until Proven Innocent", the Guardian, (20 May 2013).

[22]Chen Ruihua (ed.), Empirical Study on the Pretrial Detention System [Weijue Jiya Zhidu de Shizheng Yanjiu], Beijing University Press [Beijing Daxue Chubanshe] (2004), 27.

same level to get reviewed and approved. It has been newly ruled since 2009 that when a suspect of duty crime needs to be arrested by a (sub-provincial, excluding provincial) procuratorate, arrest of the suspect shall be reported and submitted to the investigation supervision unit of the procuratorate at a higher level to get reviewed and approved.[23] Further, if a criminal suspect not arrested in pretrial procedures is found to require arrest, the court can make a decision of arrest when the conditions of arrest are met. However, since the court only makes decisions of arrest in trial, this scenario is rare in practice.[24] Thus, it can be concluded that the key decision-maker of arrest and its attached detention in most cases is the people's procuratorate.

According to the CPL, three conditions must be simultaneously met before the prosecutor determines an arrest: (i) evidence: the facts of a crime must be proved by evidence; (ii) punishment: potential punishment of fixed-term imprisonment or above might be sentenced; (iii) necessity: the decision of an arrest cannot be made unless the suspect's dangerousness to society cannot be sufficiently prevented by taking other coercive measures. Additionally, the standard of "fewer and cautious detention[s]" also exists in criminal justice policies, even though it has been largely disregarded in practice. The procuratorate has shown a tendency to detain the suspect, which is more beneficial to fulfilling public security bureau's investigative functions and its own prosecution functions. In practice, it is not surprising to see up to 80%–90% suspects were detained during the pretrial stage in criminal cases. In some places, the figure even reached above 90%.[25]

The period of pretrial detention overlaps with the period of trial. That is, the accused remains detained as long as the criminal trial goes on. As discussed, rather than being used as an independent coercive measure, detention is a consequential and inevitable result of continuous restriction on the personal liberty of the accused caused by arrest. Meanwhile, criminal detention is not determined by an independent judicial review system. The people's procuratorate is the main decision-maker not only regarding the power of approving the arrest but also the power of approving detention.[26]

Detention in the investigation stage should follow some basic guidelines. First, the duration of post-arrest investigation detention against general felonies lasts up to five months. Usually it is no more than two months; for complicated cases that cannot be closed at the expiry, the duration can be extended for one month upon approval of the higher-level procuratorate; the duration can be extended for two months upon approval of the provincial procuratorate.[27] Second, the duration for special felony detention (where the detention can be extended for two months upon the approval by the provincial procuratorate, if the offender is to be sentenced to fixed-term imprisonment of no less than ten years or to heavier penalties) lasts up to seven months.[28]

[23]Article 1 of the Provisions on Review of and Decision to Arrest by the People's Procuratorate at the Next Higher Level Concerning Cases Filed and Investigated by the People's Procuratorate below the Provincial Level (Trial Implementation) (4 September 2009), issued by the Supreme People's Procuratorate.

[24]In the authors' interviews, six judges from different provinces all pointed out, "such cases do exist, yet the overall number is small." J14BJ01; J13AH01; J13EY04; J13AH02; J13AH03; J11CS01.

[25]Yanyou Yi, "Arrest as Punishment: the Abuse of Arrest in People's Republic of China", 10 Punishment & Society 2008 (1): 9–24.

[26]CPL, Articles 66 and 68.

[27]CPL, Articles 154 and 156.

[28]CPL, Article 157.

Moreover, there is usually a term of up to 1–1.5 months in the prosecution stage. Theoretically, in the phase of investigation and prosecution, the suspects can be detained for a maximum of 6.5 months (or 8.5 months if the suspect is accused of a special felony).[29]

In fact, as stipulated by the CPL, arrest should be revoked or modified once any condition of arrest is found to be no longer satisfied in the subsequent process. According to the law, "Where a people's court, a people's procuratorate, or a public security bureau discovers that the compulsory measure taken against a criminal suspect or defendant is inappropriate, the measure shall be revoked or modified in a timely manner. A public security bureau which releases an arrestee or replaces arrest with another compulsory measure shall notify the people's procuratorate which approved the arrest."[30] However, revoking detention rarely occurs in practice. Rather, the suspect may often be "detained through" the whole investigation, prosecution and trial phases.

2.2. Post-arrest detention necessity review system

In order to lower the high frequency of detention and to mitigate the prevalence and severity of the "detained through" scenario, Article 93 was added into the revised CPL in 2012. Accordingly, "after a criminal suspect or defendant is arrested, a people's procuratorate shall continue to examine the necessity of custody. If custody is no longer necessary, it shall suggest a release of the arrestee or change of the compulsory measure for the arrestee" ("detention necessity review"). It can be inferred that the institutional feature remains unchanged; it is still the procuratorate that mainly reviews and determines the necessity of an arrest and post-arrest detention.

Commenting on this, a head of a provincial procuratorate pointed out that:

> 'As for the post-arrest necessity review system, things are both changed and unchanged: saying it was "changed" means that since the current "detained through" is widely considered as unreasonable and dysfunctional, the review system needs to be changed. No matter what kind of change the reform makes to, the creation of the post-arrest detention necessity review is a kind of change to the original institution. Saying it is "unchanged" means that the changes are superficial while the core power is still seized by the procuratorate'.[31]

In the mainstream reform proposals made by the legal scholars on the necessity review during continued detention, power does not rest with the procuratorate.[32] Equally, before the amended CPL, the reform proposals put forward by and applauded by the majority of jurists mainly focused on the court's independent power for the detention necessity review.[33] The rationale of such reform schemes lies in the following line of thinking: the arrestee should be endowed with the right of lodging complaints to the court, which allows the court to rule after the hearing on whether the decision to arrest should be upheld or revoked, so that a just and effective judicial remedy can be provided to the arrestee through checks-and-balances. The underlying logic of switching the review power from the procuratorate to the court is to avoid

[29]CPL, Article 169.
[30]CPL, Article 94.
[31]P13AH03.
[32]For example, the proposal served by the executive chairman of China's Society of Criminal Procedure Law is inclined to judicial review rather than procuratorial review. See Weidong Chen et al., Model Code of Criminal Procedure [Mofan Xingshi Susong Fadian], Renmin University Press [Renmin Daxue Chubanshe] (2011).
[33]See Chunlei Min et al., "A Review of Conference on Detention System and Human Rights Protection [Jiya Zhidu Yu Renquan Baozhang Lilun Yantaohui Zongshu]", Contemporary Law Review [Dangdai Faxue], 2004 (6).

the conflicting roles between prosecuting and detaining the suspects simultaneously played by the procuratorates. By contrast, the court should be the gatekeeper overseeing the administration of justice at the pre-trial stage. The involvement or intervention of courts may introduce checks-and-balances between procuratorates and courts, which could prevent regional or sectoral protectionism,[34] and avoid abuse of unfettered power.

However, this court-centered reform scheme seems unacceptable for the people's procuratorates. As suggested by Sun Qian, the former deputy chief procurator of the SPP:

> "Considering the current legal circumstances in China, the idea of shrinking the procuratorial power should be more reflected in improving the operating process of prosecuratorial power rather than narrowing the scope or reducing the content of such power. For instance, in terms of the power of reviewing the arrest and detention, what can be achieved is to change the scope and focus of procuratorial review. For instance, we need to stress on reviewing the necessity of arrest or detention and the procedural facts of illegal investigation instead of on making sure the substantial facts of the criminal suspect are enough for a guilty verdict in the following trial process. In addition, we need to make the review process more transparent by, among others, having public hearings and soliciting legal opinions from lawyers. By contrast, a simple discussion of revoking or transferring the procuratorial review power is not realistic".[35]

This has also been the consensus view of the basic-level procuratorates, as echoed by a senior procurator engaged in approving arrests for years:

> "Substantially, on the one hand, the procuratorate is not willing to surrender the review power to someone else. The surrender means a partitioning or reduction of the procuratorate's existing power as other agencies can effectively revoke the procuratorate's decision to arrest. On the other hand, not to surrender the power is more beneficial. The reason is that the necessity review is an entry point through which other authorities' abuse of arrest in practice can be duly supervised by the procuratorate, leading to the expansion of the procuratorate's existing power".[36]

The underlying logic of the people's procuratorate's reform of the detention review system is a strategy of, in an old Chinese saying, "one step back today for two steps forward tomorrow". While cautiously holding the power of detention necessity review in their hands, the people's procuratorates need to make some improvements, leaving a rosy impression to the general public that criticisms and outcries from the society on the (ab)use of procuratorial power have been taken into account and somehow addressed. As a result, the interests of the people's procuratorate as a whole can be maintained and even considerably expanded instead of being damaged by any reform measures. Arguably, this makes sense as the people's procuratorates are also charged with the task of crime control.[37] Losing the power over detention necessity review may make the people's procuratorates less effective and less capable in fulfilling their crime-fighting functions.

