

# The Rhyme of History: A Transition of Legal Culture in China Crowned by the Criminal Procedure Law 2012

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## Abstract

*This article explains how recent changes in China's legal culture are being influenced by the two philosophies of good governance currently emphasised by the country's leadership; that is, the rule of law and social harmony. Focusing specifically on criminal procedure, the article uncovers the essence of China's current legal culture – that is, the juxtaposition of the rule of law and social harmony, and analogises it with the alloy of Confucianism and Legalism in dynastic China. This article posits that the effort to amend the Criminal Procedure Law ('CPL') (2012) completes the transition of China's legal culture because it accomplishes a substantive mixture of the rule of law and social harmony. The article then scrutinises the CPL amendments by classifying them into two groups in the light of their main functions – that is, to consolidate the rule of law and to legalise social harmony – and discusses how the rule of law and social harmony are further promoted in the criminal justice system through the first-year implementation of the CPL. A preliminary examination of the questions arising from the juxtaposition of the rule of law and social harmony under the CPL – which touches upon the basis of the criminal justice system and even the entire legal regime – precedes the conclusion of the article.*

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## I. Introduction

‘History does not repeat itself, but it does rhyme.’<sup>1</sup> The aim of this article is to illustrate one such ‘rhyme of history’, relating to some recent changes in China’s legal culture. Specifically, it seeks to explain how amendments made in 2012 to the Criminal Procedure Law (‘CPL’) of the People’s Republic of China (‘PRC’) reflect essential features of Chinese legal tradition, which took its shape thousands of years ago in dynastic China. At the heart of that ancient legal tradition were two pillars – rule by law and harmony – and a system of checks and balances that brought stability and effectiveness to dynastic law. The two-part hypothesis of this article is that the recent amendments to the CPL represent a ‘rhyme of history’ in that (1) the juxtaposition revealed in the CPC between the rule of law and social harmony reflects the essence of traditional legal culture in China, and specifically the alloy of Legalism and Confucianism; and (2) the amending of the CPL in 2012 marks the completion of the transition because it works out a substantive mixture of the two philosophies.

To test the two parts of this hypothesis, this article unfolds in the following way. In Part II, the juxtaposition of the rule of law and social harmony in the Chinese legal regime (including criminal judicature) is explored. In Part III, the issue as to how the CPL amendments consolidate the rule of law and legalise social harmony is examined. In Part IV the issue as to how the two pillars of the current legal culture in China are pushed further through the first year implementation of the CPL is articulated. In Part V, the checks and balances between the rule of law and social harmony under the CPL 2012 and how they challenge the criminal justice system are explained.

## II. Two Philosophies of Good Governance Pushing for a Transition of Legal Culture in China

A political system that was based on Marxist-Leninist ideas was erected within China upon the establishment of the PRC in October 1949. Based on orthodox Marxism, the Chinese government repudiated Western democracy and its justifications of an autonomous legal system. Political ‘campaigns’ and

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<sup>1</sup> This saying has been unanimously attributed to Mark Twain, although the exact origin of it cannot be identified. See eg Seymour Morris Jr, *American History Revised: 200 Startling Facts That Never Made It into the Textbooks* (Broadway Books, USA, 2010), p 309; Hugh Rawson & Margaret Miner (eds), *The Oxford Dictionary of American Quotations* (Oxford University Press, USA, 2006), p 316.

‘movements’ dominated the political and economic affairs in the country until the conclusion of the ‘Cultural Revolution’ in 1976; during that period, the legal system was almost completely shut down. The need to develop a legal system that ensures stability and continuity of the laws, as stressed by the National People’s Congress (‘NPC’), has led to a legislative and regulatory frenzy since 1978. This represents a remarkable transition of Chinese law. It is worth noting – and it will be emphasised in the following pages – that this transition has not made China’s legal system identical with those of Western nations. As one observer has noted, even though the laws in the Chinese legal regime are general, public, prospective, clear, consistent, capable of being followed, stable, and (generally) enforced, it is evident that China does not aspire to a substantive rule of law that embraces key Western-favoured elements of political morality such as domestic forms of government or liberal individual-centred conceptions of human rights.<sup>2</sup> Still, the legal reforms that were set in motion 35 years ago have created a remarkable transition in China’s legal culture.

