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**JUSTICE AND EFFICIENCY:  
AN EMPIRICAL STUDY ON SIMPLIFIED PROCEDURE FOR GUILTY PLEA CASES**

Bensen Li

Submitted to the faculty of Indiana University Maurer School of Law  
in partial fulfillment of the requirements  
for the degree  
Doctor of Juridical Science

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Accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment  
of the requirements for the degree of Doctor of Juridical Science.

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Bensen Li

JUSTICE AND EFFICIENCY:

AN EMPIRICAL STUDY ON SIMPLIFIED PROCEDURE FOR GUILTY PLEA CASES

This study explores the simplified procedure for guilty plea cases emerged in the context of the rise of crime in China. It examines the effect of the simplified procedure and the relevance of the concept of guilty plea in practice, seeking to answer the questions such as: how efficient was it in process durations in the simplified procedure? Is there any difference for guilty plea cases in sentencing between simplified procedure and regular procedure cases? What is the core problem in considerations and relationship between justice and efficiency in the simplified procedure?

To answer these questions, the empirical study is developed on the basis of relevant case summaries collected from the database of *Chinalawinfo* and surveys carried out in Beijing, Shanghai, Zhejiang, and Hunan in China. Three basic ideas come out from it: First, the duration of process in the simplified procedure changes little, particularly in trial stage. Second, there is no substantial difference for guilty plea cases in sentencing between simplified procedure and regular procedure cases. Third, the simplified procedure without the support of the public defense system would be deemed defective. Under these findings, it appears better to improve the presence of defense to ultimately overcome the ineffectiveness or problems in the implementation of the simplified procedure.

# Justice and Efficiency

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## I. Introduction

### A. Background

As crime was soaring, the simplified procedure (*jianhua chengxu*) (hereafter “SP”) as an alternative to regular procedure (*putong chengxu*) (hereafter “RP”) was introduced to dispose criminal cases in which defendants plead guilty. In recent decades, crimes in China have multiplied with the development of the economy.<sup>1</sup> According to official reports, the number of criminal defendants over the years 1993 to 1997 was 2,742,133, while from 2003 to 2007 the number shot up to 4,170,000.<sup>2</sup> Table 1 details the criminal defendants in judgment issued by courts at different levels in 2010.<sup>3</sup> The Work Report of the Supreme People’s Court (*zui gao renmin fayuan*) (hereafter “SPC”) indicated in March 2012 that crimes were still on the rise and that the number of convicts had reached one million in 2011.<sup>4</sup>

Table 1: Judgments of Criminal Defendants in 2010

Effective Judgments Issued	Defendants
Acquittal	999
Convicted but Exempted from Punishment	17,957
Convicted	988,463
Total	1,007,419

Source: *beida fayi* website : [http://www.lawyee.net/OT\\_Data/Judicial\\_Stat\\_Display.asp?StatID=794](http://www.lawyee.net/OT_Data/Judicial_Stat_Display.asp?StatID=794)

Along with the rising crime rate, the cases with illegal extended detention (*feifa chaoqi jiya*) inundated the jail system (*kanshou suo*), and particularly, some extremely notorious cases with extended detention created public discontent with the criminal

<sup>2</sup> The statistics are from *zuigao renmin fayuan gongzuo baogao* (Ren Jianxin 1998) (Supreme People’s Court Work Report), and *Zuigao renmin fayuan gongzuo baogao* (Yang Xiao, 2003, 2008) (Supreme People’s Court Work Report). (In China, the chief justice of the Supreme People’s Court is required to publicly report its work to the National People’s Congress every year.)

<sup>3</sup> *sifa tongji* (Judicial statistics), available at [http://www.lawyee.net/OT\\_Data/Judicial\\_Stat\\_Display.asp?StatID=794](http://www.lawyee.net/OT_Data/Judicial_Stat_Display.asp?StatID=794).

<sup>4</sup> Shengjun Wang, *Zuigao renmin fayuan gongzuo baogao*, (Supreme People’s Work Report) *xinhua wang* (Xinhua Net) March, 11, 2012.

justice system. For example, China's media revealed that a farmer had been detained in jail for twenty-eight years but never charged with any offense.<sup>5</sup> In response to the cases with illegal extended detention, the central law authorities launched a campaign to remove these cases.<sup>6</sup> In the fall of 2003, SPC and the Supreme People's Procuratorate (hereafter "SPP") jointly issued a notice (*tongzhi*) requiring law enforcement at different levels to dispose cases with illegal extended detention as soon as possible. As result of this effort, nearly 30,000 cases with illegal extended detention were cleared by March 2004.<sup>7</sup>

Realizing the negative influence resulted from delay, law authorities had to take measures to speed up disposing criminal cases. In 2002, a local court handling a case in the way of plea bargaining attracted the attention of the public.<sup>8</sup> Some local courts initiated pilot projects in criminal trials where the cases were tried in the simplified regular procedure. Moreover, a number of criminal law scholars showed great interest in supporting the simplification of RP, and these proponents facilitated the success of the reform of RP.<sup>9</sup> On March 14, 2003, SPC, SPP, and the China's Ministry of Justice (hereafter "CMJ") together issued a regulation that implemented SP as an alternative procedure to regular procedure cases in which the defendants pleaded guilty (*guanyu shiyong putong chengxu shenli beigaoren renzui anjian de yijian*) (*shi xing*). The purpose of the use of SP was to enhance the efficiency in criminal procedures. After nine years in

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<sup>5</sup> Jingbo Wan, *Bei yiwang 28 nian de kanshousuo zhong de ren* (A Farmer Forgotten in Jail for 28 Years), *Nanfang zhoumo* (Southern Weekend ) June 12, 2003.

<sup>6</sup> Daqiang Zhu: *Zhong guo kaizhan qingchu chaoqijiya wenti* (China Moves Against Extended Detention), *zhongguo xinwen wang* (China News net), August 3, 2003.

<sup>7</sup> *Zuigao renmin fayuan gongzuo baogao* (SPC Work Report), March 2004; *Zuigao renmin jianchayuan gongzuo baogao* (SPP Work Report), March 2004. SPP reported that it had handled 25,181 cases of extended detention. SPC reported that it had handled 4,100 cases of extended detention involving 7,658 individuals, available at, <http://www.xinhuanet.com/>.

<sup>8</sup> Guo Gu, *Zhongguo biansu jiaoyi diyi an* (The First Plea Bargaining Case in China), *Zhongguo fazhi bao*(China Legal Daily), April 19,2002.( In December 18, 2000, the defendant quarreled with Wang Yujie and the defendant asked his friends to beat Wang Yujie, who was seriously wounded later. The police could not successfully arrest other perpetrators when the prosecutor indicted the defendant.)

<sup>9</sup> For example, Weidong Chen,*beigaoren renzui anjian jianhua shenli chengxu*, The Process of the Simplified Procedure, *zhongguo jiancha chubanshe* (The Press of China's Procuratorate),2004.

practice, in March 2012, the SP was ultimately merged into the summary procedure in the new amendment of CPL, which will take into effect in 2013. The inclusion of SP in 2012 CPL signals the necessary enhancement in efficiency, and to a large extent, the legitimacy of SP will further the improvement of criminal justice.

#### B. Purpose and scope

My study attempts to understand the actual effects of SP and presents recommendations for the law authorities to refine SP in legislation and practice. In order to accomplish this purpose, I conducted two sets of analysis: (1) a comparison between cases processed according to SP and cases processed according to RP, and (2) the experiences and perceptions of legal actors (judges, prosecutors, and lawyers) with some knowledge of actual practices vis-a-vis SP. The case summaries selected in the dataset for my research are mainly from the years 2003 to 2011, and all these cases in which defendants pleaded guilty were tried in courts of first instance. The survey I conducted from legal actors in 2011 covered jurisdictions in Beijing, Shanghai, Zhejiang, and Hunan, and the number of responses varies in different regions. I reserve my interpretation of the details on my research method in Part III.

The dissertation proceeds as follows: Part I introduces the background and purpose of the research; part II briefly presents the content of SP and the relating literature review; part III summarizes the process of data collection and research methodology; part IV shows findings from the case summaries and from the survey conducted in China; part V discusses the issues derived from observations and findings; the final part concludes.

## **II. Overview of simplified procedure**

### A. Defining simplified procedure

In general, criminal charges are divided into two categories—public prosecution and private prosecution. Public prosecution cases may be tried either in the summary procedure (*jianyi chengxu*) where one judge controls the trial or in RP in which three judges on a collegial panel handle the trial. Private prosecution cases are used in the charge of minor offenses in which the victims play the role in prosecution, and all private prosecution cases should be tried in the summary procedure. The distinction between the public prosecution and private prosecution depends on the nature of the crimes regulated in the CPL and CCL.

The trial process in the SP cases is largely simplified to speed up the trial. In an SP case hearing, the judge should inform the defendants of the legal consequence of a guilty plea. The judge in SP cases has the power to review the case files before the hearing. In the hearing proceedings, the prosecutors first read the indictment information, and then the judges question the defendants on the criminal facts and charges to confirm whether or not the defendants have voluntarily pled guilty. All evidence admitted in courts should be verified and the arguments from the prosecution and defense are allowed in hearing. Generally, the defendants pleading guilty should be sentenced to a lenient punishment. The court in SP cases should immediately pronounce the judgments when the hearing is finished.

Cases that are ineligible to SP are covered by the following circumstances: (1) criminal cases in which the defendants are blind, deaf or mute; (2) criminal cases in which the defendants might be sentenced to the death penalty; (3) criminal cases in which the defendants are foreigners; (4) criminal cases with significant influence in public; (5) criminal cases in which the defendants might be acquitted with innocence; (6) criminal

cases involved with joint committed offenses to which the defendants do not plead guilty; and (7) other criminal cases not properly tried in SP. These exceptions gave the prosecutor's discretion excluding cases from entering the SP. In 2012 CPL, these exceptions have been largely reduced; thus, we may expect that the SP will be more widely used in criminal procedures starting in 2013.

Table 2 displays the distinctions between SP and RP. The significant difference between SP and RP is that the hearing trial in SP skips or simplifies some required proceedings such as the cross-examination in evidence, interrogation, and the argument. Apart from this, the defendant in SP cases should plead guilty, while in RP cases the defendant may or may not plead guilty. In addition, the defendant should be punished leniently in SP, but in RP cases the defendant cannot be guaranteed a lighter sentence. The duration of SP, although the trial proceedings are simplified, is not shortened. As far as the purpose of legislation of SP is concerned, the duration of SP in law is inconsistent with the aim of SP in enhancing efficiency.

Table 2: Distinctions between SP and RP.

Variables	SP	RP
Eligible cases	Cases where the defendants plead guilty and may be sentenced to more than three year's imprisonment.	Cases where the defendants may be sentenced to more than three years, life imprisonment, or death penalty.
Guilty plea	Yes	Yes/no
Trial Panel	Three judges in a collegial panel	Three judges in a collegial panel
Prosecutor	The prosecutor may not be present in the court.	The prosecutor should be present in the court.
Victim	If any, the victim may not be present in the court.	If any, the victim may be present in the court.
Trial process	<ol style="list-style-type: none"> <li>1. Announcing trial proceedings</li> <li>2. The prosecutor reads the statement of indictment</li> <li>3. Interrogation</li> <li>4. Argument</li> <li>5. The defendant presents the final statement</li> <li>6. Sentence issued at the court</li> </ol>	<ol style="list-style-type: none"> <li>1. Announcing trial proceedings</li> <li>2. The prosecutor reads the charge statement.</li> <li>3. The defendant presents the statement</li> <li>4. The victim presents the statement</li> <li>5. Interrogation</li> <li>6. cross-examination</li> <li>7. Argument and defense</li> <li>8. The defendant presents the final statement</li> <li>9. Sentence issued</li> </ol>
Judgment time	Trial judges should immediately pronounce the judgments when the hearing process finished	Few judgments are immediately pronounced in court after the trial
Sentence	Lenient punishment to the defendant pleading guilty	No guarantee to the lenient sentence in guilty plea cases
Trial duration	Thirty days from the case filed in the court to the judgment	Thirty days from the case filed in the court to the judgment. <sup>10</sup>

<sup>10</sup> In some special situations, the duration for the sentence issued may be allowed to extend to forty-five days.



Figure 1 outlines the process of cases in criminal procedure. The SP can be only used for the public prosecution cases while the summary procedure can be used either in public prosecution cases or private prosecution cases. The SP is paralleled with the RP and summary procedure, but performs different role in disposition of cases. However, in the new amendment of 2012 CPL, the SP is no longer a supplementary procedure but merged with the summary procedure. The outline in Figure 2 only represents the process in the court of first sentence but does not include the process of appeal trial or the intermediate process in certain special circumstances. The case will be finalized in the higher court if the defendant appealed in the exception of death penalty cases. In death penalty cases, the SPC has the power to review the file and have the final say as to whether or not the defendant should be sentenced to death. The majority of cases are handled without the appeal process, and the guilty plea cases compose the majority of criminal cases. Few guilty plea cases are appealed, and also few appeals can be successful in the higher court. Generally, the Chinese criminal procedure is more complicated than the American bench trial but much more simple than the jury trial. The implementation of the SP in guilty plea cases makes Chinese criminal procedure more simplified and more efficient. In other words, the use of the SP moves the way of disposing guilty plea cases closer to the plea bargaining system in the United States.

Figure 1: The Process of Cases Distributed in Criminal Procedure

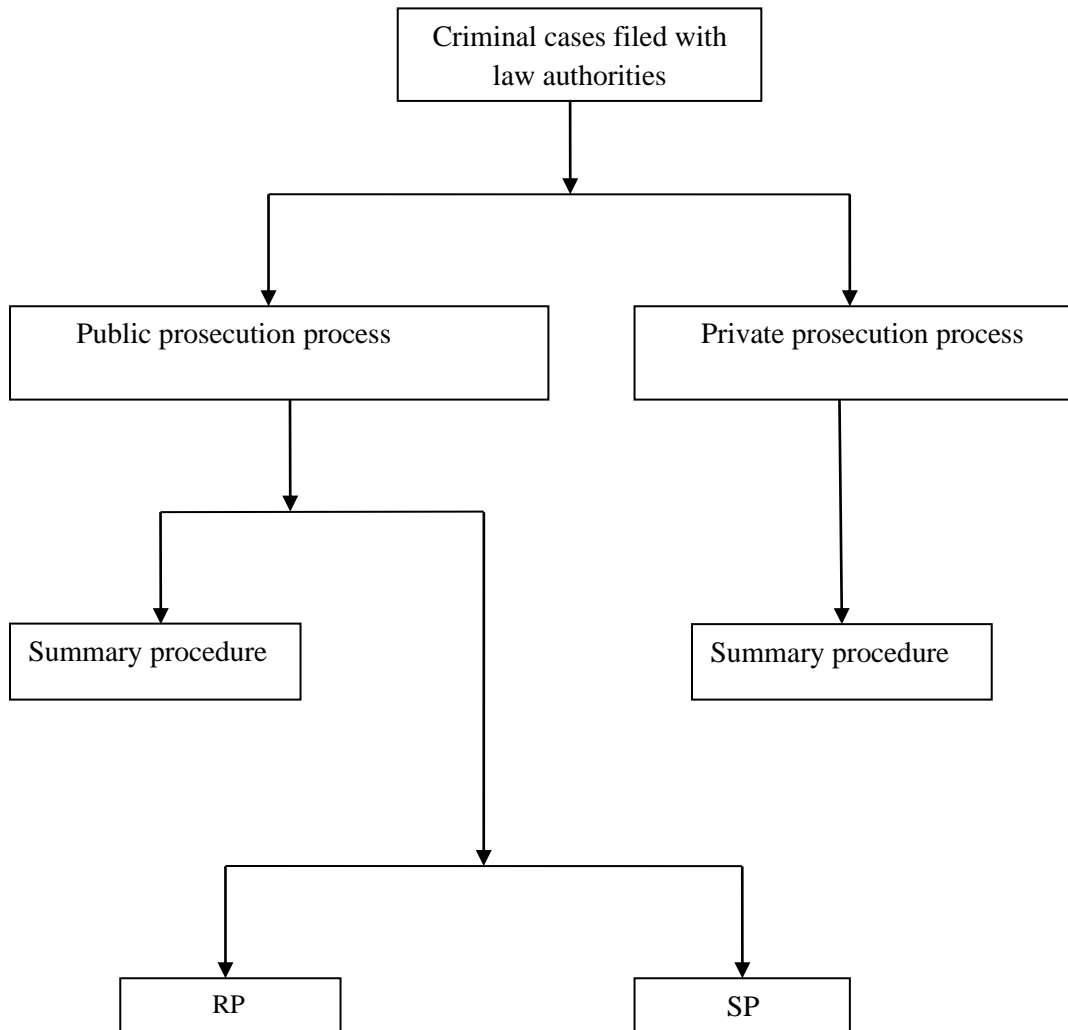
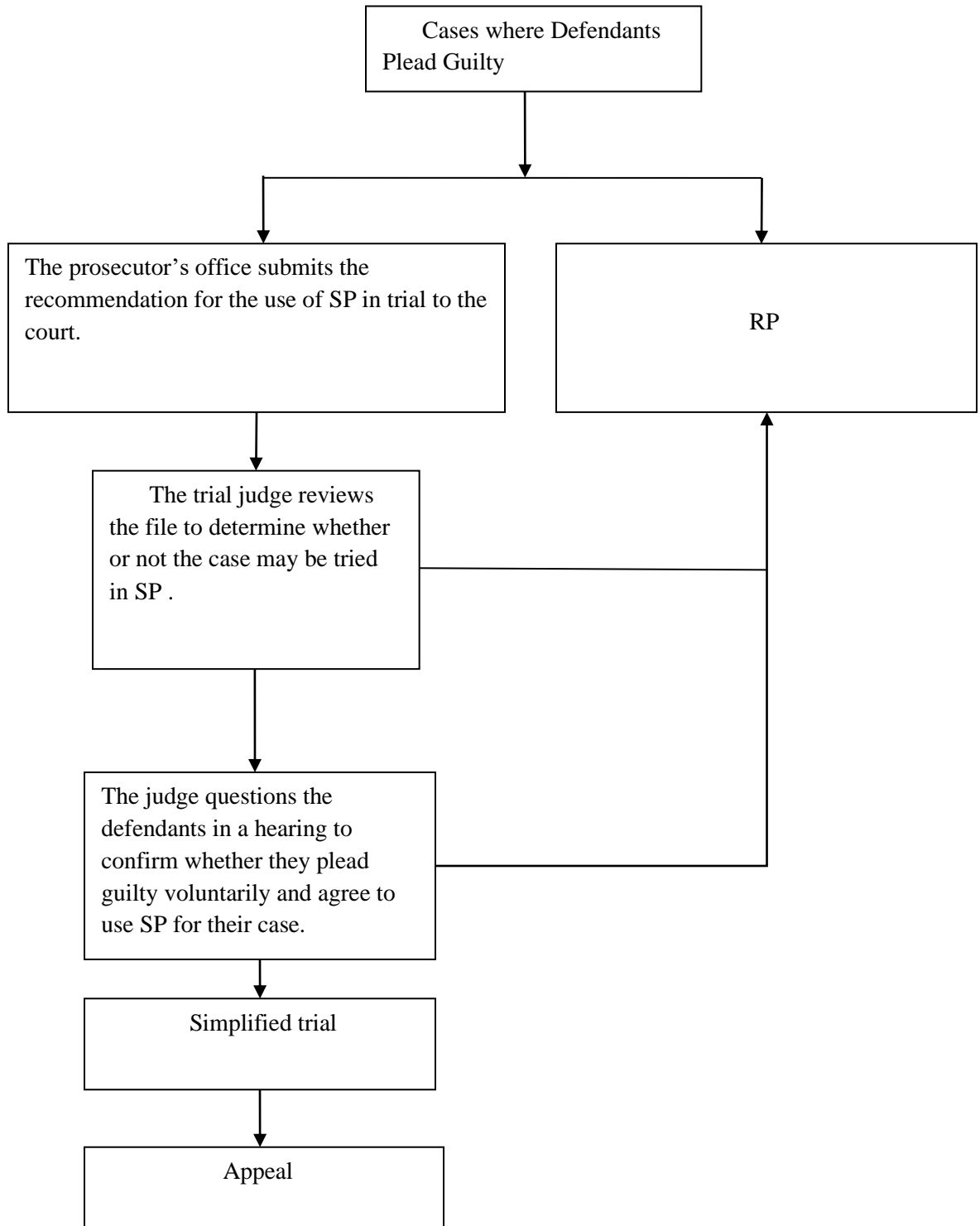


Figure 2 illustrates the proceedings of cases in SP. According to the regulation of SP, the use of SP in trial should satisfy three prerequisites. First, the defendants voluntarily plead guilty and consent to their case entering SP. Second, the prosecutor recommends that the court adopt SP in trial. Third, the trial court approves the recommendation of the request to use SP in trial. In the SP trial, the trial judges should confirm whether the defendant pleads guilty and would like to use SP, and they also need to clearly inform the

defendant about the aftermath of the SP trial. Defendants in an SP trial who are not satisfied with the sentences that they receive have the right to appeal to the higher court.

Figure 2: The Outline of Proceedings for Cases Entering SP



## B. Literature review

### 1. Research on simplified procedure

#### 1) The efficiency of simplified procedure

The SP practice in criminal procedure captured the attention of criminal procedure law scholars, most of whom focused on its efficiency in their studies. Xu Meijun, a law scholar from Fudan University, conducted empirical research in Shanghai and found that the SP is very limited in improving efficiency in the exception of saving hearing time.<sup>11</sup> She indicated that the SP played little role in saving judicial resources because the legal actors almost spent the same time on prosecution, defense, and trial as those in the RP cases. Particularly, she noted that the trial duration of most cases was around 45 days and few judgments in SP cases were pronounced immediately after the hearing proceeding finished.<sup>12</sup> However, the research conducted by Zuo Weiming, a scholar from Sichuan University, told a different story. He compared twenty-three cases tried in SP with nine cases in RP in S county, and found that the trial duration on average in SP and RP was 28.4 and 50.3 days respectively. Based on this finding, he indicated that SP is more efficient in saving judicial resources than RP.<sup>13</sup> The prosecution duration is another concern in the practice of SP; Sun Li and Li Qiaofen, two prosecutors who worked in the Haidian district in Beijing, analyzed the public prosecution cases charged in 2008 and revealed that the prosecution duration in SP was 62.6 days and 64.7days in RP.<sup>14</sup> All these studies are limited by the number of cases but are still useful in illustrating

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<sup>11</sup> Meijun Xu, *Jianhua shen chengxu de shizheng yanjiu* (An empirical study of summary trials in simplified procedure), *Xiandai faxue zazhi* (Modern Law Science Review) .Vol.29. No. 2, March, 2007.

<sup>12</sup> *Id.*

<sup>13</sup> Weiming Zuo, *S Sehng S shi, jianhuashen chengxu gaige de fankui he yanjiu* (A primary Review and Reflection on Reform of Simplified Criminal Procedure in China: Takes the Main former of Court in S County, S province). *Si chuan daxue xuebao shehuikexue ban* (Journal of Sichuan University, Social Science Edition), No.4, (2006).

<sup>14</sup> Li Sun, Qiaofeng Li, *jianhua shen chengxu—haidian jianchayuan weil* (Research on the Simplified procedure---the Example of Practice of Haidian District Prosecution Office). *Renmin jiancha yuekan* (People's prosecutorial semimonthly), No.14. (2008).

something about the efficiency of the SP. On the basis of these studies, we might expect that the SP plays little role in enhancing efficiency in disposing criminal cases, particularly in reducing the duration of trials and prosecution.

## 2) The presence of defense

A number of studies focused on the protection of defendants' rights, especially the right to the presence of the defense in SP cases. The majority of scholars indicate that the SP cannot effectively protect the defendants' right to the presence of defense counsel.<sup>15</sup> According to a study conducted by Zuo Weiming, the rate of the defendants' access to the defense in the court ranged from 15% to 30% in a western province.<sup>16</sup> Moreover, the role of the defense counsel in an SP trial is very limited because of the lack of basic rules in the defense,<sup>17</sup> and the scholars show their great concern about the low percentage of the presence of defense in SP cases.<sup>18</sup> According to these findings, we may expect that the lack of presence of defense is a problematic issue in the use of SP.

Whereas there is concern for the role of the presence of defense, some scholars suggest that the discovery be set up and added in pretrial.<sup>19</sup> Under the regulation of SP and CPL, the defense counsel has difficulties accessing the evidence and the charge information before the defendant pleads guilty to the prosecutor. Some scholars argued that the prosecutor's office should disclose all the files of the case and the evidence to the

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<sup>15</sup> Weiming Zuo, *supra* note 13. See also, Wuyun Tu Xiaojing, *Jianhuashen chengxu zhong de renquanbaohu he quanli pingheng* (The Protection of the Human Rights and the Balance of the Powers in Simplified Procedure), *Zhengzhi yu falv zazhi* (The Journal Politics and Law), No.9, (2008).

<sup>16</sup> Weiming Zuo, *supra* note 13.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Weiming Zuo, *supra* note 13; Weijian Tang, *Chongxin sikao jianhuashen chengxu* (Rethinking the Theory on the Simplified Procedure), *Falv yu jingji zazhi* (Legal and Economy Journal), No.11, (2007). Guohe Qiao, Hua Li, *Shenqian chengxu zhong de zhengju zhanshi* (The Use of the Discovery in Pretrial in Simplified Procedure), *Journal of Henan Judicial Profession Institute* (Henan zhengfa zhiye guanli ganbu xueyuan zazhi), No.4, 2004.

defendant and the defense counsel before the defendant's guilty plea to the court.<sup>20</sup>

Unfortunately, this recommendation in establishing the discovery process has not been accepted by the 2012 amendment of CPL. Due to the lack of discovery, we may assume that the trial may be troubled in the SP, leading to the time-consuming hearing process.

Regarding the issue of whether the defendants voluntarily plead guilty, the majority of scholars are concerned that that the rules of SP cannot prevent coercion from prosecution.<sup>21</sup> In the regulation of SP, the defendant is entitled the right to decide whether or not to plead guilty and accept his or her case will be tried in the SP. Yet, under pressure from the prosecution, an innocent person arrested without the assistance of defense may plead guilty in exchange for lenient punishment. In addition to pressure from the prosecution, the judges in an SP hearing may also impose pressure to bear on the defendants. The trial judges may threaten the defendant with the harsher sentence if he or she does not plead guilty in SP.<sup>22</sup> Owing to the lack of presence of the defense, the defendant may not make a wise decision in favor of his sentence. More often, the defendant cannot discern which procedure would be more favorable. Due to the limitation of resources, law scholars can only conjecture that coercion existed in the guilty plea process, but this assumption lacks motivation and evidence.<sup>23</sup> Unfortunately, few studies in this area provide empirical evidence, and thus we cannot know from previous research the actual situation concerning coercion in the process of the guilty plea.

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<sup>20</sup> Guohe Qiao, Hua Li, *supra* note 19.

<sup>21</sup> Yi Wan, Yongjun He, *Gongping yu xiaolv de guanxi he pingheng* (The Clarification on the Relationship Between the Justice and Efficiency), *Falv kexue zazhi*, Law Science Review, No.6,2004; see also, Xu Jianli, *Chongxin fansi jianhuashen chengxu* (Rethinking SP under the Defendants' Guilty Plea), *Fa xue zazhi* (Law Science journal ),No.6, (2005).

<sup>22</sup> Weiming Xu, *Jianhua shen chengxu shijian zhong de wenti* (The Discussion of the Problems in the Practice of the Simplified Procedure), available at, <http://chinalawlib.com/90360117.html>.

<sup>23</sup> Chun Huang, *Zhiyi jianhua shen chengxu*( Question on the Simplified Procedure), *Tianfu xinlun* (Tianfu New Issue), No.8, (2003).

### 3) The harshness of sentence

The scholars are also concerned with the issue of whether the defendants receive lenient punishment in SP cases. Xu Meijun reported that the defendants actually had gotten lenient punishment as long as the cases were tried in the SP.<sup>24</sup> She indicated that the sentence for defendants in SP cases is confusing in the guilty plea and suggested that the defendants pleading guilty should receive lenient punishment with the discount of punishment ranging from 20% to 30% in CCL.<sup>25</sup> Surely nothing frustrates defendants more than to discover after pleading guilty that the court does not offer them a lenient sentence. Based on these studies, we suppose that the defendants pleading guilty in SP are sentenced to lenient punishment.

### 4) Defining guilty plea

The meaning of a guilty plea is a great issue in the practice of SP. The legal actors and defendants should truly and exactly understand what the guilty plea means. According to the regulation of SP, the cases in which defendants agree to the primary charge and voluntarily plead guilty may be tried in the simplified procedure. Thus, two criteria are defined for a case eligible for the simplified procedure: one is that the defendant in the case consents to the charge, and the other is that the defendant should voluntarily plead guilty. But the key elements of a guilty plea are confusing, such as what guilty plea means, how defendants plead guilty, to whom the defendants plead guilty, who confirms the guilty plea, and what the consequences of the guilty plea are. Few studies in the research and reference rules in legislation can answer these questions. In

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<sup>24</sup> Meijun Xu, *supra* note 11.

<sup>25</sup> *Id.*

order to know what judges say in judgments on guilty plea, I move to the case summaries.

In a case summary from Henan in 2010, the trial judges concluded that:

Upon the trial, People's Court of Luyi's County in Henan Province confirmed that the acts where defendants, Zhou Kegong, Wang Guoyin, and Zhang Hailiang, assaulted the victims severely and destroyed their property seriously, constituted the crime of picking fights and provoking troubles under the penal code. Based on the sufficient evidence in trial, the charge from prosecution should be confirmed. All three defendants are principal offenders because they jointly and aggressively participated in the crime. The defendant, Zhou Kegong, confessed the main details in the crime, but argued that he did not attack the victim and broke the car. Therefore, Zhou Kegong's attitude to guilty plea was only moderate. The defense for Zhou Kegong cannot be accepted because it is inconsistent with the factors verified by the court. The defendant, Wang Guoyin, argued that he did not involve in the crime; however, his argument is inconsistent to other defendants confession and the victim statements. Wang Guoyin hoped to receive lighter punishment, but refused to plead guilty. The defendant, Zhang Hailing, pleaded guilty in trial and confessed to the court. Zhang Hailing's attitude to guilty plea was better than other defendants. Whereas the role of the defendants in crime along with the attitude in guilty plea, the sentences imposed the defendants should be different.

Hence, in accordance with the provisions of Article 293 of the Criminal Law, on April 13, 2010, the People's Court of Luyi's County of Henan Province rendered a judgment as follows:

The defendant, Zhou Kegong, should be sentenced to a fixed-term imprisonment of two years.

The defendant, Wang Guoyin, should be sentenced to a fixed-term imprisonment of two years.

The defendant, Zhang Hailiang, should be sentenced to a fixed-term imprisonment of one and a half years.<sup>26</sup>

In this case, the meaning of a guilty plea from judges' view is obvious: the defendants should confess to the prosecution. Otherwise, the defendant will not be treated as having submitted a guilty plea. In another case involving trafficking drugs, the trial judges made distinctions among co-defendants in the guilty plea:

The court confirmed that co-defendants, Li Yonghao, Xuan, Xiji, and Kang Jizhe, jointly trafficking large amount of illegal drugs

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<sup>26</sup> Luxixian renmin jianchayuan su zhoukegong an (People's Procuratorate of Luyi County v. Zhou Kegong etc., Lu yi xian renmin fayuan (Luyi County People's Court) April 13, 2010, available at <http://chinalawinfo.com>.



constitutes the offense of trafficking drugs, and thus they should be punished under the criminal law. The defendant, Li Yonghao, who pleaded not guilty, should be punished heavier; however, the defendant, Xun Xihong, who pleaded guilty, and should be given a lighter punishment in consideration. The defendant, Kang Jizhe, confessed the fact that the policemen had not known and provided assistance in capturing other criminals wanted, and certainly his confession and assistance were covered in the surrender (*zi shou*) to the law authorities and contribution (*li gong*) to the investigators, and then he should be given a lighter punishment.

Hence, in accordance with the provisions of Article 247 of the Criminal Law, on April 13, 2010, Zhenxin People's Court rendered a judgment as follows:

The defendant, Li Yonghao, should be sentenced to a fixed-term imprisonment of 13 years, fined 10,000 *yuan*, and deprived of political rights for 3 years.

The defendant, Xuan Xihong, should be sentenced to a fixed-term imprisonment of 11 years, fined 5000 *yuan*, and deprived of political rights for 2 years.

The defendant, Kang, Jizhe, should be sentenced to a fixed-term imprisonment of nine years, fined 3000 *yuan*, and deprived of political rights for 1 year.<sup>27</sup>

In these cases, the judges determined a defendant pleading guilty mainly based on the defendant's confession to the prosecution and the court. More surprisingly, the attitude of a guilty plea has different levels, leading to different punishment in cases. Clearly, confession is a basic requirement for a guilty plea, suggesting that the defendant who pleads guilty should confess to prosecution at trial. It is more likely that any defendants who confess to the indictment will plead guilty. If a defendant, however, disagrees with the details of the indictment, the court will suppose that the defendant does not plead guilty, and assume that the defendant's manner in a guilty plea is bad at trial. In the above case I first introduced, even the defendant, Zhou Kegong, confessed the primary criminal activities, his guilty plea was only treated as just so-so, for he argued

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<sup>27</sup> Zhengxing renmin jianchayuan su liyonghao an (People's Procuratorate of Zhengxing County v. Li Yonghao, etc., People's Court of Zhengxing County), zhengxing xian renmin fayuan, (Zhengxing People's County), June 10, 1999, available at <http://chinalawinfo.com>.

that he did not attack the victim and broke the car. Ultimately, he was sentenced to a fixed term of imprisonment like the other defendant who pleaded not guilty. In the second case I referred to, the defendant, Xuan Xihong, pleaded guilty, so his punishment was more lenient than that of the defendant who pleaded not guilty but heavier than that of the defendant who contributed to the investigation. It seems reasonable, but it shows the unfairness to the defendants pleading not guilty because they excised their right in defense in trial and were treated more harshly.

In addition, the meaning a guilty plea is more often confused with the defendants' remorse. Two judgments in cases related to theft show us how the defendant's remorse mixed with the guilty plea impacted different outcomes in sentencing. In the written judgment of the first case tried in Henan province, the court shows the unremorseful details of the defendant as follows:

Upon trial of the first instance, the court confirmed that the defendant, Lei Zhenbao, stole the property the other person owned, and the amount of value (3200 *yuan*) of the property is large, thus, his acts constitute the theft crime. The defendant was released from the prison on February 5, 2005, and once again stole other's property. Under the Criminal Law, the defendant, who committed the crime once again within five years after released, should be treated as a recidivist and thus sentenced heavier. During the investigation, the defendant tried to disable himself with the way of kicking on glasses in jail. The local procuratorate recommended a heavier sentence to defendant between 3 to 10 years imprisonment, and the court accepts this recommendation. The defendant offered a solid alibi and argued that the tools for the crime did not belong to him; however, his argument cannot be accepted because it is inconstant with the facts verified by the court. In accordance with the nature of the crime, the dangerousness to society of the crime, the detail of the crime, and the defendant's appearance in guilty plea and the remorse, the court rendered that the defendant, Lei Zhenbao, should be sentenced to a fixed term of 3 years' imprisonments and fined 3000 *yuan*.<sup>28</sup>

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<sup>28</sup> Yanjin xian renmin jianchayuan su leizhen bo an (People's Procuratorate of Yanjin County v. Lei Zhenbao, People's Court of Yanjin County), December 16, 2009, available at <http://chinalawinfo.com>.

The court in this case treated the defendant's argument against the charge as a sign of unremorseful demeanor at trial. Similar to the confession, the remorse if included in the element of guilty plea will prevent the defendant from excising the entitlement of defense. It is clear that the prosecutor's office in this case showed vindictiveness to the defendant for the noncooperation in the sentencing recommendation. There is a realistic likelihood of vindictiveness in plea negotiation and investigation, but it is hard to prevent. Under article 7, 2010 GOS, if the defendant pleads guilty, the court may decrease 10% of the imprisonment years of the benchmark sentence under the nature of the crime, the degree in crime, the demeanor of guilty plea, and the manner of remorse and so on. In China, there is a lot of controversy surrounding the sentence benchmark, so it is not clear how the courts at different levels implement this new legal interpretation.

In contrast, another case tried in Guangdong shows that the courts awarded the benefit to the defendant who was remorseful in trial. The People's Court of Raopin County confirmed that Fan Jun's act of stealing 174,329 *yuan* from the company he worked for constituted the crime of theft. As far as the extremely large amount of the value of the theft is concerned, the defendant, Fan Jun, should be sentenced to more than 10 years' imprisonment under the criminal law. But the defendant's acts were incidental and the measure of committing the crime was simple, and also the defendant pleaded guilty and returned all stolen money to the victim in time. Moreover, the victim requested the court to impose Fan Jun a lenient sentence. Considering these factors, it would be unreasonable to sentence Fan Jun more than 10 years' imprisonment. The court ruled that the defendant Fan Jun should be sentence to a fixed-term two years' imprisonment

and fined 3,000 *yuan*. Finally, the Supreme People’s Court approved the sentence issued by the People’s Court of Raopin County.<sup>29</sup> The defendant, Fan Jun was luckier in sentencing than Lei Zhengbao in the above case mainly because of different manners of remorse at trial. As far as the dangerousness of the crime is concerned, the two decisions ruled by the courts are simply divergent—for Lei Zhenbao, the punishment is too heavy while for Fan Jun the punishment is too light, for the property value stolen by Fan Jun was so much larger than that taken by Lei Zhenbao. Without doubt, the remorse from the defendant should be considered as an important factor in sentencing. An empirical study conducted in the United States has shown that the remorse of the defendant plays a key role in sentencing.<sup>30</sup> There were also statutes regulating the defendant’s remorse impacting sentencing in some jurisdictions in the United States.<sup>31</sup> In China, few regulations and laws touch on the remorse in sentencing. On September 13, 2010, the Supreme People’s Court enacted “the Guidance Opinions on Sentencing in Court” (2010 GOS), which only mentions the remorse in sentencing, but it is confusing of what is meant.<sup>32</sup> In sum, due to the lack of specific rules in the guilty plea, we may assume that the legal actors and other participators have disparities in the understanding of a guilty plea.

##### 5) Perceptions of legal actors

As for the perceptions of legal actors to SP, studies show that the perspective of legal actors and law scholars varies. Xu Meijun shows that the judges and prosecutors

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<sup>29</sup> Ropin xian renmin jianchayuan su fanjun an (People’s Procuratorate of Raopin County v. Fanjun), Raopin xian renmin fayuan (People’s Court of Raopin County), No.24, 2006, available at <http://chinalawinfo.com>.

<sup>30</sup> Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry the Role of Remorse in Capital Sentencing?* 83 Cornell L. Rev. 1599, (1997-1998).

<sup>31</sup> *Id.* at 1604, 1605.

<sup>32</sup> Zuigao renmin fayuan: liangxing zhidao yijian (The Supreme People’s Court: the Guidance Opinions on Sentencing in Court) (2010 GOSC), available at <http://baike.baidu.com/view/4543902.htm>.

show greater interest than the defense counsel.<sup>33</sup> According to her survey conducted in Shanghai, more than 86% of judges and 73% of prosecutors responded that SP was a successful way to speed up criminal cases, while only 31% of defense counsel thought so.<sup>34</sup> Based on this research, we may assume that judges and prosecutors are more likely to prefer the implementation of SP than the defense counsel. In contrast, an overwhelming majority of law scholars criticized the use of SP as an alternative procedure to RP.<sup>35</sup> Zhang Jianwei, a scholar from Qinghua University, argued that the SP is illegal because SPC, SPP, and CMJ have no power to interpret CPL without the endorsement from the People's Congress Committee. He also argued that the RP is simple enough to dispose criminal cases, so if further simplified it may result in the infringement of defendants' rights.<sup>36</sup> Another scholar, Huang Chun, argued that the implementation of SP lacks basic legal circumstance because the current system cannot prevent coercion and torture from the police and prosecution in guilty plea cases.<sup>37</sup> Based on these concerns in the research, we may assume that the SP has some defects in protecting the defendants' rights.

## 2. My research contribution

First, this study takes advantage of data from case summaries to observe the effects of the SP in actual practice. The case summaries are the objective outcome of the criminal procedure and may echo the effects of the SP from different aspects such as the

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<sup>33</sup> Meijun Xu, *supra* note 11.

<sup>34</sup> *Id.*, at 118.

<sup>35</sup> Jianwei Zhang, *Falv susong boyi zhong de xiangdui gongju zhuyi* (Epistemology of the relativism and the trend of the game in the lawsuit), *Falv kexue zazhi* (Law Science Review), No.4,(2004). Zhang Xuefeng, Mei Bocheng, *Jianhuashen chengxu yingdang hunxing* (The Simplified procedure should be suspended), *Jinlin keji xueyuan xuebao (sheke ban)* (Jin Lin Technology Institute Review, Social Science) No.2, (2007); Song Chuna, *Zhiyi jian huashen chengxu (Doubt on the simplified procedure)*, *Guojia jianchaguan xueyuan zazhi* (Journal of National Prosecutors' Institute) No.6, (2003). Wang Baozhong, Li Zhengfang, *Jianhuashen chengxu yingdang zhidu hua* (The Ssimplified Procedure should not be Treated as a System). *Jiancha shijian zazhi* (Prosecution Practice Journal) No.2, (2003).

<sup>36</sup> Jianwei Zang, *supra* note 35.

<sup>37</sup> Chun Huang, *Zhiyi jianhua shen chengxu* (Question on the Simplified Procedure), *Tianfu xinlun* (Tianfu New Issue), No.8, (2003).

presence of defense, the duration of processes, the harshness of the sentence and so on. More than 900 case summaries collected from *Chinalawinfo* strengthen the power of analysis in the research. Particularly, the comparison between the SP and RP may find different effects in the use of different procedures. Generally, the knowledge from the observation of case summaries enriches our understanding of the SP from a more objective view.

Second, the survey conducted in provinces and municipalities provides perceptions from different law actors and areas. The survey conducted in Beijing, Shanghai, Zhejiang, and Hunan is much more representative not only in the developed cities but also in developing areas. The judges, prosecutors, and legal actors provide distinctive perspectives on the SP. The findings of the survey broaden the view of the use of the SP in criminal procedure and may supplement the shortcomings of the observations made from the case summaries.

Third, the statistics method used may advance the analysis in the research on SP. In case summaries, the model of multivariate regression is used to observe the change of the variables influencing the effects of the dependant variables, such as the presence of defense, the process durations, and so on. The findings based on the statistical method provide a very detailed picture of the effects from different views. Generally, the statistical findings from case summaries along with the survey make the findings more trustworthy in the interpretation of the SP in the practice.

### **III. Data and Methodology**

#### **A. Case summaries**

##### **1. Resource**

The total 946 case summaries (with non missing dates N=940) were collected for the research from *Chinalawinfo*, which is by far one of the largest legal databases in China. In *Chinalawinfo* more than 427,274 case summaries publicized by courts at different levels are amassed in the database.<sup>38</sup> As *Chinalawinfo* reported, all case summaries in the database were collected from casebooks or publicized by courts at different levels.<sup>39</sup> No information is revealed about how *Chinalawinfo* collects and classifies case summaries online; however, each case summary in the database of *Chinalawinfo* has a fixed ID recorded in the top right corner of each written case summary made by the trial court. This means that the reader can identify any case online through the case ID number. The case summaries selected in the data for my research were all downloaded to check for duplication, if necessary.

As for the representative case summaries in *Chinalawinfo*, it is very difficult to resolve this very issue. One reason is that the Chinese court system has no uniform publication for the case summaries, and another reason is that China publicized very limited statistical information in cases. However, at minimum we may know some limited official statistical information in cases publicized by the central law authorities.

Typically, each case summary is an editorially-enhanced document that contains the information on the defendants' background, the prosecutor's office, trial court, the procedure used in trial, the detention date, prosecution date, the date of decision-making, the criminal facts, offenses charged, indictment information, the details of defense, the

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<sup>38</sup>The number is retrieved through the search engine system in *Chinalawinfo* website on March 3, 2012.

<sup>39</sup> In China, in recent decades, the Supreme People's Court required that the case summaries should be publicized online as a significant measure for the people's supervision of the court's judicial decision. Under this requirement, many high courts in many provinces and municipalities also encourage the courts in their jurisdictions to publicize the case summaries online. For example, Henan Province Higher People's Court in 2009 stipulates administrative rules on how to publicize case summaries online. Under these administrative rules, the case summaries selected and put online are generally standardized as example cases. There is a process in the cases selection and the sole judge cannot decide which case can or cannot be publicized, meaning that the preference of judges plays very little role in the selection of case summaries publicized online or published.

reasoning in judgment, the verdicts and so on. All case summaries selected include the above details, and I coded case information into my dataset under the code book in Appendix 6.

## 2. Case selection

Table 3 shows a brief summary of cases selected. All cases selected in the dataset are cases where the defendant pled guilty. In addition to 566 cases tried in the SP, I selected 374 cases for comparison under RP in the period 1997-2010. There were more than 900 simplified procedure cases in *Chinalawinfo* when I coded the cases, but some cases were excluded because of a lack of necessary information in the written summaries, such as the date of detention and the prosecution. To make the cases consistent in the nature of punishment, I excluded cases in which the defendants were sentenced to life imprisonment or the death penalty. In addition, appealed cases are not included in the database.

*Chinalawinfo* provides a powerful search engine to support advance research using the website. I made use of the research engine tool to look for cases I needed to code. As long as I put in the key words “the case with defendant pleading guilty” (*beigaoren renzuianjian*) in the search engine, the website would immediately present a web page listing of the titles of SP cases. I coded the case summaries under the codebook on the condition that these cases meet the basic criteria given in the code book. I coded the information including the dates of detention, arrest, and prosecution as well as the offense, the criminal record, the joint crime, the presence of defense and the decisions. Because the case summaries are updated every day online, the sum of case summaries should be



steadily increasing since I originally undertook this research.<sup>40</sup> The codebook in Appendix 6 covers all variables coded in the dataset.

The case summaries in my dataset may be biased for some reasons. First, the policy for case summaries published in courts may exclude some sensitive cases from being publicized. Second, the work of collecting case summaries for *Chinalawinfo* is not organized by law authorities. Because *Chinalawinfo* is a private company, this may lead to a lack of impartiality in case collection. Third, the timing in case summaries may lead to the bias of case selection. Some selected RP case summaries that were tried before the date of implementation of SP may lead to disparities for comparison. In addition, the geographic distribution of collected case summaries is concentrated in some areas and may lead to bias in jurisdictions.

Table 3: Distribution of Case Summaries

Offense Cases	Regular Procedure Cases	Simplified Procedure Cases
theft	1997-2010 (213)	2004-2010 (120)
other property	1998-2006 (73)	2003-2010 (250)
violent	1998-2008 (but only 1 after 2002) (38)	2003-2010 (83)
corruption	1998-2002 (10)	2005-2010 (31)
other	1998-2002 (40)	2005-2010 (82)
Total (N)	374	566

### 3. Variables Definition

This dissertation reports findings from two sets of analyses. The first concerns efficiency. The second concerns harshness of punishment. In order to isolate the effect of the SP on both efficiency and harshness, it is essential to hold constant (or control for)

<sup>40</sup>In the case database of *Chinalawinfo*, SPcases have increased to more than 1,300 cases in March, 2012. See *Chinalawinfo* website, visited on March 5, 2012.

other potential explanatory variables, such as characteristics of the offense and the individual characteristics of the offender. For this reason, all empirical findings presented here are based on multivariate regression models that estimate differences between simplified and regular procedure cases that are otherwise seemingly identical. The full models are contained in Appendix 5 for reference purposes. The primary variables of the dataset in my research are identified as follows:

1) Duration of process (*chengxu qixian*)

Measures of duration are used as dependent variables in the analyses of efficiency. Because the distributions of their values are highly skewed, regression models (which assume a normal distribution) use the logarithmic transformation of these variables. Appendix 3 contains both raw and transformed distributions. The duration of process refers to time taken by the different proceedings in criminal procedure. Under criminal procedure law, the duration of process is limited within a period of time, but also some exceptions in durations can be applied in special circumstances. In this research, I observe the durations including the duration of preliminary investigation, the duration of pretrial detention, the duration of trial. The total duration means that time period from the date of detention to the verdict date in the court of first instance. Table 4 shows the details of the definition of variables of durations in process used in the research.

Table 4: Definition of Variables in Duration of Process

<b>Durations</b>	<b>Definitions</b>
Preliminary investigation	Arrest date (the date of arrest approved by prosecutor office)– detention date
Prosecution	Prosecution start date (the date filed indictment to court) – arrest date
Trial	Written verdict issued date – prosecution start date
Total duration	Written verdict issued date – detention date

The prosecution is completed by the policemen and the prosecutors respectively, in which the policemen process the investigation and the prosecutors charge the defendant with the offense. The total time of prosecution should fall within a ninety-day period, according to CPL— sixty days for investigation and thirty days for indictment. In the written case summaries, no demarcation line is recorded between police investigation and prosecutor indictment. For this reason, the analysis in this research cannot show the difference of duration between the police investigation and prosecutor prosecution. This means that the duration of prosecution covers the durations of police investigation and prosecutor prosecution.

2) Offense (*zui ming*)

This is a control variable. Offense in case summaries refers to the nature of the crime charged by the prosecution, and all offenses are listed under criminal law code. Generally, I classify the offenses into three parts— property crime, violent crime, and corruption crime. Whereas the offense of theft is the most prevalent crime, I excluded it from the property offense as an independent variable to observe.

3) Criminal record (*fanzui jilu*)

This is a control variable. Criminal record refers to whether the defendant was prosecuted by law authorities prior to the current prosecution. Under the criminal law, the defendant who has a criminal record should be punished more severely than others in the same situation who have no criminal record. In this research, the record of punishment in labor education is seen as a criminal record.

4) Joint crime (*gongtong fanzui*)

This is a control variable. The term of joint crime in the case summaries means the offense involved two or more offenders who carried out a crime together. Generally, the dangerousness of the joint crime will be more severe and the offenders may be sentenced more harshly in trial. Also, the joint crime will make the investigation work more complicated and thus lead to more time spent on the process.

5) Presence of defense (*lvshi daili*)

This is a control variable. The presence of defense refers to defendant's access to the defense lawyer for assistance in prosecution and trial. In addition to the professional lawyer working in a law firm, the legal workers (*falv gongzuo zhe*) who have not yet received the license of lawyer may also be the defense counsel in criminal representation as long as they do not charge any fee. In this research, the term of defense refers only to registered lawyers working in law firms.