[34]See Chen Ruihua, A Research on Basic Criminal Procedure Problems [Xingshi Susu Jiben Wenti Yanjiu], China People's University Press [Zhongguo Renmin Daxue Chubanshe] (2003), 240.

[35]Qian Sun, On Prosecution [Lun Jiancha], China Procuratorate Press [Zhongguo Jiancha Chubanshe] (2013), 44–45.

[36]P13AH04.

[37]In its annual report to the congress at the same level, the local-level procuratorate reports the number of arrested suspects to indicate the positive outcome it has achieved in the past year while performing its duties.

The statements by the procurators suggest that the post-arrest detention necessity review system proposed by the amended CPL continues to be a procuratorate-centered review system, which is one of the key characteristics of criminal justice in China. The question is then whether "detained through", the other characteristic of detention, can be radically changed? This, to a certain extent, depends on the allocation of power within the procuratorial agencies and needs to be specified with solid empirical data. This will be explained respectively in sections 3 and 4 below.

3. Power struggle within the procuratorial agencies

The issue of which internal unit(s) should possess and exercise the power of detention necessary review is left unresolved in the amended CPL and has aroused much controversy in various operating lines within the people's procuratorates. The SPP stipulates in the Rules on the Criminal Procedure of the People's Procuratorate (Trial Implementation) (2012) (the Rules) that the power belongs to the (operating lines of) case-handling units inside the people's procuratorates. When the Rules were being amended, the internal struggle and competition for the review power within the procuratorial system was fierce.[38]

3.1. Horizontal struggle for review power

In China, different units are set up within the people's procuratorate according to the functions of the procuratorate in criminal proceedings endowed by the CPL, the Civil Procedure Law, and the Rules. To be specific, besides the leadership decision-making body, integrated management unit, legal and policy research unit, and civil and administrative adjudication supervision unit, internal units related to criminal justice mainly include: (1) accusation and appeal unit; (2) anti-corruption and anti-bribery investigation unit; (3) anti-malpractice investigation unit; (4) duty crime prevention unit; (5) forensic science unit; (6) investigation supervision unit; (7) public prosecution unit; (8) prison and detention center supervision unit; and (9) case management unit. In practice, each unit may create a setting, all of which then constitute the whole streamlined work process in the criminal justice system. Each unit is similar to a machine on an assembly line with the same aim of manufacturing a final product. In this vein, their interests are not supposed to be in conflict.

The greatest controversy happened during the allocation of power of detention necessity review amongst the investigation supervision unit, public prosecution unit, and PD supervision unit. According to a procurator of the SPP:

> "First of all, in the investigation phase, i.e., within two months after the arrest, the investigation supervision unit is empowered to monitor the detention of suspects. In case any decision of arrest made by itself is found false or inappropriate during the investigation stage,[39] or the detained suspect (including his or her intimate relative or lawyer) files an application to modify or revoke a coercive measure after it fails to be accepted by the agency which is in charge of the investigation of the case, the investigation supervision unit can suggest the investigative agency change or revoke the pre-set coercive measure.[40] Moreover, the investigation supervision unit should review and make decisions on the investigation agency's application of extending the investigation deadline.[41] Secondly, the public prosecution unit

[38] Article 616–621, the Rules.
[39] Article 322(1), the Rules.
[40] Article 568, the Rules.
[41] Article 278, the Rules.

has the direct decision-making and veto power over detention in the prosecution phase. Meanwhile, it has power to propose the change or revocation of the coercive measure in the first instance and second instance trials. Thirdly, in all the criminal proceedings starting from criminal detention to the end of second instance, the PD supervision unit is in charge of protecting the legal rights of the suspects in custody and supervising the validity of detention duration. One of the most important legal rights of the suspects in custody is not to be unduly detained. Therefore, the PD supervision unit must regularly review the detention necessity so as to safeguard the rights of personal liberty of criminal suspects and defendants who are not duly detained according to laws".[42]

The direct cause for this controversy among various units within the people's procuratorate is the murky division of the operating units of procuratorial power. On face, the procuratorial power seems to be clearly divided among various units in a sequential manner. But in reality, the working of these divided procuratorial powers is far less clear, and largely depends on how these units practice law based on various local conditions at different times. In the same vein, the power struggle can also be interpreted as an autonomy-seeking effort of these units, which are in a great attempt to enhance their institutional identity, thereby presumably strengthening their professional standards and competence.

3.2. Vertical competition for review power

The power struggle among different units discussed above not only exists in every single procuratorate but also extends to different operating lines in the whole procuratorate system because of the logic of "tiao-kuai". In Chinese political and legal contexts, the concept of "tiao-kuai" (literally referring to "line-block") is a distinctive feature. "Tiao-kuai" relation or logic is in fact a hybrid term of "tiao–tiao" relation and "kuai–kuai" relation. The longitudinal relation between superior and subordinate procuratorial agencies is the "tiao–tiao" relation, while the relation between specifically leveled procuratorial, legislative, administrative and judicial agencies at the same level is the "kuai–kuai" relation. Each "tiao" creates a vertical system of its own, which is often known as a "system", e.g., judicial system, procuratorial system, and public security system. The different agencies among different "kuais" of the same hierarchical level are mutually called "brother agencies", indicating their presumably coordinative and parallel relationship. Some writings have tackled the "tiao/kuai" issue in different fields of Chinese law.[43] However, this has never been used as a theoretical framework to discuss the

[42] P13S09.

[43] In the economics literature, this line of thinking has been employed to explain the effects and limitations of China's economic reform. It was termed as the corporatization of local governments or the competitive model of local governments. Steven N. S. Cheung, "The Economic System of China", 1 Man and the Economy 2014 (1): 49. In the political science literature, the focus has been placed on the bureaucratic system in China, and the question how this fragmented authoritarianism affects the government's decision-making process within the government. Kenneth G. Lieberthal & David M. Lampton, Bureaucracy, Politics, and Decision Making in Post-Mao China, University of California Press (1992); Andrew C. Mertha used the concepts of "tiao/kuai" and "soft" centralization to describe the pathologies of the state to control the local governments and avoid excessive local protectionism through the reliance on both the horizontally geographic lines and vertically functional blocks. Andrew C. Mertha, "China's 'Soft' Centralization: Shifting the Tiao/Kuai Authority Relations", 184 The China Quarterly 2005 (11): 791–810. The "tiao/kuai" analytical model has been more recently introduced into the study of law and judiciary. For instance, the "tiao/kuai" logic explained the complicated interactions among the police, the court and the procuratorate. Sida Liu & Terence C. Halliday, "Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law", 34 Law & Social Inquiry 2009 (4): 911–950.

configuration of various units within the procuratorate, which is highly relevant to the allocation of or competition for the detention review power.