Legal culture in China is now going through yet another remarkable transition, one that is motivated by the erection of two philosophies of good governance – the rule of law and social harmony. The following paragraphs of this part explain briefly (1) how the rule of law and social harmony have evolved into the overarching values of the Chinese legal system; and (2) how the Chinese legal tradition helps explain the juxtaposition of those two philosophies.

## ***A. The rule of law in contemporary China***

Despite the fact that the Western-defined rule of law<sup>3</sup> has not been completely achieved in China, the past decade has witnessed China’s huge step towards it because it has been accepted by the country’s leadership as a most important benchmark to test the quality of China’s legal system.

### **1. The Chinese legal system consolidating the rule of law**

The term ‘rule of law’ was officially incorporated into Chinese legislation by the 1999 amendments to the Constitution of the PRC, Article 5(1) of which states that: ‘The People’s Republic of China governs the country according to

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<sup>2</sup> John W Head, *Great Legal Traditions: Civil Law, Common Law, and Chinese Law in Historical and Operational Perspective* (Carolina Academic Press, USA, 2011), pp 517-525, 560-573.

<sup>3</sup> See generally eg, Lon Fuller, *The Morality of Law* (Yale University Press, USA, 1964); Head, (note 2 above), pp 542–544; Randall Peerenboom, ‘The X-Files: Past and Present Portrayals of China’s Alien ‘Legal System’’ (2003) 2 *Washington University Global Studies Law Review* 37.

law and makes it a socialist country under rule of law.’<sup>4</sup> Subsequently, the 2004 amendments to the Constitution insert one paragraph into the text of Article 33(3): ‘The State respects and preserves human rights’. This insertion of ‘human rights’ into the Constitution marks a breakthrough, that is, China’s movement towards the substantive concept of rule of law.

The 1999 and 2004 amendments to the Constitution have also brought about an intensive overhaul of the entire legal regime. According to one source, ‘[a] socialist legal system with Chinese characteristics’, a central aim of the Constitution, was successfully established by the end of 2010.<sup>5</sup> This legal regime features the protection of human rights by amending or enacting a number of human rights-related laws.<sup>6</sup>

Also, the Chinese government has participated in 26 international conventions that revolve around human rights,<sup>7</sup> and published through the State Council nine white papers about the progress in the protection of human rights in China as of July 2014.<sup>8</sup> The State Council released its first national program on human rights in 2009 – that is, the National Human Rights Action Plan of

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<sup>4</sup> Constitution (PRC) (promulgated by the Fifth Plenary Session of the Fifth National People’s Congress, 4 December 1982, effectively 4 December 1982, amended in 1988, 1993, 1999 and 2004).

<sup>5</sup> China Law Society, ‘Annual Report on the Construction of Rule of Law in China (2010)’ (Chinese), available at <http://www.chinalaw.org.cn/cnfzndbg/> (last visited 10 July 2014) [all the pertinent parts of Chinese literature that are cited in this article are translated by Xing Lijuan unless otherwise noted].

<sup>6</sup> State Council of the PRC, ‘Progresses in China’s Human Rights in 2012 (White Paper)’ (Chinese), available at [http://www.gov.cn/jwqk/2013-05/14/content\\_2402180.htm](http://www.gov.cn/jwqk/2013-05/14/content_2402180.htm) (last visited 31 July 2014). The pertinent human rights-related laws mainly include the Food Safety Law (enacted in 2009), the Law on the Protection of Disabled Persons (amended in 2008), the Law on Tort Liability (enacted in 2009), the Criminal Law (amended in 2009 and 2011), the Electoral Law of the National People’s Congress and Local People’s Congresses (amended in 2010), the Law on State Compensation (amended in 2010), the Law on Social Insurance (enacted in 2010), the Copyright Law (amended in 2010), the Law on the Applicable Law in Foreign-Related Civil Relations (enacted in 2010), the Law on Administrative Compulsion (enacted in 2011), the CPL (amended in 2012) and the Civil Procedure Law (amended in 2012).

<sup>7</sup> State Council of the PRC, ‘Progresses in China’s Human Rights in 2013 (White Paper)’ (Chinese), available at [http://www.gov.cn/zhengce/2014-05/26/content\\_2686946.htm](http://www.gov.cn/zhengce/2014-05/26/content_2686946.htm) (last visited 10 July 2014).