6) People's assessor (*renmin meishenyuan*)

This is a control variable. People's assessor refers to the citizens who are entitled to participate in the trial as part-time judges. The collegiate panel for trial should be composed of three judges, where either one or two qualified as people's assessor may be associates on the panel. The director of the panel should be assigned as a professional judge. All people's assessors who participated in the trial are listed as judges in the bottom right corner of written case summaries.

7) Prison sentence (*youqi tuxing*)

This is the first dependent variable in the analyses of the harshness of punishment. Because the distribution of its values is highly skewed, regression models (which assume a normal distribution) use the logarithmic transformation of this variable. Appendix 3

contains both raw and transformed distributions. A prison sentence is the most common penalty in sentencing. In CCL the fixed-term imprisonment cannot exceed 15 years while the minimum term for imprisonment is no less than 6 months. The longest fixed term imprisonment may reach up to 20 years unless the defendant is involved in multiple offenses in the case.

#### 8) Probation (*huanxing*)

This is the second dependent variable in the analyses of the harshness of punishment. The distribution of this variable is not noticeably skewed (see Appendix 3). In CCL, the probation in sentencing is usually connected or combined with a fixed-term imprisonment, meaning that the imprisonment term may be suspended or may not be enforced if the defendant does not commit a new offense and follows the administrative rules in a fixed-term of probation. In other words, the probation is a conditional punishment or alternative to a fixed-term imprisonment. When a court orders a defendant a fixed term imprisonment with probation, this means that the defendant should be released to the community instead of serving in prison. The defendant with probation in the community should regularly report their activities to the local police department. If the defendant does not violate the probation requirements or rules, the fixed-term imprisonment will not be enforced. The probation measure shall not be applied to the cases in which the defendant is a recidivist or imposed more than three years fixed-term imprisonment.<sup>41</sup>

#### 9) Fines (*fajin*)

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<sup>41</sup>Zhonghua renmin gongheguo xingfa (Criminal Law Code of P.R.C) (promulgated by Nat'l People's Cong., July 1, 1979, amended in March 14, 1997), art.60-77.

This is the third dependent variable in the analyses of harshness of punishment. Because the distribution of its values is highly skewed, regression models (which assume a normal distribution) use the logarithmic transformation of this variable. According to the criminal law code, when imposing a fine, the amount of the fine shall be determined according to the circumstances of the crime.<sup>42</sup> The judges have discretion in imposing fines on the defendants or offenders. The rules for how to impose a fine or set the amount of a fine are confusing. From my observation in the dataset, in theft cases, all theft defendants are imposed a fine; however, in violent crimes, few fines are applied to the offenders. Fines are not to be considered compensation for the victims, however, it is only a kind of property punishment, and all money from fines should be turned in to the national treasury department. Instead of imposing a fine, if damage to victims resulted from a crime, the defendant may be required to make civil compensation to the victim in a criminal trial.

## B. Survey

### 1. Survey process

Preparing and conducting a survey is daunting work. Beyond my expectations, the survey process conducted in the summer and fall of 2011 went smoothly. Now, I describe the details in which I administered the survey, the questions I asked, and provide a brief summary of results.

The survey application and its amendment were approved by the Office of Human Subjects of Indiana University in 2009 and in 2010 respectively.<sup>43</sup> I conducted the survey among judges, prosecutors, and defense counsels across Beijing, Shanghai, Zhejiang, and

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<sup>42</sup> *Id.*, art. 54.

<sup>43</sup> Research Protocol: IRB Study #1005001341. Also for the application of the survey, I completed and passed the Indiana University Protection of Human Research Participants Certification Test on 27 April, 2010.

Hunan. Through distributing the questionnaires by email to the prospective respondents, I gathered a total of 242 responses— 56 from judges, 50 from prosecutors, and 136 from lawyers. In the survey, the judges, prosecutors, and lawyers were asked more than 40 questions in a questionnaire. Most of the questions have a single choice although some are multiple, and 5 open-ended questions are attached at the end. The survey is anonymous, and all respondents were asked not to provide their names.

#### 1) Survey in Beijing

With the assistance of three alumni of China University of Politics and Law (hereafter “CUPL”), I conducted the survey in Beijing. I asked the assistants to collect 15 responses from judges, prosecutors, and lawyers separately. The three assistants sent the invitation via email in late August 2011 and finished the survey in September 2011. I gathered a total of 37 responses — 13 from Fengtai district court, 13 from Chaoyang district prosecutor’s office, and 11 from law firms including six in Dongcheng district, four in Chaoyang, and one in Haidian. As for the selection of jurisdictions in Beijing, I suppose that three alumni have good connections (*Gunaxi*) with these district law authorities or legal professionals. Haidian, Chaoyang, and Fengtai are among the largest population districts in Beijing, and there are more than 5,900,000 residents living there.<sup>44</sup> Each administrative district is an independent jurisdiction which has one district court. Fengtai People’s Court has thirteen trial judges who are in charge of criminal trials. All of them were invited to participate in the survey and responded to the questionnaires. As for the responses from the prosecutors, all responses are from Chaoyang People’s Procuratorate. All responses gathered in Beijing are effective for the research.

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<sup>44</sup> Beijing’s Population Geographic Distribution, *available at*: [http://database.ce.cn/district/dfjj/rk/dis/200709/28/t20070928\\_13079435.shtml](http://database.ce.cn/district/dfjj/rk/dis/200709/28/t20070928_13079435.shtml).

## 2) Survey in Shanghai

Three legal officers served as assistants in the survey. One assistant working in Shanghai Second Intermediate People's Court assisted the survey in Zhabei People's Court, and the second one working in Shanghai People's Higher Court organized the survey in Pudong People's Procuratorate, and the third working in Shanghai Judicial Department assisted me in collecting the questionnaires from law firms in Jing'an district. They distributed the questionnaires I sent to the prospective respondents by email. Ultimately, I received a total of 117 responses in Shanghai— nine from judges, seven from prosecutors, and 101 from lawyers.

## 3) Survey in Zhejiang

The survey conducted in Zhejiang province, a developed province in eastern China, was organized by a senior defense lawyer. The lawyer is prestigious in Zhejiang, and successfully conducted the whole process of the survey in Zhejiang. Surprisingly, he told me that the lawyers showed indifference to the survey in Zhejiang. At last, I received a total of seventy responses— 27 from judges, 26 from prosecutors, and 17 from lawyers. The survey covered more than ten counties and districts in Zhejiang jurisdictions, so it should be more representative.

## 4) Survey in Hunan

An alumna of CUPL working in the Hengyang Intermediate People's Court in Hunan Province assisted me in distributing questionnaires and collecting responses there. I selected Hunan Province as a survey location mainly because I wanted to know the practice of SP in developing areas in central China. The process of the survey in Hunan met with difficulties, for the assistant reported that the local legal actors were not familiar



with the online computer system. I received 18 responses—seven from judges, four from prosecutors, and seven from lawyers. The sum of responses in Hunan province is lower than I expected; but the responses received cover 6 local jurisdictions in Henyang, which is a prefecture-level city with 12 county-level jurisdictions. At minimum, the survey in Hunan is significant for us to learn a little about the SP practice in developing areas of China.

## 2. Content of the survey

The questionnaires that I sent to respondents have three parts, with each type of respondent receiving a questionnaire designed for his or her type (judge, prosecutor, or lawyer). Questions in the first part are about the background of the respondents, such as the work location, age, gender, and the rank in position. The second part is multiple-choice format, asking the respondents to provide their responses. Some questions only have one answer, and some have multiple answers, meaning the respondents can provide more than one answer for the question. Most questions are in multiple choice, asking the judge, prosecutor, and lawyer to provide his or her response, either by choosing a response among a non-ordinal set of choices, or by ranking some responses with a four- or five-point scale, for instance, the respondents need to rank the effect of SP from strongly unsuccessful to strongly successful. At the end of questionnaire, I added some open-ended questions for respondents to provide their comments and suggestions, which only a number of respondents did; where relevant, I include them in the discussion part. From question to question, the number of responses may vary slightly because some respondents did not answer all the questions. The variation occurs with responses to the question of the significance of their work in the simplified procedure, particularly in the

responses from prosecutors in Shanghai. The three different questionnaires for different legal actors may be used to compare the different perspectives in the same or similar questions. Where necessary, I will give comparisons in similar questions from respondents in different areas. In the analysis of the multiple groups, I use SPSS as a calculation tool to generate the outputs for the analyses.

### 3. Survey summary

Table 5 shows the distribution of responses received from different areas and legal practitioners, but I could not determine the precise number of surveys sent to the judges, prosecutors, and lawyers because the survey assistants were not required to report this matter to me. The rate of effective responses in the responses is 91.7%, and, of course, the ineffective responses from Shanghai are excluded from the analysis.

Table 5: Distribution of Responses Received in different Areas and Legal Practitioners

	Judges	Prosecutors	Lawyers	Total
Beijing	13	13	11	37
Shanghai	9	7	101	117
Zhejiang	27	26	17	70
Hunan	7	4	7	18
Total	56	50	136	242

Table 6 shows the summary of statistics of respondents in age and gender.

Although the population of the survey is very small, we can observe the characteristics of the distribution in age and gender among legal actors. The number of responses varies by gender and age, reflecting different distribution in judges, prosecutors, and lawyers.

There is no significant difference in responses of questions in the survey under genders

and ages. If generally compared with the average age of judges in the United States, Chinese judges should be much younger because a Chinese undergraduate law student can be a judge as long as he or she passes the uniform judicial exam. Surprisingly, the exception of the gender in respondents who are prosecutors is disproportionate from the judges and lawyers in the survey. I have no evidence to interpret this difference. In addition, the elder respondents were more likely to respond to the open-ended questions in the questionnaires. This suggests that the elder legal practitioners might be more sensitive or responsible than younger law actors to the reform of criminal justice.

Table 6: Summary Statistics in Age and Gender for Respondents

	Judge	Prosecutor	Lawyer
<b>1. Age</b>			
20-30	27.5%	63.3%	22.1%
31-40	41.1%	22.4%	47.8%
41-50	25.5%	12.3%	16.9%
More than 50	5.9%	2%	13.2%
Total	100%	100%	100%
<b>2. Gender</b>			
Male	60.7%	38%	63.9%
Female	39.3%	62%	36.1%
Total	100%	100%	100%
N	56	50	136

In the survey I found that criminal cases were concentrated in municipalities. Chaoyang People’s Procuratorate in Beijing has more than 300 prosecutors, among which seventy prosecutors are in charge of indictment and disposed more than 3,000 cases in 2010. In comparison, Pinghu County People’s Procuratorate in Zhejiang province has sixty prosecutors, among which eleven prosecutors processed 600 cases in 2010. In

general, the jurisdictions in municipalities have larger population than those counties in provinces.

The number of SP cases in Beijing and Shanghai is not as large as expected. Fengtai People' Court disposed 2,360 cases, in which only sixty cases tried in SP. However, the SP was more likely to be used in trials in the provinces. For example, Dongxiang County People's Court in 2010 disposed 880 criminal cases, of which 521 were disposed in the SP. In addition, lawyers represented few criminal cases in municipalities. For example, the survey shows that in Shanghai, the percentage of criminal cases where defendants retained a defense lawyer is only 3.71% in 2010.

#### **IV. Findings**

##### **A. Findings from case summaries**

In multiple regression models in this part, I will report the direction (negative or positive) and the variation significance of the impact of independent variables on the dependant variables. The interpretation depends on the statistical result of the formulation of regression models.

##### **1. Effect of simplified procedure**

Table 7 shows us the effects of SP on durations of processes. The SP is negatively significant in impacting on the duration of preliminary investigation and prosecution—negative 11% of the duration of preliminary investigation and negative 16% of the duration of prosecution. This finding means that guilty plea cases in SP have a significant relationship with the duration of preliminary investigation. Accordingly, the SP also led to the reduction of the total duration of processes, even though the SP played an insignificant role in the reduction of the duration of the trial.

The sentence of the SP has also been impacted by the SP, as seen in Table 7. The duration (months) of probation is higher by nine months and the fine imposed on the defendant is higher than in cases tried in the RP procedure. Surprisingly, the finding violated the hypothesis that the defendants in simplified procedure cases are imposed lenient punishment in sentencing. Prison sentences are not significantly longer in SP cases (in the regression models) with the exception of theft cases. This finding is so general that we cannot conclude how the SP impacts the prison sentence.

Table 7: Effect of SP on Duration and Sentence

Variables	Effect of Simplified Procedure
Duration of preliminary investigation	– (11%)*
Duration of prosecution	– (16%)*
Duration of Trial	+ (5%)
Total duration	– (10%)*
Prison sentence	+ (8%)
Probation	+ (9 months)*
Fine	+ (103%)*

Note: \* statistically significant at  $p < .05$ . This table summarizes the effects of the SP on duration measures and harshness of punishment measures. The full multivariate regression models on which this table is based are contained in the Appendix. The effect of the SP is reported as percentage change where the dependent variable has been logarithmically transformed (all except “probation”). For example, the coefficient of  $-.120$  in A-Table 1 in Appendix 5, Model 1 for the effect of SP on the duration of the preliminary police investigation is reported above as  $\exp(-.120) - 1 = -.113 = -11\%$ .

## 2. Effect of presence of defense

Table 8 displays the summary of distribution between the SP and RP. The total average percentage (39.55%) of the presence of defense in the dataset is close to the result of the estimation by Zuo Weiming.<sup>45</sup>

<sup>45</sup> Weiming Zuo, *supra* note 13.

Table 8: Statistical Summary of the Presence of Defense Counsel

	Regular Procedure	Simplified Procedure
No counsel	57.3%	63.6%
Lawyer	42.7%	36.4%
Total	100.0%	100.0%
N	375	558

Note:  $\chi^2=3.7$ ,  $p=.05$

Table 9 displays the effects of SP on the durations of processes and sentencing. Apart from the prison sentence and probation, the presence of defense counsel in SP cases is positively correlated with the durations of preliminary investigation, prosecution, and trial as well as the fine. Particularly, the presence of counsel significantly increases fines in simplified procedure cases, which is consistent with the hypothesis that the presence of defense counsel may signal that the defendants with defense counsel are more likely to afford the fines. In contrast, the presence of defense counsel in RP cases is not significantly correlated with sentencing and the duration of the preliminary investigation and prosecution beyond the trial duration and total duration.

Table 9: Effect of Presence of Defense Counsel

Durations	Effect of Presence of Defense Counsel	
	Regular Procedure	Simplified Procedure
Preliminary investigation duration	0	+
Prosecution	0	+
Trial	+	+
Total duration	+	+
Prison sentence	0	0
Probation	0	0
Fine	0	+

Note: This table summarizes the effects of the presence of defense counsel on duration measures and harshness of punishment measures. The full multivariate regression models on which this table is based are contained in the Appendix. "0" means no statistically significant effect. "+" means a positive and statistically significant effect ( $p \leq .05$ ).

A-Table 9 (see Appendix 5) displays the determinants of presence of defense counsel in offenses, procedures, locations, and other characteristics. Based on the reference of violent offense (omitted group), the probability of the presence of defense counsel is largely and reasonably increased in corruption cases while it is significantly reduced in the offenses of theft and other property cases. In SP cases, the probability of the defense counsel is reduced by 60.9% based on the reference of regular procedure. In jurisdiction, the probability of the presence of defense counsel is lower in Shanghai based on the reference of other provinces. In other characteristics, the probability of the presence of defense counsel is significantly reduced in the cases of defendants with criminal records while significantly increased in corruption cases.

### 3. Effect of prior criminal record

In Table 10, the prior criminal record of the defendants in cases has little impact on the durations of processes and sentences. In SP cases, the prior criminal record of the defendants is marginally and positively significant to the duration of the preliminary investigation, while in normal procedure cases the probability of the prison sentence is marginally increased with the prior criminal record. It is surprising that the probability of the total duration of process is reduced with the prior criminal record.

Table 10: Effect of Prior Criminal Record

Variables	Effect of Prior Criminal Record	
	Regular Procedure	Simplified Procedure
Preliminary investigation duration	0	+ (marginal)
Prosecution duration	0	0
Trial duration	-	0
Total duration	0	0
Prison sentence	+ (marginal)	0
Probation	0	0
Fine	0	0

Note: This table summarizes the effects of a prior criminal record on duration measures and harshness of punishment measures in both regular procedure cases and simplified procedure cases. The full multivariate regression models on which this table is based are contained in the Appendix. “0” means no statistically significant effect. “+” means a positive and statistically significant effect ( $p \leq .05$ ). “-” means a negative and statistically significant effect ( $p \leq .05$ ). “Marginal” means statistically significant at the  $p \leq .10$  level.

#### 4. Effect of joint crime

The findings in Table 11 are consistent with the hypothesis that the joint offense in SP is positively significant to the durations of processes while not significant to sentences. The joint crime in criminal cases makes investigations, prosecution and trials more time-consuming, but has little impact on the sentence because the defendant involved in joint offenses is not required to be punished more harshly in CCL. In the RP, however, the probability of the term of prison sentence is marginally increased with the joint crime, and also the duration of prosecution is not significant to the joint crime.



Table 11: Effect of Joint Offense

Variables	Effect of Joint Offense	
	Regular Procedure	Simplified Procedure
Preliminary investigation duration	+	+
Prosecution duration	0	+
Trial duration	+	+
Total duration	+	+
Prison sentence	+(marginal)	0
Probation	0	0
Fine	0	0

Note: This table summarizes the effects of a joint criminal offense on duration measures and harshness of punishment measures in both regular procedure cases and simplified procedure cases. The full multivariate regression models on which this table is based are contained in the Appendix. “0” means no statistically significant effect. “+” means a positive and statistically significant effect ( $p \leq .05$ ). “-” means a negative and statistically significant effect ( $p \leq .05$ ). “Marginal” means statistically significant at the  $p \leq .10$  level.

### 5. Effect of People’s Assessor

As for the people’s assessors (jurors) in criminal trials, few empirical studies reveal details of the role of the people’s assessors in actual trials. Table 12 tells us that it is not significant in the effect on trial duration and sentence in SP and RP cases. We cannot know much about how the people’s assessors influence criminal trial decisions because of the limited data.

Table 12: Effect of People’s Assessor

Variables	Effect of Presence of Jury (People’s Assessor)	
	Regular Procedure	Simplified Procedure
Preliminary investigation duration	n/a	n/a
Pretrial detention duration	n/a	n/a
Trial duration	0	0
Total duration	n/a	n/a
Prison sentence	0	0
Probation	0	0
Fine	0	0

Note: This table summarizes the effects of a joint criminal offense on duration measures and harshness of punishment measures in both regular procedure cases and simplified procedure cases. The full multivariate regression models on which this table is based are contained in the Appendix. “0” means no statistically significant effect

## 6. Determinants of preliminary investigation duration

In Model 1 of A-Table 1 (see Appendix 5), the variables including the corruption cases, simplified procedure, and joint offense and Shanghai jurisdiction are significant to the duration of the preliminary investigation. The corruption cases are positively significant to the duration of preliminary investigation in all offenses type. This observation should be reasonable because the overwhelming majority of defendants in corruption cases have been investigated (*shuang gui*) by the agents of discipline supervision of the communist party (*zhonguo gongchandang jilv jiancha weiyuanhui*) before being moved to the criminal procedure. Thus, it makes sense that the duration of the preliminary investigation may be shorter in the criminal procedure. The duration of preliminary investigation in SP cases is less than in regular cases. In joint offense cases, the duration of preliminary investigation is significantly higher than in other offense cases. This finding may support the fact that the joint crime leads to more time being spent on investigation. In Shanghai, the duration of preliminary investigation is higher than in other jurisdictions, but I have little information to interpret this observation.

In Model 2, the variables including the simplified procedure, cases with joint offenses, and Shanghai jurisdiction are significant to the duration of the preliminary investigation. The duration of the preliminary investigation in theft cases is reduced in simplified procedure cases if compared with regular cases. This finding makes sense because the theft cases in simplified procedure cases are generally less complicated or less severe than in regular procedure cases.

In Model 3—6, the duration of preliminary investigation is largely not a significant variables in all offenses, procedures, other characteristics, and jurisdictions. The only

exception in this is that the joint crime cases in other property offenses and corruption cases are significant with the duration of the preliminary investigation, and in other offense cases is marginally significant to the duration of the SP. Generally, the duration of preliminary investigation is little influenced by offenses beyond corruption and jurisdictions. However, it is impacted by the SP and the cases with the joint offense.

#### 7. Determinants of prosecution duration

In Model 1 of A-Table 2 (see Appendix 5), the variables including other property offense cases, corruption cases, simplified procedure, joint offense, defense counsel and jurisdiction in Beijing are significant to the prosecution duration. This interpretation for these observations should also be almost the same as that for A-Table 1. The only difference in statistical significance is that the duration of prosecution is increased in the cases with the presence of defendant counsel. The duration of prosecution in Beijing is higher than that in other jurisdictions, and this finding is interesting but either needs other data or empirical information to interpret it or may be interpreted by the bias of cases selection.

In Model 2, the prosecution duration in theft cases is reduced in simplified procedure cases; this finding is also the same as the duration of preliminary investigation in theft cases in A-Table 1. It is consistent with the suggestion that guilty plea cases in SP may lead to the saving time in investigation and prosecution. Surprisingly, the prosecution duration in charging theft cases in Beijing is longer than in other jurisdictions, and certainly we need more empirical evidence to interpret this finding.

Interestingly, two independent variables (the SP and jurisdiction) in A-Table 2 are almost close in statistical significance in prosecution duration. Note that in Model 1–4 the

prosecution duration consistently decreased in SP cases, implying that SP widely impact various offenses in time saving in prosecution. This finding is crucial for us to understand the influence of SP in the different offense cases. Similarly, beyond Model 5 in A-Table 1, the prosecution duration in offenses in Beijing overwhelmingly increases compared to other jurisdiction, implying that Beijing's criminal prosecution is more time-consuming in offenses.

#### 8. Determinants of trial duration

In Model 1 of A-Table 3 (see Appendix 5), the independent variables including theft and other property offense cases and Shanghai jurisdiction are all negatively significant to trial duration, while the joint offense and the presence of defense counsel are positively significant to the trial duration. The trial duration is shorter in theft cases and other property cases. This finding is consistent with the property offense cases in process being more time saving based on the reference of violent offense cases.

Surprisingly, in A-Table 3, offense is not significant to the SP trial duration. This finding is inconsistent with the hypothesis that the trial duration should be reduced in the SP cases. The possible reason for this finding is that the duration of trial in SP is the same as the duration of the RP in CPL.

In A-Table 6, the defense counsel, by and large, impacts the trial duration. Apart from the violence and corruption cases, the presence of defense counsel is significant to other category offense and the total offense cases. This result is consistent with the hypothesis that the presence of defense counsel may prolong the duration of process in criminal procedure. It is unclear why the presence of defense counsel is insignificant to

the trial duration in violence and corruption cases. The interpretation might be that the population of the violence and corruption cases in the current sample is too small.

The joint offense is essentially significant to trial durations in all offense type. This outcome is also consistent with observations in A-Table 1, 2, proving that the joint crime makes the duration of process longer than cases charged without involving joint offense. This finding supports the assumption that the joint offence makes investigations rather more time consuming.

In A-Table 3, the criminal record plays little role in trial duration, which is consistent with the observation in A-Table 1, 2. This finding proved that the criminal record is not a significant factor influencing the investigation, prosecution, and trial. The people's assessor is also not significant to the trial duration, which is sharply in conflict with the assumption that the people's assessor may increase trial duration. In addition, A-Table 3 reveals that the Shanghai jurisdiction is a significant factor impacting trial duration.

#### 9. Determinants of total duration

In A-Table 4 (Appendix 5), the findings in total durations of process are consistent to the results in preliminary investigation and the prosecution. The total duration of process is weakly related to the theft and corruption cases. The total duration is shorter if the theft cases increase in all offenses based on the reference of violent offense. This finding is reasonable because the majority of theft cases should be petty crimes. In contrast, the total duration of process increases with the increasing corruption cases in all offenses. This finding shows that corruption cases should be more complicated because the investigators need more time in investigation than in other misdemeanor cases.

In A-Table 4, the SP may reduce the total durations of process in all offense cases, particularly in property offense cases. Going back to A-Tables 1-3, the prosecution duration in the SP cases primarily contribute to the reduction of total duration in all offenses cases. In addition, the Beijing jurisdiction is positively significant to the total duration of process. Honestly, I have little evidence to interpret this finding.

#### 10. Determinants of prison sentence

In A-Table 5 (Appendix 5), the prison sentences in SP cases are not lighter than that in RP cases. Nevertheless, the prison sentences in theft cases under the SP are significantly longer than in the RP cases.

The defense counsel is not significant to the prison sentence in offenses. This is not consistent with assumption that the defense counsel plays a significant role in sentencing. Conversely, this finding supports the argument that the Chinese defense counsel plays little role in sentencing. For this concern, further research may be necessary.

The people's assessor participation is weakly and negatively significant in prison sentences in all offenses cases, meaning that the prison sentence is shorter than in cases tried without the participation of people's assessor. This is inconsistent with the assumption that the people's assessor attending the trial makes the prison sentence harsher. The reasonable interpretation for this finding is that the cases tried with the attendance of the people's assessor are less severe.

Surprisingly, the defendants in Beijing are generally sentenced lighter than in other jurisdictions. Probably, Beijing's sentence in criminal cases may be more impartial than in other jurisdictions due to the higher quality of legal practitioners. Prison sentences in joint offense cases are not longer with the exception of theft cases. In contrast, it is

reasonable that the criminal record is positively significant to the prison sentence in all offenses cases.

#### 11. Determinants of probation

Probation has been an oversight in the research of criminal procedure for a long time. This finding in A-Table 6 (Appendix 5) may reveal something useful for the practice of probation. The total 104 cases where defendants were treated with probation comprise 11% of the total population (945 case summaries) observed. The probation is used as a reward for the defendant for some special reasons or criminal characteristics.

In A-Table 6, the overwhelming majority of variables observed are not significant to the probation with the exception of SP and the Beijing jurisdiction. The probation periods in Model 1 of A-Table 6 are longer in SP cases based on the reference of the regular procedure. According to Appendix 1, in all offenses type cases, the means of probation periods are 33.6 months in SP cases and 29.1 months in RP cases; while the median is thirty-six months in SP cases and twenty-four months in RP cases. In theft type cases, the means of probation periods are 36.7 months in SP cases and 31.3 months in RP cases, while surprisingly, the median is the same--thirty months in both SP and RP cases. The probation periods in criminal cases are around 36 months, and also are longer in the SP cases than in RP cases. In addition, both the Beijing and Shanghai jurisdictions are negatively significant to the probation period in all offense types. The probation periods in Beijing and Shanghai are significantly shorter than in other provinces. If corroborated by the observations on prison sentence based on all offense type cases in A-Table 5 and the fine in A-Table 7 in Appendix 5, the reasonable interpretation for this finding in Beijing is that courts there are more likely to alleviate the defendants. However, the

findings in various sentences in Shanghai are not consistent if observing the models of all offense types in A-Table 5-7. Further research may be necessary to reveal the reason to interpret this finding.

## 12. Determinants of fines

Imposing a fine as an additional punishment in sentencing is complicated in criminal law, but A-Table 7 in Appendix 5 pictures its details in practice. The majority of independent variables including the simplified procedure, the presence of defense, the offense, and jurisdiction are positively significant to fines in sentencing.

The amount of fines in various offenses increases in the SP cases with the exception of corruption cases. Particularly, the SP contributes much more in the type of violent offense cases, which is not consistent with the findings in prison sentence and probation. A Table on the distribution of punishment measures in dataset in Appendix 2 shows the summary of distribution of punishment measures, but little information in empirical research can be used to interpret the findings in the relationship among the measures of punishments in sentencing.

The presence of defense counsel is significant to the fines in all offense type cases and other property offense cases beyond the theft cases. The fines are harsher in the cases tried with the presence of defense counsel. To the extent that the amount of fines increases in cases with the presence of defense counsel, we may reason that the presence of defense might signal the judges that the defendants can afford a fine in a higher amount. Another probability is that the higher fines may be a tradeoff for the more lenient prison sentence. It is possible that the defense counsel may assist the defendant in an



illegal tradeoff between the fines and prison sentence, but of course extra evidence should be provided for this interpretation.

Apart from the reference of violent offense, all variety of cases are significant to the fines. This finding shows that the fine as a punishment is widely used in sentencing. In Appendix 2, the cases in sentencing with fines cover 68.89% of the total frequency of various punishment measures in the total population. In addition, the amount of fines in Beijing is different from in Shanghai— the fines in all offense cases decrease in Beijing but increase in Shanghai.

### 13. Determinants on durations and sentences between the simplified procedure and regular procedure

I have reported the results of SP on durations and sentencing based on the reference of the RP. In this part A-Table 8 (see Appendix 5) displays tremendous details about statistics of the determinants of duration and sentence between RP and the simplified procedure.

As for efficiency, A-Table 8 tells us the disparities in significance between the SP and RP. In the duration of the preliminary investigation, the corruption in SP cases is more negatively significant than in regular procedure cases. However, the joint offense in RP is more positively significant than in SP. In the duration of the prosecution, the corruption offense cases are more positively significant in SP than in the regular procedure, and the Beijing jurisdiction is strongly significant consistently in the simplified and regular procedure. In trial duration, the presence of defense is strongly significant both in the SP and RP. In the total duration of process, the joint offense, the presence of defense and the Beijing jurisdiction are significant to the SP and RP.

Regarding the sentence, the story in A-Table 8 is greatly different from the duration of process. In the prison sentence, the theft offense cases are positively significant in SP while negatively significant in the RP. This finding in different directions in sentencing is essentially inconsistent to the idea that the sentences in SP cases should be more lenient in RP cases. The result may be interpreted by either the bias of case selection or the problems of case distributions in geographic concentration. In probation, no variables are significant to the SP and RP, which should be reasonable because probation is controlled by very loose criminal factors. In fines, the other property offense cases beyond theft cases are more significant in RP cases than in SP cases, and the Beijing jurisdiction is negatively significant in RP than in SP.

#### B. Findings from the survey

In this section, I report the responses from the survey and interpret the results of the survey in different questions. Because only a small fraction of respondents provided comments in open-ended questions—around 10% percent of respondents gave comments for those open-ended questions—I do not report them until I discuss the results in Part V, and then only when relevant. The missing data will be excluded from the calculation. The abbreviations of QJ, QP, and QL in this section refer to the questionnaire for judge, prosecutor, and lawyer, respectively. For example, if you see QJ31 in this section, it refers to the question numbered 31 on the questionnaire for judges, and the rest may be deduced by analogy.

##### 1. General evaluation

Table 13 displays the findings from the questions of JQ31, QP30, and GL31. The mean of the responses from the prosecutors was around 2.12, which is the highest credit,

while the judge medium, and lawyer lowest. The disparities among respondents are not significant. The finding, by and large, indicates that the legal practitioners highly support the adoption of SP in disposing criminal cases.

Table 13: Overall Assessment of Simplified Procedure

	Judge	Prosecutor	Lawyer
Strongly successful	10.7%	14%	1.8%
Somewhat successful	58.9%	60%	71.8%
Successful	25%	26%	24.5%
Unsuccessful	5.4%	0	1.8%
Strongly unsuccessful	0	0	0
Total	100%	100%	100%
N	56	50	110

Note: Question Scale: 1-strongly successful; 2-somewhat successful; 3-successful; 4-unsuccessful; 5-Strongly successful; Mean scale of 1-5

## 2. Efficiency

### 1) Time saving

Time saving in the questionnaires refers to the time saved for the legal practitioners on the work for the cases in SP. In time saving, the judges in the survey gave the highest credit to the simplified procedure, the prosecutors credited at a medium level and the lawyer at the lowest. More than 84% of respondents told us that the SP could save time for disposing cases. This result seems to conflict with the finding on the duration of trial from case summaries. The reasonable interpretation is that when the SP reduces trial hearing time in practice it does not automatically then lead to shortening the duration of the trial.

Table 14: Time Saving in Simplified Procedure

	Judge	Prosecutor	Lawyer
Strongly Saving	46.4%	31.9%	28.7%
Saving	37.5%	55.3%	50.4%
No Difference	8.9%	12.8%	20.9%
Increasing Time	7.1%	0	0
Total	100%	100%	100%
N	56	47	129

Note: Question scale: 1-strongly saving; 2-saving; 3-no difference; 4- increasing time; Mean scale of 1-4

## 2) Proceedings time saving

I asked a question to legal actors as to whether proceeding work time might be saved in SP. In Table 15, an overwhelming number of legal actors indicated that in trial work time was saved. This finding supports the results from empirical research conducted by Xu Meijun and Zuo Weiming.<sup>46</sup> The exception for this finding is that 58.1% lawyer thought the trial time was saved in SP, which is lower than the percentage of the response from judges and prosecutors. As for time spent on investigation and prosecution, the responses show the consistency that in investigation and prosecution the SP contributes little in saving time. According to the findings in Table 16, we may say that the SP plays a critical role in saving trial time but little in investigation and prosecution.

<sup>46</sup> Xu Meijun, *An Empirical study of summary trials in simplified procedure*, 29 *Modern Law Science Review* 112, 119 (2007). Zuo Weiming, *A primary Review and Reflection on Reform of Simplified Criminal Procedure in China: Takes the Main former of Court in S County, S province*. *Journal of Sichuan University (Social Science Edition)* 2006. (4).

Table 15: Time Saving in Proceedings

	Judge	Prosecutor	Lawyer
Investigation	3.6%	2%	9.6%
Prosecution	12.5%	50%	13.2%
Trial	82.1%	76%	58.1%
Appeal	1.8%	8%	0.7%
No Saving	12.5%	6%	36%
Total	112.5%	140%	117.6%
N	56	50	136

Note: Percentages may exceed 100% because the respondents could reply to the question with multiple answers.

### 3) Pretrial preparation time saving

I asked judges, prosecutors, and lawyers whether they spent less time on preparation for the trial in SP compared to RP. Table 16 shows the responses in this question. Not surprisingly, the judge and prosecutors credited more in time saving—in which 61.8% judges and 52% prosecutors responded that the SP contributed to saving time in pretrial preparation, while 39.6% lawyer agreed in time saving in pretrial preparation.

Table 16: Pretrial Preparation Time Saving

	Judge	Prosecutor	Lawyer
Yes	61.8%	52%	39.6%
No	14.5%	24%	26.4%
Depends	23.6%	24%	34%
Total	101%	100%	100%
N	55	50	235

Note: Percentages may exceed 100% because the question can be responded with multiple answers

### 4) Reducing Caseload

I asked judges and prosecutors whether the SP impacted their caseload. Responses in Table 17 reveal the consistency between judge and prosecutor. The overwhelming majority of judges and prosecutors confirmed that the SP is significant to reduce caseload—more than 80% of judges and 72% of prosecutors.

Table 17: Assessment of Reducing Caseloads

	Judge	Prosecutor
Strongly Important	41.7%	34%
Important	39.6%	38%
Somewhat	8.3%	22%
Unimportant	10.4%	6%
Strongly Unimportant	0	0
Total	100%	100%
N	48	50

Note: Question scale 1-Strongly important; 2-important; 3- somewhat; 4- unimportant; 5-strongly unimportant; Mean scale of 1-5

### 5) Speeding up trial

Table 18 shows us the perceptions on the importance of the SP in a speedy trial. The findings are consistent with the findings in Table 16 in which the judges and prosecutors credited the SP more than lawyers in having a speedy trial. The defense counsel has a limited role in speeding up cases, so it is not strange that the defense counsel lawyers' perception is reported at a lower percentage than the judges and prosecutors.

Table 18: Importance of Speeding up Trial

	Judge	Prosecutor	Lawyer
Strongly Important	23.9%	2.5%	3.7%
Important	45.7%	67.5%	23.1%
Somewhat	30.4%	30%	66.7%
Unimportant	0	0	5.6%
Strongly Unimportant	0	0	0.9%
Total	100%	100%	100%
N	46	40	108

Note: Question scale: 1-strongly unimportant; 2-unimportant; 3- somewhat; 4- important; 5-strongly important; Mean scale of 1-5

#### 6) Cases ineligible for SP

Table 19 shows the responses for the question of which cases cannot enter SP, which determinants should be concerned for the use of simplified procedure, and which procedure should be used for guilty plea cases. The questions asked sought to identify what cases should not be allowed to enter the SP. Certainly, not all criminal cases where defendants plead guilty are automatically eligible for SP because some sorts of cases are related to special situations adversely impacting justice. Thus, we want to know how to decide which cases are ineligible for SP.

The first question asked which characteristics may be treated as the elements for cases that are ineligible to the SP. As for the elements for the cases with doubt in evidence, the defendants tortured, or complex in prosecution, the responses of legal actors show consistently that these characteristics are the elements that disallow the cases into SP. However, the responses for the factors related in the defendant’s remorse and restitution show disparities among judges, lawyers and prosecutors—few prosecutors cared about the defendant’s remorse and restitution to the victims while some judges and

lawyers show their concern in remorse and restitution to victims. For example, 23.2% of judges thought that the defendant's remorse should be considered seriously to decide whether the case should be applied to SP.

The second question sought to determine the attitude of the legal practitioners to joint crime cases where some defendants pled guilty, but the others did not. Cases involving joint crime may make the case prosecution and trial complicated. According to case summaries in the dataset, more than 40% of criminal cases were involved in joint crimes. The data in Table 20 show the disparities among legal actors—42.9% of prosecutors, 20% of judges, and 24% of lawyers agree that cases in which some defendants pled guilty but others did not should be tried in SP. According to the regulation of SP, the cases in a joint crime cannot be tried in SP if some defendants plead guilty but others do not plead guilty. The disparities in responses among prosecutors, judges and lawyers show that the prosecutors are more likely to speed up cases in SP.



Table 19: Cases Ineligible to the Simplified Procedure

	Judges	Prosecutor	Lawyer
<b>JQ9, PQ9, and LQ11. Which case cannot enter the simplified procedure?</b>			
• Case which cannot be publicly hearing for the private information or state interest	10.7%	20%	12.1%
• Case with the doubt in primary factors	96.4%	92%	96.2%
• Case where the defendant denies the offense even though the defendant confirms the charge	57.1%	52%	52.3%
• The case with the complicated scenarios	58.9%	60%	56.8%
• the novel case	14.3%	6%	11.4%
• The suspicion for the defendant was tortured or induced	67.9%	80%	84.8%
• The purpose of the guilty plea of the defendant is to only obtain lenient punishment	28.6%	14%	9.1%
• The case where the agreement entered between the prosecutor and the defendant	17.9%	12%	7.6%
• The defendant does not show any remorse for the crime	23.2%	8%	16.7%
• The defendant is not willing to restitute for the victim	12.5%	2%	3.8%
• Other	0%	2%	9.8%
<b>Number of Responses</b>	<b>56</b>	<b>50</b>	<b>132</b>
<b>JQ13, PQ13, and LQ15. Which determinants should be concerned for the use of simplified procedure</b>			
• Guilty plea	24%	10.2%	27%
• Restitution	6%	12.2%	18.9%
• Confession	58%	59.2%	74.6%
• Other	16%	14.3%	2.5%
<b>Number of Responses</b>	<b>50</b>	<b>49</b>	<b>122</b>
<b>JQ8, PQ8, and LQ10. Which procedure should be used for guilty plea cases in joint crime</b>			
• Simplified procedure	20%	42.9%	24%
• Regular procedure	80%	57.1%	76%
<b>Number of Responses</b>	<b>55</b>	<b>49</b>	<b>129</b>

Note: In JQ9, PQ9, and LQ11 of the survey, there are multiple answers for respondents to choose in multiple choices. Percentages may exceed 100% because responders could reply to the question with multiple answers.

### 3. Guilty plea

#### 1. Defining the guilty plea

Defining the guilty plea is a crucial issue in disposing guilty plea cases in SP. I asked questions on the elements of a guilty plea, how to identify the guilty plea, and how often coercion happened in SP cases.

In Table 20, in response to the elements of guilty plea, the judges, prosecutors, and lawyers showed different perceptions in understanding the guilty plea. Among the responses, more than 57% of judges, 48% of prosecutors, and 50% of lawyers provided different answers. One exception is that the majority of legal actors agreed that the consent to the charge should be a basic element of the guilty plea.

When asked how to identify whether a defendant pled guilty voluntarily (JQ11, PQ11, and LQ13), an overwhelming majority of responses focused on the interrogation or interview. In contrast with judges, both the prosecutors and lawyers in the survey favored a review of the file to determine if the defendant truly pleaded guilty in addition to the interrogation of the defendant personally. Strangely, some of the respondents responded that they inquired of the witnesses to identify whether the defendant truly pleaded guilty.

In questions (JQ16, PQ16, and LQ18), I asked how often you found the coercion in cases tried in SP. Among both judges and prosecutors, 80% reported that they have never found any coercion, while 55.2% of lawyers responded that they have never found coercion and more than 48% of lawyers replied that they have sometimes found coercion. A small percentage of lawyers and prosecutors reported that they have often found coercion in SP cases—2.9% of lawyers and 2% of prosecutors. The finding in this

question reveals the differences in the observation of coercion as perceived among lawyers and judges, prosecutors. Who should be less biased in responses the judge, prosecutor, or lawyer? Unfortunately, the survey could not resolve this concern. Anyway, the problem of coercion in SP cases should be considered more important in guilty plea cases.

Table 20: Identification of Guilty Plea

	Judge	Prosecutor	Lawyer
<b>JQ7, PQ7, and LQ9. What is the meaning of guilty plea?</b>			
1) Voluntarily confessing to the charge	25%	30%	31.3%
2) Confirmation of all charges	39.3%	40%	35.1%
3) Not contending the primary charges	53.6%	54%	51.1%
4) Voluntarily plead guilty	50%	40%	35.9%
5) Remorse	23.2%	24%	18.3%
6) Restitution for the victim	10.7%	10%	7.6%
7) Not contending the charges and voluntarily plead guilty	69.6%	72%	70.2%
8) Partly plead guilty	0%	0%	6.1%
9) Other			
<b>Number of Responses</b>	<b>56</b>	<b>50</b>	<b>131</b>
<b>JQ11, PQ11, and LQ13. How did you identify that defendants pleaded guilty voluntarily?</b>			
1) To inquire of the defendant	78.2%	98%	90.8%
2) To review the file	67.3%	84%	87.7%
3) To inquire of witnesses	7.3%	18%	5.4%
4) No way	0%	2%	0%
5) Other	1.8%	0%	9.2%
<b>Number of Responses</b>	<b>55</b>	<b>50</b>	<b>130</b>
<b>JQ16, PQ16, and LQ18. How often did you find coercion?</b>			
6) Never	81.8%	88%	55.2%
7) Sometimes	16.4%	10%	37.1%
8) Often	0%	2%	2.9%
9) Other	1.8%	0%	4.8%
<b>Number of Responses</b>	<b>55</b>	<b>50</b>	<b>105</b>

Note: In JQ7, PQ7, and LQ9 of the survey, there are multiple answers for respondents to choose in multiple choices. Percentages in the table may exceed 100% because the responder can reply to the question with multiple answers.

## 2. Finding truth

In Table 21, the prosecutor showed more concern than judges and lawyers in the investigation, while the lawyers were a little bit indifferent. Around 50% of responses reveal that further investigation depends on the case condition—49.1% of judges, 57.1% of prosecutors, and 56.5% of lawyers. This findings show the disparities in investigation on the condition that the defendants plead guilty.

When asked the question about their duty in trial, surprisingly, the judges responded that they hear the defense and arguments. In contrast, the prosecutors attached more importance in questioning the defendants, suggesting that the prosecutors are more concerned about the confirmation of a guilty plea or evidence.

Table 21: Finding Truth in Simplified Procedure

	Judges	Prosecutors	Lawyers
<b>JQ14, PQ14, and LQ16. Is it necessary to investigate if defendant pleading guilty?</b>			
1) No	10.9%	4.1%	17.6%
2) Yes	40%	38.8%	26%
3) It Depends	49.1%	57.1%	56.5 %
<b>Number of Responses</b>	<b>55</b>	<b>50</b>	<b>131</b>
<b>JQ17, PQ17. What is your duty in trial?</b>			
1) To review indictments	39.2%		
2) To hear arguments	58.9%		
3) To inquire the defendant	39.2%		
4) To inquire the witness	5.3%		
5) Reading the indictment		16%	
6) Showing evidence		20%	
7) Inquiring the defendant		68%	
8) Arguing with defense lawyer		14%	
<b>Number of Responses</b>	<b>56</b>	<b>50</b>	

Note: Percentages in the table may exceed 100% because some respondent gave multiple answers for the questions.

#### 4. Consequence in simplified procedure

As for the consequence for the defendants who plead guilty, asked in questions JQ18, PQ18, and LQ20, Table 22 shows that the overwhelming majority of judges, prosecutors, and lawyers in the survey reported that most defendants who pleaded guilty received lenient punishment.

As for a speedy trial, the legal actors provided different perspectives--44.3% of judges, 78% of prosecutors, and 75.7% of lawyers thought that the defendants in SP might benefit from a speedy trial. Corroborated with the finding from case summaries, the judges' responses may be more trustworthy. In addition, the judges have more power in a speedy trial than the prosecutors and lawyers.

As for appeals in the simplified procedure, the overwhelming majority of responses indicate that very few appeals are made. This result is consistent to the finding that few defendants in SP cases appealed for higher court. In addition, the legal actors indicated that most arguments in appeals in SP cases are that the defendant did not obtain lenient punishment for a guilty plea—75.5% of judges, 21.1% of prosecutors, and 95.9% of lawyers. In observation, even when appealed, unfortunately, few appellants win the case in high courts.

Table 22: Consequence in Simplified Procedure

	Judge	Prosecutor	Lawyer
<b>JQ18, PQ18, and LQ20. Result in sentencing</b>			
• All defendants obtained lighter punishment	31%	22.4%	20.2%
• Most defendants obtained lighter punishment	61.9%	71.4%	59.6%
• Small proportion defendants obtained lighter punishment	7.1%	4.1%	14.7%
• Other	0	2.0%	5.5%
<b>Number of Responses</b>	<b>42</b>	<b>49</b>	<b>109</b>
<b>JQ24, PQ24, and LQ26. Benefits from guilty plea</b>			
• Obtaining lighter punishments	55.8%	22%	17.5%
• Obtaining speedy trial	5.8%	10%	7.1%
• Both of the above	38.5%	68%	75.4%
<b>Number of Responses</b>	<b>52</b>	<b>50</b>	<b>126</b>
<b>JQ19,PQ19,and LQ18.Appeal</b>			
• More often	0	2%	0.9%
• Often	4.2%	2%	5.2%
• Less often	79.2%	55.1%	24.3%
• Never	16.7%	40.8%	69.6%
<b>Number of Responses</b>	<b>48</b>	<b>49</b>	<b>115</b>
<b>JQ21, PQ21, and LQ22. Appeal reason</b>			
• The procedure was not fair	5.7%	7.0%	16.5%
• The disagreement with the charge	9.4%	25.6%	29.9%
• The defendant could not obtain the lighter punishment	75.5%	72.1%	95.9%
• Other	20.8%	18.6%	16.5%
<b>Number of Responses</b>	<b>53</b>	<b>43</b>	<b>97</b>

Note: Percentages for JQ21, PQ21 and LQ22 in the table may exceed 100% because some respondent gave multiple answers for the questions.

## 5. Defendants’ rights

In the survey, I asked the judges and prosecutors if the defense lawyers were present while they interrogated the defendants. Table 23 provides the details in response to this question—53.2% of judges and 75% of prosecutors reported “never,” while 27.7% of judges and 22.9% of prosecutors responded “sometimes.”

I also tested the responses for the question between the municipalities and provinces, and noted that there is no significant difference between them. In CPL, the defense lawyers have no right to be present in interrogation by law authorities, whereas

the law authorities have power to be present in the meeting place while defense lawyers interview clients.

The survey shows that the defendants pleading guilty did not receive credits in detention. Prosecutors and judges reported that the applications of alternative surveillance (*qubao houshen*, and *jian shijuzhu*) for the defendants pleading guilty were rarely approved—95.5% of judges and 93.6% of prosecutors responded “never” or “seldom.” Crowding in jails often leads to the abnormal deaths (*duomaomaosi*, *shuijiaosi*, *heshuisi*) in China. If criminal cases in which the defendant pleaded guilty can be disposed more efficiently, then the condition in the jails would be improved.

Another concern is the conflict of interest between defendant and defense lawyer. In some cases, the defense lawyer may disagree with the defendant pleading guilty, resulting in a conflict of interest between them. As reported in the survey, of 110 lawyers 31.8% responded that they continue to represent their clients regardless of a disagreement over the guilty plea; 30% of respondents said that they would convince their clients to accept their opinion in a guilty plea; and 38.2% thought that they would respect the defendant’s determination in representation. Sometimes for unpredictable reasons, the defendants are more likely to take actions different from the defense lawyer. If the court cannot fully advise the defendants in trial, the right to defense in these SP cases may be less protected in trial.



Table 23: Defendants' Right in Simplified Procedure

	<b>Judge</b>	<b>Prosecutor</b>
<b>JQ10, PQ10. The presence of counsel in interrogation</b>		
1) Never	53.2%	75%
2) Sometimes	27.7%	22.9%
3) Often	10.6%	
4) All	8.5%	2.1%
<b>Number of responses</b>	<b>47</b>	<b>48</b>
<b>JQ12, PQ12. Alternative surveillance approved</b>		
1) Never	34.1%	31.9%
2) seldom	61.4%	61.7%
3) More often	4.5%	4.3%
4) All		
<b>Number of responses</b>	<b>44</b>	<b>47</b>

Note: I exclude a response in PQ12 for the multiple answers, and thus the percentage may be lower 100%.

## 6. Victims' Right

Victims in criminal procedure are usually overlooked, even more often in SP cases. In the survey I asked how often the victims appeared in an SP trial. The responses in Table 24 are almost consistent within and across groups of judges, prosecutors, and lawyers. This finding also supports the presumption that few victims attend the simplified trial. The victim rights protection movement is critical in the reform of criminal procedure, and innovative programs of restorative justice are set up throughout the world now. The finding here, however, shows that the victim's voice cannot be heard in trial and his or her rights are often unnoticed in criminal processes.