The "tiao–kuai" relation easily creates structural contradictions in a top-down society as various institutional segments of the state are inclined to use their organizations to advance their own interests and power bases. The police, procuratorate, and court each has its own interest and tries to check and constrain the power of others. The codification of law or amendments to the implementing rules may re-shape or transform the "tiao–kuai" relation but will not optimize the distribution of power due to the significant asymmetry among various self-interested actors in enforcing law. Some literature has described the competitive relationship among self-interested agencies involved in criminal justice in the legislation process.[44] A good case in point is that, in the enactment of the CPL, the Supreme People's Court, the SPP, and the Ministry of Public Security, on behalf of judicial system, procuratorate system, and public security system, respectively, struggled for their own say and benefit, rendering the whole criminal justice regime segmented.[45] Other writings have also indicated some other paternalistic or innovative approaches employed by judicial agencies to promote their popularity among litigants by marginalizing legal rules.[46] Things are the same at the local level. When national laws or judicial interpretations (for example, the Rules, and the Provisions of Several Issues concerning the Implementation of the CPL, issued by the Supreme People's Court) need to be implemented in a locality, detailed implementing rules and regulations are often introduced. The fight for a final say, in our case, over detention powers, is normal in this "bargaining" or power-enforcing process. The goal of each entity is to exert unfettered powers in carrying out its legal duties. As a consequence, originally fragmented "kuais" have been re-configurated to reach a new "competitive" equilibrium.[47] The reason that the procuratorates finally obtained and secured the power to carry out the detention necessity review is that the procuratorate system, represented by the SPP, won in the "kuai" competition and defeated the other two important systems ("tiaos"): the judicial system represented by the Supreme People's Court and the public security system represented by the Ministry of Public Security. As it were, the "tiao" relation is mainly reflected as the top-down integrity and management, while the "kuai" relation is chiefly reflected as cooperation (combination) or restraint (competition) among different "brother agencies".[48]

The "tiao-kuai" logic is not only shown among different systems but also among different units within an agency.[49] Take the procuratorate system as an example. Topped by different operating units of the SPP, various "lines" are formed longitudinally downward. The so-called "tiao" or "line" relation refers to the vertical management or supervisory relation between the superior and subordinate focusing on certain specialized operational tasks or functions. On the other hand, lateral "kuai–kuai" relation is formed among various operating units inside a

[44]Weimin Zuo, "From State Monopoly to Social Participation: the New Blueprint of China's Legislation on Criminal Procedure [Cong Guojia Longduan Dao Shehui Canyu: Dangdai Zhongguo Xingshi Susong Lifa De Xintujing]", Tsinghua Law Journal [Qinghua Faxue], 2013 (5).

[45]Sida Liu & Terence C. Halliday, "Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law", 34 Law & Social Inquiry 2009 (4): 911–950.

[46]Yuqing Feng & Qing Cao, "Popularised Judiciary in Rural China: Paternalistic Approaches and Enchanted Legal Consciousness", 44 Hong Kong Law Journal 2014 (2): 651–675.

[47]P14AH05.

[48]P14S12.

[49]See Andrew C. Mertha, "China's 'Soft' Centralization: Shifting the Tiao/Kuai Authority Relations", 184 The China Quarterly 2005 (11): 791–810; Lihong Ma, "On the Tiao/Kuai Relationship in the Governmental Governance [Lun Zhengfu Guanli Zhong De Tiao/Kuai Guanxi]", Political Study Journal [Zhengzhixue Yanjiu] 1998 (4).

procuratorate. The "kuai–kuai" relation is close to a functional division relation among various operating units inside a procuratorate. The public security system, procuratorate system and judicial system are "brother agencies" that mutually coordinate and restrain with separated allocated responsibilities, while different units inside a specific system are "functional units". Such "kuai–kuai" relation also means mutual coordination and restraint based on distinct and allocated responsibilities within one single system.

According to the CPL, there is presumably a cooperative ethos among these "kuais". Mutual cooperation theoretically prevails over mutual supervision. In other words, cooperation should be the mainstream principle guiding the relationship among these "kuais" in the criminal justice process. Nevertheless, in practice, coordinative or restrictive relation depends on different circumstances. On one hand, coordination is required to maintain the functionality and efficacy of the entire system. For example, locating the detention necessity review in the procuratorate's jurisdiction reflects coordination among different functional units in the procuratorate. On the other hand, restraint is necessary to maintain the interest of a functional unit. Delegating the power of detention necessity review to different internal unit(s) embodies the competiveness among the units. The struggle among internal functional units in the procuratorate turns out to be a power struggle among all functional lines within prosecutorial system. In a procuratorial agency, a number of operational units such as the investigation supervision unit, public prosecution unit, and PD supervision unit can be involved in the detention necessity review. Following the "line" (tiao) logic, fighting for the review power can evolve into a struggle for the benefits and interests of the operating lines of which the involved are a part.

3.3. Fierce power struggles among internal units

Compared to a relatively balanced relationship among various "kuais", there is a lack of intra-institutional comity among various "lines" within the procuratorates. Allocating this review power to a specific unit touches on each line's interest in strengthening and expanding its own power, inevitably leading to a stance of competing for potential power and skimming of possible duties. Thus, likely, there is a confrontation when these "lines" come to compete for additional review power. As all functional units of the SPP fight for these delegated powers on behalf of the interests of various lines in all procuratorial agencies nationwide, the competition for this power is particularly reflected in the process of amending the Rules.

The SPP revised the new draft three times. Each time the review authority was specified differently. The first draft proposed that review should be mainly executed by the PD supervision unit with cooperation of the investigation supervision and public prosecution units. The second draft introduced a phased-in model, that is, reviewing the detention necessity should be the responsibility of the investigation supervision unit in the post-arrest investigation phase and then the responsibility should be handed over to the PD supervision unit in the prosecution and trial phases. The third draft also followed the phased-in model but changed the players and their sequence. According to the third draft, the responsibility should belong to the investigation supervision unit in the post-arrest investigation phase and to then the public prosecution unit after the case has been handed over to the prosecution and trial phases. Upon uncovering any misuse in the execution of detention occurring in the detention center, the PD supervision unit can make suggestions to the other two units for a change or revocation.[50]

[50]P13S09.

The SPP started a pilot program in 20 basic-level procuratorates nationwide in 2008. In the earliest pilot program, the model proposed in the second draft was taken. Later, a new attempt was made where the model proposed in the third draft was tried. Finally, the model proposed in the first draft was attempted.[51] It can be seen that, within the procuratorate system, the controversy had never been settled and changes has been made frequently when the detention necessity review scheme was being implemented.

3.4. Units' considerations: departmental interests during the reform process

Allocating the detention necessity review to all core units (lines) was a factor taken into account by the SPP in the process of amending the Rules. In the process of revising the Rules, the self-interest of each line was taken into consideration through opinion-seeking consultations.[52] Ultimately, as the detention necessity review mechanism concerned the division of functionality among the investigation supervision unit, public prosecution unit and PD supervision unit, the attitudes and standpoints of these three units determined the direction of the revision of the Rules. A senior prosecutor in AH described as follows:

> "Take Province AH as an example. In implementing the detention necessity review system, the deputy chief procurators in the lower-level procuratorates and the principals of the operating lines in the provincial level procuratorate in charge of the three lines were promoting the benefits of their own units or lines".[53]

Among these units (lines), the investigation supervision unit and PD supervision unit were proactive in pursuing benefits, while the public prosecution unit adopted a "passive, non-repulsive, and indifferent" approach.

3.4.1. The investigation supervision unit's proactive stance

There are technical difficulties for the investigation supervision unit to have the power both in theory and practice. First, the investigation supervision unit's performance of its legal duties is highly influenced by the public security bureaus (the police). As the decision to revoke the detention made by the investigation supervision unit can be resisted by the public security bureau, the rate of arrest cannot be significantly lowered. Second, once the decision of arrest has been made, to review the necessity of the arrest and subsequent detention becomes a self-review, which is not consistent with the principle of checks-and-balances.[54] Several leading criminal law scholars hold the similar view that it is not realistic to expect the investigation supervision unit to revoke its own decision.[55] Third, since the dossier of the case will be transferred to the investigative agency if the arrest is approved, the instant case information in post-arrest stage cannot be known immediately by the investigation supervision unit. Besides, in the absence of neutrality and incentives, how to motivate the investigation supervision unit to collect the information on the necessity of detention is a big challenge.[56]

[51] P13S09.
[52] P14AH05; P14AH06.
[53] P14AH14.
[54] S14CS02.
[55] S14CS01; S14AH01; S15DT01.
[56] P14AH03.