<sup>8</sup> The nine white papers about the progresses in China’s human rights are published in 1995 (for the years between 1991 and 1995), 1997 (for the year of 1996), 1999 (for the year of 1998), 2001 (for the year of 2000), 2004 (for the year of 2003), 2005 (for the year of 2004), 2010 (for the year of 2009), 2013 (for the year of 2012), and 2014 (for the year of 2013), respectively.

China (2009-2010) – through the State Council Information Office (‘SCIO’).<sup>9</sup> In May 2012, the SCIO published the second national program on human rights – that is, the National Human Rights Action Plan of China (2012-2015), which reiterates China’s determination to incorporate human rights protection into the entire legal system.<sup>10</sup> Between 2009 and 2013, the protection of human rights has been intensively underscored in different areas of judicial reform, such as the enhanced transparency of adjudication and the enlarged participation of lawyers in judicial proceedings.<sup>11</sup>

To further the steps towards a country under rule of law, the Chinese government advocates the proposition of ‘administration in accordance with law’, which is based on the 1999 amendments to the Constitution.<sup>12</sup> The State Council formulated in 2004 the Outline for Promoting Law-based Administration in an All-round Way (‘the Outline’),<sup>13</sup> requesting that the ‘administration in accordance with law’ be enforced in comprehensive areas of administration, including administrative policy-making, administrative management, the publication of government-related information, and so on. It also set a target of establishing a government under rule of law in the ten years following the formulation of the Outline. The year 2014 marked the tenth anniversary of the publication of the Outline. Between 2004 and 2014, remarkable accomplishments under the ‘administration in accordance with law’ have been reported in many fields, such as the reforms of administrative institutions, the increasing transparency in administration and the improved administrative-permission system.<sup>14</sup> The system of ‘re-education through labour’

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<sup>9</sup> State Council of the PRC, ‘National Human Rights Action Plan of China (2009-2010)’ (Chinese), available at <http://www.scio.gov.cn/zxbd/nd/2009/Document/310304/310304.htm> (last visited 11 July 2014).

<sup>10</sup> State Council of the PRC, ‘National Human Rights Action Plan of China (2012-2015)’ (Chinese), available at <http://www.scio.gov.cn/zxbd/tt/Document/1171248/1171248.htm> (last visited 11 July 2014).

<sup>11</sup> State Council of the PRC, ‘Progresses in China’s Human Rights in 2009’ (Chinese), available at [http://www.gov.cn/zwgk/2010-09/26/content\\_1709942.htm](http://www.gov.cn/zwgk/2010-09/26/content_1709942.htm) (last visited 7 July 2014).

<sup>12</sup> The emphasis on the administration in accordance with law has appeared consecutively in the annual Working Reports of the Government made by the Premier of the State Council for years between 1999 and 2014, available at [http://www.gov.cn/guoqing/2006-02/16/content\\_2616810.htm](http://www.gov.cn/guoqing/2006-02/16/content_2616810.htm) (Chinese) (last visited 10 July 2014).

<sup>13</sup> State Council of the PRC, ‘Outline for Promoting Law-based Administration in an All-round Way’ (published in March 2004) (Chinese), available at [http://www.gov.cn/zwgk/2005-08/12/content\\_21811.htm](http://www.gov.cn/zwgk/2005-08/12/content_21811.htm) (last visited 10 July 2014).

<sup>14</sup> China Law Society, ‘Annual Report on the Construction of Rule of Law in China (2013)’ (Chinese), available at [http://www.legaldaily.com.cn/bm/content/2014-06/18/content\\_5603103.htm](http://www.legaldaily.com.cn/bm/content/2014-06/18/content_5603103.htm) (last visited 12 July 2014).

was abolished in December 2013, which had operated for over 50 years since the establishment of the PRC as a form of administrative sanction and had been criticised for infringing upon constitutional human rights like personal freedom.<sup>15</sup> The abolition of ‘re-education through labour’ system stands as a milestone of the ‘administration in accordance with law’ and the Chinese government’s dedication to human rights protection.<sup>16</sup>

In addition to these and other changes relating to administrative organs, the Chinese judiciary also increasingly submits itself to the legal principles purported by the rule of law. Checking and balancing judicial power has become the priority of its work since 2008.<sup>17</sup> Between 2008 and 2013, the Supreme People’s Court (‘SPC’) and the Supreme People’s Procuratorate (‘SPP’) promulgated 144 judicial interpretations, endeavouring to unify the application of law nationwide.<sup>18</sup> In short, the rule of law has been deeply embedded in the practices of the Chinese legislature, administration, and judiciary.