Table 24: Victims' Appearance in Trial

	Judge	Prosecutor	Lawyer
<b>JQ23, PQ23, and LQ24. Appearance in trial</b>			
Never	14.6%	16%	18.2%
Few	68.8%	72%	57.9%
Often	14.6%	12%	23.1%
All	2.1%	0	0.8%
<b>Number of responses</b>	<b>48</b>	<b>50</b>	<b>121</b>

7. Benefits in simplified procedure

When asked about the benefits from SP, the judges and prosecutors responded consistently. In Table 25, 83.9% of judges selected “saving time in trial,” and 16% of judges said little pressure in trial, while 76% of prosecutors reported “saving time in prosecution,” and 58% of prosecutors said “no pressure.” Saving time along with little pressure should make the duration of SP shorter than before; otherwise, the data indicated that the duration of prosecution and trial changed very little. That procrastination exists among legal authorities was ascertained in the survey.

Table 25: Benefits to Judges and Prosecutors in Simplified Procedure

	Judge	Prosecutor
<b>JQ25, LQ26. Benefits to judges</b>		
• Saving time in trial	83.9%	
• No worry about defendants' complaint		
• No pressure	16%	
• No benefit	16.1%	
• Other		
• <b>Number of Responses</b>	<b>56</b>	
<b>PQ25: Benefits to prosecutors</b>		
1) Saving time in prosecution		76%
2) No worry about defendants' complaint		12%
3) No pressure		58%
4) No benefit		10%
5) Other		
<b>6) Number of Responses</b>		<b>50</b>

Note: Percentages in the table may exceed 100% because some respondent gave multiple answers for the questions.

8. Defects of simplified procedure

When asked about the defects in SP, the responses of judges and lawyers reflected more interest in plea bargaining than the prosecutors did. Both 24% judges and twenty-seven lawyers selected “no plea bargaining” between the prosecution and defendant being a shortfall in the simplified procedure, while prosecutors seems less interested in plea bargaining—only 10.2% of prosecutors chose “no plea bargaining” as one of defects of the simplified procedure. As for the inefficiency in prosecution, the judges, prosecutors, and lawyers had different senses—the lawyers stronger, prosecutors medium, and the judges lighter— whereas in blinding justice, 38.5% of lawyers were dissatisfied with justice, while 16.3% of prosecutors and 8% of judges responded with dissatisfaction regarding justice. As far as coercion to force a guilty plea is concerned, the judges, prosecutors and lawyers showed the same level of concern—58% of judges, 59.2% of prosecutors, and 74.6% of lawyers selected coercion as a problem. The judgment in SP cases would be distorted if the defendant pleads guilty involuntarily. Based on this finding, it should be necessary to improve the system of presence of defense and enhance the role of defense.

Table 26: Perceived Defects of Simplified Procedure

<b>JQ27, PQ26, and LQ27. Defects of the simplified procedure</b>	<b>Judge</b>	<b>Prosecutor</b>	<b>Lawyer</b>
• No plea bargaining	24%	10.2%	27%
• Inefficiency in prosecution	6%	12.2%	18.9%
• Blinding justice	8%	16.3%	38.5%
• Coercion	58%	59.2%	74.6%
• Other	16%	14.3%	2.5%
<b>• Number of responses</b>	<b>50</b>	<b>49</b>	<b>122</b>

Note: Percentages in the table may exceed 100% because the question can be given multiple answers in multiple choices.

## 9. Satisfaction for legal work among counterparts

The responses in the evaluation of the satisfaction for their peers in Table 36 reflect the different senses for their colleagues in the simplified procedure. In Table 27, the mean for judges in the survey is 2.21, for prosecutors 2.405, and for lawyers 2.705. In other words, the satisfaction degree for the judges is the highest, the prosecutors lower, and the lawyers lowest. The finding is consistent to the finding that the judges and prosecutors undervalue the role of defense counsel. However, interestingly, the lawyers in the survey credited higher grades to judges and prosecutor.

Table 27: Means of Evaluation for Satisfaction among Judges, Prosecutors, and Lawyers

	<b>Judge</b>	<b>Prosecutor</b>	<b>Lawyer</b>	<b><u>Mean</u></b>
<b>PQ28, LQ29. Evaluation for judges</b>		2.26(0.102)	2.16(0.081)	2.21
Responses of Number		50	104	
<b>JQ29, LQ28. Evaluation for prosecutors</b>	2.39(0.071)		2.42(0.073)	2.405
Responses of Number	56		104	
<b>JQ28, PQ27. Evaluation for lawyers</b>	2.73(0.06)	2.68(0.078)		2.705
Responses of Number	56	50		

Note: Question scale: 1-strongly satisfied; 2-satisfied; 3-somewhat satisfied; 4-unsatisfied; 5-strongly satisfied

## 10. Importance of various legal work

Judges, prosecutors, and lawyers play different roles in the SP, but more often they collaborate with each other to facilitate criminal cases. Table 28 shows the means of the evaluation of the importance of their specific work in SP. The legal actors responded in the survey highly estimate the importance of their work in the SP.

In preventing coercion, the means from lawyers is clearly lower than that from judges and prosecutors, and reflects the real status of legal actors respectively. The presence of defense is thought to be the best way to prevent the coercion from law

authorities, but the defense lawyers have not been entitled this right. The lawyer's role in the supervision of the investigation and prosecution is very limited.

Similarly, in speeding up the process, the outcome of the responses also show that the role of the lawyer is less important than that of judge and prosecutor. This is not strange, for the role of the defense lawyer is very limited in expediting the proceedings because once the case enters the indictment; the proceedings are controlled by the prosecutors and judges.

In examining evidence, the mean from the defense lawyer is higher than from the prosecutor, which might imply that the defense pays more attention in examining evidence in processes than prosecutors. The reasonable interpretation for this is that the prosecutor may not care much about the evidence as long as the defendant pleads guilty.

Judges and prosecutors in the survey expressed strong views in favor of protecting the victims' interests. In Table 24, we can find that few victims participated in the trial in the simplified procedure, largely implying that their voice cannot be heard in trial. This may thus lead to the judges and prosecutors giving more consideration for the protection of the victims' interests.

The judges in the survey also attributed higher credit to interrogation in trial than prosecutors. In the inquisitorial system, the judges play a crucial role in finding truth and interrogation. This means that SP cannot reduce the burden in finding truth in trial, and the judge should take advantage of interrogation to assist them in identifying the truth of the case.

Table: 28: Means of Evaluation of Importance of Legal Works

	Judge	Prosecutor	Lawyer
<b>Preventing coercion</b>	4.11(0.140)[46]	3.79(0.117)[39]	3.57(0.120)[108]
<b>Interrogation</b>	4.15(0.112)[46]	3.93(0.097)[40]	
<b>Interview</b>			4.44(0.076)[108]
<b>Defense in trial</b>			4.44(0.071)[108]
<b>Examining evidence</b>	4.33(0.108)[46]	4.03 (0.094)[39]	4.12(0.090)[108]
<b>Plea Negotiation</b>		3.05 (0.143)[40]	
<b>Present in trial</b>		3.58 (0.107)[40]	
<b>Legal Advice</b>			3.98(0.066)[107]
<b>Hearing argument</b>	4.11(0.106)[45]		
<b>Identifying guilty plea</b>	4.17(0.109)[46]		
<b>Speeding up process</b>	3.93(0.109)[46]	3.73 (0.080)[40]	3.23(0.063)[108]
<b>Review of case file</b>	4.22(0.112)[46]		
<b>Improving Justice</b>		3.90 (0.080)[39]	3.74(0.099)[108]
<b>Protecting victims' interests</b>	4.20(0.106)[46]	3.74 (0.080)[39]	
<b>Assistance of appeal</b>			3.28 0.080)[108]
<b>Total work</b>	4.22(0.098)[46]	3.77 (0.078)[39]	4.05(0.044)[108]

Note: The importance of legal work are scaled: 1-strongly unimportant, 2-unimportant, 3-somewhat important, 4-important, and 5-strongly important. Standard errors means are in the small parentheses, and the number of responses is in the middle parentheses.

## V. Discussion

The empirical research displays for us “the living law” of the SP practice. Not only do the findings situate the knowledge from case summaries, but they also show the perceptions among the legal actors through the survey. In this part, I discuss some critical issues based on the findings from case summaries and the survey.

### A. Presence of defense

The presence of defense is a central issue in the SP. The defendants may be trapped by unenforced promises from prosecution and fall in a pit without the assistance of the

defense counsel. The procedure may be simplified, but the right of presence of defense for the defendants cannot be accordingly simplified or overlooked. The findings show that the presence of defense is a serious problem in the SP.

1. Probability of the presence of defense

One of the critical findings in the case summaries is that the probability of the presence of defense in SP cases is lower than in RP cases. In A-Table 9, a startling finding from case summaries is that the probability of defense counsel is 39.9% lower in SP cases than in RP cases. The percentage of the presence of defense counsel in Table 8 shows the lower representation of lawyers in SP cases. How do we interpret this finding? What is the significance of this finding?

There are two probabilities for this finding. One of the probabilities is that SP cases are less complicated in evidence than RP cases. Clearly, if the defendants plead guilty, they are more likely to be convicted than the defendants who do not plead guilty, and certainly those defendants are less likely to retain defense counsel. Another probability is that the defendants pleading guilty might assume that the defense will negatively influence his sentence in trial. Trial judges may see participation of the defense in trials an expression of the defendant's bad attitude towards the guilty plea, leading to a heavier sentence. Thus, the defendants are reluctant to retain a defense lawyer in SP cases.

Due to the different proceedings in the SP, we are curious about the disparities of the probability of the presence of defense in different proceedings. The finding in the probability of the presence of defense in SP cases should be applicable to that in trial. However, we have no statistics reporting the rate of the presence of defense in

investigation and prosecution proceedings. In case summaries, no records show which proceedings the defense lawyers were first involved in. If the written case summaries indicate the presence of the defense, this means that the defense lawyer showed up in trial, but does not correspondingly indicate that they also showed up in the investigation or prosecution. Due to difficulties of the defense in the criminal defense,<sup>47</sup> we may reason that the probability of the presence of defense decreases in a sequence from trial, prosecution, and investigation.

The interpretation for the presence of the defense is seemingly logical in the current context, but it is not reasonable. The presence of the defense is not only a public good which everyone should have the right to access but also a weapon for the defendants to contend the government from the duress and prejudice in criminal procedure. The presence of the defense should be a public good in a nation,<sup>48</sup> or at least a limited public good. The evolution of access to the defense lawyer, particularly in the public defense and pro bono system, exemplifies that the presence of defense transitioning into a public good from a private good is in a crucial stage. Anyway, a pure public good must yield benefits to everyone in a nation, but a limited public good should meet as much as possible the needs of defendants in criminal procedure. However, China has a very limited pool of lawyers in a huge population. The ideology under the theory of public good is that every suspect or defendant can enjoy equal treatment in the presence of the defense, but it is almost impossible in nations with large populations like China. Nevertheless, the defense as a public good within limited legal resources raises a critical

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<sup>47</sup> Generally see, Sida Liu, Terence C. Halliday, *Dancing Handcuffed in the Minefield, Survival Strategies of Defense Lawyers in China's Criminal Justice System*, Center on law and globalization Research Paper No.08-04, available at, <http://ssrn.com/abstract=1269536>. See also, Ethan Michelson, Lawyers, *Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, American Journal of Sociology, Vol. 113, No. 2 (September 2007), pp.352-144.

<sup>48</sup> Harry T. Edwards, A Lawyer's Duty to Serve the Public Good, 65.N.Y.K. L.Rev.1148, 1163 (1990).



issue as to why defendants in SP should be less likely to enjoy the presence of defense. An American scholar argued that the accuracy in criminal adjudication may be increased while the defense declines.<sup>49</sup> This bold argument, if proved, may exclude the presence of defense in a criminal trial, but I strongly doubt it because the goal of the presence of defense is not only to improve the accuracy of adjudication but also to free the defendants from the duress and unfair treatment in proceedings. China's defendants' situation is not essentially better off if we notice the media report on the anomalous incidents of death in jails.

Surprisingly, the second finding is that the probability of the presence of defense in Shanghai is obviously lower than in other provinces—the probability of the presence of defense decreases to 37.3%. Coincidentally, in 2011 I conducted a survey of Shanghai lawyers in the presence of defense during 2010. I also read a news report that in Beijing the rate of the presence of defense in criminal cases was only 2.5% (500/20,000) in 2011.<sup>50</sup> This may corroborate the findings that the rates of the presence of defense in municipalities are surprisingly lower. This result is also consistent with the findings from the survey in the Jing'an district of Shanghai, which is located in the main center of the city. To further clarify this observation, I contacted an officer working in the Shanghai Judicial Bureau, and he responded that the lower rate of the presence of defense in Shanghai should be trustworthy. He added that the probability might be that the overwhelming majority of defendants who were not Shanghai citizens but were tried in Shanghai could not afford the cost of retaining a local lawyer in Shanghai. The high cost of representation fees largely prevents the defendants from the presence of the defense.

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<sup>49</sup> Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, California Law Review, Vol. 93, No. 6 (Dec., 2005), pp. 1585-1645.

<sup>50</sup> Dongqing Yao, *Xingsu fa daxiu neimu* (The Secrets of the Amendment of CPL), *Zhongguo jingji zhoukan* (China Economy Weekly), March 26, 2012.

This means that defendants who are not Shanghai citizens may not benefit from local resources for legal representation. In a sense, the discrimination in jurisdictions in legal service may also lessen the likelihood of the presence of the defense in the criminal procedure.

The disparities in the presence of defense in different offense cases also show the discrimination in the use of the defense as public goods. Noticeably, the defendant in theft cases is less likely to enjoy the presence of defense than the defendant in corruption cases, implying that indigent defendants have little probability in obtaining the assistance of defense lawyers. The inequality in access of defense resulting from funding limitations inevitably obstructs the unfairness in process and justice in sentencing.

## 2. Effect of presence defense

In this research, not only do I care about the probability of the presence of the defense but I also take into account the effect of the presence of the defense. In 1996 CPL, the defense lawyers were entitled to the right of access to the suspects in an investigation. A number of empirical research projects indicated that the effects of the presence in investigation were very limited. Defense lawyers in China have cried out for the improvement of the defense right in criminal procedures. One of findings in Table 9 reveals that the effects of the presence of defense in SP cases are more widely significant in pretrial than in RP cases. The interpretation for this is that the defense lawyers are more likely to take more time in the pretrial preparation in SP cases. The presence of defense should not simply fall on deaf ears. To recover the effects of the presence of defense, not only should the defense right be enhanced but the quality of defense work should also be improved. The 2012 amendment to criminal procedure law enhances the

defense right particularly in the investigation process. The primary changes include that the suspects in preliminary investigations have the right to retain a defense lawyer, meet with the defendants without interference beyond the cases related to national and public security, and accept legal aid in the course of investigation and prosecution.<sup>51</sup> Although these changes cannot completely reach the goal of defense required in human rights protection, they make much progress in bettering the situation of the defendant. The effect of the new amendment for defense, of course, needs to be observed in the future.

In addition, in Table 28 the work of defense lawyers were graded lower than that of judges and prosecutors. The working relationship between judges and prosecutors is closer than their relationship with the defense lawyers in criminal procedures because the defense counsel usually contends with them. The second probability is that the scope of the defense lawyers' work is very limited, impacting the evaluation of the defense. The third possibility is that the poor legal ethics of defense lawyers in the legal market may influence their reputation in the evaluation. In any case, the level of lawyer's defense work in SP needs to be further advanced.

In fact, the factors impacting the effects of SP are multiple and compound, where the most important factor is that the legal system needs to leave more room for the role of the presence of defense. The presence of the defense lawyer in simplified procedure cases plays a critical role in preventing coercion in a guilty plea. In a sense, the defense lawyer should have the right in the presence of the defense while the policemen, prosecutors, and judges interrogate the defendant. Regarding this key issue, there is a long way to go towards the improvement of the presence of defense in criminal procedure.

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<sup>51</sup>Xing shi susong fa (2012), (Criminal Procedure Law) (2012) (promulgated by the Nat'l People's Cong., July 1, 1979, amended on March 17, 1996 and March 14, 2012 ), art 33,34.

A factor impacting the efficiency of SP is the defense lawyer—the trial with the defense lawyer took 10 days longer than those cases without a defense lawyer. Nearly all lawyers in the survey reported that the defense lawyer has little impact in speeding up the trial. All process in the trial is controlled in court, and the defense lawyer has no right to influence the course of the trial. The critical question is why the disposition of the cases with defense lawyers were significantly delayed compared to the cases without defense lawyers. The lack of the discovery process in CPL will inevitably lead to a more time-consuming trial. The defense lawyer will also examine factors more carefully or summon legal actions in proceedings; these things may decelerate the course of the trial.

## B. Durations of process

### 1. Trial duration

The surprising finding is that the reduction of the hearing time in a simplified trial did not decrease the trial duration. Based on the finding in Appendix 5, all variables of determinants are not significant to the trial duration. We would be surprised at the difference in the process durations between SP and the normal procedure for the preliminary investigation, prosecution, and trial. In Figures 1, 2 and 3 in Appendix 1, all observed means and medians of trial durations are almost close between SP and RP cases. However, the judges in the survey told us that SP could save trial time. Why does the SP not reduce the trial duration in some cases but in certain other offenses such as theft the SP may prolong the trial duration? Why is this finding in the case summaries different from that in the survey?

One possibility is that the SP as an alternative to RP, as we know, applies the trial duration of RP in CPL. Even with the hearing time in trial saved, the judges wrap up the

SP cases the same way as in RP cases. Thus, we may reason that the same requirement in trial duration is the primary reason for the similar durations in practice between SP and RP cases.

Another possibility is that judges are more anxious to clear RP case dockets. The regulation of SP lists the exceptional cases ineligible to the SP, the majority of which are more sensitive, urgent and complicated. Cases satisfying these exceptional conditions may create pressure from higher authorities to dispose them. It is reasonable that judges may give RP cases higher priority in the timeline of the trial. Therefore, the trial procedure may be simplified, but the trial duration may not be reduced accordingly.

If the above interpretations were taken at face value, what would the significance of these findings be? Is it necessary to reduce the trial duration in SP cases? Should defendants pleading guilty be credited in speeding up cases and in sentencing? Why can simplified procedure cases not be processed as summary procedure (*jian yi chengxu*) cases? As I observed, the mean of trial durations in theft cases tried in summary procedures is around 20 days shorter than that in simplified procedure cases.<sup>52</sup> Thus, based on the same conditions that the defendants plead guilty and the trial procedure is almost the same, we must wonder why the disparities in trial duration are so large between them. I would say it depends particularly on the case docket and the pressure from certain exceptional cases, but generally the trial duration in simplified procedure cases should be sped up. The very reason is that the defendant contributes to saving time for the legal authorities in the course of the investigation, prosecution, and trial. Logically, the legal authorities in guilty plea cases in general spend less time working on those cases

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<sup>52</sup> Beyond the case summaries used in the research, I also observed the 181 theft cases in summary cases and found that the mean of trial duration of these cases is only 8.9 days.

than they do in working on the no guilty plea cases. For instance, the prosecution has more difficulties in providing sufficient evidence and persuasive argument if the defendant pleads not guilty, and the trial, consequently, becomes more complicated and time consuming. In disposing not guilty plea cases, the intricate examination in trial is widely used and more judicial participators are involved in trial. However, the defendant pleading guilty makes the charge and trial almost effortless. Thus, defendants pleading guilty may be credited in shortening the trial duration.

The second finding in trial duration is that the presence of defense counsel in the trial may extend the trial duration both in the simplified and regular procedure. The presence of defense is positively significant to trial duration in various offense cases with the exception of violent and corruption cases. The presence of defense is strongly significant to the trial duration both in SP and RP cases. These findings are consistent with the hypothesis that the presence of counsel may delay the trial in SP. This phenomenon suggests that the defense in trial process extends the trial duration, implying the cases with the presence of defense are more sensitive or complicated. It is possible that the presence of defense may extend the trial duration because the defense in trial will consume more trial time than without defense. Nevertheless, the presence of defense in the trial is necessary in the simplified procedure, particularly because the defense counsel can advise the defendant in the process of the confirmation of a guilty plea and sentencing. In general, the presence of defense in trial is a fundamental right for defendants and certainly cannot be sacrificed simply for speeding up the trial.

Third, I also noticed other determinates impacting the trial duration. The trial duration in the property offense cases is shorter than that in other offense cases, suggesting that the

property offense cases such as theft cases may be less complicated. In the joint offense cases the duration of trial is longer than that of the cases without the joint offense. These findings are consistent with the hypothesis that the complicated cases may take more time in trial.

## 2. Prosecution duration

The basic finding is that the prosecution duration in simplified procedure cases is lower than that in normal procedure cases. This finding proves that the guilty plea cases under SP save time in formal investigation and indictment, and it makes sense as I interpreted in Part IV. The question is whether the prosecution duration in guilty plea cases can be further lowered, and, if so, to which stage and what extent can it be reduced?

To know the duration of investigation and indictment, we should invoke the rules in CPL. In RP the investigation after the defendant arrested should be completed within two months (sixty days), and only investigation on the very complicated cases can go beyond two months upon the approval of the procuratorate, and also the indictment work should be finished within one month after the case is referred from the police department or the investigation office of the procuratorate. Thus, the duration of prosecution should be limited to 90 or fewer days under CPL. The requirements of duration in CPL are also applied to the simplified procedure. In A-Table 2 in Appendix 5, the prosecution duration decreases 1.19 days ( $e^{0.176} = 1.192438$ ) in all offense cases, 1.17 days ( $e^{0.164} = 1.178214$ ) in theft cases, 1.16 days ( $e^{0.152} = 1.16416$ ) in other property offense cases, and 1.44 days ( $e^{0.365} = 1.440514$ ) when SP cases increase each unit. Furthermore, In Appendix 1, the means in all offense cases are 101.1 days in RP cases and 92 days in simplified procedure cases respectively, while in theft cases the mean and the median are

84 days in regular procedure cases and 81 days in simplified procedure cases. Under these results, I would say that even though some regular cases are more sensitive in prosecution, it is still very much possible that the prosecution duration for guilty plea cases can be further reduced by less sensitive cases or limited by the ineligible cases in SP.

The formal investigation duration should be lowered in guilty plea cases unless the cases are sensitive or ineligible to the simplified procedure. The observed means and medians in all offense cases either exceed or are close to the deadline of prosecution duration. This implies that the formal investigation consumes a large part of prosecution time. Also, responses in the survey suggest that the formal investigation is rather time-consuming in the guilty plea cases. Thus, it is necessary to further limit the formal investigation in guilty plea cases with the exception of cases that are ineligible to be disposed by the simplified procedure.

The second finding is that the discrepancy exists in the presence of defense under different procedures. In A-Table 2 (Appendix 5), the presence of defense in prosecution contributes less to the prosecution duration than to the trial duration. This finding signals that the defense plays a very limited role in investigation and indictment proceedings. As discussed, the presence of defense is significant to prevent coercion from law authorities. Particularly in formal investigation, the overwhelming majority of suspects are in jails, and they need the defense to assist them in protecting their legal rights. In speeding up cases, the law authorities control the process of case disposition, and the defense lawyers have no way to make the cases move quickly. Moreover, if the defense counsel cannot



play a significant role in investigation and indictment proceedings, it is difficult for them to defend the defendant in sentencing.

Another interesting finding from this research is that the extreme outliers were observed usually focusing on the cases where the defendant in surveillance is in residence (*qubao houshen, jianshi juzhu*). The difference between cases in simplified procedure and those in regular procedure is that the outliers in regular procedure cases are allotted more time to await trial than those in the simplified procedure. According to article 58 of CPL, the period granted by a People's Court, People's Procuratorate or public security organ to a criminal suspect or defendant for awaiting trial after obtaining a guarantor shall not exceed twelve months; the period for residential surveillance shall not exceed six months, and during the period when the criminal suspect or defendant is awaiting trial after obtaining a guarantor or when he is under residential surveillance, investigation, prosecution and handling of the case shall not be suspended. The duration of prosecution for the cases where defendants were approved in residential surveillance was generally more than 150 days, and in some cases will be more than 200 days. This finding shows that the delay in prosecution is widespread and the prosecution is largely suspended. In other words, the system for surveillance in residence has defects in efficiency and thus should be reconsidered in legislation.

### 3. Preliminary investigation

The important finding in preliminary investigation is that the duration of the investigation seriously exceeds the regular limitations in CPL.<sup>53</sup> In Appendix 1, the

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<sup>53</sup> CPL (1996), Article 69: If the public security organ deems it necessary to arrest a detainee, it shall, within three days after the detention, submit a request to the People's Procuratorate for examination and approval. Under special circumstances, the time limit for submitting a request for examination and approval may be extended by one to four days. As to the arrest of a major suspect involved in crimes committed from one place to another, repeatedly, or in a gang, the time limit for submitting a request for examination and approval may be extended to 30 days. The People's Procuratorate shall decide either to approve or disapprove the arrest within seven

means and medians of duration in simplified procedure cases are shorter than in regular procedure cases. However, the means and medians all are seriously longer than three days—the basic time limitation in CPL. One possibility is that three days are essentially not enough time for investigators to identify whether suspects should be arrested on formal charges. An alternative possibility is that the bias of case selection may lead to this discrepancy. However, from my experience in defense, the overwhelming majority of suspects are detained for more than three days in preliminary investigation. It seems unusual in law, but it is usual in reality. Then, the issue is whether or not the rule of the timeline of preliminary investigation in CPL is reasonable, and, if not, what length of time is reasonable?

I believe that the timeline in preliminary investigation should be amended. First, the current rule is costly because of the unnecessary approval process for special cases such as joint crime cases and the like. Second, the supervision from the prosecutor's office cannot play a critical role in checking the discretion of the legal investigator in preliminary detention. Under the theory of check and balance, the courts as independent judicial organs should have the power in determining whether or not the suspects should be detained or how long they should be in custody. The power of supervision in preliminary investigation, in the long-run, should be transferred to the court system, but this is almost impossible in the current context. The practical reform within the current mechanism is how to reduce the unnecessary approval proceedings in order to make the timeline workable.

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days from the date of receiving the written request for approval of arrest submitted by a public security organ. If the People's Procuratorate disapproves the arrest, the public security organ shall, upon receiving notification, immediately release the detainee and inform the People's Procuratorate of the result without delay. If further investigation is necessary, and if the released person meets the conditions for obtaining a guarantor pending trial or for residential surveillance, he shall be allowed to obtain a guarantor pending trial or subjected to residential surveillance according to law.

Whether suspects confess or not in non-sensitive cases may be considered as a standard to divide the line between the short-term and the long-term in the preliminary detention. The simple underlying rationale is that the confession will make the investigation less trouble than no confession. The concern for detention is how long the duration should be reasonable for the policemen. It depends on the cases with complications, sensitive issues or pressure from outside of the cases, but the legislation cannot regulate only for a unique case like common law. To answer this question, it is necessary to observe cases and clarify the majority, which is where the defendants' behavior should be common in investigation. The rate of confession of the defendant is high enough to classify, even as it declined after the enforcement of the 1996 CPL.<sup>54</sup> According to law and economics, the cases where defendants confess should be treated more efficiently than those cases where defendants do not confess to the investigator. The practical approach is that the time spent on detention should merge with the investigation after the arrest. Generally, the time allocation in detention can be estimated based on whether or not the defendant confesses. Due to the lack of empirical research from policemen in the course of this study, the argument needs more evidence to be supported.

What is noticeable is that the debate on the new amendment CPL extends the period of the interrogation by summons (*juchuan*) from 12 hours to 24 hours.<sup>55</sup> This amendment suggests that the previous time limitation cannot meet the interrogation requirement, but may lead to infringing upon the detainees' human rights. The serious issue is whether it is necessary to make an interrogation time within 24 hours more flexible. Certainly, the extension of summons time will authorize the investigators more

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<sup>54</sup> Hong Lu, Terance D. Miethe, *Confessions and Criminal Case Disposition in China*, 37 *Law & Society Review*, 549, 569 (2003).

<sup>55</sup> CPL (2012), art 117, also see, Qinchang Huang, Lixiang, *jujiao xingshisuong falv xiugai, 12 xiaoshi yu 24 xiaoshi libi quanheng* (Focus on the Time Extension in Juchuan—12 vs.24 hours), *Renmin ribao* (Renmin daily), October 19, 2011.

discretion in restricting personal freedom. From this point of view, it is not practical only to allow extension of the summons time without consideration a similar adjustment to the time allowed for preliminary investigation. I feel like that this issue should be included as an integrated problem in the solution of the timeline in preliminary investigation.

Another issue is that the impact of presence of defense in the duration of preliminary investigation. In Table 14, the presence of defense is not significant to the duration of preliminary investigation in all offense cases. This finding is consistent with the hypothesis that the defense counsel plays little role in the preliminary investigation. As I know, few lawyers can be allowed to be involved the defense in the preliminary investigation if you consider the lower rate of the presence of defense in trial in China. The policemen or other investigators may strongly argue that the presence of defense in preliminary investigation may interrupt the investigative work and therefore may resist the presence of defense. When only considering the efficiency in the preliminary investigation, it makes sense from the legal actor's point without doubt. However, the problem of infringement on human rights may easily happen in the preliminary investigation without the assistance of the defense lawyer. In the current context, there is a long way to go toward allowing the presence of defense in the preliminary investigation.

### C. Sentencing

#### 1. Guilty plea in sentencing

The most valuable finding in the survey is that the legal actors do not reach an agreement in the meaning of the guilty plea. Whether the defendants pleading guilty or not plays a crucial role because it will help decide if the case is eligible to SP but also because it influences the verdict of punishment in sentencing. In Table 29, the legal

actors in the survey revealed the discrepancies in the meaning of the guilty plea. Obviously, the guilty plea is not a simple self-evident term, but a very ambiguous concept if the law cannot clarify it very specifically. As I indicated in the problems of SP in Part II, the judges in case summaries also show their different perceptions in understanding the guilty plea. Then, the issues raised are of how to clarify the meaning of guilty plea in law and how the guilty plea affects sentencing.

The discrepancies in understanding the guilty plea and its relationship with confession, and remorse lead to legal actors confusion in the implementation of SP. It is also difficult for the defendants to make a decision in the guilty plea process. Traditionally, a popular political policy (*tanbai congkuan, kangju congyan*) is strongly advocated by the central government, implying that the defendants confessing what they have done to investigators will mean that they are treated leniently in sentencing. Impacted by this policy, the courts tend to use various terms to differentiate the manners or attitudes for a guilty plea such as *renzui taidu jiaohao, renzui taidu lianghao, renzui taidu yiban, jiaobian, renzui taidu elie, jubu renzui*, and *renzui taidu xiaozhang* and so on. These terms are used epidemically in the language of case summaries. Generally, these terms are connected with the defendants' attitude in confession, remorse, sometimes indicating the manner of a guilty plea at trial.

What is the difference between a guilty plea and confession? Confession in criminal procedure in general means that the defendant discloses the criminal fact to the investigator, cooperating with the prosecution to find the truth under the case. Confession is encouraged by law authorities for making the investigation efficient. Confession's value in the investigation is often exaggerated, and sometimes it is extracted by means of

torture. In the simplified procedure, the confession is simply not an element of a guilty plea. In the United States, a guilty plea refers to “an accused person’s formal admission in court of having committed the charge of offense, and a guilty plea must be made voluntarily, and only after the accused has been informed of and understands his or her rights. A guilty plea ordinarily has the same effect as a guilty verdict and conviction after a trial.”<sup>56</sup> The ABA standard in a guilty plea also shows the very detail in the requirement of guilty plea.<sup>57</sup> In *The Prosecutor v. Goran Jelusic*, an international criminal case, the decision clarified that the judge must verify: (i) the guilty plea has been made voluntarily; (ii) the guilty plea is informed; (iii) the guilty plea is not equivocal; (iv) there is sufficient factual basis for the crime and the accused participation in it, either on the basis of independent indicia or of lack of any material disagreement between the parties about the facts of the case.<sup>58</sup>

The key prerequisite for the defendant’s pleading guilty is that there is sufficient factual basis for the charge. This means that the prosecution has made the charge sufficiently against the guilty defendant in trial. Therefore, guilty plea for the defendant should begin from the time of formal indictment. The guilty plea also cannot be confused with the confession, which means the defendant tells the facts of the crime to the investigator, who may or may not grasp the facts as stated by the defendant. However, the guilty plea should have basis in the obvious and factual foundation in evidence.

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<sup>56</sup> Black’s Law Dictionary (2007), at 1189.

<sup>57</sup> The fact that a defendant has entered a plea of guilty or nolo contendere should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence. It is proper for the court to approve or grant charge and sentence concessions to a defendant who enters a plea of guilty or nolo contendere when consistent with governing law and when there is substantial evidence to establish, for example, that: (i) the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct; (ii) the concessions will make possible alternative correctional measures which are better adapted to achieving protective, deterrent, or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction; (iii) the defendant, by making public trial unnecessary, has demonstrated genuine remorse or consideration for the victims of his or her criminal activity; or (iv) the defendant has given or agreed to give cooperation. See, ABA Standards for Criminal Justice (Pleas of Guilty), Standard 14-1.5, third edition, 61, (1999).

<sup>58</sup> *The Prosecutor v. Goran Jelusic*. Judgement. U.N. ICTY, at 28, U.N. Doc. IT-95-10-T (1999). [Reproduced at Tab D].

The key element for a guilty plea is that the defendants voluntarily consent to the indictment. One issue is what the meaning of voluntariness is in consent of the charge. Voluntariness means that the defendant makes the consent in a guilty plea by his own willingness without any influence by torture, duress or tricks on the part of the prosecutor. The question is how we know whether the defendant pled guilty voluntarily. The presence of counsel in a guilty plea should be necessary to guarantee the defendant pleads guilty voluntarily because the defense lawyer may assist the defendant to clearly understand what the guilty plea is and what the aftermath is after pleading guilty. The judges also can review the case in a hearing to determine if the defendant pleaded guilty voluntarily. This voluntariness is an essential element for a guilty plea. RPS actually mentions that the defendant should plead guilty voluntarily, but there are no reference rules to ensure this is legally accomplished.

The guilty plea should be informed. This means that the defendant should be informed on the outcome of the plea, whether guilty or not. A guilty plea might be involuntary if the judge, prosecutor, or defense counsel fails to inform the defendant that a guilty plea might be affected by alternate processes or realities. The issue is who should have the vital responsibility for fully advising the defendant in a guilty plea. Surely, the defense lawyer should assume this role; however, if the case occurs without the presence of defense counsel, whose responsibility is this very issue? The prosecutor is responsible for this, but the judge should carefully review whether the guilty plea was made by a defendant who was completely informed in the plea hearing.

The guilty plea should not be equivocal. In my survey, a defense lawyer from Shanghai indicated that the court should permit the defendant to plead guilty to defend

against illicit details of the charge. A lawyer from Zhejiang also suggested that the defendant's disagreement with trivialities of the charge cannot adversely impact the effect of a guilty plea in mitigation of the punishment in sentencing. Under SP, if a defendant pleads guilty in the primary facts of the charged offense, the case may enter the simplified procedure. This may result in a serious query about the meaning of the primary facts of the offense., If the defendant does not consent to some trivial detail in the charged offense, is it possible for the defendant to get a hearing on this matter, and if so, does this defense impact the effect of the guilty plea in sentencing? The plea bargaining system in China is banned in criminal procedure including the simplified procedure, in which the defense counsel has no right to negotiate with the prosecutors in charge; needless to say there is no bargaining in sentencing. If the defendant pleading guilty does not deny the primary charge, apart from disagreement in some details unimportant to the offense, the effects of a guilty plea should not be adversely affected against the sentence for the defendant. The direct reason is that the defendant pleading guilty in China does not automatically waive the defense right.

Should the guilty plea be a factor for mitigating punishment in the simplified procedure? The defendant should also be regretful and demonstrate a willingness to assume responsibility for his or her criminal conduct if he or she wants a lighter punishment.<sup>59</sup> The remorse and the willingness to take responsibility are also possible independent factors in sentencing in a guilty plea. A plea of guilt cannot be considered by

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<sup>59</sup> The fact that a defendant has entered a plea of guilty or nolo contendere should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence. It is proper for the court to approve or grant charge and sentence concessions to a defendant who enters a plea of guilty or nolo contendere when consistent with governing law and when there is substantial evidence to establish, for example, that: (i) the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct; (ii) the concessions will make possible alternative correctional measures which are better adapted to achieving protective, deterrent, or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction; (iii) the defendant, by making public trial unnecessary, has demonstrated genuine remorse or consideration for the victims of his or her criminal activity; or (iv) the defendant has given or agreed to give cooperation. See, ABA Standards for Criminal Justice (Pleas of Guilty), Standard 14-1.5, third edition, 61, (1999).



itself alone as a mitigating factor in sentencing. In China, however, if the defendant pleads guilty in the simplified procedure, he or she should be permitted to receive lighter treatment in sentencing unless there is an exceptional situation in the case. Consequently, the defendant may make use of SP to avoid the proper punishment. Accordingly, it is not strange for divergent perspectives on the guilty plea in the survey.

The concern in making decisions consistent is how making a guilty plea impacts sentencing. For instance, a defendant is charged with the crime of stealing 10,000 *yuan* from a person, and he pleads guilty in trial. Under the judicial interpretation of theft cases in sentencing by the Supreme Court, the defendants who steal more than 5,000 *yuan* and less than 20,000 *yuan* will be confirmed as having stolen the larger amount, and this defendant should be sentenced with 3-10 years' incarceration. If we do not consider the details beyond the guilty plea, in this hypothetical case, how long is fair for the defendant to be sentenced? Without doubt, the guilty plea should make a difference in sentencing when compared to similar cases where the defendant does not plead guilty. Recently, the People's Supreme Court issued some judicial documents regulating sentencing in courts at different levels, and the guilty plea as an important factor in sentencing. These actions signal a serious concern about inconsistency in sentencing on the side of the public. In the survey, a judge from Hunan strongly suggested that plea bargaining should be permitted in the SP, and some prosecutors asked for the power of recommendation in sentencing. Reform in sentencing can provide incentives for the improvement of the SP, but the actual effectiveness will be observed later.

The relationship between the confession and guilty plea is also important for the defendants. If a defendant confesses in investigation, does this mean that the defendant

should plead guilty in indictment and trial? If not, how should the prosecutor and judge consider the defendant's withdrawal of his or her confession?

Finally, the defendant cannot protect their interest without the assistance of defense counsel. SP cannot essentially eliminate the chances of coercion to the defendants from the investigator. Duress, coercion and illegal inducement often threaten the protection of human rights in criminal procedure. The responses in the survey show that the overwhelming majority of lawyers, prosecutors, and judges are concerned about the possibility of coercion in the simplified procedure. Coercion is a common concern in the process of a guilty plea or plea bargaining, or simplified processes in any countries. The concern is reasonable, not only because the benefit from the guilty plea for the accused is irresistible but also because the pressure from the prosecution against the accused is also overwhelming. As a researcher indicated that a guilty plea may be attractive in ways such as: (a) the sentence for the crime admitted will be less than at first appeared likely, and may not even involve imprisonment; (b) the offender may have time served deducted from their punishment if they plead guilty, and be released immediately; and (c) pleading guilty may involve being moved from overcrowded remand conditions to better conditions.<sup>60</sup> Given a defendant is detained in a jail, he or she would think about what he or she did, and more importantly what he or she will face in trial.

Psychologically, the defendant is more likely to expect a lenient punishment if he or she actually committed a crime. Freedom for the inmates living in harsh circumstances is a kind of scarce resource, and is more likely to be overvalued, and to be exchanged with whatever the defendant would like to offer. Does a guilty plea become a kind of

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<sup>60</sup> Stephen Jones, *Under Pressure: Women Who Plead Guilty to Crimes They Have not Committed*, II (I) *Criminology and Criminal Justice*, 77, 79, (2011).

goods inherent with the defendant? If so, what is the price and how do we identify the “goods”? Unfortunately, the price of a guilty plea will be determined by the investigator, and the deal will be finalized by the judge, so the defendants have no voice in decision making beyond a guilty plea. Thus, the defendant will be in a dangerous situation during the guilty plea process if they cannot have access to the presence of defense in process.

The determinants of a prison sentence are complicated with the offenses and criminal characteristics. Theoretically, SP through a guilty plea influences the sentence. Therefore, we want to know the disparities between SP and regular procedure with the same condition in a guilty plea. The general finding from the regression model in Table 18 is that there are no discrepancies in prison sentences between simplified procedure and regular procedure cases. The exception is that the prison sentence in theft cases in SP is longer than in the regular procedure. However, in Table 31 the overwhelming majority of responses of legal actors in the survey reported that most defendants in SP obtained lighter punishment. How do we interpret these findings with the hypothesis that the defendants in SP should expect a lenient sentence?

The possibility is that a potential case selection bias exists in the population of current case summaries in observing the prison sentence. It is very difficult to control more variables in the observation of the disparities in sentencing because of the complicated criminal characteristics influencing the prison sentence. For instance, the prison sentences in theft cases are largely quantified under the judicial interpretation of the guideline on theft cases in sentencing enacted by SPC in 1998.<sup>61</sup> Under the guideline of this interpretation, theft offenses are classified into three levels—misdemeanor (more

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<sup>61</sup> Zuigao renmin fayuan guanyu shenli daojie anjian juti yingyong falv ruogan wenti de jieshi (Supreme People’s Court’ Legal Interpretation on the Implementation of Rules in the Issue of Sentencing in Theft Cases) ,March 10,1998.

than 500-5,000 *yuan*), felony (more than 5,000-20,000 *yuan*), and severe felony (more than 30,000-100,000 *yuan*). Accordingly, the sentences of theft cases are divided into three levels—less than 3 years prison sentence, 3-10 years prison sentence, and more than 10 years prison sentence. If we can select theft cases summaries controlled in one level of the offense between the simplified and regular procedure, it may be possible to observe the discrepancies between them. The current dataset in theft cases cannot satisfy this requirement in variables, and therefore the topic needs further exploration.

Nevertheless, it should be worth noting that the respondents in the survey reported that most defendants in simplified procedure cases received lighter treatment. Generally, more than 70% of respondents in the survey reported the defendant in simplified cases received a lenient sentence. However, the responses are based on the fact of whether or not the defendants pleaded guilty, but not based on the different category of procedures. In other words, we need more evidence to know the disparities of the sentence in guilty plea cases between SP and RP.

Another finding in sentencing is that the defense counsel play little role in sentencing. The status of defense counsel is pretty low in criminal procedure. The judges pay little attention to the defense in sentencing. In general, the defense counsel is a kind of exogenous variable in sentencing, and its relationship with the prison sentence should be looser than other criminal characteristics.

## 2. Probation

Probation is an alternative punishment to imprisonment used in sentencing. It may be used with defendants who are sentenced to less than three years fixed-term imprisonment. In a sense, probation is a kind of lenient punishment and is rewarded to

defendants who commit a misdemeanor offense and also pose little danger to society. These defendants will receive personal freedom as long as they do not commit a new crime during the period of probation. The problem is that the probation system may be abused by judges who might choose to grant probation in exchange for a bribe.

In A-Table 6 (Appendix), the probation durations in SP are longer than in regular procedure cases. The possibility is that cases with probation under SP deal with offenses that are more severe than cases with probation under regular procedure. An alternate possibility is that the selected cases may create bias that results in this issue. Anyway, theoretically it is not significant to explore the disparities of the duration of probation between the simplified and regular procedure because the duration of probation depends on the criminal characteristics, not on the procedures.

Through the calculation in the dataset of selected case summaries, 7.8% of all cases are those with probation in simplified procedure, while cases with the probation in regular procedure number 3.2%. This may imply that the defendants in SP are more likely to receive probation.

Surprisingly, in my dataset the proportion of probation in corruption cases is much higher than in other offense cases. The corruption cases with probation comprise 34% (14/41) of the total corruption cases selected, while theft cases with probation are 16.2% (54/333) of the total theft cases, and violent cases with probation are 21% (26/121) of the total violent cases.

### 3. Fine

Fines are widely used in criminal sentencing in China, and in the majority of cases (73% in the dataset) defendants are imposed fines for committing crimes. However,

the fine as a penalty of property in criminal law has been controversial because of disparities in sentencing. The findings in fines from the case summaries may broaden the view of the fine in sentencing in reality, and may also raise some interesting issues for the empirical research.

The interesting finding is that the fines are generally higher with the presence of defense counsel. The reasonable interpretation is that the offenses of cases with the presence of defense counsel are more severe than other cases without the presence of defense counsel, leading to higher fines in sentencing. The second possibility is that the judges may trade off the lenient sentence or probation in exchange for higher fines because the defense counsel may secretly bargain over the sentence with the trial judges. The third reason is that the presence of defense may signal that the defendants can afford a higher fine. I tried to find related evidence to support the probability in literature, but unfortunately very few research studies have touched on this issue.

The second finding is that the fines in simplified procedure cases are higher than in regular procedure cases. The probability is that the offenses in simplified procedure case are more severe than in regular procedure cases because more severe offenses should be fined higher amounts under criminal law. The findings in prison sentencing support this probability because the prison sentences in SP cases are longer than in RP cases. The possible reason is that some exceptional cases such as cases with disabled defendants may influence the results of the sentences in regular procedure because the disabled defendant usually receives a very lenient punishment in sentencing. Whatever the procedure involves, the fines that are imposed should be more consistent with the criminal characteristics.

The third finding is that the fines in Beijing are lower than in other provinces, while fines in Shanghai are higher than in other provinces. This finding is consistent with the finding in prison sentences—prison sentences in Beijing are lower than in other provinces while prison sentences in Shanghai are higher than in other provinces. The possibility is that the selected case summaries may lead to disparities in case distribution based on geographical concentration. Maybe Beijing’s judges or courts are less likely to publicize the serious cases due to political concerns. However, this conjecture need more evidence.

## **VI. Conclusion**

The implementation of SP provides insight to observe how the SP works. Obviously, the findings from the case summaries and survey display multiple problems in the simplified procedure, but all problems can be centered on one issue—the presence of defense. Without the presence of defense, neither justice nor efficiency can be generated from the SP. Thus, the recommendations for reform in SP essentially focus on the issue of the presence of defense.

### **A. Improving access to defense**

The critical problem for the implementation of SP is that the overwhelming majority of defendants cannot access the presence of defense. The proportion of defendants who retain defense counsel in China’s criminal cases is less than 30%, and much lower in certain provinces, in which it is less than 12%.<sup>62</sup> Furthermore, Chinese lawyers have a higher risk in defense in criminal cases. As Ethan Michelson noted in his research, Chinese lawyers prevalently complain about intervention and obstruction in

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<sup>62</sup> Ning Yu, *Guanyu tigao xingshibianhu lvshi canyu lv de jianyi (Recommendations for Improving the Participation of the Presence of Defense in Criminal cases)*, Xingjing bao (Xinjing Newspaper), Feb,13,2012.

criminal defense.<sup>63</sup> In this context, it is not strange that the defense lawyer prefers to represent the defendant in more complicated cases and profitable cases.

Due to the high risk in criminal representation, only a very small number of lawyers engage in criminal defense. The Chinese government has realized this problem and has taken measures to improve criminal defense, but there is still a long way to go.

#### 1. Public defense

As a public good, the presence of defense should be open to anyone who needs it. In the simplified procedure, the defendants confessing or pleading guilty to law authorities may assume that they no longer need defense counsel. Also, the majority of defendants cannot afford the legal service fee and therefore would not have access to the defense. In my research, the rate of defendants who have access to defense counsel is surprisingly lower in the developing provinces in China's western areas. Because the protection of human rights in criminal procedure is a significant issue, a public defense system should be formed in China in the long run. Due to the imbalance of economic development throughout the country, instituting the public defense system across all geographic areas requires funding that simply is not currently available as this dissertation is being completed. Therefore, the public defense system should be gradually formed gradually and within the means of the local economy.

First, a prior consideration is that the developed municipalities and provinces should set up the public defense system. The resources of the developed municipalities and provinces can meet the needs of the defense public system, particularly in legal resources; as long as the local governments can provide subsidies to legal service, the

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<sup>63</sup> Ethan Michelson, Lawyers, *Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, *American Journal of Sociology*, Vol. 113, No. 2 (September 2007), pp. 375,376,384.



public defense system can be set up and operate effectively. In 2002 the Ministry of Justice promoted pilot work in public lawyering in local government.<sup>64</sup> This project has made much progress in Shanghai, Beijing, Guangdong and other provinces and cities.<sup>65</sup> However, few public lawyers are engaged in legal service in criminal cases because the defense lawyers are mainly advisors for the government agents. The current difficulty for the public defense focuses on the funding problem, for the local governments are reluctant to distribute financial resources to the legal market.<sup>66</sup> In 2011, Beijing's Judicial Bureau initiated a pilot work for public defense in the legal aid system, and this initiative provides a new approach for furthering the public defense system. Anyway, the improvement of public defense will make the defendants better off, not only in SP but also in the regular procedure.

Second, in developing areas such as China's western provinces and cities, legal workers (*falv gongzuo zhe*) may be entitled to be an alternate public defense in simplified procedure cases. In 1996, China's Lawyer's Law prohibited legal workers in local judicial and legal service offices (*sifasuo, falv fuwu suo*) from participating in criminal cases,<sup>67</sup> worsening the situation of the defense in criminal cases, particularly in those developing areas with a small population of lawyers. The original goal in lawyer's law in barring the legal workers involved in defense was to improve the quality of defense, but the law overlooked the condition that the criminal defense would collapse without the legal workers' participation in some developing areas. As a compromise, the Ministry of

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<sup>64</sup> Ministry of Justice P.R.C., *Sifabu guanyu kai zhan lvshi shidian gongzuo d yijian* (The Opinion on Initiating the Pilot Project of Public Lawyers), No.79,2002.

<sup>65</sup> Shigui Tan, *Jianlun wanshm gongzhi lvshi* (Summary of the Improvement of Public Lawyers), *Guangming ribao* (Guangming daily), October 28,2009.

<sup>66</sup> Beijing Judicial Bureau, *Beijing shi falv yuanzhu gongzhi lvshi guanli banfa* (Measurments on the Public Lawyers in Legal Aid in Beijing), July 4, 2011.

<sup>67</sup> *Zhongguo lvshi fa* (Chinese Lawyer's Law) (promulgated by the Standing Comm. Nat'l People's Cong., May 15,1996,effective January 1,1997 ), art 14.