During the reform, the greatest concern of the investigation supervision unit was the risk of losing control over the cases, or in its wording, "revocation of detention by another unit would put its earlier efforts over arrest in vain."[57] Once the decision to arrest was "revoked", the public security bureaus would complain. As a result, increased pressure would be exerted on the investigation supervision unit.[58] Considering its own interest, the investigation supervision unit expected to possess this power so as to avoid the possibility of detention being revoked by other units. The public security organs also prefer to see the necessity review power allocated to the investigation units in the procuratorates due to their close working relationship with these units. A prosecutor who has been working at the investigation supervision unit for a long time indicated:

> "Strategically, the investigation supervision unit would not pursue such power without presenting a strong case. Instead, it argued the cases artistically. A number of sensible reasons were given to support the unit's proposition of assuming and performing the duty of conducting the detention necessity review so as to cover up the real motivation of pursuing the unit's power or interest. One of these reasons was that the investigation supervision unit had long been engaged in arrest approval. Possessing richer experience should be beneficial to assuming and exerting the power over detention necessity review if delegated. The investigation supervision unit was in a more advantageous position to be acquainted with the development of the case due to the fact that it was in charge of collecting case information in the investigation phase".[59]

3.4.2. The public prosecution unit's "passive, non-repulsive and indifferent" stance

Compared to the investigation supervision unit, the public prosecution unit took a laid-back approach. The reason for its "passive and non-repulsive" attitude was that: first, it had already had the power of reviewing and changing the detention decision in the prosecution phase, thus it had absolute discretion to decide whether detention should continue rather than needing to advise other agencies to change the detention decision.[60] Additionally, on a subsequent position at the prosecution stage compared with the investigation supervision unit, the public prosecution unit was more comprehensively aware of the case details and could make more informed and wiser judgments on the odds of prosecution, the possibility of suspect's final conviction, and the necessity of continued detention. Further, as the public prosecution unit was not responsible for making a decision of arrest compared with the investigation supervision unit, it was not afraid of the revocation of the previous decision of arrest in the detention necessity review process. In the trial phase, while playing its customary procuratorial role in court, the public prosecution unit may propose suggestions to the court to modify or revoke coercive measures. In this sense, Article 93 is merely a repetition of the existing institutional or procuratorial norms for the phases of prosecution and trial.

The reason for the "indifferent" attitude was that the power of post-arrest detention necessity review as stipulated in Article 93 also covered the post-arrest investigation phase. Different from the detention review in the phase of prosecution and trial, the review task added to this phase would actually impose new workloads on the public prosecution unit during the post-arrest investigation phase, especially if the criminal suspect or its close relatives or counsel request the detention necessity review. Thus, different from the investigation supervision unit's

[57] P13DT08.
[58] P13AH06.
[59] P13AH06.
[60] Article 363 of the Rules.

concern over "arrest by itself but release by another unit", the public prosecution unit seemed more concerned with more staff needing to be assigned to carry out the detention necessity review (particularly in the post-arrest investigation phase). There was no such headcount for the public prosecution unit.[61]

3.4.3. The PD supervision unit's position

In contrast to the investigation supervision unit and the public prosecution unit, the PD supervision unit actively pursued the detention necessity review power because of two main reasons. First, it seemed more legally tenable. Although the PD supervision unit is one of the internal units of the procuratorial agency, it does not directly take charge of criminal cases. Neither responsible for arrest approval nor prosecuting the suspect, it merely supervises suspects' detention in the detention center with a view at preventing illegal conduct. It can presumably maintain neutrality in the detention necessity review process if so delegated.[62] Second, detention necessity review was a new procuratorial power for the PD supervision unit. The authority and importance of this unit inside the procuratorial agency can be better enhanced with this power. For principals of the PD supervision units in some local procuratorates, such power-expanding or benefit-developing reform could easily lead to evident achievements and is good for their personnel promotion.[63]

Yet, there were some inherent obstacles if the PD supervision unit attempted to obtain this power and exert it well. In terms of personnel allocation, "the professionalism, experience and headcount of the PD supervision unit has never truly been up to an accepted level. This issue is even more serious at the local procuratorates".[64] The current PD supervision unit is described as an organ filled with "old, weak, sick and disabled".

The situation can be quite vague if no sufficient importance is attached to this unit or without significant allocation or investment of resources into the unit by the procuratorates at each level.[65] Accordingly, in procuratorates at both higher and lower levels, the motivation of the PD supervision unit to pursue the power may be contingent upon the need to weigh the benefits and costs of exercising this power. A prosecutor who works at the PD supervision unit expressed such view:

> "Even if the power is gained, without any change to the expenditures, personnel, and supporting facilities being allocated and without the support of other relevant units, the power cannot be well-executed by itself in its current shape. Apart from any side-effects the execution may create (i.e., damaging the relationship with other 'brother' units or other criminal justice agencies), the costs involved in executing the expanded power may outweigh associated benefits and interests, and eventually would become a burden on the unit."[66]

3.4.4. The SPP's solutions

The question of which unit within the prosecutorate was supposed to possess the power to conduct the detention review was a huge controversy. Provincial prosecutorates had different views as well. The deputy chief prosecutor in AH mentioned this in a coordinating meeting:

[61] P14AH11.
[62] P14AH01.
[63] P14AH07.
[64] P14AH09.
[65] P14AH02.
[66] P14AH01.

> "…Different lines claim their authority over the detention necessity review due to their own interests. Three points can be made. First, the controversy is huge, and there is no way to reach a consensus on this. Second, it is still important to study how to move forward and how to form a plan. Third, the final plan needs to be informed to the High Court and Police Bureau [in AH]. Ideally the final plan can be agreed upon and issued by the prosecutorate, court and police bureau together".[67]

The SPP was quite aware of such fragmentation in China's legal system. "Coordinating the interests of different agencies or units is termed as 'unifying the thinking' or 'obeying the instruction'. When different units cannot reach unanimous consent, the chief prosecutor or the prosecutorial committee will stand out to coordinate. The higher level leader will come to coordinate if the higher and lower levels do not agree with each other. The legal-political commission or the coordinating meeting among the police, court and prosecutorate at different levels will come to coordinate if these judicial organs disagree with each other."[68] This seems to be in line with the principle of "harmony" in justice cooperation put forward under both Hu Jintao and Xi Jinping.[69]

In Articles 612 to 616 of the amended 2012 Rules, the SPP finally stipulated the unit, method, and deadline of detention necessity review. The phased review model was set up and legalized in the Rules. According to Article 617, two lines, investigation supervision and public prosecution, lead the detention necessity review, while the line of PD supervision is only responsible for information, suggestion, and consultation.

How could the three lines have reached the compromise in the end? The investigation supervision and public prosecution units are still two major sectors with predominant positions in the procuratorate. By contrast, the PD supervision unit has a relatively less important (lower) position. Besides, investigation supervision and public prosecution units have considerable interest-based consensus in agreeing with the phased review model. For the investigation supervision line, although detention necessity still needs to be reviewed by the public prosecution unit in the prosecution stage, such institutional arrangement has been in existence, and thus remains unchanged in the new law.[70] On the other hand, in the post-arrest investigation phase, the investigation supervision unit has the power to carry out the detention necessity review, which means that it maintains the discretion to decide "to review the case or not" and "to release the suspect or not". This scheme prevents such review power from falling into the hands of the relatively-neutral PD supervision unit both in the investigation phase and in the prosecution phase. For the public prosecution line, as long as the detention necessity review in the post-arrest investigation stage is not allocated to it, no additional workload will be created. This institutional arrangement is acceptable to the public prosecution unit.[71]

In addition, the PD supervision unit realizes that if power is allocated to it, the situation could have been quite vague if there is no strong intra-system and extra-system support on personnel and financial and material equipment. Since the power has never been in existence, maintaining the status quo is more realistic and tactically acceptable.[72] Apparently, the ultimate allocation of the detention necessity review power is a product of balancing the conflicting

[67] Authors' ethnographic notes, December 5, 2013.
[68] Z14AH01.
[69] See the State Council, Judicial Reform in China (2012).
[70] P13AH02.
[71] P13AH01; P13AH05.
[72] P14AH01.

interests among a variety of internal units within the people's procuratorate. The phenomenon described above is one example of the way in which decisions are made within the Chinese justice system, which is heavily influenced or even distorted by power-seeking impulses of power-holders. The real effect and prospect of the criminal justice reform then become uncertain.