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<sup>15</sup> See generally eg, Larry Catá Backer & Keren Wang, ‘The Emerging Structures of Socialist Constitutionalism with Chinese Characteristics: Extra-Judicial Detention and the Chinese Constitutional Order’ (2014) 23 *Pacific Rim Law and Policy Journal* 251.

<sup>16</sup> State Council of the PRC, ‘Report on the Work of the Government (2014)’ (Chinese), available at <http://lianghui.people.com.cn/2014npc/n/2014/0305/c376646-24535026.html> (last visited 31 July 2014).

<sup>17</sup> China Law Society, ‘Annual Report on the Construction of Rule of Law in China (2008)’ (Chinese), available at <http://www.chinalaw.org.cn/cnfzndbg/> (last visited 10 July 2014).

<sup>18</sup> The numbers of judicial interpretations promulgated by the SPC and the SPP in individual years between 2008 and 2013 are as follows: 19 in 2008, 22 in 2009, 21 in 2010, 24 in 2011, 26 in 2012, and 32 in 2013. See China Law Society, ‘Annual Reports on the Construction of Rule of Law in China (2008)-(2013)’ (Chinese), available at <http://www.chinalaw.org.cn/cnfzndbg/> (last visited 11 July 2014). It is worth noting that some scholars have shed their light on the legality of judicial interpretations in terms of the scope of judicial interpretation as delineated by the Constitution and the Legislation Law of the PRC. See generally eg, Hu Yuhong, ‘To Give Respect to the Law: The Primary Principle for Judicial Interpretation’ (2010) 68 *Journal of the East China University of Politics & Law* 98 (Chinese), Chen Jinzhao, ‘An Explanation of the Proposition of “Rule of Law Resists Interpretation”’ (2008) 134 *Law and Social Development* 79 (Chinese), and Yuan Mingsheng, ‘A Study on the Phenomenon of “Legislation” Through Judicial Interpretation’ (2003) 94 *Studies in Law and Business* 3 (Chinese). Two authorities on Chinese law further point out that ‘although the [Standing Committee of the NPC (NPCSC)] issued two circulars setting out detailed procedures for handling proposals for NPCSC review of [the constitutionality or legality of] administrative regulations and judicial interpretations, these circulars do not provide much transparency into how the decisions are actually made.’ Randall Peerenboom & Xin He, ‘Dispute Resolution in China: Patterns, Causes and Prognosis’ (2009) 4 *East Asia Law Review* 1, pp 51-52.

## 2. The amending of the CPL pushed by the rule of law

The efforts in China to ensure the rule of law have also extended to criminal proceedings. The Political-Legal Committee under the Central Committee of the Communist Party of China ('CCCPC') initiated the second round of judicial reforms in 2008 by issuing the Opinions on Issues of Deepening Reform of the Judicial System and Its Work Mechanisms ('the CCCPC Opinions on Judicial Reform of 2008'), which gives considerable attention to the amending of the CPL for the purpose of enforcing the constitutional principle of protecting human rights.<sup>19</sup>

Prior to the release of the CCCPC Opinions on Judicial Reform of 2008, the 2004 amendments to the Constitution had in effect urged the judiciary to help pave the way for amending the CPL to enhance human rights protections. For instance, in order to manifest an extremely cautious attitude towards applying the death penalty, the Organic Law of the People's Courts as amended in 2006 requests the SPC to retake the exclusive authority of reviewing and finalising death penalty sentences.<sup>20</sup> Subsequently, the SPC published in 2007 the Provisions on Some Issues of Reviewing Death Penalty,<sup>21</sup> which also contribute to the drafting of pertinent provisions in the CPL 2012.

Another remarkable accomplishment of the judiciary regarding due process is the significant improvement of evidence rules in criminal proceedings. In June 2010, the SPC, the SPP, the Ministry of Public Security ('MPS'), the Ministry of State Security ('MSS') and the Ministry of Justice ('MOJ') issued jointly the Provisions on Some Issues of Inspecting and Assessing Evidence in Handling Death-Penalty Cases and the Provisions on Some Issue of Excluding Illegal Evidence in Handling Criminal Cases.<sup>22</sup> These have served as the embryo of pertinent provisions in the CPL 2012.