Justice softened the hard requirement for attending the united judicial examination in developing areas in order to increase the number of legal professionals in those areas. The demands for more members of the legal profession have been alleviated to an extent, but it still cannot sufficiently satisfy the demand of defense in criminal cases. In my opinion, a legal worker can be allowed to serve as a public defender provided that the cases are eligible for the simplified procedure and also that the legal worker has been trained and certified by the local lawyers' association. Since SP cases where defendants plead guilty may be less complicated than RP cases, the trained legal workers can be engaged in the defense. In other words, a little bit is better than nothing. The practical solution for the lack of public defense is that the legal workers can be permitted to attend the defense under certain conditions.

## 2. Legal aid

Legal aid as a social benevolence system was launched in 1996 and is now widely instituted across the majority of provinces and municipalities in China.<sup>68</sup> The legal aid system plays a crucial role in improving the presence of defense in criminal cases. However, the deficient resources and limited field in criminal defense seriously obstruct the legal aid that is much more involved with defense. The new CPL (2012) extends the field for the legal aid to the investigation process, and also the accused can retain the defense counsel when the preliminary investigation is initiated.<sup>69</sup> These amendments are significant for the improvement of the presence of defense, but supplementary measures should be embraced to make them work better in reality.

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<sup>68</sup> Zhen Gao, *Shiliu da yilai falv yuanzhu gongzuo xin jianzhan* (New Improvements on Legal Aid Since the 16th Session of Communist Party), *Zhongguo sifa zazhi* (Chinese Justice Journal), No.2009.

<sup>69</sup> CPL(2012), art. 36.

First, lawyers in law firms should bear more obligations in criminal defense. In 2010, all Chinese lawyers per capita represented fewer than three cases per capita, some even less than one and this figure also includes legal aid cases. The survey findings among Shanghai lawyers in defense also support this problem in defense. The lawyers should have the capability to bear more responsibility in the defense for the accused in criminal cases. As a result, the regulation of legal ethics should require the lawyers to voluntarily attend the legal defense for a minimum number of cases every year.

Second, expanding the limitation on defendants having the right to free access to defense counsel may improve the lack of defense counsel in reality. When the guilty plea cases enter the simplified procedure, the defendants have to invoke the necessary assistance from the defense counsel; otherwise, the defendants do not know how to protect their rights not only in investigation, prosecution but also in sentencing. Theoretically, all defendants in SP should have a defense lawyer from the government if the defendants cannot afford the fee for the defense counsel, but this is not practical because of the limitation of resources. The new 2012 CPL has included SP in summary procedure, and the cases where defendants plead guilty and will probably be sentenced to more than 3 years' imprisonment should be tried by collegial panels.<sup>70</sup> In accordance with this rule, the field of defendants having free defense counsel may expand to include these cases where defendants may be sentenced to more than 3 years.

#### B. Enhancing the role of defense

My survey revealed that the defense counsel plays a very limited role in the simplified procedure and has no way to check the power of legal authorities. The cost of the criminal procedure will increase if the defense counsel falls on deaf ears, and the

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<sup>70</sup> CPL (2012), art.210.

possibility of errors in the case will accordingly go up. In the simplified procedure, apart from the legal ethics I discussed in Part V, some measures should be considered to enhance the role of the defense counsel in the simplified procedure.

1. Checking investigation power

In the investigation process, the defense counsel should have the right of access to the suspects at any time. The essential problem is that the defense counsel has no right to be present in the interrogation by investigators. The new CPL (2012) still does not provide this right to the defense counsel, suggesting that the defense rights for the defendants has made little progress. The prosecutor's discretion is powerful in investigation and indictment in spite of certain limitations imposed on the prosecution under CPL. The suspects may be trapped into pleading guilty under the pressure of investigation. The practical suggestion is that the regulation of the guilty plea should limit the discretion of the prosecution and also make defense lawyers accessible during the interrogation by investigators. To accomplish this, the duty counsel system in legal aid should be translated in China.

The central government may further the pilot projects in the duty counsel system in some provinces or municipalities. The concern over the presence of defense in interrogation is that the police are worried their work will be disrupted or distracted by the defense counsel. If so, then the police power in investigation will be significantly checked by the defense counsel. In 2010, the Shanghai Judicial Bureau initiated the pilot project of the duty counsel in legal aid. In Shanghai, the offices of duty counsel are set up

in jails for the convenience of the duty counsel.<sup>71</sup> Due to the limitation of the law, the pilot project cannot extend the duty defense counsel to include the appearance during interrogation, but the basic conditions to permit this have gradually formed. If the government can permit the local pilot project of duty counsel to extend to the interrogation, the work will be moved forward in essence. Practically, as long as the defendants confess and plead guilty after first being interrogated by the investigator, the duty defense may be allowed to be present when further interrogations occur. This work should be very hard in the current context, but the progress should be made little by little.

## 2. Discovery in pretrial

In pretrial, the discovery system should be embedded in the criminal procedure, and the defense counsel can have access to the information and evidence prepared for the trial. The discovery system is also supported by some Chinese scholars.<sup>72</sup> Discovery allows a defense lawyer a better chance to examine evidence—detention and arrest records, police interrogation reports, written or oral testimony from witnesses, and any evidence to appear at trial. In the discovery, the defense lawyer might either be made aware of the exculpatory evidence or evaluate whether the defendant should agree to plead guilty. The discovery system might improve the efficiency at trial if the defense counsel has sufficient knowledge of the indictment and the records of the guilty plea in pretrial. Unlike the plea bargaining system in the United States, the SP is only a simplified regular procedure and not a confirmation process for a guilty plea. This means that the trial in SP should be a true trial. The defense counsel should prepare a defense

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<sup>71</sup>Shanghai Lawyers' Association, *shanghai shi jiji kaizhan falv yunzhu zhiban lvshi shidian gongzuo* (The Pilot Project on Duty Lawyers in Legal Aid in Shanghai), available at <http://www.lawyers.com.cn/info/7e4b79e72585415b8bc62b1da3cb18a3>.

<sup>72</sup>Guohe Qiao, Hua Li, *Jianhuashen chengxu zhong de shenqian zhengju zhanshi de yingyong* (The Use of the Discovery in Pretrial in Simplified Procedure), *Henan zhengfa zhiye guanli ganbu xueyuan zazhi* (Journal of Henan Judicial Profession Institute), No.4, 2004.

even for the defendants who have pled guilty. The lack of discovery will make it difficult for the defense counsel to play a critical role in the trial. The defense counsel should also know the sentence recommendation as soon as possible, so that they can prepare well to represent the defendant in sentencing. In the survey, some lawyers who responded to the open questions strongly claimed that the discovery process should be set in the pretrial process. In my opinion, the defense lawyer must have the right to access the information from the prosecution and when necessary can also negotiate with the prosecution or victim, if any, to make a settlement before the trial.

The discovery process should be regulated in detail and presented in court, and the judge must preside over the discovery process. The new CPL (2012) does not touch on the discovery system, maintaining the prior rules on the defense counsel's right to read criminal files.<sup>73</sup> These rules are very vague, particularly in the field of reading files; if the prosecutor's office does not want to reveal certain substantial evidence, the defense counsel cannot learn about it and cannot require the prosecutor to turn over all the evidence to them. First, the defense counsel has the right to receive all evidence particularly on the facts of the crime and the record of the guilty plea. Second, the judge should control the discovery process so that the defense counsel can retrieve all evidence necessary for defense in discovery. In sum, the discovery process can make the allow the defense counsel to learn as much as possible and thereby enhance the role of the defense in pretrial.

### 3. Strengthening defense in trial

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<sup>73</sup> CPL (2012), art 38, 39.

By pleading guilty, the defendant does not give up his or her right to have defense counsel at trial. In the survey, some lawyers complained that some judges were dismissive of the defense because the defendants have pled guilty. In case summaries, few written summaries recorded the details of the defense. Surely, the defense should be strengthened in trial. The trial should be clearly divided into two parts—the plea confirmation and the sentencing process.

The plea hearing should be entrenched in the trial for the further review of whether the defendant is informed and whether the guilty plea is voluntary. The plea hearing is processed in trial, where the defendant will appear in court and give the oral testimony in a guilty plea. The defendants in trial also have a chance to consult the defense lawyer in a guilty plea. The procedure should be clear for any participators, and the defense counsel should also advise the defendants so that they clearly understand the aftermath of a guilty plea. It is practical for the SPC to make a judicial regulation for interpreting the details in confirmation of a guilty plea.

Another issue is that the defense counsel has a critical role in the defense in sentencing. The current problem is that the defense counsel are worried about offending the judge in sentencing because the defense will make the judges think that in making the guilty plea, confession and statement of remorse, the defendant is not truly acting from the heart, thus leading to a harsher sentence. This is truly a problem in the simplified procedure. If the sentencing trial is separate from the confirmation of the guilty plea, the defense counsel may thus focus on the sentencing defense. This reform, of course, needs to be integrated into other mechanisms adjusted in the simplified procedure.

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In conclusion, the SP without the support of the public defense system would be deemed defective. The Chinese criminal justice system is essentially an inquisitorial style with hierarchical features. As a supreme power, the state's interest is generally higher than the individual's interest in the criminal justice system. The 1996 CPL set up the principal of the presumption of innocence.<sup>74</sup> However, suspects and defendants are traditionally presumed to be criminals while they are in custody, and the law authority agencies do not take into account the protection of their rights.

Uncertainty blocks the efficiency and justice in criminal procedure. The guilty plea vitally shapes the rights and interests of defendants—and, in the whole, our society. For defendants, the risks are enormous—whether or not they realize it—because every participant knows the rules of the game favor the law authorities. It is clear that the defendants need accurate information about the guilty plea—both what it means and what the consequence is if he or she pleads guilty—in order to make a good decision and fair bargain in process. In short, an effective simplified procedure should be based on the agreement of the meaning of a guilty plea.

This dissertation, however, cannot come close to exhausting the research of the SP, but should be a good start. A newspaper reported that the National People's Congress received more than 78,000 opinions from the public for the amendment of CPL publicized in September 2011.<sup>75</sup> So many voices were given, indicating that the public enthusiastically desire to participate in the legal process. SP has been adopted as an essential part in the new 2012 CPL. This dissertation not only pictured the guilty plea cases in case summaries but also told us the perceptions of legal actors in the survey.

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<sup>74</sup> CPL (1996), art.12.

<sup>75</sup>Huayun Yang, *xingfa caoan zhengqiu yijian jieshu, gonghuo jin 8 wan tiao jianyi* (Nearly 80,000 Pieces of Recommended Opinions from Public after the new Bill of CPL was publicized ), *Xinjing bao* (New Beijing News), December 27, 2011.



While much work remains to be done, all the findings in my research may further our understanding of the relationship between justice and efficiency in criminal justice, and accordingly the recommendations should also be valuable for improving the implementation of the new 2012 CPL.

## Appendices

### Appendix 1: Figures of offense type means and medians in durations and sentences

Figure 1: All Offense Types, Means

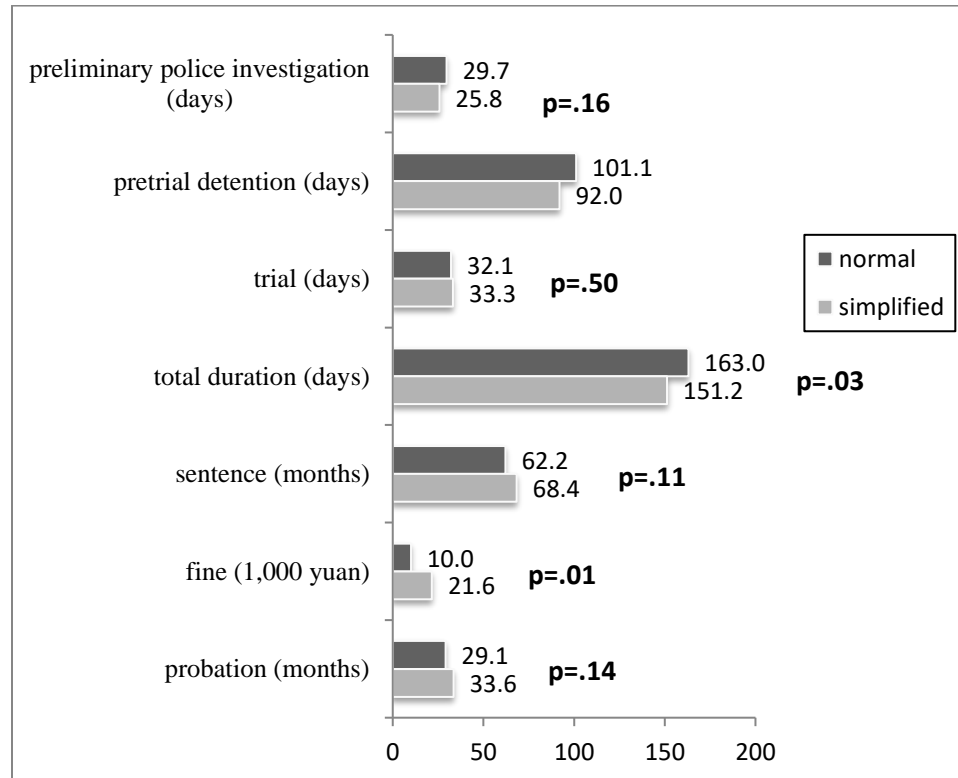


Figure 2: All Offense Types, Medians

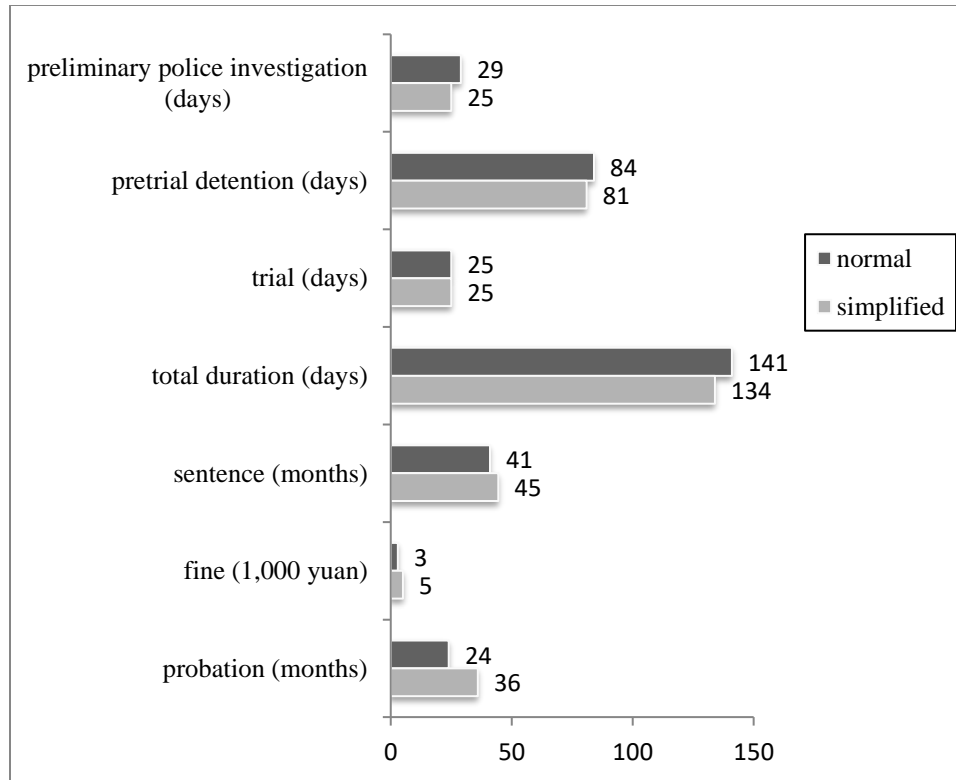


Figure 3: Theft Only, Means

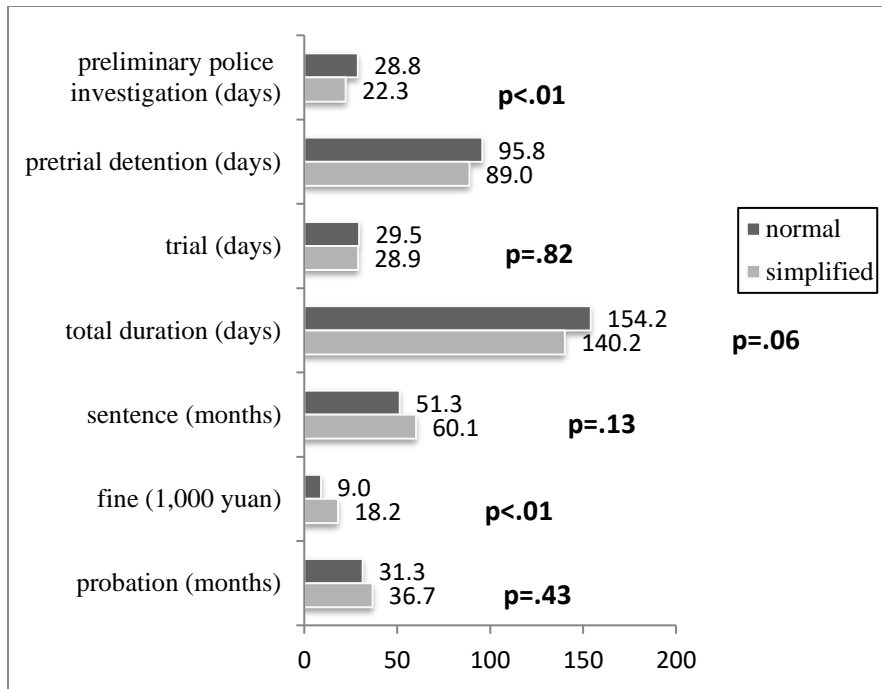
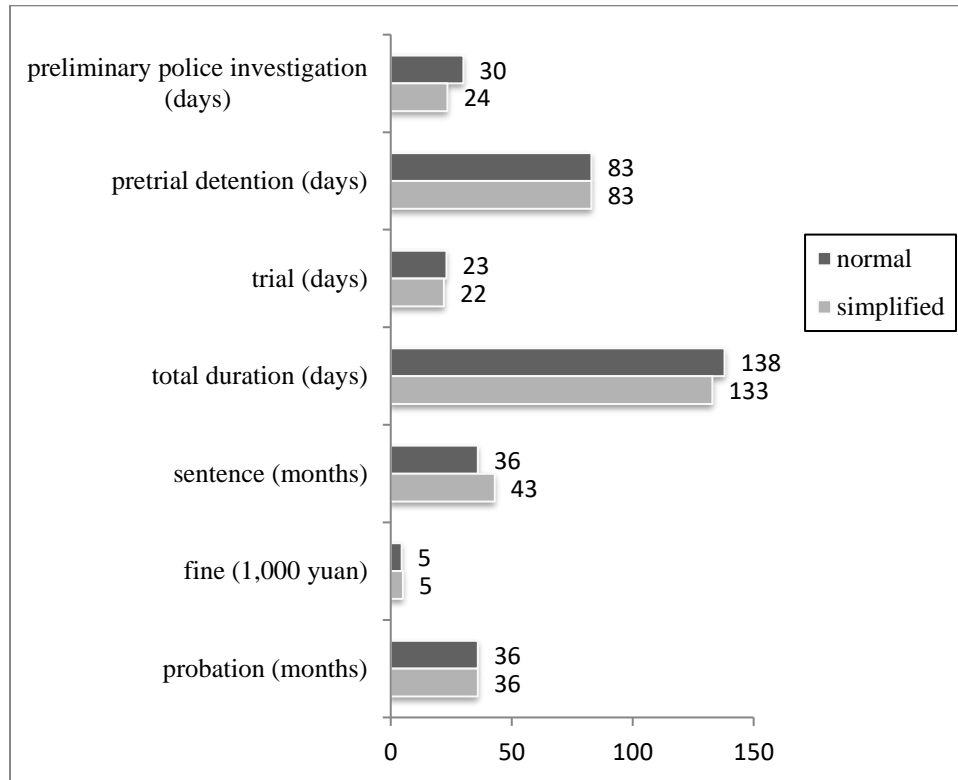


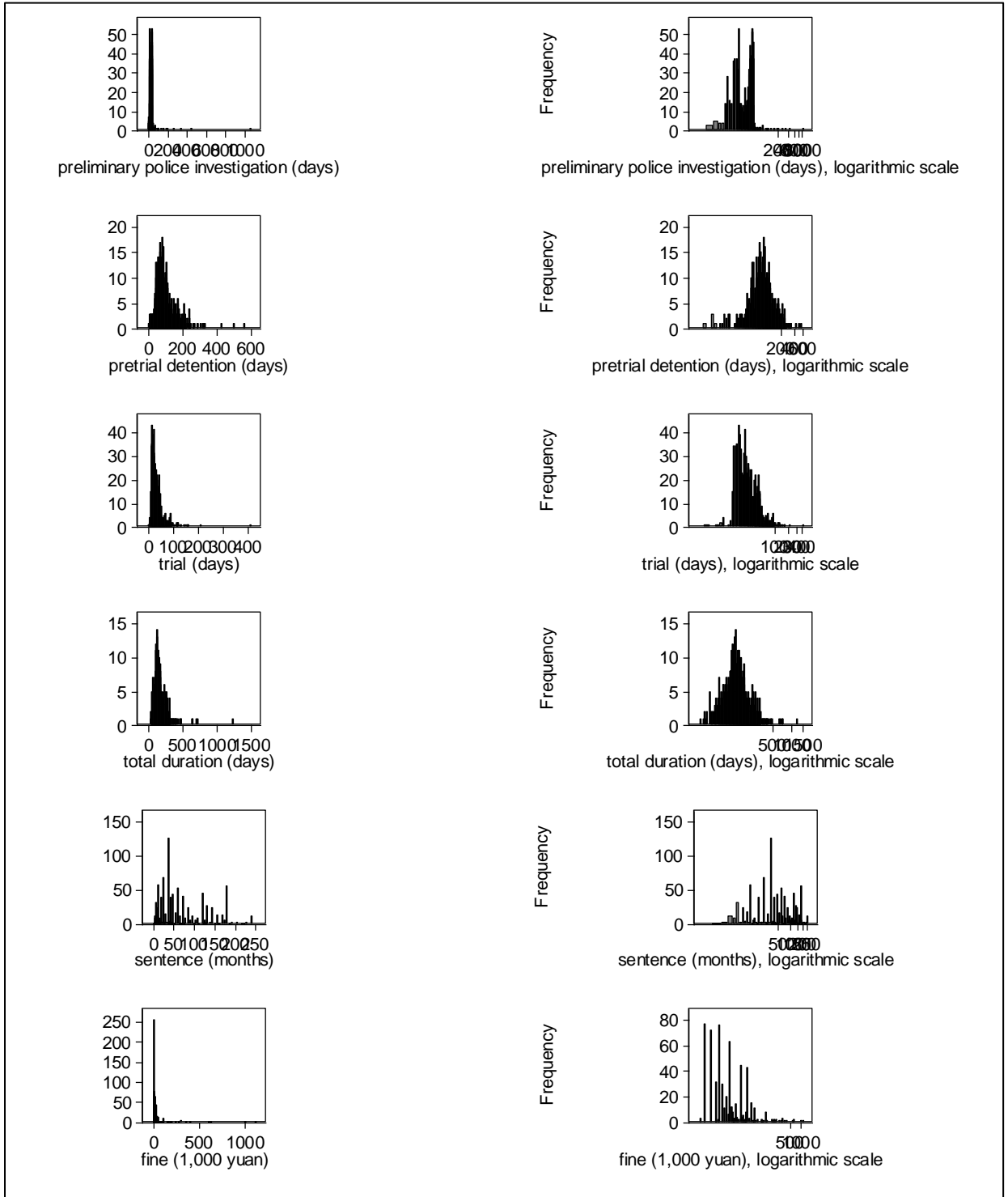
Figure 4: Theft Only, Medians



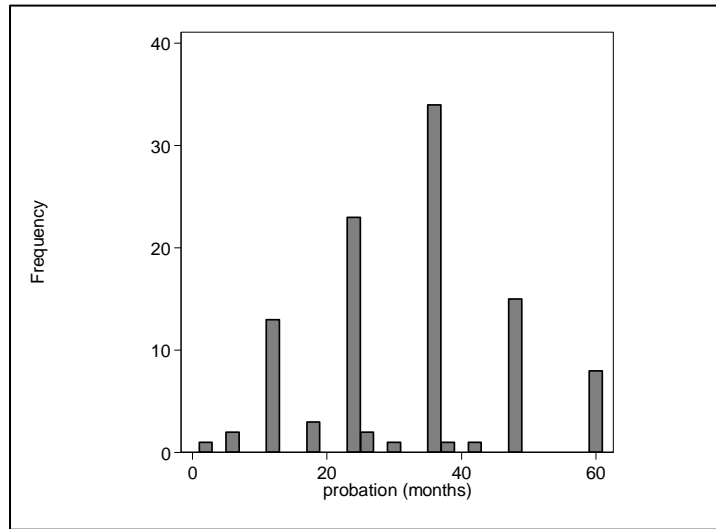
Appendix 2: Table of distribution of punishment measures in dataset

Punishment	Freq.	Percent	Cum.
prison only	190	20.11	20.11
fine + prison	651	68.89	88.99
prison + probation	65	6.88	95.87
fine + prison + probation	39	4.13	100.00
Total	945	100.00	

Appendix 3: Figures of comparisons with the logarithmic value



Appendix 4: Figure of the distribution of probation





## Appendix 5: Multivariate regression models for case summaries

A-Table 1: Determinants of Duration of Preliminary Investigation (logged days)

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
	all offenses	Theft	other property offense	violent offense	corruption	other offense
<b>OFFENSE</b>						
Theft	-.034 (.074)					
other property	.084 (.071)					
corruption	-.416*** (.121)					
other offense	-.106 (.085)					
violent offense (omitted reference group)						
<b>PROCEDURE</b>						
simplified	-.120* (.052)	-.256** (.083)	-.029 (.091)	-.054 (.193)	-.017 (.150)	-.051 (.147)
regular (omitted reference group)						
<b>OTHER CHARACTERI STICS</b>						
criminal record	.055 (.051)	-.004 (.076)	.122 (.084)	.027 (.200)	.000 (.000)	.239 (.158)
joint offense	.187*** (.044)	.250*** (.073)	.181** (.072)	.048 (.167)	.286# (.159)	.150 (.128)
counsel	.075 (.046)	.108 (.079)	.096 (.075)	.068 (.172)	-.156 (.150)	-.003 (.127)
<b>JURISDICTIO N</b>						
Beijing	-.088 (.061)	-.025 (.100)	-.180# (.103)	-.055 (.203)	.186 (.263)	-.123 (.169)
Shanghai	.202** (.077)	.426** (.142)	.119 (.102)	-.072 (.364)	.054 (.241)	.087 (.285)
other province (omitted reference group)						
Constant	3.055*** (.078)	2.998*** (.087)	3.101*** (.096)	3.161*** (.218)	2.671*** (.157)	2.785*** (.164)
N	925	329	319	119	40	118
R <sup>2</sup>	.070	.093	.045	.023	.199	.069

Note: #  $p \leq .10$  \*  $p \leq .05$  \*\*  $p \leq .01$  \*\*\*  $p \leq .001$ , two-tailed tests. Standard errors are in parentheses.

A-Table 2: Determinants of Prosecution Duration (logged days)

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
	all offenses	theft	other property offense	violent offense	corruption	other offense
<b>OFFENSE</b>						
Theft	.005 (.066)					
other property	.134* (.064)					
Corruption	.403*** (.108)					
other offense	.044 (.076)					
violent offense (omitted reference group)						
<b>PROCEDURE</b>						
Simplified	-.176*** (.047)	-.164* (.074)	-.152# (.085)	-.365* (.148)	-.393 (.245)	-.133 (.129)
normal (omitted reference group)						
<b>OTHER CHARACTERISTICS</b>						
criminal record	.038 (.045)	.115# (.068)	.034 (.079)	-.273# (.151)	.000 (.000)	.069 (.139)
joint offense	.113** (.040)	.108# (.066)	.111# (.067)	.035 (.128)	-.165 (.260)	.268* (.113)
Counsel	.119** (.041)	.082 (.071)	.166* (.070)	-.029 (.132)	.068 (.244)	.210# (.112)
<b>JURISDICTION</b>						
Beijing	.318*** (.054)	.367*** (.089)	.244** (.096)	.279# (.157)	.659 (.430)	.442** (.149)
Shanghai	-.023 (.069)	.131 (.127)	-.057 (.095)	-.428 (.281)	-.195 (.394)	.096 (.251)
other province (omitted reference group)						
Constant	4.230*** (.069)	4.219*** (.078)	4.345*** (.089)	4.536*** (.167)	4.862*** (.257)	4.070*** (.144)
N	927	329	319	121	40	118
R <sup>2</sup>	.095	.075	.094	.125	.201	.173

Note: #  $p \leq .10$  \*  $p \leq .05$  \*\*  $p \leq .01$  \*\*\*  $p \leq .001$ , two-tailed tests. Standard errors are in parentheses.

A-Table 3: Determinants of Trial Duration (logged days)

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
	all offenses	theft	other property offense	violent offense	corruption	other offense
<b>OFFENSE</b>						
theft	-.214*** (.061)					
other property	-.152** (.059)					
corruption	.091 (.099)					
other offense	-.006 (.070)					
violent offense (omitted reference group)						
<b>PROCEDURE</b>						
simplified	.048 (.043)	.004 (.072)	.022 (.074)	-.009 (.120)	.243 (.248)	.174 (.128)
normal (omitted reference group)						
<b>OTHER CHARACTERISTICS</b>						
criminal record	-.049 (.042)	-.048 (.065)	-.059 (.069)	.023 (.122)	.000 (.000)	-.053 (.137)
joint offense	.156*** (.036)	.082 (.063)	.251*** (.059)	.047 (.103)	.216 (.263)	.127 (.112)
counsel	.217*** (.038)	.252*** (.068)	.188** (.062)	.096 (.107)	.250 (.247)	.228* (.111)
people's assessor	.020 (.041)	-.090 (.070)	.038 (.068)	.087 (.109)	.188 (.395)	.088 (.123)
<b>LOCATION</b>						
Beijing	.070 (.050)	.073 (.086)	.076 (.085)	.275* (.126)	.042 (.434)	-.214 (.147)
Shanghai	-.225*** (.063)	-.158 (.122)	-.177* (.084)	-.218 (.226)	-.156 (.398)	-.663** (.248)
other province (omitted reference group)						
Constant	3.280*** (.064)	3.173*** (.075)	3.099*** (.079)	3.304*** (.135)	3.134*** (.260)	3.254*** (.143)
N	932	331	322	121	40	118
R <sup>2</sup>	.121	.064	.147	.106	.154	.129

Note: #  $p \leq .10$  \*  $p \leq .05$  \*\*  $p \leq .01$  \*\*\*  $p \leq .001$ , two-tailed tests. Standard errors are in parentheses.

A-Table 4: Determinants of Total Duration (logged days)

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
	all offenses	theft	other property offense	violent offense	corruption	other offense
<b>OFFENSE</b>						
theft	-.084# (.046)					
other property	.027 (.045)					
corruption	.174* (.076)					
other offense	-.021 (.053)					
violent offense (omitted reference group)						
<b>PROCEDURE</b>						
simplified	-.107*** (.033)	-.132** (.051)	-.120* (.058)	-.080 (.104)	-.220 (.203)	-.039 (.098)
normal (omitted reference group)						
<b>OTHER CHARACTERISTICS</b>						
criminal record	.041 (.032)	.069 (.047)	.018 (.054)	.029 (.107)	.000 (.000)	.066 (.105)
joint offense	.163*** (.028)	.148*** (.045)	.192*** (.046)	.103 (.090)	-.051 (.215)	.193* (.085)
counsel	.146*** (.029)	.126** (.049)	.143** (.048)	.140 (.092)	.116 (.202)	.185* (.085)
people's assessor	.002 (.031)	-.020 (.050)	.003 (.053)	-.063 (.095)	-.056 (.324)	.095 (.094)
<b>JURISDICTION</b>						
Beijing	.191*** (.038)	.207*** (.061)	.171** (.065)	.145 (.109)	.460 (.356)	.205# (.113)
Shanghai	-.069 (.048)	.068 (.087)	-.065 (.065)	-.399* (.196)	-.177 (.326)	-.136 (.190)
other province (omitted reference group)						
Constant	4.845*** (.049)	4.774*** (.054)	4.879*** (.061)	4.915*** (.117)	5.124*** (.213)	4.680*** (.110)
N	926	329	320	119	40	118
R <sup>2</sup>	.124	.089	.164	.118	.157	.158

Note: #  $p \leq .10$  \*  $p \leq .05$  \*\*  $p \leq .01$  \*\*\*  $p \leq .001$ , two-tailed tests. Standard errors are in parentheses.

A-Table 5: Determinants of Prison Sentence (logged months)

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
	all offenses	theft	other property offense	violent offense	corruption	other offense
<b>OFFENSE</b>						
theft	-.009 (.105)					
other property	.494*** (.101)					
corruption	.393* (.171)					
other offense	-.209# (.121)					
violent offense (omitted reference group)						
<b>PROCEDURE</b>						
simplified	.076 (.074)	.359** (.117)	-.182 (.136)	-.268 (.209)	.167 (.338)	-.042 (.189)
normal (omitted reference group)						
<b>OTHER CHARACTERISTICS</b>						
criminal record	.142* (.072)	.182# (.106)	.013 (.126)	.497* (.213)	.000 (.000)	-.138 (.201)
joint offense	.093 (.063)	.377*** (.103)	-.136 (.107)	-.042 (.180)	.070 (.358)	.033 (.164)
counsel	-.023 (.066)	.007 (.111)	-.213# (.112)	.072 (.186)	.318 (.337)	.026 (.164)
people's assessor	-.136# (.071)	.015 (.115)	-.142 (.124)	-.186 (.190)	1.001# (.539)	-.347# (.181)
<b>JURISDICTION</b>						
Beijing	-.194* (.086)	-.263# (.140)	.003 (.154)	-.831*** (.220)	-1.006# (.593)	.250 (.216)
Shanghai	.038 (.109)	.142 (.200)	.195 (.153)	-1.234** (.395)	-.591 (.543)	-.409 (.363)
other province (omitted reference group)						
Constant	3.631*** (.110)	3.247*** (.122)	4.461*** (.143)	4.072*** (.235)	3.568*** (.355)	3.589*** (.216)
N	931	331	322	121	40	117
R <sup>2</sup>	.110	.090	.042	.282	.163	.052

NOTE: #  $p \leq .10$  \*  $p \leq .05$  \*\*  $p \leq .01$  \*\*\*  $p \leq .001$ , two-tailed tests. Standard errors are in parentheses.

A-Table 6: Determinants of Probation (months)

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
	all offenses	theft	other property offense	violent offense	corruption	other offense
<b>OFFENSE</b>						
theft	1.138 (4.315)					
other property	-5.366 (4.488)					
corruption	-3.291 (4.799)					
other offense	-5.777 (3.998)					
violent offense (omitted reference group)						
<b>PROCEDURE</b>						
simplified	8.829** (3.285)	8.597 (9.155)	-8.765 (10.665)	18.280# (9.860)	0.882 (6.891)	9.356 (7.240)
normal (omitted reference group)						
<b>OTHER CHARACTERISTICS</b>						
criminal record	-2.680 (5.971)	-2.365 (13.953)	6.318 (12.456)	0.000 (0.000)	0.000 (0.000)	5.482 (12.113)
joint offense	1.892 (2.908)	1.199 (9.303)	8.776 (5.175)	-3.739 (8.958)	15.632 (12.432)	-2.186 (7.107)
counsel	3.872 (2.965)	10.178 (9.363)	2.406 (8.580)	11.654 (7.586)	8.921 (6.950)	-7.019 (6.990)
people's assessor	3.317 (3.359)	3.585 (11.607)	-4.923 (7.636)	7.995 (7.872)	3.092 (9.281)	7.253 (7.469)
<b>JURISDICTION</b>						
Beijing	-11.069* (4.506)	-10.391 (14.597)	-12.149 (9.897)	-15.504 (11.428)	0.000 (0.000)	-16.442 (9.641)
Shanghai	-12.756# (7.489)	0.000 (0.000)	-2.179 (8.638)	-27.859 (17.504)	0.000 (0.000)	0.000 (0.000)
other province (omitted reference group)						
Constant	27.453*** (4.190)	26.571* (10.667)	36.056** (12.182)	18.204# (10.524)	22.566** (7.344)	27.952** (8.166)
N	104	20	19	25	14	26
R <sup>2</sup>	.154	.182	.292	.356	.321	.222

Note: #  $p \leq .10$  \*  $p \leq .05$  \*\*  $p \leq .01$  \*\*\*  $p \leq .001$ , two-tailed tests. Standard errors are in parentheses.

A-Table 7: Determinants of Fines (logged *yuan*)

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
	all offenses	theft	other property offense	violent offense	corruption	other offense
<b>OFFENSE</b>						
theft	.847** (.264)					
other property	1.083*** (.262)					
corruption	2.699*** (.697)					
other offense	.634* (.325)					
violent offense (omitted reference group)						
<b>PROCEDURE</b>						
simplified	.709*** (.124)	.641*** (.145)	.463* (.201)	2.695** (.913)	.000 (.000)	2.730** (1.026)
normal (omitted reference group)						
<b>OTHER CHARACTERISTICS</b>						
criminal record	.062 (.113)	.111 (.131)	.028 (.183)	-.927 (.761)	.000 (.000)	.123 (1.126)
joint offense	.132 (.101)	.293* (.128)	-.155 (.154)	-.227 (.663)	.000 (.000)	1.092 (.722)
counsel	.329** (.108)	.099 (.139)	.471** (.161)	1.268 (.763)	.000 (.000)	.777 (.716)
jury	-.039 (.116)	.106 (.142)	-.126 (.177)	.192 (1.037)	-1.500 (1.908)	-1.019 (1.197)
<b>LOCATION</b>						
Beijing	-.427** (.142)	-.830*** (.173)	.010 (.220)	-.162 (1.062)	.000 (.000)	.336 (1.245)
Shanghai	.484** (.167)	.111 (.244)	.766*** (.213)	-1.049 (1.982)	.000 (.000)	-.784 (1.689)
other province (omitted reference group)						
Constant	7.408*** (.280)	8.279*** (.153)	8.671*** (.211)	5.998*** (1.019)	11.403** (.954)	5.922*** (.956)
N	683	322	291	27	4	39
R <sup>2</sup>	.162	.135	.120	.391	.236	.282

Note: #  $p \leq .10$  \*  $p \leq .05$  \*\*  $p \leq .01$  \*\*\*  $p \leq .001$ , two-tailed tests. Standard errors are in parentheses.

A-Table 8: Determinants of Duration and Sentence between SP and RP

	Preliminary Investigation (Logged Days)		Prosecution Duration (Logged Days)		Trial Duration (Logged Days)		Total Duration (Logged Days)		Prison Sentence (Logged Months)		Probation (Months)		Fine (Logged Yuan)	
	Regular	Simplified	Regular	Simplified	Regular	Simplified	Regular	Simplified	Regular	Simplified	Regular	Simplified	Regular	Simplified
<b>OFFENSE</b>														
Theft	-.024 (.133)	-.104 (.091)	-.106 (.113)	.080 (.085)	-.115 (.104)	-.275*** (.078)	-.075 (.084)	-.091 (.057)	-.591*** (.177)	.389** (.133)	8.122 (7.892)	-1.231 (5.748)	1.871*** (.499)	.378 (.311)
other property	.046 (.145)	.077 (.080)	.040 (.124)	.179* (.074)	-.063 (.114)	-.187** (.068)	.047 (.091)	.020 (.050)	.100 (.194)	.684*** (.116)	2.570 (11.384)	-9.748# (5.399)	2.052*** (.512)	.742* (.302)
corruption	-.490* (.253)	-.407** (.134)	.429* (.216)	.406*** (.125)	-.107 (.200)	.150 (.115)	.201 (.159)	.162# (.084)	-.217 (.341)	.671*** (.196)	.518 (9.161)	-5.881 (6.112)	.000 (.000)	2.310*** (.711)
other offense	-.116 (.163)	-.099 (.098)	-.104 (.139)	.109 (.091)	.071 (.128)	-.037 (.083)	-.063 (.102)	-.002 (.061)	-.703** (.220)	.023 (.142)	-3.781 (8.132)	-5.820 (5.000)	-.073 (.683)	.665# (.369)
violent offense (omitted reference group)														
<b>OTHER CHARACTERISTICS</b>														
criminal record	.009 (.085)	.105# (.064)	.012 (.072)	.059 (.059)	-.136* (.066)	.017 (.054)	-.006 (.053)	.082* (.040)	.202# (.113)	.083 (.093)	-2.268 (15.735)	-1.524 (6.952)	.025 (.170)	.097 (.149)
joint offense	.263*** (.078)	.162** (.054)	.093 (.066)	.122* (.050)	.149* (.061)	.150*** (.046)	.146** (.049)	.172*** (.034)	.178# (.104)	.024 (.079)	-1.195 (6.580)	3.894 (3.465)	.121 (.160)	.143 (.130)
Counsel	.027 (.079)	.118* (.057)	.104 (.068)	.118* (.053)	.225*** (.062)	.216*** (.049)	.135** (.050)	.155*** (.036)	-.068 (.107)	-.060 (.084)	10.566 (6.406)	1.901 (3.570)	.262 (.161)	.397** (.144)
people's assessor	-.016 (.079)	.040 (.067)	-.037 (.067)	.121* (.062)	-.071 (.062)	.090 (.057)	-.060 (.049)	.062 (.042)	-.074 (.106)	-.155 (.097)	4.374 (6.075)	1.803 (4.444)	.149 (.165)	-.253 (.165)
<b>JURISDICTION</b>														
Beijing	.154 (.126)	-.169* (.070)	.374*** (.108)	.257*** (.065)	.098 (.100)	.027 (.060)	.246** (.079)	.140** (.044)	-.255 (.170)	-.153 (.103)	-25.978 (15.456)	-9.631# (5.109)	-.662** (.249)	-.289# (.177)
Shanghai	.139 (.242)	.194** (.078)	-.020 (.207)	-.015 (.073)	-.123 (.191)	-.218*** (.067)	-.043 (.152)	-.060 (.049)	-.251 (.326)	.048 (.115)	29.244# (15.462)	-3.331 (9.104)	-.027 (.498)	.537** (.179)
other province (omitted reference group)														
Constant	3.034*** (.138)	2.948*** (.081)	4.382*** (.118)	3.979*** (.075)	3.266*** (.108)	3.322*** (.069)	4.891*** (.087)	4.710*** (.051)	4.044*** (.185)	3.542*** (.117)	20.677* (8.979)	37.913*** (3.657)	6.451*** (.509)	8.458*** (.314)
N	370	555	371	556	375	557	370	556	374	557	31	73	285	398
R <sup>2</sup>	.058	.087	.062	.124	.090	.158	.080	.164	.124	.132	.407	.128	.133	.138

Note: #  $p \leq .10$  \*  $p \leq .05$  \*\*  $p \leq .01$  \*\*\*  $p \leq .001$ , two-tailed tests. Standard errors are in parentheses



A-Table 9: Determinants of Presence of Defense Counsel

<b>OFFENSE</b>	
Theft	.349*** (.083)
Other property	.576** (.129)
Corruption	3.757** (1.657)
Other offense	1.089 (.289)
Violent offense (omitted reference group)	
<b>PROCEDURE</b>	
Simplified	.609** (.105)
Regular (omitted reference group)	
<b>OTHER CHARACTERISTICS</b>	
Criminal record	.518*** (.091)
Joint offense	.916 (.134)
people's assessor	1.324# (.217)
<b>Jurisdiction</b>	
Beijing	.723 (.145)
Shanghai	.627# (.170)
other province (omitted reference group)	
Constant	1.643* (.381)
N	932

Note: #  $p \leq .10$  \*  $p \leq .05$  \*\*  $p \leq .01$  \*\*\*  $p \leq .001$ , two-tailed tests. Standard errors are in parentheses. Coefficients are odds ratios. An odds ratio of 1.0 means the probability is the same. An odds ratio of .5 means the probability is reduced by 50%. An odds ratio of 1.5 means the probability is increased by 50%.

Appendix 6: Code book for case dataset

Code Book for Case Dataset

1. Province:

Beijing	11	Liaoning	21	Zhejiang	33
Tianjin	12	Jilin	22	Anhui	34
Hebei	13	Heilongjiang	23	Fujian	35
Shanxi	14	Shanghai	31	Jiangxi	36
Neimonggu	15	Jiangsu	32	Shandong	37
Henan	41	Chongqing	50	Shaanxi	61
Hubei	42	Sichuan	51	Gansu	62
Hunan	43	Guizhou	52	Qinghai	63
Guangdong	44	Yunnan	53	Ningxia	64
Guangxi	45	Hainan	46	Xinjiang	65

2. Offense

Property crime: 1

Violent crime: 2

Corruption crime: 3

Other: 4

3. Sex

Male: 0

Female: 1

4. Job
  - Unemployment: 0
  - Farmer: 1
  - Worker: 2
  - Civil Servant: 3
  - Other: 4
5. Resident
  - Non-local resident: 0
  - Local resident: 1
6. Criminal record
  - Non-criminal record: 0
  - Criminal record: 1
7. Joint crime
  - Non-joint crime 0
  - Joint crime: 1
8. Guilty plea
  - Non-guilty plea: 0
  - Guilty plea: 1
9. Trial category
  - Summary procedure: 0
  - Simplified procedure: 1
  - Regular procedure: 2
10. Peoples' assessor

- Non-people's assessor in trial: 0
- People's assessor in trial: 1
- 11. Defense
  - Non-defense counsel in trial: 0
  - Defense counsel in trial: 1
- 12. Deprivation of political right
  - No: 0
  - Yes: 1
- 13. Appeal argument
  - Sentence too heavy 1
  - Fact error: 2
  - Mixed: 3
- 14. Appeal decision
  - Affirmed: 0
  - Trial de novo: 1
  - Revised: 2
- 15. Prosecution appeal
  - No: 0
  - Yes: 1
- 16. Defendant appeal
  - No: 0
  - Yes: 1
- 17. Civil litigant appeal
  - No: 0

Yes: 1

18. Legal sentence range (year) in theft cases

0-3: 0

3 -10: 1

>10: 2

**IRB Study #1005001341**

**INDIANA UNIVERSITY BLOOMINGTON**

**Study Information Sheet**

**A Study on SP for Guilty Plea Cases in China**

You are invited to participate in a research study of a study on SP for guilty plea cases in China. You were selected as a possible subject because you play a role in SP for guilty plea cases in China. We ask that you read this form and ask any questions you may have before agreeing to be in the study.

The study is being conducted by Bensen Li, Maurer School of Law.

**STUDY PURPOSE**

The purpose of this study is to evaluate what is the effect of SP in China

**NUMBER OF PEOPLE TAKING PART IN THE STUDY:**

If you agree to participate, you will be one of around 300 subjects who will be participating in this research.

**PROCEDURES FOR THE STUDY:**

If you agree to be in the study, you will do the following thing:

Responding the Questionnaire you received

**RISKS OF TAKING PART IN THE STUDY:**

While on the study, the risk is of possible loss of confidentiality; however, you are required to not provide any private information in questionnaire.

**BENEFITS OF TAKING PART IN THE STUDY:**

The benefit to participation that is reasonable to expect is you may be informed about my research final result and recommendations for SP in China.

## CONFIDENTIALITY

Efforts will be made to keep your personal information confidential. We cannot guarantee absolute confidentiality. Your personal information may be disclosed if required by law. Your identity will be held in confidence in reports in which the study may be published.

Organizations that may inspect and/or copy your research records for quality assurance and data analysis include groups such as the study investigator and his/her research associates, the IUB Institutional Review Board or its designees, the study sponsor, and (as allowed by law) state or federal agencies, specifically the Office for Human Research Protections (OHRP) and the Food and Drug Administration (FDA), if applicable, the National Institutes of Health (NIH) [for research funded or supported by NIH], etc., who may need to access your medical and/or research records.

## COSTS

There are no costs involved with participation in this study.

## PAYMENT

You will not receive payment for taking part in this study.

In the event of physical injury resulting from your participation in this research, necessary medical treatment will be provided to you and billed as part of your medical expenses. Costs not covered by your health care insurer will be your responsibility. Also, it is your responsibility to determine the extent of your health care coverage. There is no program in place for other monetary compensation for such injuries. However, you are not giving up any legal rights or benefits to which you are otherwise entitled.

## CONTACTS FOR QUESTIONS OR PROBLEMS

For questions about the study or a research-related injury, contact the researcher Bensen Li at 812-857-0316.

For questions about your rights as a research participant or to discuss problems, complaints or concerns about a research study, or to obtain information, or offer input, contact the IUB Human Subjects office, 530 E Kirkwood Ave, Carmichael Center, L03, Bloomington IN 47408, 812-855-3067 or by email at [iub\\_hsc@indiana.edu](mailto:iub_hsc@indiana.edu)

#### VOLUNTARY NATURE OF STUDY

Taking part in this study is voluntary. You may choose not to take part or may leave the study at any time. Leaving the study will not result in any penalty or loss of benefits to which you are entitled. Your decision whether or not to participate in this study will not affect your current or future relations with the investigator(s).