4. Basic-level judicial ecology and pilot effect of "centralized review"

4.1. Pilot program in Province AH: "centralized review"

In China, both the central and local governments insist that the implementation of law ought to depend on local particularities.[73] A large population and socio-economic varieties seem to justify this line of argument. A top-down society such as China does not guarantee seamlessness in the bureaucratic hierarchy. Local bureaucrats exercise remarkable ingenuity in promoting domestic interests by relying on local resources.[74] In the academic literature, "stepping the stone cross the river" has been explained to be an experimental program or principle more relevant to the economic reform.[75] It is also the case in the field of judicial reform. Local judicial agencies adopted some experimental schemes to test the water and improve the reform plan in the past several decades.[76] More recently, there has been a large scale of pilot reforms undertaken in the field of criminal litigation.[77] Various judicial experiments have been made at the local level in reforming the detention necessity review system. Although the phased review model has been adopted in the Rules, subordinate procuratorial agencies still have the room to innovate and select other models.

In Province AH, several basic-level procuratorates have been taken as the pilot agencies for possible experiments by the procuratorial committee of AH People's Procuratorate. In the pilot experiment, the power of detention necessity review was centralized while being executed – that is the so-called centralized review model. The PD supervision units in the pilot procuratorates that adjudicate the necessity of continued detention upon the arrested suspects during the whole criminal process, including the phases of post-arrest investigation, prosecution, and court trial. In this model, the PD supervision unit has the discretion to listen to the opinions of other units and makes a final decision on the necessity of detention through assessing the following conditions of criminal suspects: (i) the severity of the suspect's offense; (ii) the facts of the offense; (iii) the culpability of the offense; (iv) the suspect's performance of the penitence; (v) the suspect's physical condition; (vi) case progress, evidence of the case, and potential punishment.[78] This tick-box approach matches China's civil law tradition, which relies on more

[73]Randall Peerenboom, "Assessing Human Rights in China: Why the Double Standards", 38 Cornell International Law Journal 2005: 72–172.

[74]See generally Stanley B. Lubman, Bird in Cage: Legal Reform in China after Mao, Standard University Press (1999).

[75]Sebastian Heilmann, "Policy Experimentation in China's Economic Rise", 43 Studies in Comparative International Development, 2008: 1–26.

[76]For instance, the Hexi District Court in Tianjin tried a pilot program for public hearings in 1978. Tianjin City Hexi District Court, "An Introduction to the Public Hearing Trial Scheme for Civil Litigation Cases" [Minshi Anjian Gongkai Shenpan Shidian Gongzuo Jieshao], People's Judiciary [Renmin Sifa] 1978 (3). The Changning District Court in Shanghai adopted a pilot program to set up a bench for hearing cases involving teenagers in 1984. Liu Jian, "Some Pieces of Memory of the Teenage Bench in Changning District Court in Shanghai" [Shanghai Changningqu Fayuan Shaonian Fating Jiyi Pianduan], China Legal Daily [Fazhi Ribao] (2009-06-24).

[77]Ni He, Chinese Criminal Trials: An Comprehensive Empirical Inquiry, Springer (2014), 65–84.

[78]P14AH08.

intensive fact-finding and documents-based inquisitorial trials. These wide-ranging review factors constitute the scope of reviewing guidelines, and are easier for the practitioners to operate. This injects consistency and fairness into the review scheme.

In essence, the centralized model emphasizes the leading role of the PD supervision unit in the review process. The core differentiation between the centralized model and the phased review model can be summed to just one question: inside the procuratorates, should the detention necessity review be the main responsibility of the case-handling units with the information provided by the PD supervision unit, or should it be the main responsibility of the PD supervision unit with the information provided by the case-handling units? As the PD supervision unit has nothing to do with the result of case-handling, the centralized review model seems more neutral than the phased review model. Specifically, from 1 January 2013, Province AH began to implement the CPL and the Rules. Focusing on the system of detention necessity review, the procuratorates in the province executed the phased review model based on the Rules. One month later, in February 2013, the leaders of the provincial People's Procuratorate of AH approved and determined that the people's procuratorates of County ZF and the other two counties were the pilot agencies to explore the centralized review model so that the on-the-ground experience would be gained and prepared for its progressive implementation in the whole province.[79]

4.2. Pilot effect in Province AH

Despite the measures stipulated by the CPL on reducing abuse in detention, the practical effect was not successful. According to an officer of the SPP,

> "Although there have been legal provisions, authority allocation, document stipulations, leader's lectures, practical demands and duty requirements for judicial workers, the current situation remains intact, and no schedule with substantial changes has been set out so far in the current phased responsibility power system".[80]

Nevertheless, the centralized review model seems to have brought about a glimmer of hope for criminal justice reform to reduce the rate of detention. Field research was done on all the county procuratorates in one specific area of Province AH, some of which carried out phased reviews, while others carried out centralized ones. Based on this research, the effects of the two models can be compared and assessed horizontally.

In 2013, the PD supervision units in three pilot counties conducted the detention necessity review on all prisoners using the centralized model. 337 suspects or defendants who were detained in the detention center had their cases reviewed. Defenders' applications triggered 224 reviews, and PD supervision units initiated 133 reviews ex officio. After this process, 114 (50.9%) had their applications accepted and the PD supervision units, to criminal justice agencies or other units, made suggestions to changes in coercive measures; in the reviews started ex officio by the PD supervision units, suggestions to change coercive measures were made for 38 detainees (33.6%) after the review. Therefore, the PD supervision unit made a total of 152 detainees' suggestions, meaning that there was a rate of 45.1% in all cases reviewed in the centralized model. 128 proposals to change coercive measures for detainees were accepted by public security bureaus, courts or public prosecution units, reaching an acceptance rate of

[79] P14AH01.
[80] P13S09.

84.2%. The data (up to June 2014) we collected show that in the proposed cases, 69 detainees who showed no necessity for continued detention and experienced changed coercive measures were dealt with in the successive procedures. 65 of 69 were treated with *nolle prosequi*, dismissal of charges, sentenced with temporary service of punishment outside prison, or sentenced with probations.[81] Only 4 out of 69 suspects were eventually sentenced to prison. This means that 65 of 69 suspects satisfied the "non-necessity" conditions for the purpose of revoking or changing the pre-set coercive measures. The underlying objective of having this review scheme in place has been achieved.

Foremost, compared to the phased review, the centralized review increased the ratio of non-detention in criminal cases.[82] Some characteristics emerged:

The scope of review was expanded. The PD supervision unit of the procuratorates in the pilot program included all the detainees in the review scope and cases of up to 28 crime types were involved. According to the statistics, the types of criminal cases reviewed by the PD supervision units in three pilot areas included misdemeanors (such as theft, traffic offense, and affray) as well as felonies (such as intentional murder, arson and drug trafficking). In 128 cases in which suggestions were made by the PD supervision units and were accepted by other agencies or units, 23 (18%) were suspects of theft, fraud, embezzlement and other crimes against property; 51 (39.8%) were suspects of intentional injury, causing death negligently and causing disturbance; 51 (39.8%) were suspects of obstructing public business, gambling and traffic offence; 3 (2.4%) were suspects of drug-related cases. It can be seen that cases reviewed by the pilot procuratorates were not limited to any particular crime type. Rather, inappropriate or unnecessary detentions were reviewed based on the comprehensive consideration of such elements as *corpus delicti* and the particulars of cases, guilt acknowledgment, penitence behaviors, and possible punishment. Prior to the implementation of this review scheme, it was unlikely to see proposals made to revoke or change a detention decision if the suspects were alleged to have committed serious crimes or if the criminal cases were complicated ones.[83]

In 2013, the average ratio of the suggestions for changing coercive measures taken by each procuratorate was high. In Province AH, suggestions of changing coercive measures were made for 375 detainees and 152 were from the procuratorates in three pilot areas, accounting for 40.5% of all. That is, on average, each procuratorate of the pilot area proposed suggestions for 51 detainees, while the figure for each non-pilot procuratorate was just 16.