Appendix 8: Questionnaires

1) English version

<b>QID:</b>	<b>Start Time:</b>	<b>End Time:</b>
<b>Research Location: Province</b>	<b>City</b>	<b>Survey Method:</b>
<b>County/District</b>		
<b>Research Assistant Name</b>	<b>Telephone:</b>	<b>Email:</b>

**Questionnaire on SP**

**(Judges)**

**I. The Background of the Respondent**

1. The province ( ) City ( ) County/District ( )
2. Age ( )
3. Gender ( )
  - 1) Male
  - 2) Female
4. Prosecution position ( )
  - 1) Judges
  - 2) Assistant judges

**II. Questions (Note: please refer to its detail in the parentheses if you choose “other ”choice)**

1. How many judges are there in your court? ( ) (Please give a specific number)
  - Among how many judges are mainly charged in criminal trial in your court? ( ) Please give a specific number.
2. How many criminal cases did your court process in 2010? ( ) (If you cannot answer this question, please skip to the No.4 question) (Please give a specific number)
  - Among how many cases were handled by the simplified procedure? ( )
  - Among how many cases were handled by RP? ( )
  - Among how many cases were handled by the summary procedure? ( )
3. How many criminal cases were you participated in handling in 2010? ( )

(Please give a specific number)

- Among how many cases were handled by the simplified procedure?  
(            )
  - Among how many cases were handled by RP? (            )
  - Among how many cases were handled by the summary procedure?  
(            )
4. Generally, to compare with regular procedure, how do you estimate the time you spent on the cases with the simplified procedure? (            ) (Please give a specific number)
- 1) More less than the time spent on the cases in RP
  - 2) Somewhat less than the time on the cases in RP
  - 3) No difference
  - 4) More than the time spent on the cases in RP
5. Generally, if you spent less time on the cases in simplified procedure, on which stage you spent much less? (            ) (Multiple Answers) ( If you think the time spent more you may skip to the next question)
- 1) In the investigation stage
  - 2) In the prosecution stage
  - 3) In the trial stage
  - 4) In the appeal stage
6. Generally, if you spent more time on the cases in simplified procedure, on which stage you spent much more? (            ) (Multiple Answers) ( If you think the time spent less time you may skip this question)
- 1) In the investigation stage
  - 2) In the prosecution stage
  - 3) In the trial stage
  - 4) In the appeal stage
7. According to your understanding, the guilty plea of the defendant refers to (            ) (Multiple Answers)
- 1) Voluntarily Confessing to the charge
  - 2) Confirmation of all charges
  - 3) No contending the charges
  - 4) Voluntarily plead guilty
  - 5) Remorse
  - 6) Restitution for the victim
  - 7) No contending the charges and voluntarily plead guilty



12. If the defendant pleads guilty, did your court usually approve the request from the defendant for the *qubao houshen* and *jianshi juzhu*? ( )
- 1) Never approved
  - 2) Sometimes approved
  - 3) More often approved
  - 4) all approved
13. In the following factors, which are most important for the court to decide to process the case in the simplified procedure ( ) (Multiple Answers)
- 1) Voluntarily to pled guilty
  - 2) Restitution to the victim
  - 3) Confession to the prosecution
  - 4) Remorse for the crime
  - 5) Other ( )
14. Is it necessary for you to investigate the fact charged if the defendant has pled guilty? ( )
- 1) No
  - 2) Yes
  - 3) It depends
15. Did you spend less time on the preparation for the trial in simplified procedure than in RP? ( )
- 1) Yes
  - 2) No
  - 3) It depends
16. Did you find that the defendants were tortured or induced by the prosecution to plead guilty in cases you handled? ( )
- 1) Never
  - 2) Yes, sometimes
  - 3) Yes, more often
  - 4) Other ( )
17. If you attend the trial in the simplified procedure, what is your most important work in the trial? ( )
- 1) To examine the bill of information
  - 2) To hear argument both prosecution and defense
  - 3) To Inquire the defendant

- 4) To inquire the witness
18. In the cases you handled in the simplified procedure, which one is true?  
( )
- 1) All defendants obtained lenient decision
  - 2) Only a few defendants obtained lenient decision
  - 3) Most defendants didn't obtain lenient decision
  - 4) Other ( )
19. In cases you handled in 2010, how often did the defendant appeal to the higher court?
- 1) More often
  - 2) often
  - 3) Less often
  - 4) Never
20. How many cases you represented are there in which the defendant appealed in 2010?  
( ) (Please give a specific number.)
21. If the defendant appealed to the higher court in the simplified procedure, his/her argument mainly referred to : ( ) (Multiple Answers)
- 1) The procedure was not fair
  - 2) The disagreement with the charge
  - 3) The defendant could not obtain the lenient punishment although he/she pled guilty
  - 4) Other ( )
22. In terms of the reduction of the caseload in court, which one is true? ( )
- 1) Strongly efficient
  - 2) Efficient
  - 3) Somewhat efficient
  - 4) inefficient
  - 5) strongly inefficient
23. In cases eligible to the simplified procedure, if there is a victim, how often did the victim participated in the trial? ( )
- 1) More often
  - 2) often
  - 3) Less often
  - 4) Never

24. How do you think the benefit for the defendant from the simplified procedure?  
 ( )
- 1) Obtaining the lenient decision
  - 2) Obtaining the expedited trial
  - 3) Both of the above
25. Under your experience, how do you think the benefit for the judge in the simplified procedure? ( ) (Multiple Answers)
- Saving time in trial
  - No worry about the defendants' complaint
  - No pressure
  - No benefit
  - Other ( )
26. In the simplified procedure, which one is true in making decision?
- 1) Never immediately making decision in trial
  - 2) All cases in which the judge immediately make decision in trial
  - 3) Few cases in which the judge immediately make decision in trial
  - 4) Most cases in which the judge immediately make decision in trial
27. How do you think about the defects of the simplified procedure? ( )
- The prosecution and lawyer cannot negotiate for the lenient Charge.
  - The ignorance of the issue in the effectiveness of the investigation and prosecution
  - Only focusing on the effective but ignoring the justice
  - Easily bringing about the duress and inducement to the defendant
  - Other ( )
28. Generally, how do you appreciate the lawyers' defense for the defendant in trial in the simplified procedure? ( )
- 1) Strongly satisfied
  - 2) Satisfied
  - 3) Somewhat satisfied
  - 4) Unsatisfied
  - 5) Strongly unsatisfied
29. Generally, how do you appreciate what the prosecutor's work in the trial in the simplified procedure? ( )
- 1) Strongly satisfied
  - 2) Satisfied

- 3) Somewhat satisfied
- 4) Unsatisfied
- 5) Strongly unsatisfied

30. How do you appreciate the importance what you have done in the simplified procedure? Please check and mark the choice you choose in the following table.

<b>Preventing the defendant from the torture and inducement</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Inquiring the defendant</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Examining the evidence</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Hearing the argument</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Examining if the defendant pled guilty voluntarily</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Expediting the trail process</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Preparation for the trial</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Protection of the victim's interest</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>General Assessment</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important

31. How do you appreciate the regulation on simplified procedure jointly issued by the Peoples' Supreme Court, the People's Procurator ate Court and the Ministry of justice?

( )

- 1) Strongly successful
- 2) Successful

- 3) Less successful
- 4) Unsuccessful
- 5) Strongly unsuccessful

32. Open Questions

- 1) Under your experience in the simplified procedure, which aspects should be enhanced in the power for judges?
  
- 2) Under your experience in the simplified procedure, which aspects should be enhanced in the protection of the right of defendants?
  
- 3) Under your experience in the simplified procedure, which aspects should be enhanced in the right of victims?
  
- 4) Under your experience in the simplified procedure, which aspects should be enhanced in the efficiency of the disposition of cases?
  
- 5) Under your experience in the simplified procedure, which aspects should be enhanced in fairness and justice?
  
- 6) Others

**Thank you so much for your great support!**



<b>QID:</b>	<b>Start Time:</b>	<b>End Time:</b>
<b>Research Location: Province</b>		<b>City</b>
<b>County/District</b>		<b>Survey Method:</b>
<b>Research Assistant Name</b>	<b>Telephone:</b>	<b>Email:</b>

**Questionnaire on SP**  
**(Prosecutors)**

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**I. The Background of the Respondent**

1. The province (            ) City (            ) County/District (            )
2. Age (            )
3. Gender (            )
  - 3) Male
  - 4) Female
4. Prosecution position (            )
  - 3) Prosecutor
  - 4) Assistant prosecutor

**II. Questions (Note: please refer to its detail in the parentheses if you choose “other ”choice)**

1. How many prosecutors are there in your office? (            ) (Please give a specific number.)
  - Among how many judges are mainly charged in prosecution in your office? (            ) Please give a specific number.
2. How many criminal cases did your office process in 2010? (            ) (If you cannot answer this question, please skip to the No.4 question) (Please give a specific number.)
  - Among how many cases were handled by the simplified procedure? (            )
  - Among how many cases were handled by RP? (            )
  - Among how many cases were handled by the summary procedure? (            )

3. How many criminal cases were you participated in handling in 2010?  
 (                    ) (Please give a specific number.)
- Among how many cases were handled by RP? (                    )
  - Among how many cases were handled by the simplified procedure?  
 (                    )
  - Among how many cases were handled by the summary procedure?  
 (                    )
4. Generally, to compare with regular procedure, how do you estimate the time you spent on the cases with the simplified procedure? (                    )
- 1) More less than the time spent on the cases in RP
  - 2) Somewhat less than the time on the cases in RP
  - 3) No difference
  - 4) More than the time spent on the cases in RP
5. Generally, if you spent less time on the cases in the simplified procedure, on which stage you spent much less? (                    ) (Multiple Answers) ( If you think the time spent more you may skip to the next question)
- 1) In the investigation stage
  - 2) In the prosecution stage
  - 3) In the trial stage
  - 4) In the appeal stage
6. Generally, if you spent more time on the cases in the simplified procedure, on which stage you spent much more? (                    ) (Multiple Answers) ( If you think the time spent less time you may skip this question)
- 1) In the investigation stage
  - 2) In the prosecution stage
  - 3) In the trial stage
  - 4) In the appeal stage
7. According to your understanding, the guilty plea of the defendant refers to  
 (                    ) (Multiple Answers)
- 1) Voluntarily Confessing to the charge
  - 2) Confirmation of all charges
  - 3) No contending the charges
  - 4) Voluntarily plead guilty
  - 5) Remorse
  - 6) Restitution for the victim

- 7) No contending the charges and voluntarily plead guilty  
 8) Partly plead guilty  
 9) Other ( )
8. In the joint offense where the codefendants plead guilty but other codefendants do not plead guilty, which procedure should be chosen to the defendants who plead guilty?  
 ( )  
 1) Simplified procedure  
 2) Regular procedure
9. How do you understand “those cases cannot be tried in SP in the second clause of regulation of the simplified procedure? ( ) (Multiple Answers)  
 1) Case which cannot be publicly hearing for the private information or state interest  
 2) Case with the essential doubt in fact  
 3) Case where the defendant denies the offense even though the defendant confirms the charge  
 4) The case with the complicated scenarios  
 5) The novel case  
 6) The suspicion for the defendant was tortured or induced  
 7) The purpose of the guilty plea of the defendant is to only obtain lenient punishment  
 8) The case where the agreement entered between the prosecutor and the defendant  
 9) The defendant does not show any remorse for the crime  
 10) The defendant is not willing to retribute for the victim  
 11) Other ( )
10. Before the trial in the simplified procedure, did the lawyer appear in SP when you interrogated your client? ( )  
 1) Never  
 2) Sometimes  
 3) Often  
 4) Every time ( )
11. In the simplified procedure, how do you know if the defendant voluntarily pleads guilty? ( ) (Multiple Answers)  
 1) To inquire the defendant  
 2) To review the file  
 3) To inquire witnesses  
 4) Never explicitly known  
 5) Other ( )

12. If the defendant pleads guilty, did your office usually approve the request from the defendant for the *qubao houshen* and *jianshi juzhu*? ( )
- 1) Never approved
  - 2) Sometimes approved
  - 3) More often approved
  - 4) all approved
13. In the following factors, which are most important for prosecution to decide to process the case in the simplified procedure ( ) (Multiple Answers)
- 1) Voluntary pled guilty
  - 2) Restitution to the victim
  - 3) Confession to the prosecution
  - 4) Remorse for the crime
  - 5) Other ( )
14. Is it necessary for you to investigate the fact charged if the defendant has pled guilty? ( )
- 1) No
  - 2) Yes
  - 3) It depends
15. Did you spend less time on the preparation for the trial in SP than in RP? ( )
- 1) Yes
  - 2) No
  - 3) It depends
16. Did you find that the defendants were tortured or induced by the prosecution to plead guilty in cases you handled? ( )
- 1) Never
  - 2) Yes, sometimes
  - 3) Yes, more often
  - 4) Other ( )
17. If you attend the trial in the simplified procedure, what is your most important work in the trial? ( )
- 1) To examine the bill of information
  - 2) To Show the evidence charged

- 3) To Inquire the defendant
  - 4) To argue with the defense
18. In the cases you handled in the simplified procedure, which one is true?  
 (                    )
- 1) All defendants obtained lenient decision
  - 2) Only a few defendants obtained lenient decision
  - 3) Most defendants didn't obtain lenient decision
  - 4) Other (                    )
19. In cases you handled in 2010, how often did the defendant appeal to the higher court?
- 1) More often
  - 2) often
  - 3) Less often
  - 4) Never
20. How many cases you represented are there in which the defendant appealed in 2010?  
 (                    ) (Please give a specific number.)
21. If the defendant appealed to the higher court in the simplified procedure, his/her argument mainly referred to : (                    ) (Multiple Answers)
- 1) The procedure was not fair
  - 2) The disagreement with the charge
  - 3) The defendant could not obtain the lenient punishment although he/she pled guilty
  - 4) Other (                    )
22. In terms of the reduction of the caseload in the prosecutor office, which one is true?  
 (                    )
- 1) Strongly efficient
  - 2) Efficient
  - 3) Somewhat efficient
  - 4) inefficient
  - 5) strongly inefficient
23. In cases eligible to the simplified procedure, if there is a victim, how often did the victim participated in the trial? (                    )
- 1) More often
  - 2) often
  - 3) Less often
  - 4) Never

24. How do you think the benefit for the defendant from the simplified procedure?  
 ( )
- 1) Obtaining the lenient decision
  - 2) Obtaining the expedited trial
  - 3) Both the above
25. Under your experience, how do you think the benefit for the prosecutors from the simplified procedure? ( ) (Multiple Answers)
- Saving time for the prosecution
  - Not worry about the defendants' complaint
  - No pressure
  - No benefit
  - Other ( )
26. How do you think about the defects of the simplified procedure? ( )
- The prosecution and lawyer cannot negotiate for the lenient Charge.
  - The ignorance of the issue in the effectiveness of the investigation and prosecution
  - Only focusing on the effective but ignoring the justice
  - Easily bringing about the duress and inducement to the defendant
  - Other ( )
27. Generally, how do you appreciate for the lawyers' work in the representation in the simplified procedure? ( )
- 1) Strongly satisfied
  - 2) Satisfied
  - 3) Somewhat satisfied
  - 4) Unsatisfied
  - 5) Strongly unsatisfied
28. Generally, how do you appreciate what the judge's work in the simplified trial?  
 ( )
- 1) Strongly satisfied
  - 2) Satisfied
  - 3) Somewhat satisfied
  - 4) Unsatisfied
  - 5) Strongly unsatisfied

29. How do you appreciate the importance what you have done in the simplified procedure? Please check and mark the choice you choose in the following table.

<b>Preventing the defendant from the torture and inducement</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Inquiring the defendant</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Examining the evidence</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Present in trial</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Negotiation with lawyer</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Expediting the process</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Legal Supervision</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Protection of the victim's interest</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>General Assessment</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important

30. How do you appreciate the regulation on simplified procedure jointly issued by the Peoples' Supreme Court, the People's Procurator ate Court and the Ministry of justice?

( )

- 6) Strongly successful
- 7) Successful
- 8) Less successful
- 9) Unsuccessful
- 10) Strongly unsuccessful

31. Open Questions

- 7) Under your experience in the simplified procedure, which aspects should be enhanced in the power for prosecutors?
- 8) Under your experience in the simplified procedure, which aspects should be enhanced in the protection of the right of defendants?
- 9) Under your experience in the simplified procedure, which aspects should be enhanced in the right of victims?
- 10) Under your experience in the simplified procedure, which aspects should be enhanced in the efficiency of the disposition of cases?
- 11) Under your experience in the simplified procedure, which aspects should be enhanced in fairness and justice?
- 12) Others

**Thank you so much for your great support**



<b>QID:</b>	<b>Start Time:</b>	<b>End Time:</b>
<b>Research Location: Province</b>		<b>City</b>
<b>County/District</b>		<b>Survey Method:</b>
<b>Research Assistant Name</b>	<b>Telephone:</b>	<b>Email:</b>

## Questionnaire on SP

### (Lawyers)

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#### I. The Background of the Respondent

1. The province (            ) City (            ) County/District (            )
2. Age (            )
3. Gender (            )
  - 5) Male
  - 6) Female
4. Lawyer's Position (            )
  - 5) Professional lawyer
  - 6) Part-time Lawyer

#### II. Questions (Note: please refer to its detail in the parentheses if you choose "other" choice)

1. How many lawyers are there in your law firm? (            ) (Please give a specific number.)
2. How many lawyers mainly handle the criminal cases in your law firm? (            )  
Please give a specific number.
3. How many criminal cases did your office process in 2010? (            ) (If you cannot answer this question, please skip to the No.4 question) (Please give a specific number.)
  - Among how many cases were handled by the simplified procedure? (            )
  - Among how many cases were handled by RP? (            )
  - Among how many cases were handled by the summary procedure? (            )
4. How many criminal cases did you handle in 2010? (            ) (Please give a specific number.)

- Among how many cases were handled by the simplified procedure? (                    )
  - Among how many cases were handled by RP? (                    )
  - Among how many cases were handled by the summary procedure? (                    )
5. Normally, how did you first find out the case you represented would be tried in the simplified procedure? (                    )
- 1) Reviewing the file in prosecutor's office
  - 2) Reviewing the file in court
  - 3) The written letter informing hearing the case from the court
  - 4) The information in prosecution from prosecutor's office
  - 5) Interviewing the defendant
  - 6) Other (                    )
6. Generally, to compare with RP, how do you estimate the time you spent on the cases with the simplified procedure? (                    )
- 5) More less than the time spent on the cases in RP
  - 6) Somewhat less than the time on the cases in RP
  - 7) No difference
  - 8) More than the time spent on the cases in RP
7. Generally, if you spent less time on the cases in the simplified procedure, on which stage you spent much less? (                    ) (Multiple Answers) ( If you think the time spent more you may skip to the next question)
- 1) In the investigation stage
  - 2) In the prosecution stage
  - 3) In the trial stage
  - 4) In the appeal stage
8. Generally, if you spent more time on the cases in simplified procedure, on which stage you spent much more? (                    ) (Multiple Answers) ( If you think the time spent less time you may skip this question)
- 1) In the investigation stage
  - 2) In the prosecution stage
  - 3) In the trial stage
  - 4) In the appeal stage
9. According to your understanding, the guilty plea of the defendant refers to (                    ) (Multiple Answers )
- 1) Voluntarily Confessing to the charge
  - 2) Confirmation of all charges

- 3) No contending the charges
- 4) Voluntarily plead guilty
- 5) Remorse
- 6) Restitution for the victim
- 7) No contending the charges and voluntarily plead guilty
- 8) Partly plead guilty
- 9) Other ( )

10. In joint offenses where the codefendants plead guilty but other codefendants do not plead guilty; which procedure should be chosen to the defendants who plead guilty? ( )

- 1) Simplified procedure
- 2) Regular procedure

11. How do you understand “those cases cannot be tried in SP in the second clause of regulation of the simplified procedure? ( ) (Multiple Answers)

- 1) Case which cannot be publicly hearing for the private information or state interest
- 2) Case with the essential doubt in fact
- 3) Case where the defendant denies the offense even though the defendant confirms the charge
- 4) The case with the complicated scenarios
- 5) The novel case
- 6) The suspicion for the defendant was tortured or induced
- 7) The purpose of the guilty plea of the defendant is to only obtain lenient punishment
- 8) The case where the agreement entered between the prosecutor and the defendant
- 9) The defendant does not show any remorse for the crime
- 10) The defendant is not willing to retribute for the victim
- 11) Other ( )

12. Before the trial in the simplified procedure, did the prosecutor or police officer appear the place where you were meeting your client? ( )

- 1) Never
- 2) Sometimes
- 3) Often
- 4) Every time

13. In the simplified procedure, how do you know if the defendant voluntarily pleads guilty? ( ) (Multiple Answers)

- 1) To inquire the defendant



- 1) Withdraw the representation
  - 2) Continuing to represent regardless of the deviation
  - 3) Convincing the defendant to agree with your opinion, otherwise withdraw the representation
  - 4) Other ( )
20. In the cases you represent in simplified procedure, which one is true? ( )
- 1) All defendants obtained lenient decision
  - 2) Only a few defendants obtained lenient decision
  - 3) Most defendants didn't obtain lenient decision
  - 4) All defendants didn't obtain lenient decision
21. In cases you represented in 2010, how often did the defendant appeal to the higher court? ( )
- 1) More often
  - 2) often
  - 3) Less often
  - 4) Never
22. If the defendant appealed to the higher court in simplified procedure, his/her argument mainly referred to : ( ) (Multiple Answers)
- 1) The trial procedure was not fair
  - 2) The disagreement with the charge
  - 3) The defendant could not obtain the lenient punishment although he/she pled guilty
  - 4) Other ( )
23. How many cases you represented are there in which the defendant appealed in 2010? ( ) (Please give a specific number)
24. In cases eligible to the simplified procedure, if there is a victim, how often did the victim participated in the trial?
- 1) More often
  - 2) often
  - 3) Less often
  - 4) Never
25. How do you think the benefit for the defendant from the simplified procedure? ( )
- 1) Obtaining the lenient decision
  - 2) Obtaining the expedited trial

- 3) Both of the above
26. Under your experience, how do you think the benefit for the lawyers from the simplified procedure? ( ) (Multiple Answers)
- 1) Saving the time for the representation
  - 2) Increasing the income
  - 3) No worry about the defendants' complaint
  - 4) No legal risk from the prosecution
  - 5) No benefit
  - 6) Other ( )
27. How do you think about the defects of the simplified procedure? ( ) (Multiple Answers)
- 1) The prosecution and lawyer cannot negotiate for the lenient Charge.
  - 2) The ignorance of the effectiveness of the investigation and prosecution
  - 3) Only focusing on the effective but ignoring the justice
  - 4) Easily bringing about the duress and inducement to the defendant
  - 5) Other ( )
28. Generally, how do you appreciate the prosecutor's work in the simplified procedure? ( )
- 1) Strongly satisfied
  - 2) Satisfied
  - 3) Somewhat satisfied
  - 4) Unsatisfied
  - 5) Strongly unsatisfied
29. Generally, how do you appreciate the judges' work in the simplified trial?
- 1) Strongly satisfied
  - 2) Satisfied
  - 3) Somewhat satisfied
  - 4) Unsatisfied
  - 5) Strongly unsatisfied

30. How do you appreciate the importance what you have done in the simplified procedure? Please check and mark the choice you choose in the following table.

<b>Preventing the defendant from the torture and induce</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Interview of the defendant</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Examining the evidence</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Defense</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Legal Service</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Expediting the process</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Improving justice</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>Assistance in appeal</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important
<b>General Assessment</b>	1.strongly unimportant	2.unimportant	3. somewhat important	4. important	5. strongly important

31. How do you appreciate the regulation on simplified procedure jointly issued by the Peoples' Supreme Court, the People's Procurator ate Court and the Ministry of justice?

( )

- 1) Strongly successful
- 2) Successful
- 3) Less successful
- 4) Unsuccessful
- 5) Strongly unsuccessful

### 32. Open Questions

- 1) Under your experience in the simplified procedure, which aspects should be enhanced in the right of the defense counsel?
- 2) Under your experience in the simplified procedure, which aspects should be enhanced in the protection of the right of defendants?
- 3) Under your experience in the simplified procedure, which aspects should be enhanced in the right of victims?
- 4) Under your experience in the simplified procedure, which aspects should be enhanced in the efficiency of the disposition of cases?
- 5) Under your experience in the simplified procedure, which aspects should be enhanced in fairness and justice?
- 6) Others

**Thank you so much for your participation and great support!**



2) Chinese version

问卷编号:	发放问卷时间:	收集问卷时间:
问卷地点: 省 市 县(区)	问卷方式:	
问卷收集人姓名: 李本森	联系电话	电子邮件: libensen@sohu.com

关于被告人认罪案件适用普通程序简化审实施效果的问卷调查

(法官部分)

一、答卷人背景

1. 答卷人工作的省 ( ) 市 ( ) 县 (区) ( )
2. 年龄: ( )
3. 性别 ( )
  - 1) 男
  - 2) 女
4. 法官职务 ( )
  - 1) 审判员
  - 2) 助理审判员

二、问卷问题 (如果您选择选项中的“其他”项, 请在其后的括号中注明具体内容)

1. 您所在的法院有多少法官? ( ) 请您给出一个具体数字。
  - 其中, 有多少法官从事刑事审判业务? ( ) 请您给出一个具体数字。
2. 你们法院 2010 年共审理多少刑事案件? ( ) (如果您不知道这个问题的答案, 请您直接跳到第 4 题)
  - 其中, 使用被告人认罪案件的简化审程序的多少件? ( )
  - 其中, 使用普通程序的多少件? ( )
  - 其中, 使用简易程序的多少件? ( )
3. 您在 2010 年共参与审理多少个刑事案件? ( )
  - 其中, 使用被告人认罪案件的简化审程序的多少件? ( )
  - 其中, 使用普通程序的多少件? ( )
  - 其中, 使用简易程序的多少件? ( )
4. 总体上, 和普通程序案件相比, 您认为处理普通程序简化审的案件所花费的时间: ( )

- 1) 很节省
  - 2) 节省一点点,
  - 3) 没有多大差别
  - 4) 反而增加了
5. 总体上,您在普通程序简化审的案件起诉上所花费的时间,如果有所节省,主要节省在哪个阶段? ( ) (本题可多选,如果您认为不节省时间,请可您直接转到下题)
- 1) 在侦查阶段
  - 2) 在起诉阶段
  - 3) 在一审阶段
  - 4) 在二审阶段
6. 您在被告人普通程序简化审的案件中所花费的时间,如果您认为办案时间有所增加,主要增加在哪阶段? ( )
- 1) 在侦查阶段
  - 2) 在起诉阶段
  - 3) 在一审阶段
  - 4) 在二审阶段
7. 根据您的理解,被告人认罪是指 ( ) (本题可以多选)
- 1) 被告人自愿供述全部犯罪事实
  - 2) 被告人自愿承认所指控的全部犯罪事实
  - 3) 被告人对被指控的基本犯罪事实无异议
  - 4) 被告人自愿认罪
  - 5) 被告人表示悔改
  - 6) 被告人愿意主动赔偿被害人的损失
  - 7) 被告人对被指控的基本犯罪事实无异议,并自愿认罪
  - 8) 被告人认可部分犯罪事实即可
  - 9) 其他 ( )
8. 在共同犯罪的案件中,部分被告人认罪,部分被告人不认罪,对于认罪的被告人的审理,根据您的观点,对该认罪的被告人的审理应当 ( )
- 1) 适用普通程序简化审
  - 2) 适用一般的普通程序
9. 根据“两高一部”的《关于适用普通程序审理“被告人认罪案件”的若干意见》第二条中的“其他不宜适用本意见审理的案件”,您认为下列的选项中哪些情况属于该条的规定: ( ) (本题可多选)

- 1) 不能公开审理的案件
  - 2) 案件有重大疑点
  - 3) 被告人虽然承认指控的犯罪事实，但是否认涉嫌的罪名
  - 4) 案情复杂
  - 5) 案件新奇
  - 6) 被告人被逼供、诱供
  - 7) 被告人认罪的动机就是为了减轻惩罚
  - 8) 被告人与控方达成认罪协议
  - 9) 被告人没有悔改表现
  - 10) 被告人不愿意赔偿被害人损失
  - 11) 其他 ( )
10. 在适用普通程序简化审的案件中，您提审犯罪嫌疑人时是否有律师在场？ ( )
- 1) 从没有
  - 2) 很少有
  - 3) 经常有
  - 4) 每次都有
11. 在适用普通程序简化审案件中，您如何判断和确定被告人基本承认犯罪事实，并自愿认罪？ ( ) (本题可以多选)
- 1) 询问被告人
  - 2) 审查卷宗
  - 3) 询问证人
  - 4) 根本无法准确地知道
  - 5) 其他 ( )
12. 在您代理的普通程序简化审的案件中，如果被告人提出取保候审或监视居住，对于这样的申请，法院 ( )
- 1) 从不批准
  - 2) 有时批准
  - 3) 大多批准
  - 4) 全部批准
13. 您认为下列哪些因素是法院决定使用普通程序简化审的重要因素？ ( ) (本题可以多选)
- 1) 被告人自愿认罪
  - 2) 被告人赔偿
  - 3) 被告人坦白
  - 4) 被告人悔罪

- 5) 其他 ( )
14. 如果被告人已经就指控的罪名认罪了, 您认为是否还需要继续进行庭审或庭外调查?  
( )
- 1) 不需要
  - 2) 需要
  - 3) 根据案件情况确定
15. 与普通程序相比, 在普通程序简化审案件中, 您是否要花费较少的时间来准备庭审?  
( )
- 1) 是的
  - 2) 不是
  - 3) 根据案件情况而有不同
16. 在您处理的普通程序简化审案件中, 您是否发现有被告人被强迫认罪的情况?  
( )
- 1) 从来没有
  - 2) 偶尔有
  - 3) 有很多
  - 4) 其他 ( )
17. 如果您参加普通程序简化审案件的庭审, 您在庭审中的最主要的工作是:  
( )
- 1) 审查起诉书
  - 2) 听取双方的辩论
  - 3) 讯问被告人
  - 4) 询问证人
18. 在您代理过的普通程序简化审的案件中, 下列选项中您认为属实的是?  
( )
- 1) 所有的被告人都得到从轻处罚
  - 2) 大部分被告人得到从轻处罚
  - 3) 少部分被告人得到从轻处罚
  - 4) 所有的被告人没有得到轻的处罚
19. 在您 2010 年处理过的普通程序简化审案件中, 关于被告人上诉的情况, 您同意下列的哪项? ( )
- 1) 都上诉
  - 2) 经常上诉

- 3) 偶尔上诉
- 4) 没有上诉

20. 2010 年，在您参与代理的普通程序简化审理的案件中，有多少案件被告人上诉？  
（            ）请您给出具体数字。

21. 在普通程序简化审的案件中，如果被告人上诉，上诉主要的理由是：（            ）（**本题可多选**）

- 1) 审判程序不公
- 2) 对指控有很大异议
- 3) 虽然被告人自愿认罪，但是认为并没有得到从轻处罚
- 4) 其他

22. 下面是关于普通程序简化审对于减少案件积压的作用的评价，请您给出您的选项：  
（        ）

- 1) 很有效果
- 2) 有些效果
- 3) 差不多
- 4) 基本没有效果
- 5) 根本没有效果

23. 在适用普通程序简化审的案件中，如果有被害人，下列选项中关于被害人参加庭审的判断，您认为哪项是符合您的审判实际的？（            ）

- 1) 被害人从不参加
- 2) 被害人大都不参加
- 3) 被害人大都参加
- 4) 被害人都参加

24. 您认为被告人认罪案件适用普通程序简化审案件，对于被告人的最大益处是：  
（            ）

- 1) 被告人获得了从轻处罚
- 2) 被告人获得了从快处理
- 3) 以上两者都有

25. 您认为普通程序简化审对于法官的益处是：（            ）（**本题可多选**）

- 1) 节省办案时间
- 2) 不用担心当事人投诉
- 3) 办案比较轻松
- 4) 没有什么好处

5) 其他 ( )

26. 对于普通程序简化审案件，下列选项中哪项符合您的判决实际情况？

( )

- 1) 全部当庭判决
- 2) 多数当庭判决
- 3) 偶尔当庭判决
- 4) 从不当庭判决

27. 从法官的角度，您认为普通程序简化审的主要缺陷是？ ( )

- 1) 辩护律师与控方无法协商减轻指控
- 2) 忽视了该类案件的侦查和起诉的效率问题
- 3) 只注重效率，忽视了公正
- 4) 容易产生强迫或诱使被告人认罪的问题
- 5) 其他 ( )

28. 总体上，您如何评价律师在普通程序简化审案件中的辩护工作？ ( )

- 1) 非常满意
- 2) 比较满意
- 3) 一般化
- 4) 不满意
- 5) 非常不满意

29. 总体上，您如何评价检察官在普通程序简化审案件中的审理工作？ ( )

- 1) 非常满意
- 2) 比较满意
- 3) 一般化
- 4) 不满意
- 5) 非常不满意

30. 您如何评价您作为法官参加普通程序简化审案件中各项工作的重要性？（请在下面的图表的选项中打勾）

防止刑讯逼供和诱供	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
讯问被告人	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
核实证据	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
听取辩论	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
审查被告人是否自愿认罪	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
加速审判程序	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
庭前阅卷	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
维护被害人利益	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
总体评价	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要

31. 总体上，您如何评价最高院、最高检和司法部《关于适用普通程序审理“被告人认罪案件”的若干意见（试行）》的实施？（            ）

- 1) 相当成功
- 2) 基本成功
- 3) 一般化
- 4) 不成功
- 5) 很不成功

32. 开放问题

1) 根据您的经验，在普通程序简化审中，对法官的权力方面还需要加强什么？

2) 根据您的经验，在普通程序简化审中，对被告人的权利保护还需要做出哪些改进？

3) 根据您的经验，在普通程序简化审中，对于被害人的权利保护还需要做出哪些改进？

- 4) 根据您的经验，在普通程序简化审中，在提高案件的处理效率方面还需要哪些改进？
- 5) 根据您的经验，在普通程序简化审中，在保证案件审理公正方面还需要哪些改进？
- 6) 其他方面的意见或建议

**非常感谢您的参与和对本次调查的大力支持！**



问卷编号:	发放问卷时间:	收集问卷时间:
问卷地点: 省            市            县(区)	问卷方式:	
问卷收集人姓名: 李本森	联系电话:	电子邮件 libensen@sohu.com

## 关于被告人认罪案件适用简易程序简化审实施效果的问卷调查

### (检察官部分)

#### 一、答卷人背景

1. 答卷人工作的省 (        ) 市 (        ) 县 ( 区 ) (        )
2. 年龄: (                    )
3. 性别 (                    )
  - 1) 男
  - 2) 女
4. 检察职务 (                    )
  - 1) 检察员
  - 2) 助理检察员

#### 二、问卷问题 (如果您选择选项中的“其他”项, 请在其后的括号中注明具体内容)

1. 您所在的检察院有多少检察官? 请您给出一个具体数字。 (                    )
  - 其中, 有多少检察官从事刑事起诉业务? 请您给出一个具体数字。 (                    )
2. 你们检察院 2010 年共起诉大约多少刑事案件? (        ) (如果您不知道这个问题的答案, 请您直接跳到第 4 题)
  - 其中, 使用被告人认罪案件的简易程序的多少件? (                    )
  - 其中, 使用普通程序的多少件? (                    )
  - 其中, 使用简易程序的多少件? (                    )
3. 您在 2010 年共起诉多少个刑事案件? (                    )
  - 其中, 使用被告人认罪案件的简易程序的多少件? (                    )
  - 其中, 使用普通程序的多少件? (                    )
  - 其中, 使用简易程序的多少件? (                    )
4. 总体上, 和普通程序案件相比, 您认为处理简易程序简化审的案件所花费的时间: (        )
  - 1) 很节省
  - 2) 节省一点点,

- 3) 没有多大差别
- 4) 反而增加了
5. 总体上，您在普通程序简化审的案件起诉上所花费的时间，如果有所节省，主要节省在哪个阶段？（ ）（本题可多选，如果您认为不节省时间，请可您直接转到下题）
- 1) 在侦查阶段
  - 2) 在起诉阶段
  - 3) 在一审阶段
  - 4) 在二审阶段
6. 您在被告人普通程序简化审的案件中所花费的时间，如果您认为办案时间有所增加，主要增加在哪个阶段？（ ）
- 1) 在侦查阶段
  - 2) 在起诉阶段
  - 3) 在一审阶段
  - 4) 在二审阶段
7. 根据您的理解，被告人认罪是指（ ）（本题可以多选）
- 1) 被告人自愿供述全部犯罪事实
  - 2) 被告人自愿承认所指控的全部犯罪事实
  - 3) 被告人对被指控的基本犯罪事实无异议
  - 4) 被告人自愿认罪
  - 5) 被告人表示悔改
  - 6) 被告人愿意主动赔偿被害人的损失
  - 7) 被告人对被指控的基本犯罪事实无异议，并自愿认罪
  - 8) 被告人认可部分犯罪事实即可
  - 9) 其他（ ）
8. 在共同犯罪的案件中，部分被告人认罪，部分被告人不认罪，对于认罪的被告人的审理，根据您的观点，对该认罪的被告人的审理应当（ ）
- 1) 适用普通程序简化审
  - 2) 适用一般的普通程序
9. 根据“两高一部”的《关于适用普通程序审理“被告人认罪案件”的若干意见》第二条中的“其他不宜适用本意见审理的案件”，您认为下列的选项中哪些情况属于该条的规定：（ ）（本题可多选）
- 1) 不能公开审理的案件
  - 2) 案件有重大疑点

- 3) 被告人虽然承认指控的犯罪事实，但是否认涉嫌的罪名
  - 4) 案情复杂
  - 5) 案件新奇
  - 6) 被告人被逼供、诱供
  - 7) 被告人认罪的动机就是为了减轻惩罚
  - 8) 被告人与控方达成认罪协议
  - 9) 被告人没有悔改表现
  - 10) 被告人不愿意赔偿被害人损失
  - 11) 其他 ( )
10. 在适用普通程序简化审的案件中，您提审犯罪嫌疑人时是否有律师在场？ ( )
- 1) 从没有
  - 2) 很少有
  - 3) 经常有
  - 4) 每次都有
11. 在适用普通程序简化审的案件中，您如何判断和确定被告人基本承认犯罪事实，并自愿认罪？ ( ) (本题可以多选)
- 1) 询问被告人
  - 2) 审查卷宗
  - 3) 询问证人
  - 4) 根本无法准确地判断或知道
  - 5) 其他 ( )
12. 在您代理的普通程序简化审的案件中，如果被告人提出取保候审或监视居住，对于这样的申请，检察院 ( )
- 1) 从不批准
  - 2) 有时批准
  - 3) 大多批准
  - 4) 全部批准
13. 您认为下列哪些因素对于检察院使用普通程序简化审非常重要？ ( ) (本题可以多选)
- 1) 被告人自愿认罪
  - 2) 被告人赔偿
  - 3) 被告人坦白
  - 4) 被告人悔罪
  - 5) 其他 ( )

14. 如果被告人已经就指控的罪名认罪了，您认为是否还需要继续调查取证？  
( )
- 1) 不需要
  - 2) 需要
  - 3) 根据案件情况确定
15. 与普通程序相比，在普通程序简化审案件中，您是否要花费较少的时间来准备庭审？  
( )
- 1) 是的
  - 2) 不是
  - 3) 根据案件情况而有不同
16. 在您处理的普通程序简化审案件中，您是否发现有被告人被强迫认罪的情况？  
( )
- 1) 从来没有
  - 2) 偶尔有
  - 3) 有很多
  - 4) 其他 ( )
17. 如果您参加普通程序简化审案件的庭审，您在庭审中的最主要的工作是：  
( )
- 1) 宣读起诉书
  - 2) 出示证据
  - 3) 讯问被告人
  - 4) 辩论
18. 在您代理过的普通程序简化审的案件中，下列选项中您认为属实的是？  
( )
- 1) 所有的被告人都得到从轻处罚
  - 2) 大部分被告人得到从轻处罚
  - 3) 少部分被告人得到从轻处罚
  - 4) 所有的被告人没有得到轻的处罚
19. 在您 2010 年处理过的普通程序简化审的案件中，关于被告人上诉的情况，您同意下列的哪项？( )
- 1) 都上诉
  - 2) 经常上诉
  - 3) 偶尔上诉
  - 4) 没有上诉

20. 2010 年，在您参与代理的普通程序简化审理的案件中，有多少案件被告人上诉？请您给出具体数字（            ）

21. 在普通程序简化审的案件中，如果被告人上诉，上诉主要的理由是：（            ）（**本题可多选**）

- 1) 审判程序不公
- 2) 对指控有很大异议
- 3) 虽然被告人自愿认罪，但是认为并没有得到从轻处罚
- 4) 其他

22. 下面是关于普通程序简化审对于减少起诉案件的积压的作用的评价，请您给出您的选项：

（            ）

- 1) 很有效果
- 2) 有些效果
- 3) 差不多
- 4) 基本没有效果
- 5) 根本没有效果

23. 在适用普通程序简化审的案件中，如果有被害人，下列选项中关于被害人参加庭审的判断，您认为哪项是符合您的审判实际的？（            ）

- 1) 被害人从不参加
- 2) 被害人大都不参加
- 3) 被害人大都参加
- 4) 被害人都参加

24. 您认为被告人认罪案件适用普通程序简化审案件，对于被告人的最大益处是：

（            ）

- 1) 被告人获得了从轻处罚
- 2) 被告人获得了从快处理
- 3) 以上两者都有

25. 您认为普通程序简化审对于检察工作的益处是：（            ）（**本题可多选**）

- 1) 节省办案时间
- 2) 不用担心当事人投诉
- 3) 因为被告人是自愿认罪，办案比较轻松
- 4) 没有什么好处

5) 其他 ( )

26. 从检察官的角度，您认为普通程序简化审的主要缺陷是？ ( )

- 1) 辩护律师与控方无法协商减轻指控
- 2) 忽视了该类案件的侦查和起诉的效率问题
- 3) 只注重效率，忽视了公正
- 4) 容易产生强迫或诱使被告人认罪的问题
- 5) 其他 ( )

27. 总体上，您如何评价律师在普通程序简化审案件中的代理工作？ ( )

- 1) 非常满意
- 2) 比较满意
- 3) 一般化
- 4) 不满意
- 5) 非常不满意

28. 总体上，您如何评价法官在普通程序简化审案件中的审理工作？ ( )

- 1) 非常满意
- 2) 比较满意
- 3) 一般化
- 4) 不满意
- 5) 非常不满意

29. 您如何评价您作为检察官参加普通程序简化审案件中工作的重要性？（请在下面的图表的选项中打勾或者在选项上作其他任何的标记）

防止刑讯逼供和诱供	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
讯问被告人	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
核实证据	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
出席法庭	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
律师协商	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
加速程序	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
法律监督	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
维护被害人利益	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
总体评价	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要

30. 总体上，您如何评价最高院、最高检和司法部《关于适用普通程序审理“被告人认罪案件”的若干意见（试行）》的实施？（            ）

- 6) 相当成功
- 7) 基本成功
- 8) 一般化
- 9) 不成功
- 10) 很不成功

31. 开放问题

1) 根据您的经验，在普通程序简化审中，对检察官的权力方面还需要加强什么？

2) 根据您的经验，在普通程序简化审中，对被告人的权利保护还需要做出哪些改进？

3) 根据您的经验，在普通程序简化审中，对于被害人的权利保护还需要做出哪些改进？

- 4) 根据您的经验，在普通程序简化审中，在提高案件的处理效率方面还需要哪些改进？
- 5) 根据您的经验，在普通程序简化审中，在保证案件审理公正方面还需要哪些改进？
- 6) 其他方面的意见或建议

**非常感谢您的参与和对本次调查的大力支持！**



问卷编号:	发放问卷时间:	收集问卷时间:
问卷地点: 省            市            县(区)	问卷方式:	
问卷收集人姓名: 李            本森	联系电话:	电子邮件: libensen@sohu.com

关于被告人认罪案件适用简易程序简化审实施效果的问卷调查

(律师部分)

一、答卷人背景

1. 答卷人工作的省 (        ) 市 (        ) 县 ( 区 ) (        )
2. 年龄: (                    )
3. 性别 (                    )
  - 1) 男
  - 2) 女
4. 律师职务 (                    )
  - 1) 专职律师
  - 2) 兼职律师

二、问卷问题 (如果您选择选项中的“其他”项, 请在其后的括号中注明具体内容)

1. 您所在的律师事务所有多少执业律师? (                    ) 请您给出一个具体数字。
2. 你们律师事务所有多少律师主要代理刑事业务? (                    ) 请您给出一个具体数字。
3. 你们律师事务所 2010 年共代理了大约多少刑事案件? (                    ) (如果您不知道这个问题的答案, 请您直接跳到第 4 题)
  - 其中, 使用被告人认罪案件的简易程序的多少件? (                    )
  - 其中, 使用普通程序的多少件? (                    )
  - 其中, 使用简易程序的多少件? (                    )
4. 您在 2010 年共代理的多少个刑事案件? (                    )
  - 其中, 使用被告人认罪案件的简易程序的多少件? (                    )
  - 其中, 使用普通程序的多少件? (                    )
  - 其中, 使用简易程序的多少件? (                    )

5. 一般来说, 您如何在第一时间知道您代理的案件是适用普通程序简化审?  
( )
- 1) 检察机关阅卷
  - 2) 法院阅卷
  - 3) 法院的书面开庭通知
  - 4) 检察院的起诉意见书
  - 5) 在会见被告人时, 从被告人处得知
  - 6) 其他 ( )
6. 总体上, 和普通程序案件相比, 您认为代理普通程序简化审的案件所花费的时间:  
( )
- 1) 很节省
  - 2) 节省一点点,
  - 3) 没有多大差别
  - 4) 反而增加了
7. 总体上, 您在普通程序简化审的案件代理上所花费的时间, 如果有所节省, 主要节省在哪个阶段? ( ) (本题可多选, 如果您认为不节省时间, 请可您直接转到下题)
- 1) 在侦查阶段
  - 2) 在起诉阶段
  - 3) 在一审阶段
  - 4) 在二审阶段
8. 您在被告人普通程序简化审的案件中所花费的时间, 如果您认为办案时间有所增加, 主要增加在哪个阶段? ( )
- 1) 在侦查阶段
  - 2) 在起诉阶段
  - 3) 在一审阶段
  - 4) 在二审阶段
9. 根据您的理解, 被告人认罪是指 ( ) (本题可以多选)
- 1) 被告人自愿供述全部犯罪事实
  - 2) 被告人自愿承认所指控的全部犯罪事实
  - 3) 被告人对被指控的基本犯罪事实无异议
  - 4) 被告人自愿认罪
  - 5) 被告人表示悔改
  - 6) 被告人愿意主动赔偿被害人的损失
  - 7) 被告人对被指控的基本犯罪事实无异议, 并自愿认罪

- 8) 被告人认可部分犯罪事实即可
- 9) 其他 ( )
10. 在共同犯罪的案件中，部分被告人认罪，部分被告人不认罪，对于认罪的被告人的审理，根据您个人的观点，对该认罪的被告人的审理应当 ( )
- 1) 适用普通程序简化审
- 2) 适用一般的普通程序
11. 根据“两高一部”的《关于适用普通程序审理“被告人认罪案件”的若干意见》第二条中的“其他不宜适用本意见审理的案件”，您认为下列的选项中哪些情况属于该条的规定： ( ) (本题可多选)
- 1) 不能公开审理的案件
- 2) 案件有重大疑点
- 3) 被告人虽然承认指控的犯罪事实，但是否认涉嫌的罪名
- 4) 案情复杂
- 5) 案件新奇
- 6) 被告人被逼供、诱供
- 7) 被告人认罪的动机就是为了减轻惩罚
- 8) 被告人与控方达成认罪协议
- 9) 被告人没有悔改表现
- 10) 被告人不愿意赔偿被害人损失
- 11) 其他 ( )
12. 在适用普通程序简化审的案件中，您会见犯罪嫌疑人时是否有警察或检察官在场？ ( )
- 1) 从没有
- 2) 很少有
- 3) 经常有
- 4) 每次都有
13. 在适用普通程序简化审的案件中，您如何判断和确定被告人基本承认犯罪事实，并自愿认罪？ ( ) (本题可以多选)
- 1) 询问被告人
- 2) 审查卷宗
- 3) 询问证人
- 4) 根本无法准确地判断或知道
- 5) 其他 ( )

14. 在您代理的普通程序简化审的案件中，如果被告人提出取保候审或监视居住，对于这样的申请，法院和检察院（                      ）
- 1) 从不批准
  - 2) 有时批准
  - 3) 大多批准
  - 4) 全部批准
15. 您认为，在普通程序简化审的案件中，下列哪些因素决定被告人可以获得从轻处罚？（                      ）（**本题可以多选**）
- 1) 被告人自愿认罪
  - 2) 被告人赔偿
  - 3) 被告人坦白
  - 4) 被告人悔罪
  - 5) 其他（                      ）
16. 如果被告人已经就指控的罪名认罪了，您认为是否还需要继续调查取证？（                      ）
- 1) 不需要
  - 2) 需要
  - 3) 根据情况
17. 与普通程序相比，在普通程序简化审案件代理中，您是否要花费较少的时间来准备庭审？（                      ）
- 1) 是的
  - 2) 不是
  - 3) 根据案件情况
18. 在您代理的普通程序简化审案件中，您是否发现有被告人被强迫认罪的情况？（                      ）
- 1) 从来没有
  - 2) 偶尔有
  - 3) 有很多
  - 4) 其他（                      ）
19. 如果被告人认罪，而您认为被告人不构成犯罪，您怎么处理与被告人的委托关系？（                      ）
- 1) 撤回代理
  - 2) 不考虑彼此的分歧，继续代理
  - 3) 劝说被告人尊重自己的意见，否则退出代理

- 4) 其他 ( )
20. 在您代理过的普通程序简化审的案件中, 下列选项中您认为属实的是? ( )
- 1) 所有的被告人都得到从轻处罚
  - 2) 大部分被告人得到从轻处罚
  - 3) 少部分被告人得到从轻处罚
  - 4) 所有的被告人没有得到轻的处罚
21. 在您 2010 年代理过的普通程序简化审的案件中, 关于被告人上诉的情况, 您同意下列的哪项? ( )
- 1) 都上诉
  - 2) 经常上诉
  - 3) 偶尔上诉
  - 4) 没有上诉
22. 根据您的代理经验, 在普通程序简化审的案件中, 如果被告人上诉, 上诉主要的理由是: ( ) (本题可以多选)
- 1) 审判程序不公
  - 2) 对指控有很大异议
  - 3) 虽然被告人自愿认罪, 但是认为并没有得到从轻处罚
  - 4) 其他 ( )
23. 2010 年, 在您参与代理的普通程序简化审理的案件中, 有多少案件被告人上诉? 请您给出具体数字 ( )
24. 在适用普通程序简化审的案件中, 如果有被害人, 下列选项中关于被害人参加庭审的判断, 您认为哪项是符合您的审判实际的? ( )
- 1) 被害人从不参加
  - 2) 被害人大都不参加
  - 3) 被害人大都参加
  - 4) 被害人都参加
25. 您认为被告人认罪案件适用普通程序简化审案件, 对于被告人的益处是: ( )
- 1) 被告人获得了从轻处罚
  - 2) 被告人获得了从快处理
  - 3) 以上两者都有
26. 根据你的经验, 您认为普通程序简化审对于法官的益处是: ( ) (本题可多选)

- 1) 节省办案时间
- 2) 增加了收入
- 3) 不用担心当事人投诉
- 4) 因为被告人是自愿认罪，所以对律师来说没有法律风险
- 5) 没有什么好处
- 6) 其他 ( )

27. 从辩护律师的角度，您认为普通程序简化审的主要缺陷是？ ( ) (本题可多选)

- 1) 辩护律师与控方无法协商减轻指控
- 2) 忽视了该类案件的侦查和起诉的效率
- 3) 只注重效率，忽视了公正
- 4) 容易产生强迫或诱使被告人认罪的问题
- 5) 其他 ( )

28. 总体上，您如何评价检察官在普通程序简化审案件中的起诉工作？ ( )

- 1) 非常满意
- 2) 比较满意
- 3) 一般化
- 4) 不满意
- 5) 非常不满意

29. 总体上，您如何评价法官在普通程序简化审案件中的审理工作？ ( )

- 1) 非常满意
- 2) 比较满意
- 3) 一般化
- 4) 不满意
- 5) 非常不满意

30. 您如何评价您作为辩护律师参加普通程序简化审案件中各种工作的重要性？（请在下面的图表的选项中打勾或作其他任何的区分标记）

防止刑讯逼供和诱供	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
会见被告人	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
核实证据	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
法庭辩护	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
法律咨询	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
加速案件处理	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
促使审理公正	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
帮助上诉	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要
总体评价	1、一点也不重要	2、不重要	3、一般	4、重要	5、非常重要

31. 总体上，您如何评价最高院、最高检和司法部《关于适用普通程序审理“被告人认罪案件”的若干意见（试行）》的实施？（            ）

- 1) 相当成功
- 2) 基本成功
- 3) 一般化
- 4) 不成功
- 5) 很不成功

32. 开放问题

1) 根据您的经验，在普通程序简化审中，对律师的权利方面还需要加强什么？

2) 根据您的经验，在普通程序简化审中，对被告人的权利保护还需要做出哪些改进？

3) 根据您的经验，在普通程序简化审中，对于被害人的权利保护还需要做出哪些改进？

- 4) 根据您的经验，在普通程序简化审中，在提高案件的处理效率方面还需要哪些改进？
- 5) 根据您的经验，在普通程序简化审中，在保证案件审理公正方面还需要哪些改进？
- 6) 其他需要补充的意见或建议

**非常感谢您对本次调查的参与和大力支持！**



**APPENDICES II: LLM Thesis**

**THE TRANSLATION OF PLEA BARGAINING IN CHINA**

Bensen Li

Submitted to the faculty of the University Graduate School

In partial fulfillment of the requirements

For the degree

Master of Law

In the School of Law

Indiana University

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of the requirements for the degree of Master of Law

Thesis Committee

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Joseph Hoffmann

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## **ABSTRACT**

Plea bargaining, though a term with great rhetorical meaning in criminal procedure, embroiled in ideological controversy in the literature of the criminal justice. To date, plea bargaining transferred to not only the common law countries but also the

civil-law countries. The trend of the plea bargaining system in the world greatly inspired the interest of Chinese scholars in criminal justice. In order to effectively appraise and clarify the possibility and feasibility in introduction of plea bargaining to China, it is necessary to more thoroughly investigate the experience and lessons in the development of plea bargaining system in the Western countries. This thesis provided an issue of whether the plea bargaining system can be introduced into China, if so, how plea bargaining operates in the context of the present criminal procedure. Based on the analysis of the background of the Chinese criminal justice system and the introduction of the practice of plea bargaining in the western countries, the thesis formulated a new mechanism with Chinese characteristics and designed the proceedings for the mechanism. Furthermore, the thesis explored the obstacles and possibilities in transplanting plea bargaining into China. The thesis concluded that the plea bargaining system can be translated in China even though there is a long way to go.

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## I. Introduction

China has been in the track of transition in economics, politics, the legal system, and cultural affairs since 1979.<sup>76</sup> Apart from great achievement in the development of the economy, remarkable progress in legislation has been made with considerable speed. A large number of codes, statutes and regulations with Chinese characteristics have been promulgated by the National People's Congress (hereinafter NPC) and made known by nation-wide campaigns in legal publicity (*pu fa* or *fazhi xuanchuan*)<sup>77</sup> As a crucial part of the legal system, Criminal Law (hereinafter CL) and Criminal Procedure Law (hereinafter CPL), greatly impacted by the former Soviet Union, were issued by the NPC in July 1979, which was portrayed as a landmark in the development of criminal justice in China.<sup>78</sup>

In 1996, the NPC revised the CL and CPL to follow the international development of criminal justice under pressure from the public's dissatisfaction with the criminal justice system. The Chinese media pictured the 1996 CPL as a great improvement in the protection of human rights and a shift to the adversarial system from the inquisitorial model. The practice of the CPL, however, is not as good as the people, the legislators, and scholars had expected, not only because of defects in certain mechanisms of the 1996 CPL but also because the law authority agencies have been reluctant to enforce it due to concerns about their interests and powers.<sup>79</sup> This phenomenon reflects the intricacies and difficulties in the transformation of the inquisitorial system by introducing certain elements from the adversarial system.

Generally, China's criminal justice system is essentially an inquisitorial style with hierarchical features. First, as a supreme power, the state interest is higher than the individual's interest in the criminal justice system. Suspects and defendants are

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<sup>76</sup> The Communique of Third Plenary Session of the 11th CPC Central Committee, *available at* [http://news.xinhuanet.com/ziliao/2005-02/05/content\\_2550304.htm](http://news.xinhuanet.com/ziliao/2005-02/05/content_2550304.htm).

<sup>77</sup> Wu, Aiyong, *The Great Efforts to Aim at the Goal of Legal Publicity in the Fifth Five Years* [nuli shixian di wuge wunian pufa mubiao], *available at* [http://www.moj.gov.cn/fzxc/2006-05/12/content\\_314048.htm](http://www.moj.gov.cn/fzxc/2006-05/12/content_314048.htm).

<sup>78</sup> Liu zheng, *the Milestone of Political Democracy* [ming zhu zhengzhi de lichengbei], legal daily [fazhi ribao], Sep 6, 2005.

<sup>79</sup> See generally, Chen Weidong, *Research on the Problems of the Implementation of the 1996 CPL* [xing shi susongfa shishi wenti duice yanjiu] (2002).



traditionally presumed to be criminals in practice when they are in custody, and the law authority agencies do not take into account their rights, even though the 1996 CPL set up the principal of the presumption of innocence.<sup>80</sup> Thus, it is almost impossible for individuals to bargain with the state in terms of their rights. Second, the judiciary is not independent from the government. The Communist Party at different levels actually controls the appointment of the chief justice of the courts. Also, the judicial officials at different levels should follow the policy of the government and Communist Party in the process of disposing the cases. Third, the courts, procuratorates (the office of prosecutor), and public security agencies have a concerted interest in crime control because the national power in China is superior to the individual as well as social organizations. Fourth, the power of the police at the investigatory stage has few restrictions, and the police have few obligations in the trial.<sup>81</sup> Given all of the above concerns, it is difficult for China to introduce the elements of the adversarial system from western countries into the Chinese criminal justice system. However, current judicial reforms focus on ways to avoid the plagues of the inquisitorial by recognizing an independent judiciary, giving more weight to procedural justice than substantive justice, increasing the transparency of the judicial process, and enhancing the protection of human rights.<sup>82</sup> These conversions hint that Chinese leadership is moving toward a new phase in the criminal justice system, in which the Chinese inquisitorial model will be gradually weakened.

For many years China's scholars, legal professionals, and lawmakers have been inspired by and enthusiastic about the Western criminal justice system. Some legal scholars and judicial officials in criminal justice from the United States have been eager to make recommendations to their counterparts in China.<sup>83</sup> Not surprisingly, numerous

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<sup>80</sup> CPL, art. 12, (1996) (P.R.C.) (no person shall be found guilty without being judged as such by a people's Court according to law).

<sup>81</sup> Generally, the accused in China does not have widespread rights like his/her counterparts in the United States. In practice, the police can interrogate the accused without the presence of the defense counsel. Also, the police need not be present in the trial as a witness because the judges trust the police records, which are admissible without any limitation.

<sup>82</sup> The Reform Outline on the People's Court in the Third Five Years (2009-2013), *available at* [http://news.xinhuanet.com/legal/2009-03/25/content\\_11072992.htm](http://news.xinhuanet.com/legal/2009-03/25/content_11072992.htm).

<sup>83</sup> Under the impact of the cooperation and communication in justice in the "*Joint Declaration by the United States and the People's Republic of China*" In October 1997, programs related to the legislation, legal education, law enforcement official train and criminal assistance between two countries have been increased quickly.

programs in the criminal justice system have been instituted by the institutions funded by the American and Chinese governments, and an increasing number of scholars, students, judges, lawyers and law enforcement officials have received degrees or short-term training in the United States and other western countries. Unfortunately, the progress toward the Americanization in criminal justice system is dawdling because the gap between the two systems is greater than scholars had anticipated. However, the prospect is bright since the seeds for change have been sown. One such bright signal is that the amendment of the 1996 CPL has brooded for several years and has been on the agenda of the NPC.<sup>84</sup>

In recent decades, the issue in terms of how to make criminal procedure more efficient has become increasingly crucial to achieve the goal of the mandate of criminal justice because of the severe caseload in law authority agencies. The problem of heavy caseloads in criminal procedure has adversely affected the protection of human rights and the authority of law enforcement. Thus, it is necessary to set up a more efficient, effective and practical mechanism. The practical experiences of plea bargaining in the United States and civil law countries have proved that plea bargaining is an efficient mechanism in disposing criminal caseloads. In China, the law authorities have furthered the summary process in criminal procedure in response to the increasing rate of crime and caseloads.<sup>85</sup> However, the effect of the summary process in the resolution of criminal caseloads cannot achieve the goal because of its inefficiency in the proceedings. In 2002, the Railway Transportation Court in the city of *Mudanjiang* in *Heilongjiang* province was the first to publicly experiment in the disposition of a dilemma case in criminal procedure by plea bargaining.<sup>86</sup> As a result of the creative test in plea bargaining, many debates ensued on the question of whether plea bargaining should be embedded in the

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<sup>84</sup> Cui Ming, *Opinions on the amendment of the 199 CPL*, available at <http://www.dffy.com/faxuejieti/ss/200802/20080213215150.htm>.

<sup>85</sup> In March 2003, SPC, SPP and the Ministry of Justice (hereinafter MJ) jointly issued two regulations to expedite the criminal cases.

<sup>86</sup> Zhang Jingyi, Li Wenguang, Zhao Binsong, Wu Quanqi, *Focus on the First Case in the Adoption of Plea Bargaining In China* [guanzhu zhongguo biansu jiaoyi di yian], People's Court Newspaper, August 8, 2002.

Chinese criminal justice system.<sup>87</sup> In fact, this case was the significant test in the practice of plea bargaining in China.

This thesis attempts to clarify the issue of whether and how the plea bargaining system can fix the problems of the summary process in criminal procedure in China. This thesis provides a map for the approach in the implementation of plea bargaining in China. The plea bargaining system I have designed in this thesis for China cannot be completely functional yet, but it is possible and feasible to adopt it with the improvement of the circumstances of justice in the decades to come.

For the purpose of this thesis, “plea bargaining” is defined as any arrangement reached by negotiations between the defendants and the prosecutors or judges, or victims, whereby a criminal charge or potential charge, or compensation to the victim is disposed in summary process without onerous and formal trial. This definition is broader and more general than is usually given because the range of research in this thesis is involved not only in the common law system but also the civil law system. Also, the data collected in this thesis are mainly from official statistical sources released by the law authority agencies.

In section II, I briefly trace the background of the Chinese criminal justice system. The criminal justice system in China is much different from the Western criminal justice system. The amendment of the 1996 CPL did not change the nature of the inquisitorial; the hard-striking campaigns did not defeat increasing crime; and the summary process could not effectively address the problem of heavy caseloads. The right to a speedy trial for the defendant is also not incorporated in the 1996 CPL. In practice the problems of illegal extended detention and the inefficiency of summary process adversely influence the protection of defendants’ fundamental rights, such as the right to the speedy trial. Thus, a new mechanism to fix the above-mentioned problems should be formulated and embedded in the criminal justice system.

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<sup>87</sup> Cheng Guangzhong (Chief Editor), *Plea Bargaining in China*, (2003). See also, Li Fucheng, *Plea bargaining is not fit in China* [biansu jiaoyi bushi he zhongguo], available at <http://www.dffy.com/faxuejieti/ss/200322/20031119081625-2htm>. Qin Yinghui, *Transplanting Plea Bargaining into China*, *Journal of Beijing University of Technology (Social Science Edition)* (2006) (6) (3), [Http://d.wanfangdata.com.cn/Periodical\\_bjgydxxb-shkx200603013.aspx](http://d.wanfangdata.com.cn/Periodical_bjgydxxb-shkx200603013.aspx).

Section III introduces the practical experiences in plea bargaining in some countries, including the United States, Germany, France and Italy, because these countries have a long history in the practice of plea bargaining. The introduction of the practices of plea bargaining in these countries aims at finding suitable experiences on which to model the adoption of plea bargaining in China. As for the United States, I have summarized the American style of plea bargaining and the reforms in plea bargaining in the United States. For the three civil law countries, I have summarized and differentiated the nuances of the plea bargaining system in those countries. There are three basic experiences for the adoption of plea bargaining. One is that the cases eligible to plea bargaining should be limited in a reasonable range; the second is that the judicial participation in the process of plea bargaining can effectively prevent the prosecutors from coercing the defendant to plead guilty; and the third is that the victim(s) should be granted the rights to make their voices heard in the proceedings of plea bargaining. Basically, these experiences are favorable for the introduction of plea bargaining into China.

Section IV formulates and justifies a framework of plea bargaining with Chinese characteristics. Based on the experience of the United States and three civil law countries, the framework of plea bargaining in China should focus on the cases limitation, the prosecutorial discretion limitation, the judicial intervention, the correctional function, and restorative justice. The framework not only absorbs the experience of western countries in plea bargaining, but it also incorporates the Chinese criminal justice system. This framework might effectively function in reducing criminal caseloads, enhancing the right to speedy trial for the defendants, and the protecting the victims' interests.

Section V clarifies the mechanism in which the framework of plea bargaining with Chinese characteristics operates. In other words, this section will give the details about how the Chinese model of plea bargaining functions. The mechanism covers the operating proceedings and the roles of participants in the proceedings. The proceedings include four steps, namely initial action, pre-plea hearing, plea negotiation, and confirmation. The mechanism clarifies and details the proceeding of plea bargaining and the responsibilities of participants in plea bargaining. Generally, there are some merits in

the mechanism, for instance, the defendants have more options in plea negotiation, and the victims are granted more rights to participate in plea bargaining.

Section VI analyzes the difficulties and prospects in the adoption of plea bargaining in China. The difficulties include the inquisitorial model of the criminal justice, the reluctance of the courts, the inefficiency of legal aid and defense work, inferior legal ethics, and Confucianism. These factors will adversely influence the translation of the Western plea bargaining to China. On the other hand, the simplified procedure, the on-going reform in criminal justice, the policy of confession in criminal procedure, and the policy of establishing the harmonious society constitute the positive elements favorable to the plea bargaining system. The plea bargaining system can be rooted in China's criminal justice system in the long run.

Finally, section VII concludes that it is possible and feasible to translate the Western plea bargaining to China's criminal justice system even though there is a long way to go. The movement of the reform on China's criminal justice system has accelerated. The plea bargaining system, although problematic and controversial, can eventually be modified as a new mechanism in disposing criminal caseloads in China's criminal justice system.

## II. Overview: Problems in Chinese Criminal Procedure

China's criminal justice system is rooted in the inquisitorial tradition.<sup>88</sup> The 1996 CPL is only a moderate step towards the adversarial model in which the spirit of due process was incorporated.<sup>89</sup> The increase in crime as well as outcry from the public to enhance the protection of human rights required the national government to remodel the 1996 CPL. This section provides an overview of the major problems in the criminal justice, including the inquisitorial model, the increasing crime, and the caseloads. These challenges raise the issue of how to set up a new, efficient framework in order to meet them.

### 1. The Inquisitorial v. the Adversarial

Generally, the inquisitorial model refers to criminal justice controlled by the hierarchical or authoritarian system where the goal for law enforcement officials is to find the truth regardless of the protection of the defendant's rights.<sup>90</sup> In contrast, the defendant's rights in the adversarial system should not be sacrificed for fact finding.<sup>91</sup> "Inquisitorial criminal justice systems are more readily identified with the civil law tradition of continental Europe, while the adversarial system, also known as the accusatory system, is generally associated with the common law tradition of Great Britain and its former colonies."<sup>92</sup> Most civil law countries, including China, inherited the features of the inquisitorial model; however, the degree of the inquisitorial has been weakened because of the trend of convergence between civil law tradition and common law tradition since the last century.<sup>93</sup> To the extent that the criminal justice system under the inquisitorial model has certain merits in crime control, it also brings about the adverse

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<sup>88</sup> See generally, Zhang Jinfan, *the History of China Legal System* (zhongguo fazhi shi) (2007).

<sup>89</sup> CPL, art.5, 6, 9, 11, 12, 32, (1996).(P.R.C.).

<sup>90</sup> See generally Mirjan R. Damaska, *The Faces of Justice and State Authority* 4-6 (1986).

<sup>91</sup> *Id.*

<sup>92</sup> Mike P. H. Chu, *Criminal Procedure Reform in the People's Republic of China: the Dilemma of Crime Control and Regime Legitimacy*. 18 UCLA PAC. BASIN L. J. 157, 159 (2001).

<sup>93</sup> Craig M. Bradley, *The Convergence of the Continental and the Common Law Model of Criminal Procedure*, 7 Crim. L. F. 471, 475, 476, 477 (1996).

influence in the protection of human rights. Yet the adversarial model is crucial in the protection of human rights but problematic in crime control. In reality, there is no purely inquisitorial or adversarial model in the world. The dichotomy between them is only a useful tool for analysis that is widely employed by criminal justice scholars.

To a certain extent, the reform of the 1996 CPL reduced the features of the inquisitorial model in criminal justice.<sup>94</sup> The attempt of this reform in criminal justice was to cure the 1979 CPL defects through the implementation of the adversarial model. In 1996, the NPC amended CL and CPL by absorbing certain elements of the adversarial system and the principles under due process. The substantial changes in the 1996 CPL focused on the custody-for-investigation<sup>95</sup>, the abolishment of the system of exemption from prosecution<sup>96</sup>, the forbidding of convictions to be made without court trials<sup>97</sup>, and the enhancement in access to the defense counsel for suspects and defendants in criminal proceedings.<sup>98</sup> Since the 1996 CPL, the judges have become more passive in the fact finding process, whereas the obligation of the prosecution in fact finding has been enhanced. Also, the accused, suspects, and defendants in criminal procedure are entitled to more rights than under the 1979 CPL. Impartial judgments in criminal cases are slightly increased since the 1996 CPL took effect in January 1997, partly because the introduction of adversarial trial procedure has limited the power of the judge in the process of investigation and enhanced the participation of the defense counsel during criminal procedure.<sup>99</sup> The reforms represented great progress in the change of the inquisitorial tradition.

However, the current criminal justice system still operates under the inquisitorial model. The main mandate of the 1996 CPL is “ensuring accurate and timely

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<sup>94</sup> Mike P. H. Chu, *Criminal Procedure Reform in the People's Republic of China: the Dilemma of Crime Control and Regime Legitimacy*, 18 UCLA PAC. BASIN L. J. 157, 177-185 (2001). In the practice of the 1979 CPL, the voice of the requirement for the reform on 1979 CPL become stronger and prevailed finally because of the major defects in the 1979 CPL.

<sup>95</sup> Xiao Han, *the Criticism and Assessment of the Hard-striking campaigns* [shifei gongguo shuo yanda], Huanqiu Journal, (2005).

<sup>96</sup> The 1996 CPL abolished the system of exemption from prosecution. The rule of the exemption from prosecution was a unique system in 1979 CPL, under which a people's procuratorate might decide a defendant guilty but exempting him from the prosecution without the trial. *See* CPL 1979, art 101 (P.R.C.).

<sup>97</sup> CPL 1996, art 12, 163(P.R.C).

<sup>98</sup> *Id.* art.156, 160.

<sup>99</sup> Mike P. H. Chu, *Criminal Procedure Reform in the People's Republic of China: the Dilemma of Crime Control and Regime Legitimacy*, 18 UCLA PAC. BASIN L. J. 157, 187 (2001) (noted the acquittal rate in China's criminal court rose from 0.66% in 1997 to 1.03 in 1998).

ascertainment of facts about crimes, punishing crimes, protecting the citizen's personal right, safeguarding State and public security and maintaining socialist public order.”<sup>100</sup> In the practice of law, the implications of the 1996 CPL in terms of the protection of human rights encountered obstacles from law enforcement agencies.<sup>101</sup> As far as human rights are concerned, the 1996 CPL is not viewed as a successful reform because the law enforcement agencies in criminal justice still maintain superior power in criminal procedure over the defendant and the defense counsel. The defendants and the defense counsels cannot equally face-off with the prosecution at the investigatory stage and in pretrial or trial process.

First, the police have the strongest power at investigation stage. Under the principle of due process, the power of police should be limited in appropriate proportions in the process of investigation to avoid the invasion of human rights. Traditionally, the public security agency (the police office), the procuratorate<sup>102</sup>(the prosecutor's office), and the court are treated as a “family”(gong jian fa shi yi jia) by the public because the interests of the authority agencies are consistent in criminal justice. In China, the police are in charge of the investigation of criminal cases except for those cases involving official misconduct, corruption, and bribery.<sup>103</sup> The police can intervene in the public's everyday life without warrants issued by judges and interrogate suspects without having defense counsel present.<sup>104</sup> Furthermore, police officers are not obligated to appear as witnesses in trials because their working records or reports can be admissible as evidence in the trial without the need of cross-examination by the defense counsel. SPC issued a version of the limited exclusionary rule, which excludes evidence obtained in torture and forced confession. However, this version of exclusionary rule cannot limit the power of the police because the rule is too broad and obscure.<sup>105</sup>

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<sup>100</sup> CPL, art. 1, (1996) (P.R.C.).

<sup>101</sup> Generally, Chen Weidong, *Research on the problems in the implementation of the 1996 CPL* [xing shi susongfa shishi wenti duice yanjiu], (2002).

<sup>102</sup> For convenience and consistency in the thesis, the prosecutor also refers to people's procuratorate because the prosecutor is an agent of the People's Procuratorate.

<sup>103</sup> Under the 1996 CPL, these offenses are charged by the prosecutor in China.

<sup>104</sup> CPL, art. 3, chapter II, (1996) (P.R.C.).

<sup>105</sup> CPL 1996, art 43, *see also*, the Interpretations on the implementation of the 1996 CPL by SPC in 1998, art, 61.



Second, the prosecutor's discretion is powerful in the process of investigation and indictment in spite of certain limitations imposed on the prosecution. Under the 1996 CPL, prosecutors are responsible for the approval of arrests, investigations, and the initiation of public prosecution.<sup>106</sup> Prosecutorial discretion in dismissing a charge is limited to three categories, namely cases without sufficient evidence, cases with suspicion of evidence, and cases with distinguished minor offenses.<sup>107</sup> China's public prosecutors are recruited, educated, trained, and regulated almost in the same way as judges. In reality, the prosecutors' office is regarded as a part of the judiciary because the prosecutors can monitor the process of investigation by the police and oversee the trial.<sup>108</sup> In practice, the prosecutors are always reluctant to cooperate with the defense counsels because they think the defense counsel may impinge on their prosecutorial power. For instance, in the process of discovery, prosecutors have often rejected to yield critical, potentially exculpatory information, such as statements of the defendant, physical evidence, witness testimony, and other important documents favoring the defendant.<sup>109</sup> The defense counsel, in contrast, must obtain permission from the prosecutor and the judge to question the victim or other witnesses before the trial. It is taboo for the defense counsel to question a witness in person before the trial because the defense counsel could possibly be arrested and indicted for perjury by the prosecutor. Although the defense counsel has the right to require the court to issue a warrant to abating evidence from witnesses who refuse to provide testimony, judges are often reluctant to provide such assistance.

Third, the judges have the final say and the obligation in fact finding. Under the 1996 CPL, the prosecutor and the defense counsel or the defendant should present evidence to the court and interrogate the witness and debate on the alleged facts. However, traditionally, people in China would attribute blame on the judge if the judge could not discover what really happened in the case. The 1996 CPL still left the room for

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<sup>106</sup> CPL, art. 3, (1996.) P.R.C.

<sup>107</sup> *Id.* art, 142.

<sup>108</sup> Constitution of P.R.C. (Zhonghua Renmin Gongheguo Xianfa), art. 129 (1982) (P. R.C.) (the Supreme People's Procuratorate is the supervisory organ of the law); *see also*, CPL, art. 8, (1996).(P.R.C.) (the People's Procuratorates, shall, in accordance with law, exercise legal supervision over criminal procedure).

<sup>109</sup> Generally, Chen Weidong, *Research on the problems in the implementation of the 1996 CPL*[xing shi susongfa shishi wenti duice yanjiu], (2002).

judges to interrogate the witness and collect evidence during the trial. So judges in China have more responsibilities in fact finding than their counterparts in the United States. Under the 1996 CPL, judges have power to interrogate the defendant and to collect evidence out of court, if necessary.<sup>110</sup> The equal status between the prosecutor and the defendant may be impaired when the judge has more power in the investigation and fact finding. This shakes the very foundation of the adversarial model in criminal procedure. The essentially inquisitorial nature in truth findings and the participation of the judge in the investigation leave little room for the defendant's autonomy in plea proceedings.

## **2. Increasing Crimes v. Hard-striking Campaigns**

### **(1) Increasing crimes**

The rate of crime in China has been increasing in recent decades due to the rapidly growing economy and the "open door policy." The problem of crime has twisted of the development of economy and security of society. Compared to some countries, such as the United States, France, Germany and Russia, China still has a low crime rate;<sup>111</sup> however, China's crime rate has undergone a sudden surge in some major crimes, including homicide, armed robbery, trafficking, corruption, and cases involving interfering with the economic order. For instance, during 2003-2007, except for cases heard by the Supreme People's Court (SPC), all courts at different levels in China heard around 3,385,000 first instance cases, which is an increase of 19.61% over the last period (1998-2003). The cases that related to bombing, homicide, abduction, and robbery amounted to 1,200,000, which was an increase of 10.09% over the same period; the cases that related to counterfeiting and shoddy products, trafficking, impinging on the financial system reached 80,000, which was an increase of 11.76% over the same period; the cases that involved the violation of intellectual property law amounted to 2,962, which is an increase of 1.33% over the same period; and the cases that related to corruption, bribery,

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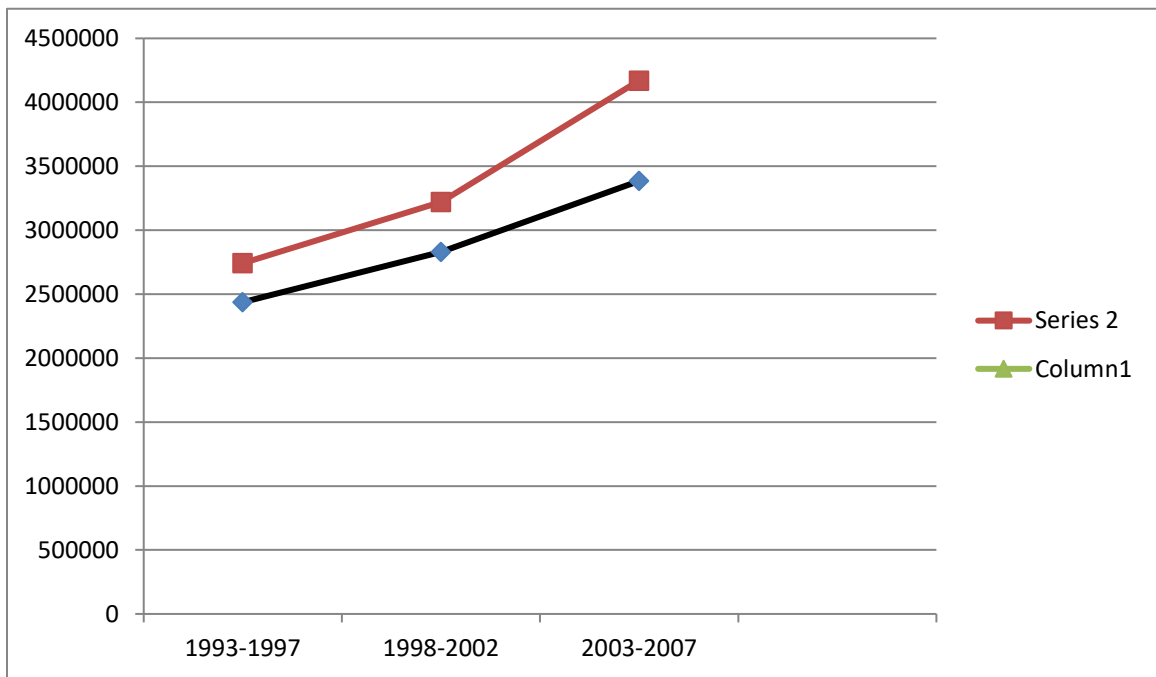
<sup>110</sup> CPL, art 155,158 (1996) (P.R.C.).

<sup>111</sup> China crime rate ranks 41 among 100 countries in the world, available at <http://www.Nationmaster.com/country/ch-china/crime> ([Seventh UN Survey](#) summarized at NationMaster.com).

the misconduct of officials on duty exceeded 120,000, which is a rise of 12.5% over the same period.<sup>112</sup>

The following graph (Figure 1) indicates the surge of increasing criminal cases (series 1) and criminals (series 2) determined by courts every five years during 1993-2007. The graph clearly shows that crime has been on the rise in China over the decades. During 1993-1997, the numbers of criminal cases and criminals determined by the courts at different levels were 2,437,426 and 2,742,133, respectively. However, in the period of 2003-2007, the numbers respectively rush to 3,385,000 and 4,170,000.<sup>113</sup>

Figure 1: The Trend of Increasing Criminal Cases and Criminals Every Five Years, 1993-2007



Sources: Ren Jianxin, *Supreme People's Court Work Report* (1998); Xiao Yang, *Supreme People's Court Work Report* (2003), (2008).

Note: Series 1 refers to the change of criminal cases filed in courts every five years during 1993-2007.

<sup>112</sup> Xiaoyang, *Supreme People's Court Work Report* [Zuigao renmin fayuan gongzuo baogao], 10 March 2008, available at <http://www.xinhuanet.com/2008lh/gzbg/20080310a.htm>.

<sup>113</sup> The graph is made by myself in accordance with the statistics from, *Supreme People's Court Work Report* (Ren Jianxin 1998), and *Supreme People's Court Work Report* (Xiao Yang, 2003, 2008). In China, the chief justice of SPC is required to report the work of trial to NPC every year.

Series 2 indicates to the change of criminals determined by courts every five years during 1993-2007.

## (2) Hard-striking Campaigns

In response to the challenge of the increase in crime, China's national government as well as local governments have been launching Hard-striking (*yan da*) campaigns to reduce the crime rate since the early 1980s. Hard-striking campaigns refer to a hard measure in which the law enforcement agencies are authorized to dispose criminal cases by simplifying the legal process to arrest and punish the accused speedily and severely. Generally, the national government and local governments initiate hard-striking campaigns to maintain the stability of the society when the social situation in security worsens or deteriorates. The Hard-striking campaigns are a powerful tool for the government to crack down on crimes in the short term, but the campaign deviated in the principles and rules established in the constitution, criminal law, and criminal procedure.

In the hard-striking campaigns, law enforcement agencies implemented the policy of the campaign often beyond the limitation of the law. Police officers were often required to fulfill the quotas for arrests, which easily resulted in forced confessions from the accused. To dispose the cases more quickly, necessary procedures, such as arrest warrants as well as the access to defense counsel were cut off or simplified. Also, hard-striking campaigns led to inconsistencies with precedence setting because the convictions and penalties imposed on criminals during hard-striking campaigns were more severe than those cases in the regular period. Consequently, the caseloads in police offices, procuratorates,<sup>114</sup> and the courts greatly increased during hard-striking campaigns, thereby resulting in illegal extended detentions for many criminals.

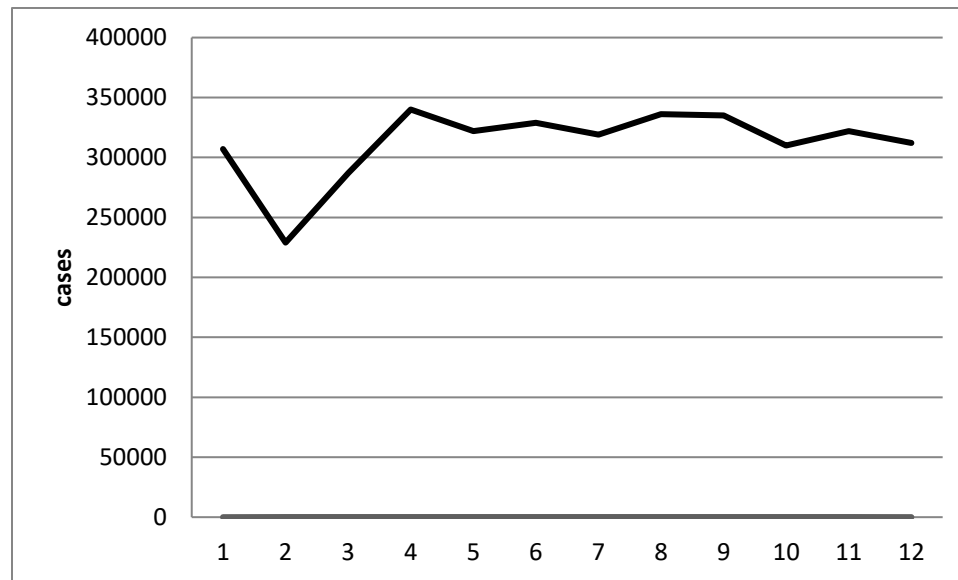
In practice, the hard-striking campaign does not bring a positive and effective impact on crime control. Figure 2 not only shows the public security agencies of national monthly investigated criminal cases in 2005, it also reveals the trend of criminal cases from January to May 2005, when the special hard-striking campaign focused on various

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<sup>114</sup>Under the 1996 CPL, the procuratorate refers to the office of prosecutors, which is in charge of the indictment and investigation of criminal cases in criminal procedure. The higher level of procuratorate has the power to supervise the lower level procuratorate.

gambling offenses was launched.<sup>115</sup> Although the effect of the hard-striking campaign led to the fall of criminal cases from April to May of the same year, crime was on the rise again during the other quarters of the year. This phenomenon shows that the positive effect of the hard-striking campaign is limited because this campaign only produces short-term crime control.

Figure 2: Public Security Agencies Monthly Investigations of Criminal Cases in China in 2005



Source: the website of the Ministry of Public Security of the People's Republic of China.

Note: In February of this year, Chinese people traditionally celebrated the Spring Festival, so the crime rate was regularly lower than that of other months.

Even though hard-striking campaigns have been condemned due to the lack of the protection of human rights,<sup>116</sup> this policy is still used by the national government and local governments to control crime. The government cannot find a more effective measure right now to replace the hard-striking campaigns in the face of surging criminal activity. Also, the public overwhelmingly supports the policy of the hard-striking campaign because serious crime threatens the security of the common people and the stability of society. For example, from July 10, 2008 to September 30, 2008, the police department of Chongqing city launched a widespread hard-striking campaign that resulted in the arrests of nearly 10,000 suspects in 80 days, jamming many of the city's

<sup>115</sup> Xinhua News Agency January 13, 2005.

<sup>116</sup> Xiao Han, *the Criticism and Assessment of Hard-striking* [shifei gongguo shuo yanda], Huanqiu Journal, (2005).

jails.<sup>117</sup> The media and public highly appreciated the campaigns that took place in Chongqing City.<sup>118</sup> Although the hard-striking campaigns achieved the needed goal of reducing the rising crime rate, different opinions have been voiced concerning the effectiveness of the campaign.<sup>119</sup> In the long run, the policy of hard-striking as a temporary instrument should be eliminated because of its obvious flaws in the protection of the accused suspects' human rights.

### 3. Heavy Caseload v. Summary Process

#### (1) Heavy Caseload

As a result of the increasing criminal rate, the caseloads in courts and procuratorates have accumulated on the docket recently.<sup>120</sup> In contrast, the number of judges, prosecutors and police increases slowly. One of the reasons for this slow increase is that the national government and local governments are unwilling to provide more resources to the judicial departments. The salary of judicial officials is so low that many officials have resigned to pursue higher-salaried positions.<sup>121</sup> Additionally, the low rate of passage of the National United Exam for the Legal Profession cannot satisfy the need for new members of the legal profession to work in some rural areas.<sup>122</sup> For example, Figure 3 shows the contrast between the increase in criminal cases and the decrease in the number of prosecutors during 2004-2006. The national government has taken great measures to recruit more qualified judicial officials, but the effect is not obvious.

Figure 3: Comparison between the Increasing Number of Criminal Cases and the Decreasing

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<sup>117</sup> Chongqing Evening News, *Nealy 10,000 Arrested and Jails Stuck* (80 tian daibu wanren kanshousuo baoman) available at <http://www.cqwb.com.cn/webnews/htm/2008/10/22/305255.shtml> (In the hard-striking campaigns, 9,512 suspects were arrested, and 32,771 criminal cases were accomplished in investigation within 80 days in Chongqing ).

<sup>118</sup> *Let the show become crazier if the Hard-striking Campaign was a show* (Chongqing yanda shi xiu? Rang zheyang de xiu laide zai menglie xie ba), available at <http://qzone.qq.com/blog/23272059-1224689741>; see also, *Supporting the Hard-striking Campaigns(xiexie zhich yanda)*, available at <http://qzone.qq.com/blog/23272059-1224689741>

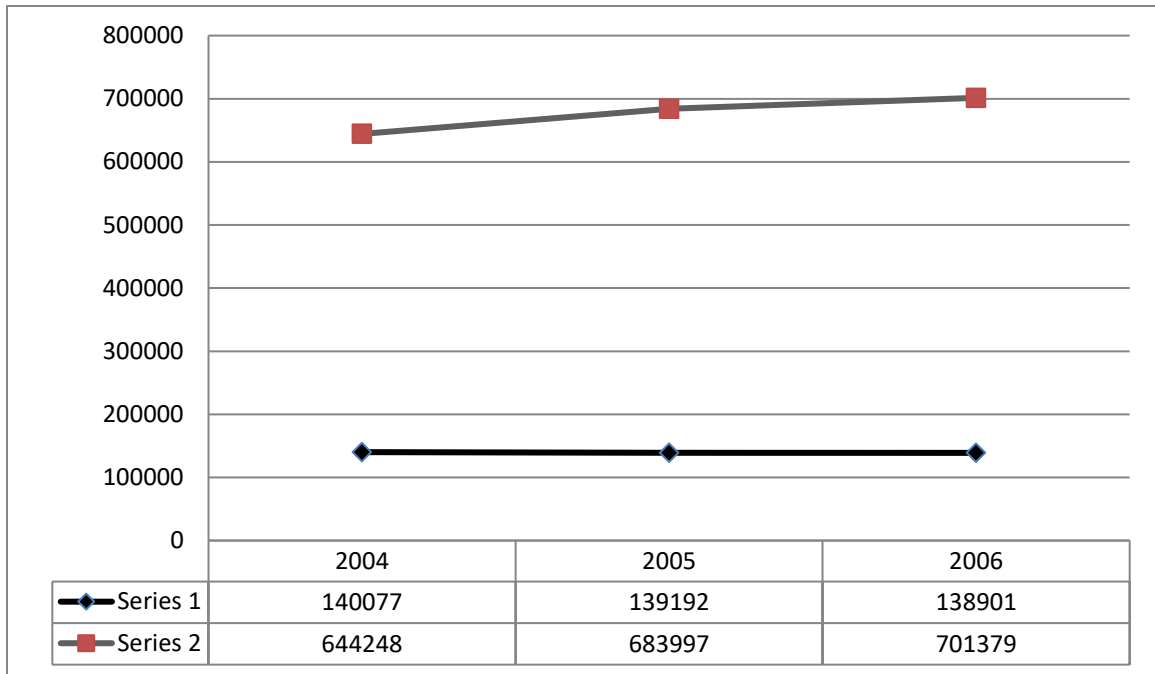
<sup>119</sup> Wei,Bohe, *My point of view on the Hard-striking Campaign in Chongqing* (Chongqing yanda zhi wojian), available at <http://laws.sinoth.com/Doc/article/2008/10/22/server/1000026748.htm>.

<sup>120</sup> See Figure 1.

<sup>121</sup> Zhao Yan, *Thinking on Judges' Doing Business after Resignation*, Tianjing Lawyer, Vol 1, 2005.

<sup>122</sup> In 2007, the rate of passing the National Judicial Examination in China rose to 22.39% from around 13% in previous years. Available at <http://www.51test.net/show/50906.html>. However, the need of the legal profession in some areas cannot be resolved in the short time.

Number of Prosecutors in China, 2004-2006



Sources: Xiao Yang, the Supreme Court work report (2004), (2005),(2006); Xinhua News Agency, March 10, 2008.

Note: Series 1 refers to the change of the number of prosecutors of all country during 2004-2006. Series 2 indicates the change of the number of criminal cases determined in first instance courts of all countries during 2004-2006.

As a result of the heavy caseloads, the problem of illegal extended detention is widespread in the practice of the criminal justice system. The 1996 CPL has provisions for the time limitation in the process of detention in investigation, indictment and trial. It is easy, however, for judicial officers to circumvent the provisions and extend the detention period. A suspect may be in custody for seven months or longer before the process of the trial begins if he/she is found to have committed other crimes during the period of detention.<sup>123</sup> Even with such a long detention allowed under the 1996 CPL, the number of suspects currently in custody with illegal extended detentions is exceptionally high. In some extreme cases, the length of the detention is surprising. For example, in 2003 a popular newspaper in China reported a shocking case involving illegal extended

<sup>123</sup> CPL, art 124. (1996) (P.R.C.).

detention where a farmer had been in custody for 28 years but had never been formally charged with a crime.<sup>124</sup>

To address the problem of illegal extended detention, in the spring of 2003 Chinese courts and other law enforcement agencies launched a major public campaign to eliminate “illegal extended detention.”<sup>125</sup> In the beginning, law enforcement agencies were reluctant to carry out the policy of the campaign. In the fall of 2003, the Supreme People’s Court (SPC) and the Supreme people’s Procuratorate (SPP)<sup>126</sup> jointly issued the notice that set time limits for law enforcement agencies throughout the country to rectify the problem of illegal extended detentions. In March 2004, the SPP and the SPC reported that nearly 30,000 cases of extended detention in all stages of the criminal process had been cleared.<sup>127</sup> Nevertheless, there will continue to be a large number of cases related to illegal extended detentions in criminal procedure unless the financial and human resources are supplied to match the increasing crime.

## (2) Summary Process

Summary process under China’s criminal justice system refers to a mechanism in which criminal cases are disposed through a simplified process. The system not only benefits the government by saving national resources with efficient and fair judgments, but it also favors the defendants by getting concession of the charge or a lenient decision from the government. In China’s criminal justice system, summary process includes summary procedure and simplified procedure. In general, summary procedure refers to the process in which cases involving private prosecution or minor offenses shall be summarized and tried by a single judge whereas simplified procedure indicates the

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<sup>124</sup> The farmer from Guangxi, had initially been detained in 1974 on suspicion that he possessed an “enemy” leaflet. “Chinese Peasant Detained Without Charges for 28 Years,” citing from Southern Weekend [Nanfang zhoumo], June 12, 2003.

<sup>125</sup> “China’s Public Prosecutors Crack Down on Illegal Prolonged Detention,” Xinhua Agency, July 22, 2003. See also, Zhu Daqiang “China Moves Against Extended Detention,” China News Agency [Zhongguo xinwenshe], August 3, 2003.

<sup>126</sup> Supreme People's Procuratorate is the highest agency at the national level responsible for prosecution in the People's Republic of China. Hong Kong and Macau, as special administrative regions, have their own separate judicial systems, based on common law traditions and Portuguese legal traditions respectively, and are out of the jurisdiction of the SPP.

<sup>127</sup> SPC Work Report, March 2004; SPP Work Report, March 2004. The SPP reported that it had handled 25,181 cases of extended detention. The SPC reported that it had handled 4,100 cases of extended detention involving 7,658 individuals, *available at* <http://www.xinhuanet.com/>.



process in which a case involving public prosecution shall be simplified and tried by the judicial panel based on the defendant pleading guilty.

In response to the increase in caseloads, China's law enforcement agencies, including the SPC, SPP and the Ministry of Justice of China (MJC) enhanced the adoption of summary process in criminal procedure early in 2003. The 1996 CPL provides summary procedure to be applied in certain minor cases, but its role is much limited.<sup>128</sup> In March 2003, the SPC, SPP and MJC jointly issued two regulations that respectively provided for summary procedure in regular cases with public prosecution and simplified procedure in public prosecution cases with the defendant pleading guilty.<sup>129</sup> The two regulations attempt to deal with the problems of efficiency without going so far as to adopt American-style plea bargaining.<sup>130</sup> The first interpreted regulation clarifies and details the summary procedure in Article 174 in the 1996 CPL to promote its implementation in misdemeanor cases.<sup>131</sup> Another regulation relates to simplified procedure applying to cases in instances in which the defendant raises no objection to the basic facts and voluntarily admits guilt.<sup>132</sup> The two regulations try to expedite the disposition of certain

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<sup>128</sup> Article 174 in the 1996 CPL provides that "the People's Court may apply summary procedure to the following cases, which shall be tried by a single judge alone: (1) cases of public prosecution where the defendants may be lawfully sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or punished with fines exclusively, where the facts are clear and the evidence is sufficient, and for which the People's Procuratorate suggests or agrees to the application of summary procedure; (2) cases to be handled only upon complaint; and (3) cases prosecuted by the victims, for which there is evidence to prove that they are minor criminal cases."

<sup>129</sup> The two regulations refer to "several opinions on applying summary procedures to try cases of public prosecution"[hereinafter Summary Procedures] and "several opinions on applying ordinary procedure to try cases in which the defendant pleaded guilty"[hereinafter Simplified Procedures].

<sup>130</sup> Randall Peerenboom, *Out of the Pan and into the Fire, Well-intentioned but Misguided Recommendations to Eliminate all Forms of Administrative Detention in China*, 98 Nw. U. L. Rev. 991, 1092, (2004).

<sup>131</sup> Under Summary Procedures, the trial is overseen by a single judge, as opposed to the usual panel of three judges in the normal procedure. If the defendant voluntarily confesses guilt, raises no objection to the charges or the facts of the case, and has nothing material to say in his own defense, the judge then issues a verdict. In keeping with the traditional emphasis on rehabilitation, judges are instructed to treat those who voluntarily admit guilt leniently. The judge will terminate the proceedings and revert to normal procedures if the defendant challenges the facts of the case, the facts are unclear, the evidence is insufficient, the defendant's conduct does not constitute a crime, or the defendant ought to be sentenced to more than three years in prison.

<sup>132</sup> Under Simplified Procedures, the court must inform the defendant of the relevant laws, explain the legal consequences of admitting guilt and using the simplified procedure, and reconfirm that the defendant agrees to have the case tried in accordance with the regulations. The court may examine the case file before the trial begins. In contrast to summary procedure, the case is still tried by a panel of three judges rather than a single judge. In the process, after the procuratorate reads the complaint, the panel asks the defendant's opinion about the facts and charges, verifies that the defendant has voluntarily confessed and

criminal cases; however, internal defects prevent the summary process from functioning smoothly and efficiently.

First, the scope of cases applied to summary process in ordinary cases is too narrow. Under Article 2 of Summary Procedures, summary procedure cannot be applied to a case of the public prosecution when the case is involved in, for example, a joint complicated offense; the defense of the innocent; the defendants of those who are blind, deaf or mute; or other circumstances in which the case should not be applied to the summary procedures. Also, under Article 10 of Summary Procedures, the court should terminate the summary procedure and move to ordinary procedure when the court discovers, for instance, the behavior of the defendant charged does not constitute a criminal offense; the defendant will probably be sentenced for more than three years imprisonment; the defendant denied the indictment of the criminal facts in person in the trial court; the fact is obscure or the evidence of the charge is insufficient.<sup>133</sup>

Second, the discretion of the prosecutor in the summary process is too limited to expedite the disposition of criminal cases. Based on the experience of Japan, the judicial practice shows the effective discretion of the prosecution in the processing of criminal cases is an effective measure to expedite the disposition of the caseload.<sup>134</sup> Under the 1996 CPL, the prosecutor's power was limited within the indictment and investigation in official corruption and misconduct offenses. Under Summary Procedures, the prosecutor has the power to recommend summary process be applied to the case. However, the prosecutor has no power to intervene and influence the final decision of the case.

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agreed to the simplified proceedings, and verifies that the defendant understands the potential legal consequences of admitting guilt. All evidence that is disputed must be investigated and verified. The panel will then take up any disputed issues before issuing the sentence. Again, those who voluntarily confess should be treated leniently. When these simplified procedures are used, the panel generally should announce the verdict immediately after the hearing. If the court discovers during the proceeding that the circumstances are not appropriate for simplified procedures, then it ought to revert to ordinary procedures.

<sup>133</sup> Under Simplified Procedures, the following cases shall not apply to the simplified procedure: (1) criminal cases in which the defendants are blind, deaf or mute; (2) criminal cases in which the defendants might be sentenced to the death penalty; (3) criminal cases in which the defendants are foreigners; (4) criminal cases suggesting a significant effect on society; (5) criminal cases in which the defendants might be innocent although they plead guilty; (6) joint committed offense cases in which one of defendants does not plead guilty or disagrees to the trial through the simplified procedure; and (7) other criminal cases not fitting the requirements of Simplified Procedure. The aforementioned restricted provisions in summary process not only limit the scope of cases applied to summary process but also provide more discretion to the court in the determination of whether a case should enter summary process.

<sup>134</sup> Mark D. West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 *Colum. L. Rev.* 684, 688 (1992).

Although the prosecutor has the power to decide whether to be present at the trial, most prosecutors would not like to appear in the trial court.<sup>135</sup> Similar to the power in the summary procedure, under Simplified Procedures, the prosecutor has the power to determine whether the case is applicable to the simplified procedure and to recommend it to the court. If permitted by the court, the prosecutor should provide all evidence and files to the court and appear at the trial when the case is heard by the court. Generally, the role of the prosecutor is so trivial or frivolous in the summary process that he/she often shows indifference in the summary case, whereby the burden on the judge is increased and the effect of summary process weakened.