Proposals to change coercive measures also had a high accuracy rate. Statistics show that, proposals of changing coercive measures for 223 detainees were made by 14 non-pilot county procuratorates, and 180 such proposals were accepted, reaching an acceptance rate as high as 80.7%; while proposals for 152 detainees were made by the three pilot procuratorates, and 128 such proposals were accepted, reaching an acceptance rate of 84.2%. It appears that inappropriate or unnecessary detentions may be subject to a harsher review by the centralized model in those pilot procuratorates.

The proportion of detainees being released or obtaining a guarantor pending trial for reasons other than physical causes was also raised. Previously, as detention mainly serves for the purposes of investigation and prosecution, the arrested suspect would be detained through unless he or she has physical causes such as illness. When the PD supervision units in pilot procuratorates reviewed the necessity of detention, they strictly followed the legal conditions

[81]The data is collected from the documents prepared by the People's Procuratorate of AH Province.
[82]Ibid.
[83]P14AH15.

for "unnecessary or inappropriate continued detention", not confined to the condition of physical health. Statistically, for whom the proposals were accepted in 14 non-pilot procuratorates, 53.3% had the detention changed for non-physical causes; while for whom changes of coercive measures were accepted in the pilot procuratorates, 89.8% had the proposals accepted and detention decisions changed for non-physical causes.[84]

The proportion of non-resident (or migrating or "floating") detainees being released or obtaining a guarantor pending trial was also raised. The non-resident suspects used to be indiscriminately deemed that they has high possibility to escape trial and should be kept in custody. Considering the high proportion of non-resident suspects in Province AH, for instance, in the detention necessity review process, the PD supervision units in pilot procuratorates examined the comprehensive factors of the entire cases to figure out the necessity of suspects' continued detention rather than the suspects' *hukou* alone. Statistics indicated that, of the 180 detainees for whom the coercive measures were changed owing to the suggestions of non-pilot procuratorates, 93 were non-Province AH residents, accounting for 51.7% of all; while of the 128 detainees for whom the coercive measures were modified under the suggestion of pilot procuratorates, 93 were non-Province AH residents, accounting up to 72.7% of all.[85]

Not only did the detention necessity review scheme in the pilot areas save transaction costs and judicial resources involved in criminal litigation, but it also strengthened judicial fairness. The above statistics demonstrate a movement towards fewer, more cautious, and more lenient detentions, which help transform China's harsh rhetoric of criminal law and criminal justice. Increasingly, detention is less adopted by the procuratorates as a punishment device and a seemingly neutral unit, the PD supervision unit, stands out inside the procuratorate – an agency of prosecution in nature. Nevertheless, this may not be hard evidence to confirm that China has been reformulating its crime control ideology.

4.3. Overcoming the difficulties in the pilot program

What were the reasons for such a remarkable outcome as mentioned above? Was it because the centralized review scheme was more neutral, scientific, and reasonable in the procedural setting? Previously, the centralized review scheme was taken into account during the SPP's 2008 pilot programs as mentioned above.[86] Yet the effect was not satisfactory. For instance, a basic-level procuratorate began the pilot program in 2008, but the final statistics suggested that the effect achieved after the implementation of detention necessity review showed no substantial difference from before.[87] Experience gained by the SPP in the centralized review scheme suggested that the promotion of centralized review in practice may be frustrated in three aspects: (i) limited personnel ability; (ii) blocked case information; (iii) worsened relation with the public security bureau.

Comparatively, the reasons that the procuratorate in Province AH had reached such remarkable effects were that "manpower was allocated", "resource[s] [were] transferred" and "relations were coordinated". How could Province AH adopt such countermeasures without significant obstacles? Support from the chief procurator of the provincial procuratorate and

[84]The data is collected from the documents prepared by the People's Procuratorate of AH Province.
[85]Ibid.
[86]See part 3.3.
[87]P13S09.

strong promotion of the principals of PD supervision operating line certainly mattered.[88] The basic-level judicial ecology probably had played a more crucial role.

Manpower adjustment and resource equipment were significantly correlated with the chief procurator's strong promotion of the reform in the procuratorate of county ZF. Otherwise, it would be impractical for the PD supervision unit to have more human resources. After all, the key units of a procuratorate are case-handling units, such as the investigation supervision unit, the public prosecution unit, the anti-corruption and anti-bribery investigation unit, and the anti-malpractice investigation unit. The result that the PD supervision unit can obtain information from the other two units also greatly benefits from the strong promotion of the chief procurator. Prior to the pilot project, the other two units had no obligation to share case-handling information with the PD supervision unit. The chief procurator exerted strong promotion mainly to achieve his better job performance. For the basic-level procuratorate, the procuratorial work included regular operation and distinctive innovation. Under the pressure of "excessive caseload, or in Chinese words, more cases and less manpower", the regular operation of procuratorial work is often stuffed with caseloads, and people are unable to make good performance or get award from the supervisor through regular work. In contrast, commendable performance can be made through some innovative work.[89] China's governance hierarchy determines that judicial agencies, including procuratorates, only need to pay attention to the performance evaluation of their superior agencies so as to enhance their chances for the promotion.[90] Accordingly, this internal institutional balance is ad hoc when the criminal justice reform is still ongoing.

This mechanism affirms the democracy-deficit feature of the administrative or judicial bureaucracy in a party-state and top-down society such as China. This performance-based consideration in promoting officials to some extent strengthens judicial efficiency. For example, the emphasis on the case handling number per capita speeds up the circulation and settlement of cases. The evaluation of "innovative work" encourages local officials to seek new mechanisms suitable for local conditions. However, the performance-based consideration is not objective and may lead to some tactical solutions. Both the higher and lower levels of judicial agencies are inclined to pursuing better performance by some extralegal operations during the routinized evaluation process and care little about the possible negative effects on the legal system.

Cooperation and coordination with other criminal justice agencies was mainly based on the fact that the procuratorate was the preeminent authority over the other two agencies, public security bureau and court, in county ZF. Conventionally, in a hearing of detention necessity review, the investigator from the public security bureau and sheriff from the detention center need to be open to questions. It can imperceptibly bring about new workloads to the latter and arouse strong antipathy of them. To a great extent, which criminal justice agency possesses the preponderant authority among the "triangle three" (public security bureau, procuratorate, and court) at the local level depends on the administrative or inner-party ranking and personal influence of their leaders. Under normal conditions, the power and influential force of the public security bureau is stronger than the court and the procuratorate. Nevertheless, if a leader

[88] P14AH16; P14AH17.

[89] P14AH07.

[90] Susan Whiting, "The Cadre Evaluation System at the Grassroots: the Paradox of Party Rule", in Barry Naughton and Dali Yang (ed.), Holding China Together: Diversity and National Integration in the Post-Deng Era, Cambridge University Press (2004), 101–119.

ranking high and with strong personal network takes office in the procuratorate or court, the agency this leader belongs to might become more powerful than the public security bureau. A prosecutor in County ZF said to the authors:

> "In county ZF, the leader of the procuratorate is more powerful than the counterparts at the public security bureau and court. Thus, when the pilot project of procuratorate ZF was strongly promoted by the leader, the cooperation of the public security bureau and the court were more accessible".[91]

As for the reason why public figures participate in the hearing process of detention necessity review, one prosecutor who works for connecting with public figures explained:

> "Local congress members, consultative congress members and scholars that participated in the review process were in specific positions. Local congress members have the power to vote for or against the annual work reports of the procuratorate and court; local consultative congress members have the right to question the procuratorate and court for their work. Additionally, if the hearing were conducted for every single detention necessity review, it would be highly time-consuming. Conventionally, it is hard to invite these three groups of personnel for participation. Nevertheless, the procuratorate itself has an inherent section to contact these stakeholders, the People's Supervisor Office. As a result, these people are well acquainted with the procuratorate. Besides, the work particularly promoted by the powerful figure, the chief procurator, can easily obtain the understanding and support of these stakeholders".[92]

A scholar who was invited to the hearing process said to the authors:

> "Attending a hearing of detention necessity review is not so technically difficult. We only need to audit the hearing and air some free and non-decisive opinions without assuming any significant responsibility. Furthermore, hearing a case as such pays me well".[93]

4.4. The sustainability of the pilot project

It has to be pointed out that the sustainability of positive effects in these pilot programs remains uncertain. But this again affirms the uncertainty in the interplay between the "living law" and power matrix. The pilot scheme is an informal arrangement, which lacks the hard impact on the design of the review system. The coordination that widely exists in China's legal practice is fundamentally incompatible with establishing rules, because the more coordination, the more difficult the making and implementation of law.[94] In addition, the coordination of powers is subject to a number of factors such as the incentives the coordinator himself has, the authority the coordinator has, the reasonableness of the coordination itself, and the level of acceptance in terms of the coordinated matter.