Third, the right of the defendant in summary process is restricted within too narrow a field. The two regulations do not provide the right of the defendant to effective defense assistance in the summary process. Under Summary Procedure and Simplified Procedure, access to the defense counsel for the defendant in summary process is not mandated by the authority. Also, in summary process the defendant cannot be guaranteed by the government to receive a lenient sentence. In Summary Procedure, the defendant cannot get a lenient decision just based on the case entering the summary process. In Simplified Procedure, the defendant may get a lenient decision if he/she pleads guilty and agrees to make the case enter simplified summary, however, the defendant cannot bargain for a lenient sentence with the prosecutor or the judge.

Fourth, victim rights are ignored in summary process even though the 1996 CPL has entitled various rights to the victim. Neither Summary Procedures nor Simplified Procedures refers to the rights of the victim. In the summary procedure, if a victim files a civil case attaching to the criminal trial to claim compensation from the defendant, the process of the trial will become more intricate unless the victim reconciles with the defendant. Most criminal cases in the summary process are involved with victims who will file a civil case against the defendant.

Therefore, in the final example, the summary process is not complete in some situations because the case tried in the summary process may enter the appeal process in the higher court. In accordance with the 1996 CPL, the defendant's right to appeal cannot

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<sup>135</sup> Lu Tong, *the Analysis On the Improvement of Summary Procedure [lun jianyi chengxu de wanshan]*, available at [www.chinalawedu.com](http://www.chinalawedu.com).

be deprived regardless of any reason.<sup>136</sup> In summary process, the defendant may appeal to the high court if he/she is not comfortable with the decision of the sentence from the court. In this respect, as a result of the appeal, the summary process may turn into a complicated process.

In sum, many problems are inherent in the current criminal justice system, which block the protection of human rights and the efficiency of disposing criminal cases. Although certain elements of the adversarial model were introduced into the 1996 CPL, the inquisitorial model dominates the entirety of the current criminal justice system because of the superior power held by the law authority agencies. Employing hard-striking campaigns as a temporary and informal legal measure in crime control cannot challenge the increasing crime rate. The summary process also cannot efficiently function in disposing caseloads because of its internal defects. Due to these problems, defendants and suspects encounter a lot of physical and spiritual risks, dangers and unfair treatment in the criminal justice system. Thus, all in all, the current system cannot effectively address the problems of caseloads and the protection of human rights in criminal justice, and it is necessary to establish a new framework to improve the criminal justice system in China.

### **III. International Experiences in Plea Bargaining**

There has been a trend in many countries to employ plea bargaining as an alternative summary process in criminal justice since the 1980s.<sup>137</sup> In addition to the United States, Germany, Italy, and France introduced in this section, India, Pakistan, Israel, Spain, South Africa, Argentina, Russia, Australia, Canada, Britain, Thailand are examples of countries that have also adopted plea bargaining to further the disposition of criminal cases.<sup>138</sup>

There are three reasons for the introduction of the practice of plea bargaining in the United States, Germany, Italy and France in this section. First, the United States as a

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<sup>136</sup> CPL, art 180, (1996) (P.R.C.).

<sup>137</sup> [http://en.wikipedia.org/wiki/Plea\\_bargain](http://en.wikipedia.org/wiki/Plea_bargain).

<sup>138</sup> *Id.*

common law country not only has a long history in the practice of plea bargaining but has also accumulated invaluable experience in plea bargaining. Second, the other three countries are typical civil-law countries in which features and backgrounds are similar to the inquisitorial model in the criminal justice system to China.<sup>139</sup> Third, these civil law countries have a relatively longer history in the implementation of plea bargaining than other civil law countries. The practical experience of plea bargaining in these countries can be the references for China to adopt the plea bargaining system.

### 1. Plea Bargaining in the United States

Plea bargaining is a distinctive part of the landscape in criminal justice in the United States. By the beginning of the 20<sup>th</sup> century, 50% of all cases were settled by guilty pleas in the US, the percentage rising to 80% in the 1960's and reaching 93-95% in 1994.<sup>140</sup> In the federal system the percentage of bargained for convictions is even higher.<sup>141</sup> "Guilty pleas, the first element of bargaining, began to be entered in more significant numbers in common law-based cases during the late 1830s."<sup>142</sup> Plea bargaining has been the dominant model in the criminal justice of the United States since the 1860s,<sup>143</sup> however, it had been secretive in criminal justice until the decision of the Supreme Court in *Brady v. United States* in 1970.<sup>144</sup> Since then, plea bargaining entered a new phase, whereby it brought about numerous pieces of legislation at the federal level, such as Rule 11 of Federal Criminal Procedure, ABA Standards for Criminal Justice,<sup>145</sup> and other legislation at the state level. Even though there has been much debate over whether plea bargaining

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<sup>139</sup> China has a similar context with these three countries in the inquisitorial style. For instance, the judge in these countries is actually a fact-finder unlike the passive arbitrator under the adversarial style; the prosecutor is a part of the judiciary unlike a part of executive of government; there are few evidentiary and exclusionary rules whereby the defendant is viewed as the first witness and the primary sources of eliciting evidence, and there are few jury trials in criminal justice.

<sup>140</sup> A.W. Alschuler & Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev, 867, 922-925 (1994).

<sup>141</sup> US Dep. Justice, Bur. Justice Stat, 2004; Felony sentences in state courts, 2002; Admin. Off. US Courts. 2004. Statistical tables for the federal judiciary, June 30, 2004.

<sup>142</sup> Mary E. Vogel, *Coercion to Compromise: Plea Bargaining, the Courts and the Making of Political of Authority*. 94 (2007); see also, Mary E. Vogel *The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860*, 33 Law & Soc'y Rev. 161,165 (1999).

<sup>143</sup> James E Bond, *Plea Bargaining and Guilty Pleas* (1983) .

<sup>144</sup> *Brady v. United States*, 397 U.S. 742 (1970) (the Court pointed out the positive aspects of plea bargaining, emphasizing that the practice benefits both sides in the adversary system).

<sup>145</sup> ABA Standards for criminal justice, 14-1.1--14-4.1.

should be banned;<sup>146</sup> it still effectively functions and exists as a well-entrenched institution in American criminal justice.<sup>147</sup>

### (1) American Style of Plea Bargaining

Plea bargaining as a typical institution in American criminal justice has its particular characters. The whole legal system in the United States includes not only that of the federal level but also the state level, thereby resulting in divergence in different levels and different states. However, there are three basic characters in plea bargaining in the United States.

First, the range of cases applied to plea bargaining is broad.<sup>148</sup> Not only minor offenses but serious offenses such as murder, homicide, and robbery can enter the process of plea bargaining. For this reason, the plea bargaining system can largely facilitate the disposition of criminal cases. In some jurisdictions, more than 95% of criminal cases were disposed through plea bargaining.<sup>149</sup> Although the prosecution has the power to exclude the case applied to plea bargaining based on some special reasons such as public interest, such situations have rarely occurred.

Second, plea bargaining is regulated by uniform standards which are widely acknowledged by the different jurisdictions. Despite various laws, rules and numerous precedents regulating plea bargaining in different jurisdictions, the standards for the implementation of plea bargaining are generally united or consistent. Summarizing those various requirements, the arraignment judge should address the defendant to ensure: (1) that the plea is “intelligent,” i.e., that the defendant understands the elements of the plea and any associated bargain; (2) that the plea is “voluntary”, i.e., that the defendant was not coerced into the plea; and (3) that there is some sort of factual basis for the plea.<sup>150</sup>

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<sup>146</sup> E.g., Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv. L. Rev (1984).

<sup>147</sup> Jacqueline E. Ross, *Criminal Law and Procedure: The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 Am. J. Comp. L. 717,718 (2006).

<sup>148</sup> Stephen C. Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*, vol. 11.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2007), <<http://www.ejcl.org/113/article113-34.pdf>>.

<sup>149</sup> *Id.*

<sup>150</sup> Accordingly, there are specific standards to regulate the above basic requirements. For instance, as for “intelligent,” the Federal Rules of Criminal Procedure prescribes that before the court accepts a plea of

Standard 14-1.3 in ABA Standards for Criminal Justice provides that “a defendant should not be called upon to plead until an opportunity to retain counsel has been afforded or, if eligible for appointment of counsel, until counsel has been appointed or waived.”<sup>151</sup> In sum, the United States provides the basic uniform and united standards for plea bargaining, although there are different rules and regulations in different jurisdictions in the United States.

Third, the plea agreement entered between the defendant and the prosecution is endorsed by the court as a contract.”When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”<sup>152</sup> If prosecutors break the agreement, the court may either permit defendants to pull out their guilty plea or force specific performance of the prosecutor's promise. Since the plea agreement is viewed as a contract, the judge, as a passive arbitrator in the process of plea negotiation, cannot be involved in setting the terms of plea agreement unless it violates the requirement of voluntariness, intelligence, and fact-support. In addition, the defense counsel has equal position with the prosecutor in the process of plea negotiation. During plea negotiation, the prosecution cannot threaten or coerce the defendant to plead guilty; otherwise, the plea agreement will be invalid.<sup>153</sup> The contract theory on plea bargaining reflects the fundamental spirit of the adversarial model in which the defense counsel has sufficient rights to contend the indictment from the prosecution.

## (2) Reforms of Plea Bargaining

While plea bargaining cannot be banned,<sup>154</sup> some scholars have made great efforts to introduce various suggestions to reform plea bargaining in the United States.<sup>155</sup> In recent

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guilty or *nolo contendere*, the court must inform the defendant of, and determine that the defendant understands, the right to be represented by counsel -- and if necessary have the court appoint counsel -- at trial and at every other stage of the proceeding.”

<sup>151</sup> ABA Standards for Criminal Justice 14-1.3.

<sup>152</sup> [Santobello v. New York, 404 U.S. 257, 261 \(1971\)](#).

<sup>153</sup> *Id.*

<sup>154</sup> Douglas D. Guidorizzi, *Should We Really Ban Plea Bargaining?* 47 Emory L.J. 753 (1998). (the efforts to reform plea bargaining have not been suspended in some jurisdictions. Only Alaska among 50 states officially banned plea bargaining, but Alaska's experience demonstrates the difficulty in maintaining a complete, long-term ban on plea bargaining)

years, some jurisdictions have attempted to readjust the mechanism of plea bargaining in response to the dissatisfaction from the public with the plea bargaining system.<sup>156</sup>

One of the reforms calls for effectively limiting the discretion of the prosecutors in plea negotiation.<sup>157</sup> The discretion of the prosecutor in the process of indictment is almost unlimited. An innocent person may plead guilty in the process of plea bargaining because the prosecutor may coerce the defendant through threats of overcharging and other verbal or non-verbal lures. In general, the prosecutor can make his decision in the process of plea bargaining “without reference to any guidelines or regulations, without any checks from other prosecutors or judges, without any requirement for reasons or explanations, without any input from the victim of the crime, and without exposure to the public view.”<sup>158</sup> For the limitation of the discretion of the prosecutors, most notably, the U.S. Attorneys' Manual ("Principles of Federal Prosecution") lists factors the prosecutors should weigh in assessing whether to enter into a plea agreement.<sup>159</sup> As for judicial review, the court should decide whether the prosecutor has appropriately weighed the applicability of aggravating and mitigating circumstances related to adjusting the presumptive sentence and whether the prosecutor has applied the provisions in terms of the strength of the state's evidence and the defendant's cooperation with law enforcement authorities.<sup>160</sup>

Some jurisdictions in the United States take on more judicial participation in the process of plea bargaining to prevent the coercion or threat imposed on the defendant from the prosecution. The *Florida Rules of Criminal Procedure* provides the baseline for

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<sup>155</sup> E.g., Alschuler, Stephen Schulhofer.

<sup>156</sup> See generally Peter W. Greenwood et al., *Prosecution of Adult Felony Defendants in Los Angeles* (1973) (study of Los Angeles); Martin A. Levin, *Urban Politics And the Criminal Courts* (1977) (study of Pittsburgh); Eisenstein, *supra* note 90 (study of Baltimore and Chicago); Milton Heumann & Colin Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 L. & Soc'y Rev. 393 (1979) (study of Detroit); Schulhofer, *supra* note 71 (study of Philadelphia); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. Pa. L. Rev. 439, 441-42 (1971) (study of Philadelphia).

<sup>157</sup> E.g., the reforms in Florida, Alaska, and Connecticut.

<sup>158</sup> Donald G. Gifford, *Meaningful Reform of Plea Bargaining: the Control of Prosecutorial Discretion*. 1983 U. Ill. Rev. 37, 61 (1983).

<sup>159</sup> Principle of Federal Prosecution, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title1/7mdoj.htm#1-7.530](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title1/7mdoj.htm#1-7.530).

<sup>160</sup> Donald G. Gifford, *supra* note 83.



judicial participation in plea bargaining, which allows judges to advise the parties, prior to the acceptance of a plea, “whether factors unknown to the parties at the time may make the judge's concurrence to the plea impossible.”<sup>161</sup> Also, the state of Connecticut has endorsed more active involvement by judges in the plea discussions.<sup>162</sup> In Connecticut, the judge moderates between the parties' positions and, in some cases, directly offers views on the plea bargains merits.<sup>163</sup> The Connecticut Supreme Court has acknowledged that it is common practice in the state for the presiding criminal judge to conduct plea negotiations with the parties.<sup>164</sup> Another reform focused on the bench trial to replace plea bargaining, an alternative of plea bargaining. Professor Stephen Schulhofer suggested that “the simple solution is to discourage plea bargaining; in fact you can prohibit any concessions for pleading guilty and also discourage jury trials by giving defendants an incentive to give up the jury only and take their case to a trial before a judge.”<sup>165</sup> In reality, this idea was inspired by the practice of the bench trial system in Philadelphia where more than 50 percent of cases are tried before a single judge.<sup>166</sup>

Another significant reform in plea bargaining is an increase in the extent of statutorily-mandated consultation between prosecutors and the victims of crime.<sup>167</sup> The prosecutor should consider the wishes of the victim in determining whether to accept the defendant’s guilty plea. The victim has the statutory right “to be reasonably heard “at any public court proceeding”“involved in release, plea, sentencing, or any parole proceeding.”<sup>168</sup> The Federal Rule, *Rules 11 of the Federal Rules of Criminal Procedure*, does not explicitly allow for victim participation in plea bargaining proceedings, but the updated Rule 60 of *The Federal Rules of Criminal Procedure* entitles the victim to participate in some proceedings in criminal procedure, including

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<sup>161</sup> Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 Am. J. Comp. L. 199, 238 (2006).

<sup>162</sup> In Connecticut, a judge is free to participate in plea negotiations with the defendant as long as he does not preside at trial if negotiations prove unsuccessful. *State v. Niblack*, 596 A. 2d 407 (Conn.1991).

<sup>163</sup>*Id.*, at, 199,238.

<sup>164</sup> [State v. Revelo, 775 A.2d 260, 268 \(Conn. 2001\).](#)

<sup>165</sup>“I interview Stephen Schulhofer,” available at <http://www.pbs.org/wgbh/pages/frontline/shows/plea/interviews/schulhofer.html>.

<sup>166</sup> *Id.*

<sup>167</sup> Mary Patrice Brown and Stevan E. Bunnell, *Negotiation Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, Am. Crim. L. Rev. 1063, 1090 (2006).

<sup>168</sup> [18 U.S.C. § 3771\(a\)\(4\)](#).

the right for the victim to participate in the plea bargaining process.<sup>169</sup>“The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.”<sup>170</sup> In addition, *ABA Standards for Criminal Justice 14-3.1 (e)* calls upon the prosecuting attorney to make “every effort to remain advised of the attitudes and sentiments of victims and law enforcement officials” before reaching a plea agreement with the defendant. In addition, *14-1.8(a)(iii) of ABA standards for Criminal Justice* recognizes that charge or sentence concessions also are appropriate where the defendant demonstrates genuine consideration for the victims of the crime, either by agreeing to make restitution or by sparing the victims the ordeal of a public trial.<sup>171</sup>

## 2. Plea Bargaining in Civil law Countries

Since the 1980s, more and more countries have been adopting plea bargaining in their criminal justice system.<sup>172</sup> For instance, Germany, Italy, and France successfully initiated their style of plea bargaining, which functions effectively right now. Although American-style plea bargaining positively influenced these civil law countries in the implementation of plea bargaining, these three countries supply another experience in the adoption of plea bargaining.<sup>173</sup>

### (1) Plea Bargaining in Germany

Germany is a typical civil law country which has a long history in the inquisitorial model of criminal procedure. The origin of *Absprachen* (plea bargaining) in the German criminal justice system can be traced back to the early 1970s.<sup>174</sup> At first, it was practiced on a relatively small scale without legal foundation and was limited to special cases

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<sup>169</sup> Fed R Crim Proc Rule 11, 60.

<sup>170</sup> Fed R Crim Proc Rule 60(a) (3).

<sup>171</sup> ABA standards for Criminal Justice, 14-1.8(a)(iii).

<sup>172</sup> Stephen C. Thaman, *supra* note 73, at 20,22.

<sup>173</sup> Stefano Maffei, *Negotiations on Evidence and Negotiations on Sentence –Adversarial Experiments in Italian Criminal Procedure*. ICJ 2.4 (1050)

<sup>174</sup> Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468, 489-93, 503 (1974).

mainly related to petty crimes.<sup>175</sup> As it became more widely practiced in the early 1980s, the practitioners thought it is necessary to legitimize its existence.<sup>176</sup> Therefore, plea bargaining is practiced in Germany on a large scale and roughly twenty to thirty percent of all cases are concluded through the process of plea bargaining.<sup>177</sup> In German, plea bargaining takes on the following three distinctive characteristics differentiated from American style.

Under *Absprachen*, the judges actively intervene in plea negotiation, openly discussing the merits of the case and the range of acceptable dispositions. “In this judge-manager system, the role of the judge is to be neither a passive umpire between the parties nor an active investigator. Rather, it is to assure that criminal cases are processed as quickly as possible.”<sup>178</sup> At the German trial, it is the judge who calls and interrogates the witnesses. On his own motion, he must take all evidence he considers necessary to determine the defendant's guilt and to set appropriate punishment.<sup>179</sup> The German Federal Supreme Court in its decision of August 28, 1997, analyzed in detail for the first time the requirements that plea agreements must meet in order to be admissible. Among these requirements, there must be no violation of the judicial duty to determine the truth.<sup>180</sup> That means the court has responsibility in the fact finding in the case which fits in the process of plea bargaining. Unlike German judges, American judges play a passive role in the process of plea bargaining, and thus few interfere with the process of plea negotiation between the prosecution and the defense. The defendant may make an offer to confess in exchange for a lenient sentence or dismissing a certain charge, which may happen between the trial judge and the defense during trial preparation or during trial because not all actors must participate in the process of bargaining.<sup>181</sup> Under *Absprachen*, the performers of plea bargaining are not usually the prosecution and the defense but

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<sup>175</sup> Joachim Hermann, *Bargaining Justice—A Bargain for German Justice?* 53 U. PITT. L. REV. 755, 755 (1992).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Maximo Langer, *From Legal Transplants to Legal Translations: the Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int’L. J.1, 25, at 44 (2004).

<sup>179</sup> Joachim Hermann, *supra* note 100, at 755, 760.

<sup>180</sup> BGHSt 43, 195 (F.R.G.), *see also*, Maximo Langer, *supra* note 103 at 43..

<sup>181</sup> Maximo Langer, *supra* note 103.

rather the judge and the defense. This is the biggest difference from the style of the United States.<sup>182</sup>

Unlike the American style of plea bargaining, the range of cases applied to plea bargaining in Germany is much more limited within the misdemeanor cases. The German Code of Criminal Procedure authorizes the prosecutor in misdemeanor cases to offer to terminate proceedings on the condition that the accused, for example, agrees to pay a sum of money to a charitable organization or to the state.<sup>183</sup> Because German misdemeanors cover certain crimes that would be considered felonies under American law, such as larceny, embezzlement, fraud, most drug offenses and most crimes against the environment, the German Code of Criminal Procedure actually gives the German prosecutor quite a broad discretionary power in the process of plea negotiation.<sup>184</sup> Furthermore, the prosecutor has the discretion to end proceedings if the case involves public interest.<sup>185</sup>

Also, plea bargaining under a confession of the defendant in Germany does not mean the defendant waives the right to a trial but rather causes a summary trial.<sup>186</sup> Negotiations regarding a confession are conducted between the defense counsel and the prosecutor as long as the prosecutor has not brought a formal charge.<sup>187</sup> The result of such negotiations is usually the promise of a confession in exchange for the prosecutor's offer to limit the charge to one of several offenses the accused has allegedly committed.<sup>188</sup> The prosecutor may also offer to move at the trial for a lenient sentence. Actually, the German trial combines the two phases of guilt determination and sentencing.<sup>189</sup>

Another distinctive feature of plea bargaining in Germany is the procedure of penal orders with plea bargaining. Compared to American plea bargaining, the process of

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<sup>182</sup> *Id.*

<sup>183</sup> Section 153a, added in 1975 to German Code of Criminal Procedure.

<sup>184</sup> Joachim Hermann, *Bargaining Justice—A Bargain for German Justice?* 53 U. PITT. L. REV. 755, 757,758 (1992).

<sup>185</sup> *Id.* at 758.

<sup>186</sup> *Id.* at 763.

<sup>187</sup> *Id.* at 764.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

penal order seems more efficient because it can save much time and resources of law enforcement. This written and summary procedure aims to ameliorate the problem of the backlog of routine misdemeanor cases, and in these cases there is sufficient evidence of the accused's guilt and he/she is expected not to object.<sup>190</sup> In such cases, the prosecutor may apply to the judge for a penal order rather than moving for a trial. The prosecutor prepares a draft of the penal order which shows the details of the case and requests a specific fine.<sup>191</sup> No sanction beyond a fine, or in traffic cases, suspension of a driver's license, may be imposed by a penal order.<sup>192</sup> The prosecutor's draft is, together with the official file of the case, submitted to the judge who routinely signs it without examining the merits of the case. The penal order is then sent to the accused by registered mail.<sup>193</sup> The process of penal order actually plays an important role in the process of plea bargaining. This process is much different from American plea bargaining because the defendant should appear in the court where the judge may review the process of plea negotiation and determine whether the plea agreement entered is under voluntariness and intelligence of the defendant.

## (2) Plea Bargaining in Italy

In 1989, Italy adopted a new criminal procedure code (hereafter C.P.P.) that replaced the Rocco Criminal Procedure Code enacted during Mussolini's regime, in which *patteggiament* (plea bargaining) was established.<sup>194</sup> Under the *patteggiamento*, the defense and the prosecution can reach an agreement about a sentence and request that it be imposed by the judge.<sup>195</sup> Through the plea agreement, the regular sentence can be reduced by up to one third if the reduced sentence will not exceed five years of imprisonment.<sup>196</sup>

Similar to German *Absprachen*, there is judicial participation in *patteggiamento*. Judges were granted powers to intervene in the process of negotiation and to disregard

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<sup>190</sup> *Id.* at 761, 762.

<sup>191</sup> *Id.* at 761.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Maximo Langer, *supra* note 103, at 46.

<sup>195</sup> C.P.P. art. 444-48 (Italy).

<sup>196</sup> C.P.P. art. 444.1 (Italy).

the agreement entered between the prosecutor and the defendant.<sup>197</sup> Upon examining the case's dossier, if the judge does not find sufficient reason to acquit the defendant,<sup>198</sup> and considers the charge and sentence to be proportional to the offense, he/she will apply the requested punishment.<sup>199</sup> Under C.P.P., the judge can decide to acquit the defendant after examining the evidence collected in the written dossier and before accepting the agreement.<sup>200</sup> This decision not to introduce an explicit admission of guilt with the *patteggiamento* is another reflection of due process concerns.<sup>201</sup> Also, when the prosecutor does not accept an agreement with the defendant, the latter can ask the judge at the end of the trial to examine the reasons given by the prosecutor to reject such an agreement, and to give him the benefit of the one-third reduction of the sentence.<sup>202</sup> This means the judge in *patteggiamento* has the power to review the decision of the prosecutor in denying the defendant application in plea bargaining. Unlike German judicial participation in plea bargaining, the actors of plea bargaining in Italy are usually the prosecutor and the defense.

Another feature of plea bargaining in Italy is that there is no guilty plea or explicit admission of guilt by the defendant before the trial in the *patteggiamento*. The legislator of criminal procedure was afraid that the acceptance of a guilty plea from the defendant before the trial would weaken the basic principle of the presumption of innocence assured to all defendants by the Italian Constitution.<sup>203</sup> By requesting the application of the sentence, the defendant waives his right to a trial and may be implicitly admitting his guilt. Similar to *Absprachen* in Germany, the judge under *patteggiamento* actually plays a substantial role in the fact finding and evidence collection.

In addition, similar to *Absprachen*, the cases applied to plea bargaining is limited. Italy originally limited plea bargaining to minor cases in which the final sentence could

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<sup>197</sup> *Id.*

<sup>198</sup> C.P.P. arts. 444.2, 129 (Italy)..

<sup>199</sup> C.P.P. art. 444.2 (Italy).

<sup>200</sup> C.P.P. arts. 444.2, 129 (Italy).

<sup>201</sup> William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 23 (1992).

<sup>202</sup> C.P.P. art. 448.1 (Italy).

<sup>203</sup> William T. Pizzi & Luca Marafioti, *supra note* 126.

not be more than two years.<sup>204</sup> In 2003, the range of cases eligible for plea bargaining was broadened where the sentence applied to plea bargaining does not exceed five years of imprisonment after sentence reduction, and the sentence reduction bargained for by the parties cannot be greater than one-third of the regular sentence for the case.<sup>205</sup> Not only does Italy limit the range of sentence applied to plea bargaining, but it prohibits the charge bargaining in the process of *patteggiamento*. At least as it was originally designed by the legislators, the bargain can only apply to the sentence, not to the charge or charges.<sup>206</sup> This is quite different from the United States where the charge bargaining is widely employed by the parties in the process of plea negotiation. In large part because of the limitation in the range of cases eligible for plea bargaining, the effect of *patteggiamento* in reducing the backlog of cases is pretty limited, and it is estimated 85 percent of all criminal cases go to trial, even though the system of *patteggiamento* is similar to the style of America.

### (3) Plea Bargaining in France

In June 1999, the plea bargaining (*composition*) was adopted in Articles 41-2 and 41-3 of the French Criminal Procedure Code.<sup>207</sup> While hardly bearing any resemblance to the American style, French plea bargaining has its own distinct features. According to the *composition*, before the beginning of the formal proceedings, the prosecution may offer the defendant the option of diverting his case from the standard criminal trial in exchange for an admission of guilt and the fulfillment of a condition such as paying a fine, turning over any objects used to commit the offense (or objects obtained in the course of the offense), forfeiting his driving or hunting license for a certain period of time, doing community service work, and/or repairing the damage done to the victim.<sup>208</sup> If the defendant accepts the offer, the prosecutor requests that it be validated by the judge. If

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<sup>204</sup> William T. Pizzi, Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*. 25 Mich. J. Int'l L. 429, 438 (2004).

<sup>205</sup> C.P.P. art. 444.1 (Italy).

<sup>206</sup> Maximo Langer, *supra* note 103, at 50 (2004).

<sup>207</sup> *Id.* at 59.

<sup>208</sup> *Id.*

the defendant does not accept the offer, or does not fulfill the conditions of the agreement, the prosecutor simply initiates the formal proceedings.<sup>209</sup>

The *composition* is much more different from American plea bargaining. There is the common feature, in which both can include negotiations between the prosecutor and the defendant, and the latter has to admit his guilt as part of the agreement.<sup>210</sup> However, aside from this, the *composition* hardly resembles the American model. The types of cases eligible to the *composition* is limited to certain cases with offenses specifically listed in the French Code, such as simple assault, threats, simple robbery, criminal damages, criminal libel and slander, cruelty against animals, possession of certain weapons, or driving while intoxicated, among others.<sup>211</sup> In this aspect, like *Absprachen* and *patteggiamento*, it is only applied to non-serious offenses. In addition, the application of the *composition* does not have the legal effect of a guilty verdict. Furthermore, unlike the counterpart in America who is understood to be in an equal bargaining position with the defense, the prosecutor in the *composition* does not negotiate with an equal but takes control over a person who has breached the law and may commit new offenses in the future.<sup>212</sup> The defendant must accept the prosecutor's offer and admit his guilt, not as a party who can end the dispute with his consent, but rather as part of his own process of neutralization, rehabilitation, and reparation to the victim.<sup>213</sup>

Compared to *Absprachen* and *patteggiamento*, the *composition* has similarities, such as the limitation in the range of cases eligible for plea bargaining and judicial participation in the process of plea bargaining, but also has some significant divergences. For example, unlike *Absprachen* in Germany, *composition* in France focuses on decriminalization which is combined with the correctional function. That means the direct goal of *composition* is different from that of *Absprachen* and *patteggiamento* which aim to reduce the caseload in criminal justice. *Composition* creatively combined with the correctional and restorative functions deviates the routine approach in the disposition of the caseload through plea bargaining. Unlike *patteggiamento*, under

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<sup>209</sup>C. PR. PEN. art. 41-42 (Fr.); *see also*, Maximo Langer, *supra* note 103, at 59.

<sup>210</sup>*Id.*

<sup>211</sup>*Id.*

<sup>212</sup>*Id.*

<sup>213</sup> Maximo Langer, *supra* note 103, at 60.



*composition* the victim of criminal cases enjoys sufficient right to make their voices heard in the process of pretrial and plea negotiation.

In addition, another difference between the French plea bargaining and *Absprachen* and *patteggiamento* is the adoption of charge bargaining in correctional court. Unlike the United States, most countries that have adopted plea bargaining always focus on sentence bargaining because it may avoid certain problems associated with charge bargaining, such as overcharging, undercharging, and inconsistent charging resulting from the discretion of the prosecutor. In order to circumvent abuses of the discretion of the prosecutor, many European countries, when adopting plea bargaining, clearly rejected the use of charge bargaining in the plea negotiation.<sup>214</sup> However, in France, prosecutors have broad charging discretion in the pre-filing context in which the defendant may cooperate with the prosecutor in correction court in exchange for not being rendered to the more severe procedure involving felony charges.<sup>215</sup>

### **3. Basic Experiences in Plea Bargaining from International Practice**

Generally, the United States and these three civil law countries vary in plea bargaining. However, based on my observations, from these four examples three basic experiences prove favorable to the adoption of plea bargaining in China.

First, judicial participation in plea bargaining can prevent the prosecutor from abusing the discretion in plea negotiation. Judicial participation in plea negotiation has three advantages: increasing the predictability of plea bargaining; enhancing the accuracy and fairness of the plea; and introducing more openness and transparency in the plea negotiations.<sup>216</sup> Not only do certain civil law countries adopt the judicial control style in plea bargaining, but some jurisdictions in the United States take on more judicial participation in the process of plea bargaining to prevent the coercion or threat imposed on the defendant from the prosecution.

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<sup>214</sup> Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?* 78 Calif. L. Rev. 542, 628 (1990).

<sup>215</sup> *Id.*, at 629, 631.

<sup>216</sup> Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 Am. J. Comp. L. 199, 256 (2006).

Second, all civil law countries adopting plea bargaining limit the range of cases to plea bargaining. A common phenomenon exists in the limitation of cases applied to plea bargaining in jurisdictions with civil law tradition. This shows that civil law countries are reluctant to go too far in the adopting Americanstyle plea bargaining. As we know, in the beginning, some civil law countries adopted plea bargaining with a conservative attitude in the range of cases that applied plea bargaining. But this stance has been changed with further defining the scope of plea bargaining. In Italy, the application of the plea bargaining (*patteggiamento*) was limited to crimes punishable by less than three years, but the legislators extended its scope in 2003 to up to five years.<sup>217</sup> The tendency to extend the applicability of plea bargaining also happened in Russia, where the model of plea bargaining is similar to the Italian *patteggiamento*. The range was limited to the crimes with less than three years' punishment under the first reading in the state Duma, but in 2001 extended to five years under the new code of Criminal procedure, and then in 2003 up to ten years in a revised code.<sup>218</sup> This phenomenon, in a sense, shows that the practice of plea bargaining is welcome and successful in these countries.

Third, the victims have been granted rights to participate in plea bargaining. In recent years, there has been an active trend towards promoting the rights of victims to participate in the criminal justice system.<sup>219</sup> Although the victims have difficulties in attending the process of plea bargaining, the situation has been changed. Despite the fact that Federal Rule 11 on plea bargaining makes no provision for the victim to participate in the formal hearing, there are standards and regulations involving victim participation in plea bargaining.<sup>220</sup> ABA Standards for Criminal Justice 14-3.1(e) calls upon the prosecuting attorney to make "every effort to remain advised of the attitudes and sentiments of victims and law enforcement officials" before reaching a plea agreement with the defendant. In addition, 14-1.8(a)(iii) of ABA standards for Criminal Justice

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<sup>217</sup> Stephen C. Thaman, *supra* note 73, at, 23.

<sup>218</sup> *Id.*

<sup>219</sup> In 1985, the General Assembly of the United Nations issued the *Declaration of Basic Principles of Justice for Victims of Crime*. The Declaration imposes a duty upon prosecutors to provide specific information to victims about various aspects of the criminal trial process--including plea bargains and sentencing. Since then, the campaign of victim participation came up with various reforms of criminal justice including the plea bargaining system.

<sup>220</sup> Fed R Crim Proc Rule 11.

recognizes that charge or sentence concessions also are appropriate where the defendant demonstrates genuine consideration for the victims of the crime, either by agreeing to make restitution or by sparing the victims the ordeal of a public trial.<sup>221</sup> In addition, victim participation in France has made much progress because of the depenalization model combined with plea bargaining. Under the depenalization model in France, fines, community work, and reparation to the victim, among other remedies, have been widely employed and suggested to replace the imprisonment of the defendant.<sup>222</sup> Victim participation will play a greater role in criminal procedure because of the increased demand for the protection of victim in the international community. The victim should be a positive actor in the process of plea negotiation rather than a passive outsider in the disposition of plea bargaining.

In addition to these three basic experiences, there are other useful experiences favorable to China such as making guideline in the process of plea bargaining, the establishment of features of the adversarial trial, and increasing transparency in plea negotiation. In sum, all of these experiences in the United States as well as in Germany, Italy, and France can provide useful references for the reform of summary process in China's criminal justice system.

#### **IV. Framework: Plea Bargaining with Chinese Characteristics**

Under the 1996 CPL, the current criminal justice system actually does not leave any room for plea bargaining. The perspective in China that justice is something invaluable that cannot be exchanged for anything in any situation predominates in the literature of criminal justice.<sup>223</sup> However, Simplified Procedures in 2001 smashed a hole in China's criminal justice system because it provided that in pre-trial the defendant may plead guilty in return for a summary trial with a lenient sentence.<sup>224</sup> As noted, there are defects in the Simplified Procedure and the Summary Procedure; thus, it is necessary to design a

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<sup>221</sup> ABA Standards for Criminal Justice, 14-1.8(a)(iii).

<sup>222</sup> Maximo Langer, *supra* note 103, at 60.

<sup>223</sup> Sun Changyong, *Justice is invaluable, how purchase it?* [zhengyi wujia ruhe shangshi], Chen Guangzhong, et al., *Plea Bargaining in China* (2003).

<sup>224</sup> Simplified Procedures art 9.

more ideal mechanism to improve the current summary process to address the caseloads and the increase in crime. In this section, based on the international experience and China's situation, I will formulate and justify a model of plea bargaining with Chinese characteristics.

### **1. Case Limitation in Plea Bargaining**

Plea bargaining in China should be limited in certain criminal cases. Nearly all civil law countries adopting plea bargaining limit the range of cases to plea bargaining.<sup>225</sup> A common phenomenon exists in the limitation of cases applied to plea bargaining in jurisdictions with a civil law tradition. This shows that the civil law countries are reluctant to go too far in adopting American style plea bargaining. Without a doubt, China, as a civil law country, should limit the range of cases eligible for plea bargaining. The key issue here is how to identify a reasonable range of cases eligible for plea bargaining in China.

Criminal cases involving less than five years' imprisonment should be eligible to plea bargaining in China.<sup>226</sup> In other words, a case involving more than five years' imprisonment, life imprisonment, or the death penalty could not be applied to the process of plea bargaining. That the defendants committed serious crimes and got a lenient decision through plea bargaining would result not only in dissatisfaction for the victim as well as the public, but would also lead to inconsistencies in criminal justice. Thus, generally the cases that entered plea bargaining should be minor. According to the

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<sup>225</sup> In the United States, plea bargaining nearly covers all categories of criminal cases, but it is not definitely unlimited. For instance, in *State v. Hessen*, the court upheld the constitutionality of absolutely ban on plea bargaining in all drunken driving cases in municipal court. *State v. Hessen*, 145 N.J. 441, 454-59 (1996).

<sup>226</sup> Under the 1996 CL, there are five types of principal punishment (zhu xing), control and supervision [guanzhi] (for three months to two years), criminal detention [juyi] (from one month to six months), fixed term imprisonment [youqi tuxing] from six months to 15 years and up to 20 years when the suspended death penalty or life imprisonment is commuted to fixed term or in cases of combined punishment more than one crime), life imprisonment, and the death penalty. Under my suggestion, cases involved in supervision, criminal detention, fixed term of less than 5 years' imprisonment may apply the process of plea bargaining. Under 1996 CL, there are various categories or levels in the fixed term imprisonment including imprisonment less than 3 years, 3 years to 7 years, less than 5 years, 3 years to 10 years. For practical reasons, cases involved in the imprisonment within 3 years to 7 years may include the field of cases eligible for plea bargaining; however, cases involved in imprisonment within 3 to 10 years should be excluded from the range of cases eligible for plea bargaining.

experience of civil law countries, such as Italy, the range of cases eligible to plea bargaining were limited to a certain length of imprisonment.<sup>227</sup> In general, an offense involving more than five years' imprisonment would be treated as a serious crime. Under the official statistics of the SPC, from 2003-2007, nearly 18% of all the criminal cases have involved more than five years' imprisonment.<sup>228</sup> Provided that the criminal cases involving less than five years' imprisonment enter the process of plea bargaining, it means that nearly 80% of criminal cases in China would be handled through plea bargaining. This is a reasonable limitation for the range of cases applied to plea bargaining in China.

In addition, cases without sufficient evidence cannot enter the process of plea bargaining in China. The National Advisory Commission of America has recommended that "no plea should be accepted from a defendant who is either unable or unwilling to recount facts establishing guilt."<sup>229</sup> The point of the National Advisory Commission was not accepted by the court in the United States. However, this rule is rational and reasonable because it may "avoid public disparagement of the criminal justice system and the risk that innocent defendants will be convicted."<sup>230</sup> China may borrow this standard to limit the range of cases applied to plea bargaining. Under the 1996 CPL, cases are prohibited from entering the process of plea bargaining if there is insufficient evidence supported by facts, such as cases with only the defendant's confessions.<sup>231</sup> Thus, in the pre-plea hearing, the prosecutor and the defense counsel have the responsibility to provide sufficient evidence to support the plea agreement. If the judges in the pre-hearing of the case find the case lacking basic fact support, they should dismiss the case immediately to prevent it from entering the process of plea bargaining.

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<sup>227</sup> Stephen C. Thaman, *supra* note 73, at, 23.

<sup>228</sup> XiaoYang, *The Working Report of SPC*, available at [http://news.xinhuanet.com/misc/2008-3/10/content\\_7760020.htm](http://news.xinhuanet.com/misc/2008-3/10/content_7760020.htm).

<sup>229</sup> Nat'l Advisory Commission on Criminal Standards and Goals, Courts, Standard 3.7 (1973). *See also*, ABA Standards for Criminal Justice, Pleas of guilty, Third Edition, 70.

<sup>230</sup> ABA Standards for Criminal Justice, Pleas of guilty, Third Edition, 70.

<sup>231</sup> CPL art 46 (1996) (P. R. C.).

## 2. The Limitation of Prosecutorial Discretion in Plea Bargaining

Compared to their counterparts in the United States, the prosecutors in civil law countries are more limited in discretion of the charge in the process of plea bargaining. Some scholars have criticized the American style, saying that prosecutors in the United States may abuse their discretion to overcharge, undercharge and charge crimes inconsistently in plea bargaining.<sup>232</sup> Many arguments, in contrast, support the limitation on the discretion of the prosecutor in plea bargaining.<sup>233</sup> To adopt the plea bargaining system in China, the discretion of prosecutor in criminal procedure should be readjusted.

The prosecutor should be granted greater discretion by the law in the recommendation of the sentence to the court and the power to negotiate with the defendant in plea agreement. The 1996 CPL and Simplified Procedure did not granted any power to the prosecutor to negotiate with the defendant in sentence and charge. Under the 1996 CPL, prosecutors are not granted power in the recommendation of the sentence to the court. However, in practice, prosecutors often provide the recommendation of sentence to the court, even though the court may disregard the recommendation. To adopt plea bargaining in China, prosecutors should be granted the power to recommend the sentence to the courts; otherwise, it is difficult for prosecutors to offer something in exchange for the defendant's guilty plea. Also, the recommendation of sentence from the prosecutor should be respected and accepted unless it lacks the foundation of law and evidence. Furthermore, the prosecutor should be granted discretion by the law in plea negotiations and entering plea agreements with the defendant and victim.

However, the prosecutor could not utilize discretion in dismissing the charge, changing the nature of the charge, reducing the degree of the charge in exchange for the defendant's guilty plea. Under the 1996 CPL, prosecutors were granted much power in prosecution on initiating a charge or dismissing a charge.<sup>234</sup> The prosecutor has the discretion to examine a case and ascertain whether the facts and circumstance of the

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<sup>232</sup> E.g., Andrew B. Loewenstein, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 Am. Crim. L. Rev. 351, 353 (2001).

<sup>233</sup> *Id.*

<sup>234</sup> CPL art 137 (1996) (P.R.C).

crime are clear, the evidence is reliable and sufficient, the charge and the nature of the crime has been correctly determined, any other crimes have been omitted, or other persons should be investigated, and so on. In accordance with the 1996 CPL, when prosecutors make a decision on the nature of the crime and determine to charge the defendant on the basis of evidence and law, they cannot offer to change the nature of the charge, dismiss the charge, or reduce the charge in exchange for the defendant's guilty plea. The prosecutors in plea bargaining could not exceed the above limitations in charging because of the regulation of the 1996 CPL and CL. Yet it is both impractical and practical to modify the law to grant the power for prosecutors when making a charge in exchange for the defendant's guilty plea because of the strong fear resulting from the fact that the prosecutors may abuse this privilege.

In addition, the prosecutor in China could not dismiss other pending charges in exchange for a guilty plea from the defendant in plea bargaining. In the United States, the prosecutors have the power to dismiss other pending charges in return for the defendant's guilty plea.<sup>235</sup> However, under the 1996 CPL, there are limitations in China in dismissing other pending charges. When a criminal case is initiated with evidence, the prosecutor cannot dismiss the case unless the evidence is not sufficient or special situations exist, such as the death of the defendant. If the prosecutors have the power to dismiss the pending charge in exchange for the defendant's guilty plea, then they might easily circumvent the criminal law to pursue unlawful practices, such as bribery or coercion.

### **3. Judge's intervention in plea bargaining**

Considering the Chinese tradition in criminal justice and applying the experience of civil law countries, judges in China should intervene in the process of plea bargaining, including the proceeding of pre-hearing, plea negotiation, and confirmation.<sup>236</sup> Many controversies surround the idea of judicial participation in plea negotiation—such as whether judges should play a passive or active role in plea negotiation.<sup>237</sup> Generally in the United States, the judge cannot intervene in the process of plea agreement because the

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<sup>235</sup> Fed. R. Crim Proc Rule 11.

<sup>236</sup> In the next section, I will detail the judge's role in the proceeding of pre-plea hearing, plea negotiation and confirmation.

<sup>237</sup> Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 Am. J. Comp. L. 199, 203 (2006).

coercion of the judge may impose on the defendant in the process of bargains.<sup>238</sup> “The process of involving the judge may be seen as cumbersome and costly...in some cases, the judge's participation may also be perceived as undue interference with prosecutorial functions.”<sup>239</sup> Also, judges are too distant from the facts of the case and from the parties involved to be able to make a useful contribution to the plea negotiations.<sup>240</sup> However, as noted in Section III, the judicial participation in plea negotiation constitutes a basic rule in civil law countries that have adopted plea bargaining.

Based on the experience in judicial participation in civil law countries, the judge’s intervention should prevail in the Chinese plea bargaining system. The judge’s intervention in plea bargaining is consistent with the current system. Under the 1996 CPL, judges have the final authority in fact-finding, the nature of the offense, and the sentence imposed on the defendant. The 1996 CPL affirms that no person shall be found guilty without being judged as such by a people’s court, according to the law.<sup>241</sup> In other words, under the principle of the presumption of innocence, all cases related to the guilt of the defendants should be tried by the People’s Court. The implication of plea bargaining in China does not show that the cases applied to plea bargaining can be disposed without trial; it only means that the process of the trial will be greatly simplified. Also, judges may improve the examination of the foundation of the fact of plea bargaining if the judges can participate in-depth in the proceedings of plea bargaining. It will effectively avoid an innocent person being declared guilty without the fact support or sufficient evidence.” To deprive the attorney of an opportunity to talk to the judge about a guilty plea before a defendant has made up his mind to plead guilty would deprive him of one of the most valuable tools of his defense.”<sup>242</sup> In a word, a judge’s intervention in plea bargaining would be consistent with the responsibility of judges under the 1996 CPL.

Second, the judge’s intervention in plea bargaining can effectively prevent prosecutors from abusing the discretion in plea negotiation. In the process of plea

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<sup>238</sup> [Rule 11\(c\) of the Federal Rules of Criminal Procedure](#) (stated that it is impermissible for a judge to participate in plea negotiations under any circumstance); *see also*, Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 Am. J. Comp. L. 199, 203 (2006).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> CPL, art 12 (1996) (P.R.C.).

<sup>242</sup> *Brown v Peyton*, 435 F.2d 1352, 1356, (4<sup>th</sup> Cir. 1970).



bargaining, the prosecutors will employ much discretion in the introduction of evidence, the recommendation of a sentence and bargains with the defendant. The judge's intervention may reduce the pressure from the prosecution and guarantee an equal position between the defendant and the prosecution. Without professional supervision from the judge, the discretion of prosecutors may be adversely used in the process of plea bargaining because the professional quality of the prosecutor is insufficient.

Third, the judge's intervention in plea bargaining can balance the status between the prosecution and the defense counsel. Although the defense counsel's participation under the 1996 CPL is expanded during arrest and detention, for example, defense counsels are granted the right to collect the evidence in the process of the investigation prior to the trial, but the actual function of the defense counsel is much limited by the discretion of the police and prosecutors. In China's plea bargaining system, the national government as well as local governments should grant and guarantee all defendants access to defense counsel. However, it is difficult to establish an equal relationship between prosecutors and defense counsels in criminal procedure because of the inquisitorial model in criminal justice. Thus, the judge's intervention in plea bargaining can balance the problem that resulted from a weak defense counsel.

In addition, the judge's intervention in plea bargaining can promote more openness and transparency in the plea negotiations. Traditionally, plea negotiation occurred secretly between the prosecutor and the defendant or the defense counsel. Prosecutors are granted more power in collecting information and evidence in the process of the investigation than that of the defense counsel. Thus, prosecutors may take advantage of the information to coerce the defendant to plead guilty. The judge's intervention would make the plea negotiation open and transparent, thereby reducing the possibility of pressure from the prosecutors.

#### **4. Correctional Function in Plea Bargaining**

"Correctional function" generally refers to an effectual utility in which defendants actually show remorse for their criminal activities and are willing to accept certain punishments or fines. Under correctional function in plea bargaining, defendants should

show their remorse by abstaining from further criminal conduct, apologizing to and compensating the victims, paying fines to public institutions, accepting drug or alcohol treatment, or serving the community. Traditionally, the goal of plea bargaining mainly pursues the efficiency of disposing criminal cases rather than the correction of the defendants. However, we cannot ignore the educational and correctional function in plea bargaining. The experience of plea bargaining in the French correctional courts shows that it is possible for plea bargaining to be combined with correctional function.<sup>243</sup> Based on the French experience, plea bargaining in China should include the correctional function to prevent the defendant from committing another crime.

Combining plea bargaining with correctional function will be considered a vibrant feature in the Chinese plea bargaining system. Under the correctional function, defendants should get a more lenient decision on the condition that they plead guilty, show their remorse for the crimes that they committed, and accept punishment. If the defendants plead guilty along with showing remorse with certain conditions, such as compensating to the victim, they should get a more lenient sentence than those defendants who only plead guilty without showing any remorse. Combining the plea bargaining system with the correctional function will frustrate a defendant's desire to seek the lenient decision from the court as a way to circumvent the punishment that they deserved. Under the correctional function, the category of "no contendere bargaining" in the United States will not be accepted in the process of plea bargaining in China because it lacks the correctional function.

### **5. Restorative Justice in Plea Bargaining**

"Restorative justice" refers to the initiative of solutions to promote reconciliation between the victim and the offender. In contrast, retributive justice aims to impose blame and punishment on the offenders in the form of physical and spiritual pain. Restorative justice is a creative reform emerging globally because retributive justice cannot effectively resolve the problems for the victim's compensation and the increase in crime. Although the function of restorative justice is limited in some cases, such as murder,

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<sup>243</sup> Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?* 78 Calif. L. Rev. 542, 612 (1990).

homicide, or rape, it is effective in misdemeanors or minor cases. Under the Chinese criminal justice system, it is possible to combine restorative justice with the plea bargaining system. According to the depenalization model in France, fines, community work, and reparation to the victim, among other remedies, have been widely employed and suggested to replace imprisonment of the defendant, where the court is ineffective to deal with the serious offense cases.<sup>244</sup> Victim participation will play a greater role in criminal procedure because of the increased demand for the protection of the victim in the international community.

The victim should be a positive actor in the process of plea negotiation rather than a passive outsider in the disposition of plea bargaining. Victim participation in plea bargaining would much more benefit the victim. The victim's participation embedded in plea bargaining may overcome the defects of plea bargaining through restorative justice, such as the opportunity for the victim's voice being heard by the prosecutors and the judges and reaching the reconciliation between the victim and the offender.<sup>245</sup> Victims in the United States do not have legal rights in the plea bargaining process.<sup>246</sup> Plea negotiations are generally conducted between a prosecutor and a defendant, clearly excluding a victim from the process of the negotiations. A victim is also excluded from participating in the judicial hearing in which a judge decides whether to accept a guilty plea proffered by a defendant.<sup>247</sup> In this respect, the American style cannot apply to the plea bargaining system in China. Victims' participation should be guaranteed in the process of plea bargaining in China.