The leadership of the people's procuratorate seemed to strongly promote the pilot program and spread its application, without considering the long-term operation of the mechanism. The

[91] I14AH01.
[92] P14AH04.
[93] S13AH01. This viewpoint was echoed by a congress member and two lawyers who had the similar experience. C14AH01; L14AH02; L15AH01.
[94] Sida Liu, "The Shape of Chinese Law", 1 Peking University Law Journal 2014 (2): 419.

pilot program only means a chance to show the leaders' outstanding performance of their jobs and duties. Once the supervisor or leaders in higher procuratorate recognize their performance, and they get promoted in post, the question of maintaining the characteristically innovative pilot program is left to the next leader.[95] Since the chief procurator of county ZF had done his job well in the innovative pilot program, he was informed that he might be promoted. The pilot program then discontinued to be particularly boosted in the gestation of such post promotion.[96]

The promotion and spreading of pilot measures depend on the personal power and prestige of procuratorial leaders in the basic-level procuratorate. Some empirical research also confirmed the correlation between the operational patterns and decision-making process and the administrative ranking system inside the judicial agencies.[97] However, such kind of preponderant power relationship is very unstable. In the network of political power, nobody can maintain a mighty position and hold the prestige forever. Once an influential chief procurator is off the office or transferred to another post, or a more powerful leader takes office in another "brother agency", the procuratorial operating mechanism of the pilot project may have to change.

Some in-depth obstructive factors, e.g., "enhancement of the workload of public security bureau"[98] and the "causing of antipathy of the public security personnel"[99] have always been the influential factors on-the-ground in reality. They are inextricable under the above-mentioned basic-level judicial conditions. The public security bureau and the court were aware of the real motivation behind the pilot program initiated by the procuratorate or the procuratorial leader, and they realized that the pilot project would not be the case in the long run. Tolerance of the public security bureau and the court and their short-term cooperation with procuratorate has become the reasonable strategic option. A senior police officer mentioned,

> "If the pilot project is about to sustain, the core benefits of the public security bureau (staff) and the court (staff) would be sacrificed or damaged, and we would do anything to block the pilot program. Owing to the non-sustainability of the pilot program and the fact that we also need cooperation of the procuratorate in some pilot programs assigned by our supervisors or high-level authorities, mutual tolerance, understanding and cooperation become a rational choice".[100]

In this sense, "give and take" then becomes the hidden rule for power intercourse, exchange, or bargaining.

Even the procuratorial staff responsible for the centralized review scheme in the PD supervision unit had their workload significantly increased due to the pilot program. The final decision made by the procuratorate is merely a suggestion for the public security bureau, court, or public prosecution unit, while the implementation of the changed detention decisions depends on the cooperation and coordination of other criminal justice agencies or units.[101] For this reason, many procuratorial staff lost their enthusiasm for detention necessity review.[102]

[95]P14AH07.
[96]P14AH07.
[97]Xin He, "Black Hole of Responsibility: The Adjudication Committee's Role in a Chinese Court", 46 Law & Society Review, 2012 (4): 681–712.
[98]I14CS03; P14CS10.
[99]I14AH04; P14AH18.
[100]I14AH02.
[101]P14AH13.
[102]P13AH07.

After being informed of the pilot measures, lawyers in Province AH raised some proposals for the detention necessity review; as a result, the PD supervision unit of the procuratorate in Province AH was incapable of reviewing all the cases, not to mention conducting the hearing-based review. According to a senior lawyer,

> "…the measure is apparently a show, but it is good for lawyers. The procuratorate is endowed with the power of post-arrest detention necessity review by Article 93 of the CPL in the phase of investigation, public prosecution and trial. It means that lawyers can make applications to the procuratorial agencies in the phase of investigation, public prosecution and trial. Lawyers should be responsible for and paid by clients, who support the living of us. We do not care whether it is a phased or centralized review; we do not care whether it is a show or a real reform. We charge by phase. As long as I have the right to file application, I have an expanded scope of business- applying for detention necessity review and charging on it. We can solicit business from the client or his close relatives like this, 'I am trying to propose to the procuratorate for detention necessity review for you and this may suspend the detention of the suspect.'"[103]

This lawyer further pointed out the problem he observed in the hearing proceeding for the detention necessity review:

> "The procuratorate is carrying out the hearing with an air of importance. They make the investigator of the public security bureau, the sheriff of the detention center, and applicant in the hearing of the review, and invite local congress members, CPPC members and legal scholars to attend and make the so-called democratic supervision. Clients do not know so much about criminal proceedings and they would think lawyers have made great achievements in defending their cases. We just need to reap the profits. That is why we are delighted to see the pilot program in the procuratorate. Absolutely, we would raise as many applications as possible for our clients."[104]

5. Conclusions and implications

The CPL put in place a post-arrest detention necessity review scheme. This legislative movement has tried to address the pressing concerns from society over "excessive detention" and the "detained through" phenomenon. The procuratorial agency should, under the new scheme, conduct a detention necessity review after the suspect is arrested. However, as the empirical research indicated in this article, since an impartial judicial review mechanism has not been introduced, the newly-added scheme is substantially the same as the existing institutional arrangement, making detention in the sole jurisdiction of the people's procuratorates. In this sense, the significance of this planned reform is destined to be limited. Since the CPL 2012 does not stipulate which unit(s) is in charge of this detention necessity review, debate was aroused among different units representing various operating lines inside the procuratorial agency. A program designed to enhance the basic rights of the accused has evolved into a contest of varied internal units in a procuratorate and operating lines in the whole procuratorial system for their own benefits. Influenced by the powerful case-handling units, that is, the investigation supervision unit and the public prosecution unit, the SPP adopted the phased review model. This model benefits case-handling units. On the other

[103] L14AH01.
[104] L14AH01.

hand, through field research conducted in the procuratorates in Province AH, it is found that the more neutral centralized review was implemented in the pilot program, the data indicated more satisfactory results with the derivation of some elements of due process and judicial transparency. Nevertheless, the remarkable effect achieved by the pilot program mainly depended on the judicial conditions of the procuratorate and political ecology among the Triangle Three: the public security bureaus, the procuratorate, and the courts at the basic level. Apparently, stability and sustainability of such conditions and the ecology that goes with the orientation of pilot reform promotion are quite uncertain. Protecting the accused's rights and improving the quality of criminal justice finally depend on the power equilibrium among the public security bureaus, the procuratorates, and the courts, or among different units inside the procuratorates.