In China, victims should be granted the specific rights to participate in the process of plea bargaining. Under the 1996 CPL, victims have independent rights in a criminal procedure, such as the right to be present in the court, the right to appeal for the dismissal of the prosecutor's decision, the right to have access to the defense counsel, and the right

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<sup>244</sup> Maximo Langer, *supra* note 103, at 60.

<sup>245</sup> David A. Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 *Ind. L.J.* 853, 878 (1992).

<sup>246</sup> Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 *PEPPERDINE L. REV.* 117, 163-167 (1984).

<sup>247</sup> Welling, *Victim Participation in Plea Bargains*, 65 *WASH. U.L.Q.* 301, 312-14 (1987).

to file a civil lawsuit in conjunction with the same criminal case.<sup>248</sup> Beyond these rights, the victims should be granted other rights such as the right to participate in the entire process of plea bargaining, the right to negotiate with the defendant for compensation, and the right to appeal the plea agreement.

In sum, the framework of plea bargaining with Chinese characteristics has more merits than the current summary process. First, the model broadens the field of the cases eligible for plea bargaining. Under this framework, cases involving less than five years' imprisonment can enter the process of plea bargaining. In contrast, under the 1996 CPL, the cases applied to summary procedure were only limited to less than three years' imprisonment; also under Simplified Procedures, the cases that applied to the simplified procedure are more limited. In this model, nearly 80% of criminal cases with less than 5 years' imprisonment applied to plea bargaining, thereby greatly reducing the caseloads in courts and procuratorates. Second, the judge's intervention model highlights the judge's obligations in plea bargaining to prevent the prosecutor from coercing defendants, whereas the current summary process does not provide any provisions to avoid such coercions. Third, the framework underscores the protection of human rights. In this model, the defense counsel, as the agent of the prosecutor, should participate in the process of plea bargaining. Because of the restorative justice embedded in the model, the victim's rights can be effectively protected. Fourth, the framework will improve the correction of defendants through plea bargaining. Defendants should show remorse for their criminal activities if they want to get a more lenient decision. Generally, the framework of plea bargaining that I propose will increase the reduction of criminal caseload in the current criminal justice system.

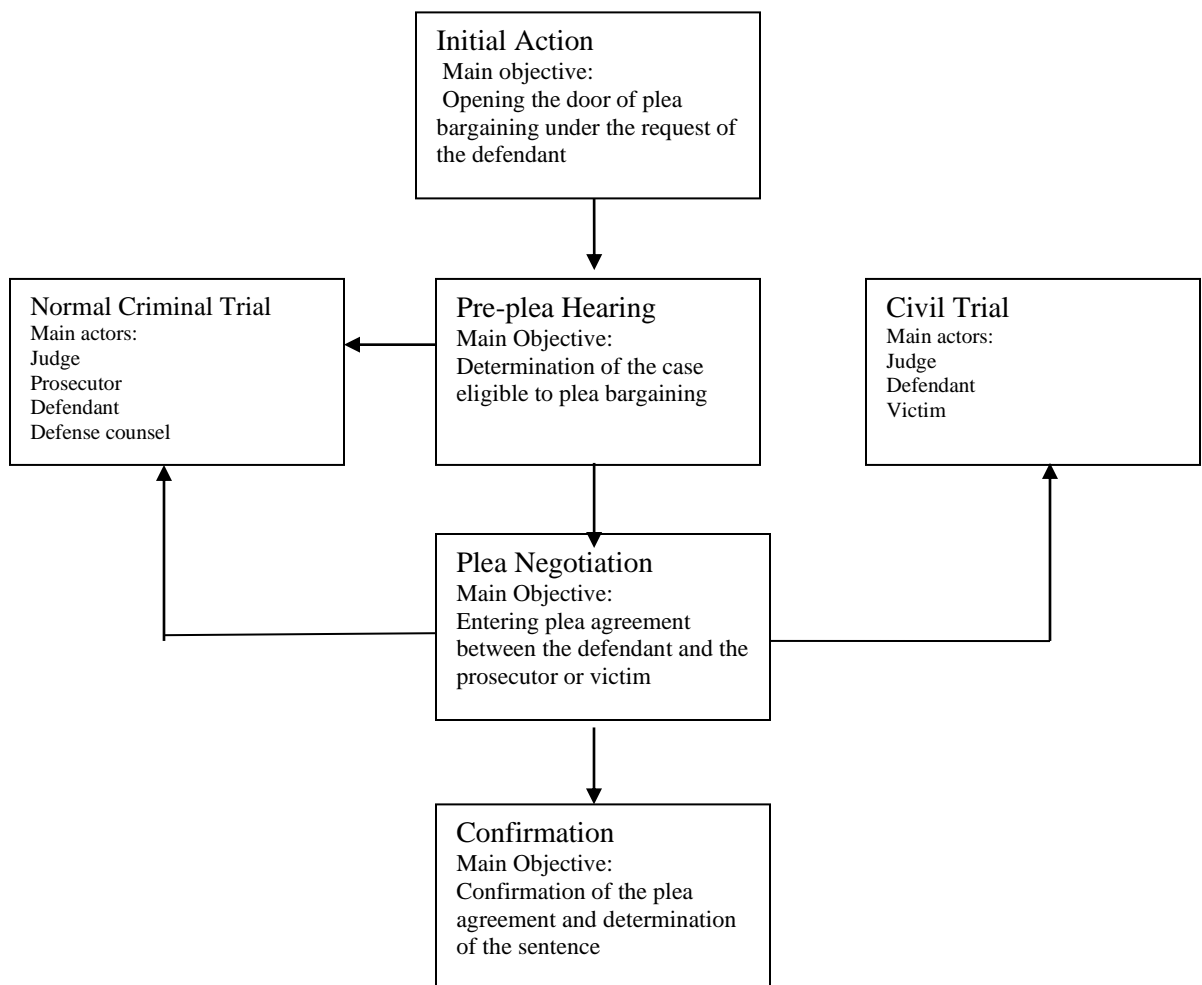
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<sup>248</sup> CPL art 40 (1996) (P.R.C.).

## . Mechanism: How to Operate Plea Bargaining

To operate plea bargaining in China, it is indispensable to clarify its proceedings<sup>249</sup> and the responsibilities of the participants in plea bargaining. A practical, efficient, and lawful proceeding will make plea bargaining function effectively. The proceedings I propose incorporate four steps: the initial action, pre-plea hearing, plea negotiation, and confirmation. The whole process of plea bargaining for a case should be completed within one month.

Figure 4: Plea Bargaining Proceedings in China



### 1. Initial Action

#### (1) Objective

<sup>249</sup>“Proceeding” refers to the institution of a sequence of steps by which legal judgments are invoked. *WordNet*® 3.0. Retrieved November 03, 2008, from Dictionary.com, website: <http://dictionary.reference.com/browse/proceeding>.

The objective in the initial action is to trigger the process of plea bargaining. In Italy, the defendant may request to enter the plea bargaining process and bypass the prosecutor.<sup>250</sup> As long as the defendant would like to plead guilty according to the regulations of plea bargaining, the door of the plea bargaining process will open for the defendant regardless of rejection from the prosecutor or the victim. Provided that the discovery or disclosure was completed,<sup>251</sup> the defense counsel might advise whether the defendant should plead guilty based on the alleged fact. If the defendant agrees to plead guilty, the defense counsel should submit a request on behalf of the defendant to the court and the procuratorate. After this, the procuratorate should inform the victim about the request for plea bargaining from the defendant. If the prosecutor and the victim disagree with the defendant on the request, they may complain directly to the court in the next stage of pre-plea screening.

## (2) The Role of Participants

The defendant plays a crucial role in opening the door of the plea bargaining process. The defendant in this stage should be granted the right to assistance of defense counsel by the government. The defendant may independently request to enter the plea bargaining process, regardless of opposition from the defense counsel or the prosecutor. Even though defense counsel advises the defendant to plead guilty, he/she may refuse the suggestion of the defense counsel without any reason. In other words, the defendant may independently request to enter the process of plea bargaining.

The defense counsel plays a vital role in screening the prosecutor's power in the initial action. The defense counsel in this stage has the right to access to all the evidence from the prosecution including inculpatated as well as exculpatated evidence. To prevent coercion, the prosecutor should be prohibited from directly bargaining with the defendant in exchange for a guilty plea or the cooperation from the defendant. If the prosecutor needs the cooperation of the defendant and would like to offer deals to the defendant, the prosecutor must contact the defense counsel rather than the defendant to discuss the

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<sup>250</sup> Maximo Langer, *supra* note 103, at 44, 45.

<sup>251</sup> To implement the plea bargaining system, a new regulation on the discovery or disclosure in pre-plea should be set up in criminal procedure in China.

specific details. After the assessment, the defense counsel may advise the defendant whether to accept the offer and plead guilty, confess or cooperate with the prosecutor. The defense counsel has an obligation to investigate the evidence involved in the case he or she is representing and to advise the defendant about the policies and law or rules involved in plea bargaining and the offense. In addition, the defense counsel should not delay any discovery, disclosure, or motion favorable to the defendant under the applicable law or rules, or knowingly make false statements or threats to the defendant in plea bargaining proceedings.

The prosecutor may control the time given to the process of discovery with the defense counsel and the request for plea bargaining from the defendant. The prosecutor, like the defense counsel, should also not delay any discovery or disclosure under the applicable law or rules, or knowingly make false statements or threatens to the defendant or defense counsel. In addition, the prosecutor should advise the victim about the proceeding of plea bargaining.

If there are victims, they should be granted the right to participate in this stage. The victim has the right to be informed and advised of the policy of plea bargaining and the law related to the offense of the defendant charged by the prosecutor and the court. The victim may provide evidence to the prosecutor to support the prosecution. Also the victim may protest the defendant's request to enter the plea bargaining process.

## **2. Pre-plea Screening**

### **(1) Objective**

The primary objective in pre-plea screening is for the court to determine whether the case should be applied to plea bargaining. "Effective regulation of plea bargaining must include an early judicial review of the strength of the government's case against the defendant."<sup>252</sup> In Germany, the primary screening process of plea bargaining is presided over by a single judge, which could be applicable to China.<sup>253</sup> There are two basic ways to screen cases. First, if the prosecutor and victim do not object to the defendant's request

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<sup>252</sup> Donald G. Gifford, *Meaningful Reform of Plea Bargaining: the Control of Prosecutorial Discretion*, 1983 U. Ill. L. Rew, 37, 75, (1983).

<sup>253</sup> Maximo Langer, *supra* note 103, at 44, 45.

for plea bargaining, the court may only screen the dossier and then make a decision for the defendant through a written process without a public hearing. However, the judge may determine to open the public hearing based on the evidence or law, even though the prosecutor and victim agree to enter plea bargaining. Second, if either the prosecutor or the victim does not agree to enter plea bargaining, the court should hold a public hearing with the presence of all participants involved in the case. In Italy, the judge in plea bargaining (*patteggiamento*) has the power to review the decision of the prosecutor in denying the defendant's application for plea bargaining.<sup>254</sup> This process may apply to the pre-plea screening in China. In the pre-plea or screening process, a single judge presides over the hearing. If the court issues a ruling for the defendant, the case will enter the plea negotiation stage. The prosecutor and the victim cannot appeal the decision to a higher court. Therefore, the court should schedule a pre-plea hearing within a short time and record all activities of the hearing.

## (2) The Role of Participants

The judge in this stage plays a key role in the process of plea hearing. The judge should review the case to determine if the case fits within plea bargaining, has sufficient evidence, and whether the defendant is informed and has voluntarily pleaded guilty. The judge should have the power to resolve the dispute that resulted from the prosecutor, the defendant and the victim.

All participants including the prosecutor, the defendant, the defense counsel, the victim, and witnesses should cooperate with the judge in this stage. The prosecutor and the defense counsel should be responsible for submitting related evidence and documents to the court. The victims should be present in the hearing when the judge summons them.

## **3. Plea Negotiation**

### (1) Objective

The objective of this stage is to enter a plea agreement between the prosecutor or procuratorate and the defendant through negotiation. As long as the judge determines that

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<sup>254</sup> *Id.*



the case applies to plea bargaining, the door of plea negotiation will open instantly. There are three options for the defendant in plea negotiation. First, the defendant and the defense counsel may negotiate with the prosecutor without the attendance of the judge; the second is that the defendant and the defense counsel may directly negotiate with the judge without the participation of the prosecutor;<sup>255</sup> and third, the defendant and defense counsel may negotiate with the prosecutor with the oversight of the judge. The plea agreement should include terms for the guilty plea, the sentence recommendation and other obligations and rights between parties. The agreement should be in writing, signed by the parties, and submitted to the court within a short time. If the terms of the plea agreement are ambiguous, the vague meaning of the relevant term should be favorable to the defendant.

## (2) The Role of Participants

The defendant, being an independent party, participates in plea negotiation. The defendant who enters the process of plea bargaining should be granted assistance from defense counsel. The defendant does not directly participate in plea negotiation, but the defense counsel should fully discuss the details of a plea agreement with the defendant, and the defendant has the independent right to decide whether he/she will accept the plea agreement. The defendant can bargain with offers for a guilty plea, confession, being a witness for the prosecutor on another case, compensation to the victim, community service, or a fine in exchange for a lenient sentence recommended by the prosecutor.

The defense counsel, as the agent of the defendant, should participate in plea negotiation. The defense counsel, on behalf of the defendant in plea negotiation, directly influences the interest of the defendant and the protection of the defendant's rights. Therefore, the defense counsel should provide effective assistance to the defendant according to the standards of the legal profession.

In some situations, the prosecutor, as the agent of procuratorate, should attend plea negotiation. In the United States, the prosecutor should assess all factors of the case

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<sup>255</sup>If the judges call on the prosecutors to attend the plea negotiation, the prosecutors should defer the requirement from the judge and participate in the plea negotiation.

during plea negotiation,<sup>256</sup> which could be applicable for China. In China, prosecutors should specially consider the following factors of the case: the defendant's willingness to confess the crimes, the defendant's attitude to cooperate with the government, the defendant's history in criminal activity, the nature and seriousness of the offense or offenses charged, and the defendant's remorse for his/her conduct. During plea negotiation, the prosecutor cannot meet the defendant without the presence of the defense counsel and cannot mislead the defendant with any fake promise or any illegal verbal and physical behavior. The prosecutor may offer a recommendation to the court to reduce the sentence or dismiss the case in conjunction with a restorative compensation in return for the defendant's confession, guilty plea, or cooperation.<sup>257</sup> The prosecutor should publicize any policies related to the disposition of cases to clarify the process of plea bargaining for defendants and victims in the beginning of the plea negotiation.

The judge actively intervenes in plea negotiation on the condition that the defendant requests such intervention. The conference of negotiation should be held in the court if the judge attends the negotiation. The judge presides over the negotiation. In Germany, the judge may openly discuss the merits of the case and the range of acceptable dispositions.<sup>258</sup> This approach can be accepted by the proceeding of plea negotiation in China. However, if a judge presides over the negotiation and in the end the negotiation is unsuccessful, the judge cannot participate in the forth-coming trial because of concerns of coercion from the judge.<sup>259</sup>

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<sup>256</sup> Under USAM 9-27230, the factors include the defendant's willingness to cooperate in the investigation of others; the defendant's history with respect to criminal activity; the nature and seriousness of the offense or offenses charged; the defendant's remorse or contrition and his/her willingness to assume responsibility for his/her conduct; the desirability of prompt and certain disposition of the case; the likelihood of obtaining a conviction at trial; the probable effect on witnesses; the probable sentence or other consequences if the defendant is convicted; the public interest in having the case tried rather than disposed of by a guilty plea; the expense of trial and appeal; the need to avoid delay in the disposition of other pending cases; and the effect upon the victim's right to restitution.

<sup>257</sup> Under ABA Standards for Criminal Justice, the prosecutor, if appropriate, may enter an agreement with the defendant regarding the disposition of related civil matters to which the government is or would be a party, including civil penalties and/or civil forfeiture; or in lieu of a plea agreement to enter an agreement permitting the diversion of the case from the criminal process where appropriate and permissible to do so.

<sup>258</sup> Maximo Langer, *supra* note 103, at 44.

<sup>259</sup> *E.g.*, *State v. Niblack*, 596 A2d 407 (Conn.1991) (noted that it is improper for a judge who participated in unsuccessful plea negotiation to later preside at trial.)

The victim, if any, can be a third party in the plea negotiation. The victims may claim their compensation from the defendant. If the defendant agrees with the claim of the victim, the victim will become an independent part of the plea agreement; otherwise, the victim may file a separate civil case against the defendant.

The police officers have the right to participate in the process of plea negotiation under applicable law and rules.<sup>260</sup> They may provide opinions and arguments to the prosecution and the court about the case in plea bargaining.

Members of the community, such as neighbors, teachers, and non-governmental organizations, related to the case should be encouraged by the government to participate in the process of plea negotiation to convey their opinions and suggestions to the judges and prosecutors.

#### **4. Confirmation**

##### **(1) Objective**

The objective in the stage of confirmation is to determine whether the plea agreement should be confirmed. If the judge attends the plea negotiation, the confirmation process would merge with the process of plea negotiation. If the plea agreement is entered between the defendant and the prosecutor without the participation of the judge, confirmation of the plea agreement must be processed. In confirmation, the court will hold a public hearing to assess the whole process of plea discussion and the terms of plea negotiation. At the outset of confirmation, the judge should inform the defendant about the policy of plea bargaining. If the agreement entered between the defendant and the prosecutor satisfies the standards of plea bargaining,<sup>261</sup> the court will approve the plea agreement during the confirmation. Otherwise, the judge may deny the plea agreement and make sentence. Generally, the judge cannot change the sentence recommended by the prosecutor without a good reason such as the prosecutor's corruption, malpractice, or the ineffective assistance of the defense counsel.

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<sup>260</sup> Beyond the judge and the prosecutor, the law enforcement officials in China include public police officers, national security officers, and prison police officers.

<sup>261</sup> To adopt plea bargaining, China's law authorities should establish the standards for the implementation of plea bargaining.

The ABA Standards for Criminal Justice provide certain provisions in the process of confirmation that can be applicable for China. Under the ABA Standards for Criminal Justice, the court should question the prosecuting attorney, the defendant, and the defense counsel, if any, and then determine whether the tendered plea is the result of a prior plea discussion and a plea agreement.<sup>262</sup> In addition, the court should inquire of the defendant whether he or she agrees with the plea agreement. The court should not accept the plea agreement without determining whether it was voluntary and under the sufficient fact-support.<sup>263</sup>

If the case is involved in private prosecution, the judge has the power to participate in plea negotiation and directly confirm the case after the negotiation.<sup>264</sup> Under the 1996 CL, the final sentence imposed on private prosecution cases is less than 3 years' imprisonment; thus, private prosecution cases could be eligible for plea bargaining.<sup>265</sup> The judge should have the power to supervise the process of plea negotiation between the defendant and the private prosecutor.

## (2) The Role of Participants

The judge in this stage will preside over the whole process of confirmation. In accordance with plea bargaining in Germany, on the basis of the dossier, the judges may

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<sup>262</sup> ABA Standards for Criminal Justice (Pleas of Guilty), Standard 14-1.5, Third Edition, 61, (1999) .

<sup>263</sup> *Id.*, at 73,74. Standard 14-1.8. Consideration of plea in final disposition: ... (i) the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct; (ii) the concessions will make possible alternative correctional measures which are better adapted to achieving protective, deterrent, or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction; (iii) the defendant, by making public trial unnecessary, has demonstrated genuine remorse or consideration for the victims of his or her criminal activity; or (iv) the defendant has given or agreed to give cooperation. (b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or *nolo contendere*.

<sup>264</sup> Article 172 under CPL provides that a People's Court may conduct mediation in a case of private prosecution; the private prosecutor may arrange a settlement with the defendant or withdraw his prosecution before a judgment is pronounced.

<sup>265</sup> Under the 1996 CPL, art 170, the cases eligible for private prosecution include the following cases: (1) cases to be handled only upon complaint; (2) cases for which the victims have evidence to prove that those are minor criminal cases; and (3) cases for which the victims have evidence to prove that the defendants should be investigated for criminal responsibility according to law because their acts have infringed upon the victims' personal or property rights, whereas the public security organs or the People's Procuratorates do not investigate the criminal responsibility of the accused.

refuse the request if they consider that the legal facts, the application, and the comparison of circumstances are wrong or the penalty is inappropriate.<sup>266</sup> In China, the judge in the process of plea bargaining should also be granted the final power in the approval of plea agreement and may accept or reject some or all of the terms of the plea agreement negotiated by the parties. If the judge disagrees with the parties in the plea agreement, the defendant may withdraw the guilty plea or renegotiate with the prosecution under the ruling of the judge.

The prosecutor is obligated to be present in the court in the process of confirmation. Although the procuratorate in China is the supervising legal department under China's Constitution,<sup>267</sup> the discretion of the prosecutor in plea bargaining should be checked by the judge to guarantee fairness in plea bargaining. In this stage, the judge will question the prosecutor about the details in the process of plea negotiation. The prosecutor cannot withdraw a plea agreement if the defendant has enforced it. If the defendant withdraws the plea agreement or refuses to enforce the terms of plea agreement, the prosecutor may withdraw the plea agreement. "A prosecutor rarely has to seek relief because a defendant has failed to comply with a plea agreement."<sup>268</sup> However, if a dispute over the plea agreement arises on the part of the defendant or prosecutor, the judge should determine the merits of the dispute.

The defendant has the right to be present in the court in the process of confirmation. In general, the defendant cannot withdraw the plea agreement after court approval unless the defendant provides sufficient evidence to support the motion for the withdrawal. In the United States, the court should allow the defendant to withdraw the plea for any fair and just reason before the sentence. Under this standard, the judge has the discretion to decide whether the plea agreement can be withdrawn before the sentence.<sup>269</sup> In China's plea bargaining, a defendant should be granted the right to withdraw the plea agreement regardless of any reason before the final confirmation of the court. After the defendant has been sentenced under a plea of guilty, the court should allow the defendant to

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<sup>266</sup> Delmas-Marty, Spencer, *European Criminal Procedure*, 372 (2002).

<sup>267</sup> Constitution [Xian fa], art 129 (1982) (P.R.C.).

<sup>268</sup> Robert L Segar, *Plea Bargaining Techniques*, 25 Am. Jur. Trials 69 (2008).

<sup>269</sup> ABA Standards for Criminal Justice.

withdraw the plea if the defendant proves that withdrawal is necessary to correct a manifest injustice.<sup>270</sup>

The victim should also have the chance to participate in the process of confirmation. The judge should inform the victim in the hearing that he or she would get certain penalties in case he or she lies to the court as a witness. The victim has the right to be present in the court and obtain any copies of the documents including the plea agreement and decisions on plea bargaining issued by the court and the prosecutorate.

In sum, the operational mechanism of plea bargaining in China that I have designed has some advantages. First, defendants in the mechanism have more options in plea bargaining. In the mechanism, defendants not only can request to enter plea bargaining beyond the prosecutor's limitation but negotiate with the judge or the prosecutor. Second, the prosecutor is limited in a reasonable range in the mechanism. The judge has the final say in the decision of cases eligible for plea bargaining and the plea agreement, which will effectively avoid coercion from the prosecutor. Third, the mechanism will be efficient in disposing criminal cases. Cases eligible for plea bargaining will be completed within one month. The right to a speedy trial will be guaranteed in this mechanism for around 80% defendants. Also, the defendant cannot appeal or withdraw the plea agreement as long as the court confirms or approves the plea agreement. This will avoid the mechanism being complicated. Finally, the victim's voice can be heard not only by prosecutors but also by judges. In the mechanism, the victim can participate in the whole proceeding as an independent part. In plea negotiation, the victim can be a third party to negotiate with the defendant for the plea agreement.

## **VI. Prospects: Difficulties and Possibilities**

In China, many controversies surround the implementation of plea bargaining in criminal justice.<sup>271</sup> As we know, it is very difficult to further the reform in criminal justice in many countries because of the legal tradition and political interests. China's law

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<sup>270</sup> The provisions 14-2.1 b(i)(A)—(F) of *ABA Standards for Criminal Justice* can be introduced into China as the reference of the standards of the withdrawal of plea agreement.

<sup>271</sup> Chen Guangzhong, et al., *Supra* note 12.

enforcement agencies have become accustomed to the current criminal justice system in crime control. For the short term, it is impossible for the plea bargaining system with Chinese characteristics I designed to be embedded in the criminal justice system. But in the long run, it can be translated into Chinese legal tradition as a replacement mechanism in summary process. This section will map the prospects of plea bargaining in China based on the analysis of anticipated difficulties and possibilities.

## 1. Difficulties

### (1) Conflicts with the Inquisitorial Model

The strong features of the inquisitorial model in China's criminal justice system constitute the basic difficulty in translating plea bargaining into China. The plea bargaining system was rooted and developed in the tradition of the adversarial model in which the defendant and the prosecutor are treated as equal parties. The civil law countries in Europe adopting plea bargaining, although they maintain the inquisitorial model, have transferred elements of the adversarial model.<sup>272</sup> Principles of the adversarial model, such as the assumption of innocent of the accused without the trial, non-compulsory self-incrimination, the right to remain silent, and the right to access to defense counsel, have been embedded in most of the civil law countries in Europe. Compared to European countries, China has more difficulties in the transition to the adversarial model because of politician reasons. China is a country with a long history of the inquisitorial model in criminal justice, and the national government hesitates to transition to the western style of this system.<sup>273</sup> In 1996, the previous criminal procedure law was amended for the purpose of shifting the inquisitorial model to the adversarial model.<sup>274</sup> As noted, although the Chinese government made great efforts to grant more

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<sup>272</sup> See generally, Mireille Delmas, Marty, J. R. Spencer, *European Criminal Procedures* (2002).

<sup>273</sup> In ancient times, the criminal justice system was filled with torture, illegal detention and arbitrary decisions. After the fall of the Qing dynasty, the *Kuomintang* government transplanted the German, French and Japanese legal systems, in which the criminal justice system inherited the inquisitorial model of those countries. After the Cultural Revolution (*wen hua da geming*) ended in 1976, the government was eager to establish a new law system. In 1979, the NPC enacted the codes of CL and CPL, which remained in the inquisitorial tradition and are influenced by the criminal justice of the Pre-Soviet era, where the suspects and defendants in criminal procedure lack basic and sufficient rights to challenge the power of the law enforcement agencies. See generally, Zhang Jingfan, *The history of China legal system* (2007).

<sup>274</sup> In order to resolve the negative check among the law enforcement agencies which adversely influence the implementation of new CCPC, in 1998, SPC, SPP, Ministry of Public Security, Ministry of national Security, MJC and the legal working Committee of people's Congress jointly issued regulations on

rights to the suspects and defendants in criminal procedure, the nature of the inquisitorial model has not been fundamentally changed. For instance, under the 1996 CPL, defendants have not been granted the right to silence. This means the defendants should truly confess their criminal activities to the law enforcement agencies and the confessions should be admissible in the courts. Without the principle of the right to silence, defendants would encounter the risk of the coercion from the law enforcement agencies. In addition, without the exclusionary rule of evidence, the defendants would fear that the record of the plea negotiation may be used as the evidence against them.<sup>275</sup> If the principle of the right to remain silent and the exclusionary rule cannot be established in China's criminal justice, it would be much difficult for China to adopt the plea bargaining system.

## (2) Reluctance of the Courts

It is clear that the adoption of plea bargaining in China will result in redistributing power among the law authorities. Among the law authority agencies, the courts would be more reluctant to adopt the plea bargaining system because doing so would inevitably lead to the redistribution of the powers between the court and the procuratorate. The court would fear the loss of part of its power in disposing criminal cases. Under the 1996 CPL, the court has the final say in making a decision.<sup>276</sup> The plea bargaining system, without a doubt, would weaken the power of the courts in sentencing, even though the court would intervene in plea bargaining and also could not be bound by the plea agreement. Under plea bargaining, the power of the prosecutor in expediting criminal cases would be broader than before.<sup>277</sup> In the current context, the courts would not like to further the adoption of the plea bargaining system in criminal justice, even though the plea bargaining system can reduce the backlog of criminal cases in the courts. If the judges in China can be entitled as the impartial supervisors in the investigatory stage as their

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carrying out CPL, which clarifies and further coordinates the power and the accountability respectively in different law enforcement agencies.

<sup>275</sup>Under American Federal Evidence Rule, the evidence from the plea negotiation will be exempted and inadmissible.

<sup>276</sup> CPL, art 12 (1996) (P. R. C.).

<sup>277</sup> In reality, there exist some conflicts between the courts and procuracies because the procuracies are indentified as legal supervisors in China under the Constitution and the 1996 CPL. However, the political position of the courts is higher than that of the procuracies in China.



counterparts in the United States, it would be possible for the judges to compromise their power with the prosecutors in the introduction of plea bargaining.

### (3) Insufficiency in Legal Aid and Defense Work

Under the 1996 CPL, the defendants are entitled to access to defense counsel;<sup>278</sup> however, most defendants, especially in rural areas, do not get the assistance of a defense counsel because of an insufficiency in legal aid. The number of available trained lawyers cannot satisfy the needs of the criminal defense. As recently as 2008, lawyers remained a minority group in China's criminal justice system. The total number of the lawyer is 118,000 in China, but most lawyers do not take on defense work.<sup>279</sup>

Under the 1996 CPL, any suspects and defendants are granted the right to be represented by a defense counsel, however, not all suspects and defendants can afford the expense of a defense counsel. Only the defendants who are deaf, blind, mute, minors, or might receive a death penalty are entitled to have a defense counsel appointed by the government.<sup>280</sup> In 2003, the national government promulgated a new regulation on legal aid that broadened the range of cases that apply to plea bargaining.<sup>281</sup> However, enforcement of this regulation has met many obstacles because governments at different levels are reluctant to provide funds to the organs of legal aid. Moreover, the defense counsels appointed by the government to represent the suspect or defendant lack the incentive to provide effective assistance to their clients because of low payment. Also, even when a defendant has enough money, it is difficult for him or her to get a capable defense counsel because most lawyers prefer business-related service in which the lawyer may make more money and meets little risk.<sup>282</sup>

In addition, the defense counsels in criminal procedure often encounter troubles from the legal enforcement agencies.<sup>283</sup> Chinese lawyers representing their clients in criminal

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<sup>278</sup> CPL, art 11 (1996) (P. R. C.).

<sup>279</sup> Yu Nayang, Wangyu, *The Total Number of the Lawyer Reaches 118,000 in 2009*. [Wo guo zhiye lvshi da 11.8 wan ren], [http://www.moj.gov.cn/lsgzgzds/2005-06/14/content\\_154886.htm](http://www.moj.gov.cn/lsgzgzds/2005-06/14/content_154886.htm).

<sup>280</sup> CPL, art 34 (1996) (P. R. C.).

<sup>281</sup> The Regulations of Legal Aid, promulgated by State Council of China (2003).

<sup>282</sup> Ethan Michelson, *The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work*, 40 Law & Soc'y Rev. 1, 15 (2006).

<sup>283</sup> *Id.*

procedures encounter tremendous obstacles such as the so-called “three difficulties”(san nan) of defense work: the difficulty in meeting the suspect at the investigatory stage, the difficulty in accessing the case files from the law enforcement agencies, the difficulty in collecting evidence.<sup>284</sup> There will be a great danger for defendants in the process of plea bargaining if they cannot get effective assistance from an able lawyer. There are many regulations that try to enhance the protection of the rights of the defense counsel in criminal procedure. However, the situation changes slowly. For instance, the defense counsel could be arrested and prosecuted for obstructing justice or perjury when the testimony of a witness the defense counsel submits to the court is inconsistent with the police or prosecutors. As the saying goes among Chinese lawyers, “*If you study law , be sure never to practice as a lawyer; if you practice as a lawyer, never work on criminal defense; if you work on criminal defense, never collect evidence yourself; if you collect evidence, never collect witness’ evidence. If you cannot do all the above, be ready for the jail yourself*”<sup>285</sup> Not surprisingly, Chinese lawyers are reluctant to work for the suspects or defendants.

#### (4) Inferior Legal Ethics

Inferiority in legal ethics is another problem in the adoption of plea bargaining in China. Generally, the plea bargaining system will leave more room for the defense counsels and prosecutors in disposing criminal cases. The legal profession should establish higher standards in the application of plea bargaining. The All Chinese Lawyers’ Association (ACLA) has issued some standards and rules regulating the conducts of lawyers,<sup>286</sup> but these standards and rules could not be effectively implemented. There are three reasons for the inferiorities in legal ethics.

First, the quality of the legal profession including judges, prosecutors and lawyers cannot be adapted to the practice of legal system in China.<sup>287</sup> The professionalism of

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<sup>284</sup> *Id.*

<sup>285</sup> Hao Lu, *Human Security in the Chinese Justice system*, [http://www.etc-graz.at/cms/fileadmin/user\\_upload/ETC-Hauptseite/human\\_security/hs-perspectives/pdf/V1-I3/03\\_HaoLu.pdf](http://www.etc-graz.at/cms/fileadmin/user_upload/ETC-Hauptseite/human_security/hs-perspectives/pdf/V1-I3/03_HaoLu.pdf).

<sup>286</sup> <http://en.wikipedia.org/wiki/Confucianism>.

<sup>287</sup> On December 27, 1993, All Chinese Lawyers Association (ACLA) promulgated the first regulation on legal ethics in its history.

many judges, prosecutors, and legal aid lawyers, many of whom are retired veterans and lack appropriate skills and training, is a serious problem. Also, judicial corruption occurred in the law enforcement agencies, encroaching on the confidence and belief of the public in the legal profession.<sup>288</sup> In 2008, the total number of criminals charged with bribery throughout the country amounted to 13,000, of which members of the legal profession and the staff were 2,620 -- including 838 judges and 262 prosecutors, an astounding 20 % of all bribery criminals in the whole country.<sup>289</sup> Second, the idealism of the legal profession where the protection of client interest should be the number-one priority has not been widely recognized by lawyers. By the nature of the inquisitorial model of criminal justice, the lawyer should cooperate with the law enforcement agencies with the goal of protecting the state interest in certain cases. Third, the traditional consciousness that looks down upon the rule of law frustrates the legal profession and makes lawyers circumvent the routine legal approach. Thus, the lawmakers' fear of practicing poor legal ethics may provide a strong reason against the adoption of plea bargaining in China.

#### (5) Contradictions to Confucianism

Plea bargaining will meet the contradictions of Confucianism--the [Chinese ethical](#) and [philosophical system](#) originally developed from the teachings of the early Chinese philosopher [Confucius](#).<sup>290</sup> In Confucianism, the elites and the rulers of the state have special power in lawsuits that common people do not have. In ancient China, higher officials such as noble man or aristocrat were granted many privileges. For example, they were not required to appear in court if they had lawsuits.<sup>291</sup> Also, obedience to authority is an important virtue.<sup>292</sup> Under Confucianism, the common people should extremely

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<sup>288</sup> Zhao hui, *People's Congress delegate(Liang Huixing) gave the Work Report of SPC the credit only 50*, (renda daibiao gei gaofa baogao da 50 fen), <http://www.sina.com.cn>, Shunwang, Jinan Daily March 13, 2009.

<sup>289</sup> *Id.*

<sup>290</sup> It focuses on human morality and good deeds with a complex system of [moral](#), [social](#), [political](#), [philosophical](#), and [quasi-religious](#) thought that has had tremendous influence on the culture and history of [East Asia](#). It has been considered as the [state religion](#) of East Asian countries because of governmental promotion of Confucian values.

<sup>291</sup> Under Confucianism, the official could send a servant to the court on his behalf, and the servant acted out of loyalty to the official.

<sup>292</sup> Lunyu II, 42.

obey their “boss,” such as father, husband, and elder brother. Although these ideas have been exempted from the law, they still adversely influence the current society. Under Confucianism, it is difficult to apply plea bargaining in China. First, it is impossible for the prosecutor to negotiate equally with the defendants in the process of plea bargaining because Confucianism did not recognize the equal relationship between individuals and the state. In Confucianism, rights were defined as duties for the society, or as collective responsibility. The group was more important than the individual, and individuals were usually expected to give up their personal well-being for the benefit of the collective good.<sup>293</sup> A second negative influence by Confucianism is the “rule by man,” in which people trust the man (the official) rather than the law. Maintaining a good relationship (*guan xi*) with officials around them is crucial for people who live in Confucianism. There are a lot of categories of *guanxi* such as individual *guanxi*, organization *guanxi* in China,<sup>294</sup> which sometimes functions more effectively in the traditional society. As a result of *guanxi*, plea bargaining probably produces more corruption if the discretion of the judges and prosecutors in plea bargaining cannot be effectively checked.

## 2. Possibilities

Although translating the plea bargaining system into China will meet difficulties, it is possible and feasible in the long run because the current reforms in China’s criminal justice system and its national policy in establishing a harmonious society will create an environment favorable to the adoption of the plea bargaining system in China.

### (1) The Simplified Procedure

The Simplified Procedure signified a substantial change with the goal of setting up a more efficient mechanism in disposing criminal cases.”This would allow the court to concentrate on its human and other resources on the more adversarial proceedings, which would certainly be more time-consuming and, perhaps, more expensive.”<sup>295</sup> Although the simplified procedure, in many aspects, differs from the Western plea bargaining system,

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<sup>293</sup> Yujie Gu, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 Drake, L. Rev. 173, 180 (1999).

<sup>294</sup> Ethan Michelson, Lawyers, *Political Embeddedness, and Institutional Continuity in China’s Transition from Socialism* 113. AJS. 352,355 (2007).

<sup>295</sup> Jianfu Chen, *Chinese Law and transformation*, 320,321 (2008).

the core spirit of the simplified procedure is consistent with plea bargaining. In the simplified procedure, the trial will be simplified and the defendant may get a lenient decision as long as the defendant pleads guilty. This is similar to the German style of plea bargaining. Although the simplified procedure has many defects, the procedure in disposing criminal cases inherits the basic spirit of plea bargaining. The foundation of the simplified procedure makes it feasible and possible to introduce the Western plea bargaining system to improve the summary process.

## (2) The Policy of Confession

The policy of encouraging confession of the government in the investigatory stage may combine with the plea bargaining system. Under the 1996 CL, if the defendants confess their criminal activities or cooperate with the police and prosecutors or judges, they may get a lenient sentence.<sup>296</sup> China's law enforcement agencies have been undertaking the policy (*tanbai congkuan, kangju congyan*), in which if the defendants plead guilty and confess their criminal activity, they may get lenient sentences; otherwise, they will get more severe sentences. In practice, in most criminal cases, the defendants often confess their criminal activities and plead guilty. However, in many cases the defendants pleaded guilty, but they did not get the lenient sentence that the prosecution had promised. The policy clearly says that if you do not confess you will get a severe sentence, which implies a strong coercion from the government. The policy should be banned due to its unfairness to the defendants and suspects. The plea bargaining system may cure the defects of this policy because it makes confession more formal. In the rule of evidence, a confession from the defendant in China is simply "a statement by the defendant" and cannot determine the conviction in itself.<sup>297</sup> According to research from Hong Lu and Terance D. Miethe, the rate of confession of the defendants declined after the legal reform under the 1996 CPL.<sup>298</sup> In a sense, this phenomenon implies the defendants do not trust the law enforcement agencies. Without the guarantee of the government, the defendants will not plead guilty in return for lenient sentences from the

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<sup>296</sup> CL art, (1996) (P.R.C.).

<sup>297</sup> CPL, art 46, (1996) (P.R.C.).

<sup>298</sup> Hong Lu, Terance D. Miethe *Confessions and Criminal Case Disposition in China*, 37 Law & Soc'y Rev. 549, 569 (2003).

court. However, the plea bargaining system can avoid such shortcomings of the policy in the confession.

### (3) The On-going Reforms

The on-going reform in criminal procedure will weaken the features of the inquisitorial model. The amendment of the 1996 CPL has been in the agenda of the NPC, which focuses on the detention regulation, the evidence rule, the trial standards, the effective defense, and the summary process.<sup>299</sup> The amendment reforms will improve the shift from the inquisitorial system to the adversarial system. Meanwhile, the law enforcement agencies have initiated some reforms within their administrations to promote the protection of human rights and efficiency of justice. For instance, the SPC initiated the reform on the criminal trial system, the evidence rule and the summary process.<sup>300</sup> The SPP has instigated the reform of the discovery system, the detention and investigation system, and the interrogation rule.<sup>301</sup> The Ministry of Justice focuses the reforms on enhancing the legal aid system, the standards for the defense counsel, the correctional system, and the restorative system.<sup>302</sup> These reforms will improve the circumstance of the criminal justice system in which the plea bargaining system can be rooted.

### (4) The Test in Plea Bargaining

There is a typical case that was successfully tested by the plea bargaining system. In April 2002, *Heilongjiang Mudanjiang Railway Transportation Court* handled a criminal case, where the defendant *Meng Guanghu* was indicted for intentional harm by the prosecution.<sup>303</sup> In this case, the defendant wanted to plead guilty and give certain compensation to the victim in return for a lenient sentence. Then, the prosecutor negotiated with the defendant and reached an agreement in terms of the guilty plea, the compensation to the victim, and the recommendation of a lenient sentence. Afterwards,

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<sup>299</sup> See generally, Chen Weidong *Supra* note 4.

<sup>300</sup> *The plan of reform of the court in the second five years of SPC*, available at [www.court.gov.cn](http://www.court.gov.cn).

<sup>301</sup> SPP, Jia Chunwang, *SPP Work report* (2008), available at [www.spp.gov.cn/site2006](http://www.spp.gov.cn/site2006).

<sup>302</sup> Ministry justice of P.R.C., *Work Plan on Legal Aid* (2008), available at [www.legalinfo.com](http://www.legalinfo.com).

<sup>303</sup> In December 18, 2000, the defendant quarreled with Wang Yujie and the defendant asked his friends to beat Wang Yujie, who was seriously wounded later. The police could not successfully arrest other perpetrators when the prosecutor indicted the defendant. Guo gu, *The First Plea Bargaining Case in China*, available at *Legal Daily*, April 19, 2002; see also, [http://case.laweach.com/Case\\_34167\\_1.html](http://case.laweach.com/Case_34167_1.html).

the Court confirmed the agreement between the prosecution and the defendant, and made a lenient decision for the defendant. In the simplified trial, the court only spent 25 minutes on the case. All participants, including the judge, the prosecutor, the defendant, and the victim, were satisfied of the plea bargaining process. This case was an isolated plea bargaining case in China and was not recognized by the SPC and NPC; however, the successful test of this case supplied practical experience in plea bargaining. In addition, there is underground plea bargaining in the practice of criminal justice. For instance, in corruption cases, the prosecutor can dismiss the charge of the bribed witness in exchange for their cooperation.<sup>304</sup>

#### (5) The Policy of Establishing Harmonious Society

The national policy of establishing a harmonious society is favorable to the adoption of plea bargaining. Recently, China's national government called for establishing a harmonious society.<sup>305</sup> In October 2006, the national government, for the first time in its history, emphasized the ability of "building a harmonious socialist society" as an important aspect of its ruling capacity.<sup>306</sup> This policy will positively influence the reform of the criminal justice system. The resolution of establishing a harmonious society was inherited from and furthermore enriched the Chinese traditional harmony theory.

The policy of establishing a harmonious society is consistent with plea bargaining. The policy describes a comprehensive and profound conception of the nature and principles of a harmonious society. It makes the point that China's harmonious society is one shared by the whole people and continues to function with Chinese characteristics.<sup>307</sup> The policy of plea bargaining encourages the defendant to reach an agreement with the prosecutor and victim. During plea bargaining, the resolution of disposing criminal cases not only focuses on the reduction of the caseload but aims to reach reconciliation between participants. In a word, the policy of resolution for establishing harmonious society will contribute to the adoption of plea bargaining.

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<sup>304</sup> Zhou Guojun, Liu Lei, *the Protection of the stained witness in Bribery Crime*, China Prosecutor, 5, 2006.

<sup>305</sup> In October, 2006, the Party's Sixth Plenary Session of the Central Committee of China approved "The Decision on Building a Harmonious Socialist Society," available at [http://www.chinadaily.com.cn/bizchina/2008-10/31/content\\_7163189.htm](http://www.chinadaily.com.cn/bizchina/2008-10/31/content_7163189.htm).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

In addition, the policy on establishing a harmonious society through the implementation of the rule of law will be favorable to the adoption of plea bargaining. The national government calls on the law authorities to deepen the reform of the judiciary system, optimize the distribution of judicial functions and powers, standardize judicial practices, and build a fair, efficient and authoritative judiciary system to ensure that courts and procuratorates exercise their respective powers independently and impartially in accordance with the law.<sup>308</sup> In addition, the national government makes great efforts to improve the overall quality of the judicial, procuratorial and public security personnel to ensure that law enforcement is strict, impartial and civilized.<sup>309</sup> These reforms will deeply change the structure of Chinese traditional culture and will further the adoption of the plea bargaining system in China.

“Even though the 1996 CPL represents a significant breakthrough in the reform of the criminal justice system in China in terms of granting more rights to the accused in accordance with international standards, there are still several issues under 1996 CPL that need to be resolved.”<sup>310</sup> The inquisitorial model will much limit the adoption of plea bargaining in the short period of time. The transition of criminal justice to the adversarial model will encounter obstacles from the law enforcement agencies. The inferior quality of the legal profession will adversely influence the implementation of plea bargaining. The current legal profession system in criminal justice in China cannot satisfy the adoption of plea bargaining. Also, the traditional culture in Confucianism in some aspects will be contradicted to the plea bargaining system. The idea of “rule by man” under the Confucianism contradicts with the core of plea bargaining. In other words, the translation of plea bargaining to China will inevitably encounter some obstacles, which should be removed to establish an efficient mechanism. This shows that there is a long way to go for China to adopt plea bargaining in the criminal justice system. However, it is possible for the adoption of plea bargaining in China to take place in coming decades. The simplified procedure, the on-going reform in criminal justice, the policy of confession in criminal procedure, and the policy of establishing a harmonious society favor the

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<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> Mike P. H. Chu, *Criminal Procedure Reform in the People's Republic of China: the Dilemma of Crime Control and Regime Legitimacy*, 18 UCLA PAC. BASIN L. J.157, 208 (2001).



translation of plea bargaining to China's criminal justice system. Based on Western experiences in plea bargaining combined with Chinese characteristics, the adoption of plea bargaining in China's criminal justice system is practical in the long run.

## VII. Conclusion

Law is not static; it moves. It is clear that the plea bargaining system is a good economical resource in criminal justice. As long as the plea bargaining system restrictively operates under the related standards and regulations, it will yield satisfaction not only to the participants but to the public and the government. Some distinguished scholars proposed that the practice of civil law countries may be used as the reference of the reform of American criminal justice.<sup>311</sup> Another American scholar also concluded some French practices already exist in American criminal procedure, at least in rudimentary form.<sup>312</sup> This phenomenon in a sense shows the trend of convergence of legal systems between the civil law and common law jurisdictions. In practice, there is a trend of convergence in plea bargaining between the common law and civil law countries. The practice of civil law countries in plea bargaining signifies that plea bargaining can survive not only in the adversarial system but in the inquisitorial system. The German plea bargaining system (*absprachen*) now is widely used and is involved in the resolution of perhaps 30-50% of German criminal cases.<sup>313</sup> This indicates that the plea bargaining system is effectively functioning in civil law countries on the condition that the plea bargaining system is formulated with the civil law tradition.

One of the challenges for the translation of plea bargaining in China is to design a reasonable and practical framework in its criminal procedure, which can be accepted by the legislators, prosecutors, and courts. The framework aims not only to reduce caseloads, but to protect human rights. It also benefits not only the defendant and the government, but the victim and the public. In addition, the framework should eliminate the fear that an innocent person might plead guilty because of coercion from the law enforcement

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<sup>311</sup>See generally, John Langbein, *Land without Plea Bargaining; How the Germans Do It*, 78 Mich. L. Rev. 204 (1979); Alschuler, *Implementing the criminal Defendants's Right to Trial : Alternatives to the Plea Bargaining System*, 50 U. Chi L. Rev. 931, 972-975 (1983).

<sup>312</sup> Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?* 78 Calif. L. Rev. 542, 628, 629, 631(1990).

<sup>313</sup> Stephen C. Thaman, *supra* note 59, at 48.

agencies. The framework I designed in this thesis offers incentives to the parties to bypass the normal trial procedure. It also tries to address the inherited problems of plea bargaining such as coercion from the prosecutor. The framework is a tentative skeleton for the translation of plea bargaining adopted by the legislature and law authorities.

Another challenge is how to form an adaptable legal environment for the plea bargaining system in China. In contemporary times, the movement to plea bargaining shows that any jurisdiction adopting plea bargaining should modify as much as possible to adapt to the new circumstances. There is a long road in this regard, but the legal environment gradually changes. The ongoing “wave” of reforms in criminal justice will create a favorable environment for the reform of the Simplified Procedure. In April 13, 2004, the State Council Information Office of China issued the *National Human Rights Action Plan of China (2009-2010)*, which promises to treat detainees better and ban extraction of confessions by torture. “It signals that the human rights cause has become a major theme of China's national construction and social development, and has ushered in a new phase of planned, all-round development,”<sup>314</sup> said Wang Chen, minister of the State Council Information Office. The action plan was framed in response to the United Nations' call in 1993 for establishing a national human rights plan. China was one of 26 countries that have responded to the call.<sup>315</sup> Many actions enhancing the right to the fair trial for the defendants and suspects are also included in the *National Human Rights Action Plan of China (2009-2010)*. The plan was an important step in enhancing the protection of human rights with more specific measures rather than only a report summing up past progress. The reforms on the protection of human rights under the plan are expected to facilitate improvements in criminal procedure.

The simplified procedure is only a small archway to plea bargaining, but it can become larger with the translation of Western consensual process. Also, the successful experiences in the introduction of plea bargaining in the civil law countries will inspire the Chinese government to reform the current simplified procedure. The cases that tested

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<sup>314</sup> *Minister Hails Human Rights Action*, [http://www.chinadaily.com.cn/cndy/2009-04/15/content\\_7677523.htm](http://www.chinadaily.com.cn/cndy/2009-04/15/content_7677523.htm).

<sup>315</sup> *Id.*

the informal plea bargaining system within the local jurisdiction can supply the lessons and Chinese experiences in plea bargaining.

Criminal justice is all too a frequently complicated and puzzling entity in most countries. Plea bargaining with Chinese characteristics can ultimately be adopted in the Chinese criminal justice system. Plea bargaining, all in all, unlike a panacea, cannot address all the problems of criminal justice in China, but it is possible and feasible to overcome the disadvantages in the current criminal justice system in the long run.

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