This article contextualizes criminal justice reform in China's socio-political conditions through empirical studies of the "living law".[105] The route of criminal justice reform is not completely determined by legislation or the "rule of law" slogan. The field research appears to show that, in a top-down society or Party-state country like China, the outcome of criminal justice reform, in particular, improving pretrial detention law and practice as discussed in this article, is less related to how legislation is designed or improved but more influenced by the result of the game of power among various criminal justice agencies or units within one judicial agency. The natural uncertainty flows out of the unstable power matrix among various agencies, which struggle for more power. This uncertainty has turned the pilot program at the local level to be the center of the reform while the CPL and the Rules, which are supposed to be the center and foundation of the reform, have become the periphery.[106]

There are two reasons for the view that "law does not matter" or for the discrepancies between legal norms and living law. First, law is deliberately drafted in a vague way (e.g. Article 93 of the CPL), leaving more space for interpretation, experimentation, and deviation. Uncertainty and indeterminacy in turn would weaken the legal system.[107] Second, law has inherent vulnerability due to the high likelihood that judicial and law enforcement agencies can interpret it in a biased or expansive manner to apply it in favor of themselves. In our case, law in action (instead of the CPL or the Rules) is more determinative if the power matrix can reach equilibrium and fit the law in action. This affirms the notion that legal norms are of limited explanatory value for socio-legal studies.[108] The empirical analysis shows a mismatch between law on books and law in action related to the ongoing detention reform in China and necessitates a fixing of the distribution of power among various actors in the criminal justice system that occurs in both lawmaking and practice. A strong policy implication based on this article is to call for a more balanced and refined reform design to synchronize law in action and law on books.

In the context of criminal justice reform, checks-and-balances are the scarce public goods[109] in a top-down society due to the authoritative nature of the political-legal system.

[105]Roger Cotterrell, The Sociology of Law: An Introduction, Butterworths (1992), 32.

[106]Roger Cotterrell, "Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies", in Marc Hertogh (ed.), Living Law Reconsidering Eugen Ehrlich, Hart Publishing (2008), 75–94; David Nelken, "Eugen Ehrlich, Living Law, and Plural Legalities", 9 Theoretical Inquiries in Law 2008 (2): 443–471.

[107]Pitman B. Potter, "Legal Reform in China: Institutions, Culture, and Selective Adaption", 29 Law & Social Inquiry 2004 (2): 465–495.

[108]Roger Cotterrell, Law, Culture and Society: Legal Ideas in the Mirror of Social Theory, Ashgate (2006), 8.

[109]From the public goods perspective, the counter-argument in favor of this "expansive" judicial approach is that it may guarantee a higher level of security to the larger population, which is viewed as an overarching interest of social stability. This line of thinking appeared in the CCP's early policies.

The ruling party, together with its law enforcement authorities (including all public security bureaus, procuratorates and courts), pays more attention to societal stability with the compelling aim of securing social order and governance legitimacy, thereby reinforcing the ruling power. The "reflexive" ecological research in this article reconnects legal and socio-legal scholarship with the political debates[110] in a Chinese context. A close examination of how power is shared and operated helps explain the normative questions—the proper boundaries and effects of power. In a top-down society, power is a centralized source of coercion in relation to the legal sphere of society.[111] Some existing literature has indicated that judicial agencies such as courts in China have a strong tendency to devise tactics with the aim of enhancing their own authority.[112] Law enforcement authorities in China are still in the process of institutionalization to reach a new power equilibrium, which will affect stakeholders in the society. Without the "thick" rule of law (instead of rhetorical emphasis on the rule of law) which is the key to transforming institutional, ideological, and regulatory components in a top-down society with more "bottom-up" legality,[113] detention system reform—as well as judicial reform in a larger context—in an authoritarian regime, even well designed, only lies in black letters. The underlying logic of China's reform of its detention system leads to similar propositions about the dynamics of state-led legal reform in other areas of law in a broader social context.

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[110]Boaventura de Sousa Santos & César A. Rodríguez-Garavito, "Law, Politics, and the Subaltern in Counter-hegemonic Globalisation", in Boaventura de Sousa Santos & César A. Rodríguez-Garavito, Law and Globalization from Below: Towards a Cosmopolitan Legality, Cambridge University Press (2005), 8.

[111]Samantha Ashenden, "The Problem of Power in Luhmann's Systems Theory", in Michael King & Chris Thornhill (ed.), Luhmann on Law and Politics: Critical Appraisals and Applications, Hart Publishing (2006), 127.

[112]Xin He, "Judicial Innovation and Local Politics: Judicialization of Administrative Governance in China", 69 The China Journal 2013 (1): 20.

[113]João Arriscado Nunes et al., "Bottom-up Environmental Law and Democracy in the Risk Society: Portuguese Experiences in the European Context", in Boaventura de Sousa Santos & César A. Rodríguez-Garavito, Law and Globalization from Below: Towards a Cosmopolitan Legality, Cambridge University Press (2005), 380.

List of Interviewees.

Code of interviewee	Province	Criminal justice experience (Years)	Occupations
Judges			
J14BJ01	BJ	3+	Judge at a basic-level court
J13AH01	AH	10+	Head of the criminal law division at a basic-level court
J13EY04	EY	8+	Judge at an intermediate-level court
J13AH02	AH	5+	Judge at a basic-level court
J13AH03	AH	10+	Judge at a basic-level court
J11CS01	CS	8+	Judge at a basic-level court
Prosecutors			
P13AH03	AH	30+	Deputy Chief Prosecutor at a provincial-level prosecutorate
P13AH04	AH	20+	Chief Prosecutor at a basic-level prosecutorate
P13S09	SPP	20+	Prosecutor at the Supreme People's Prosecutorate
P14AH05	AH	8+	Responsible person of a unit at a provincial-level prosecutorate
P14S12	SPP	5+	Prosecutor at the Supreme People's Prosecutorate
P14AH06	AH	15+	Responsible person of a unit at a provincial-level prosecutorate
P14AH03	AH	15+	Responsible person of a unit of a provincial-level prosecutorate
P13DT08	DT	5+	Prosecutor at a basic-level prosecutorate
P13AH06	AH	15+	Responsible person of a unit at a provincial-level prosecutorate
P14AH11	AH	15+	Responsible person of a unit at a basic-level prosecutorate
P14AH01	AH	5+	Prosecutor at a provincial-level prosecutorate
P14AH07	AH	5+	Prosecutor at a basic-level prosecutorate
P14AH02	AH	20+	Responsible person of a unit at a provincial-level prosecutorate
P13AH01	AH	15+	Responsible person at a unit at a provincial-level prosecutorate
P13AH05	AH	15+	Responsible person of a unit at a provincial-level prosecutorate
P14AH08	AH	5+	Prosecutor at a basic-level prosecutorate
P14AH04	AH	10+	Responsible person of a unit at a provincial-level prosecutorate
P13AH07	AH	10+	Responsible person of a unit at a basic-level prosecutorate
P14AH15	AH	10+	Prosecutor at a basic-level prosecutorate
P14AH16	AH	15+	Responsible person of a unit at a provincial-level prosecutorate
P14AH17	AH	15+	Responsible person of a unit at a provincial-level prosecutorate
P14AH13	AH	30+	Chief Prosecutor at a basic-level prosecutorate
P14CS10	CS	15+	Chief Prosecutor at a basic-level prosecutorate
P14AH18	AH	5+	Prosecutor at a basic-level prosecutorate
P13AH02	AH	10+	Prosecutor at a basic-level prosecutorate
P14AH14	AH	10+	Prosecutor at a provincial-level prosecutorate
P14AH09	AH	10+	Prosecutor at a provincial-level prosecutorate
Police Officers			
I14CS03	CS	10+	Investigator at a basic-level public security bureau
I14AH04	AH	15+	Responsible person of a unit at a provincial-level public security bureau
I14AH01	AH	10+	Responsible person of a unit at a basic-level public security bureau
I14AH02	AH	10+	Responsible person of a unit at a basic-level public security bureau
Scholars			
S13AH01	AH	N/A	Senior scholar on criminal proceedings
S14CS02	CS	N/A	Young scholar on criminal proceedings

(*continued on next page*)

(*continued*)

Code of interviewee	Province	Criminal justice experience (Years)	Occupations
S13AH02	AH	N/A	Senior scholar on criminal proceedings
S14CS01	CS	N/A	Senior scholar on criminal proceedings
S15DT01	DT	N/A	Senior scholar on criminal proceedings
Lawyers			
L14AH01	AH	15+	Partner at a criminal defense law firm
L14AH02	AH	10+	Partner at a criminal defense law firm
L15AH01	AH	10+	Partner at a criminal defense law firm
Others			
Z14AH01	AH	N/A	Official at a basic-level political-legal committee
C14AH01	AH	N/A	Congress member at a basic-level People's Congress