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<sup>19</sup> Chen Guangzhong, *Annotations and Comments on the Revised Articles of the Criminal Procedure Law of the People's Republic of China* (People's Court Press, PRC, 2012), p 4.

<sup>20</sup> Organic Law of the People's Courts (PRC) (promulgated by Order No 3 of the Chairman of the Standing Committee of the National People's Congress, 5 July 1979, effectively 1 January 1980, amended in 1983, 1986 and 2006), art 12.

<sup>21</sup> SPC, 'Provisions on Some Issues of Reviewing Death Penalty' (effectively on 28 February 2007) (Chinese), available at [http://www.court.gov.cn/qwfb/sfjs/201006/t20100609\\_5955.htm](http://www.court.gov.cn/qwfb/sfjs/201006/t20100609_5955.htm) (last visited 4 July 2014).

<sup>22</sup> SPC et al, 'Provisions on Some Issues of Inspecting and Assessing Evidence in Handling Death-Penalty Cases' (Chinese), available at <http://www.spp.gov.cn/site2006/2010-06-25/0005428111.html> (last visited 11 July 2014). SPC et al, 'Provisions on Some Issue of Excluding Illegal Evidence in Handling Criminal Cases' (Chinese), available at <http://www.spp.gov.cn/site2006/2010-06-25/0005428112.html> (last visited 11 July 2014).

In addition to the efforts taken by the judiciary, a strong request for due process from the common people within the country also helped push for amendments to the CPL. The awakening of legal consciousness among the people can be largely attributed to some notorious wrongful convictions exposed by the press media – for example, the cases of Mr She Xianglin and Mr Zhao Zuohai. Each of these two men was convicted of murdering another person – but in both cases the victim in fact recovered and returned home.<sup>23</sup> After Mr She and Mr Zhao were proved innocent, it was revealed that their confessions, on which the convictions relied heavily, were extorted by torture.<sup>24</sup> The exposure of these and similar wrongful convictions triggered a wide concern about the judiciary's capacity to achieve criminal justice.<sup>25</sup>

## ***B. Social harmony in contemporary China***

Besides the rule of law, a political motto put forward by the CPC in 2004 – that is, to construct a harmonious socialist society – has also developed into a fundamental value of the modern Chinese legal system.

### **1. The Chinese legal system legalising social harmony**

In September 2004, the CCCPC adopted the Decision of the Central Committee of the Communist Party of China on Strengthening the Party's Ruling Capacity ('the Decision on Ruling Capacity of 2004'), which designates

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<sup>23</sup> Chinacourt (website), 'The Case of She Xianglin is Retried Today, the 'Wife-Killer' is Pronounced Innocent' (13 April 2005) (Chinese), available at <http://www.chinacourt.org/article/detail/id/159023.shtml> (last visited 4 August 2012). Chinacourt (website), 'Higher People's Court Pronounced Zhao Zuohai Innocent and Released Him' (9 May 2010) (Chinese), available at <http://www.chinacourt.org/article/detail/id/407772.shtml> (last visited 4 August 2012).

<sup>24</sup> NPC, 'Law Amendments Center on Human Rights Protection' (Chinese), available at [http://www.npc.gov.cn/englishnpc/news/Focus/2012-03/14/content\\_1713573.htm](http://www.npc.gov.cn/englishnpc/news/Focus/2012-03/14/content_1713573.htm) (last visited 27 July 2012).

<sup>25</sup> China.org.cn (website), 'Vice President of the SPC, Mr. Wan Exiang, Talking about the Case of She Xianglin' (April 4, 2005) (Chinese), available at <http://www.china.com.cn/chinese/kuaixun/838170.htm> (last visited 11 July 2014). Mr Justice Wan Exiang, the then Vice President of the SPC, submitted that cases like those of Mr She had challenged the attitude of the judiciary towards the issues as to (1) the role of criminal procedure in protecting innocent people and human rights; (2) the application of the principle of presumption of innocence; and (3) the pressure imposed by popular opinion. Nevertheless, he underscored that the judiciary should ensure both substantive and procedural justice in any event. *Ibid.*



the CPC's capacity to 'construct a harmonious society' as essential to achieve good governance.<sup>26</sup> The six characteristics of a harmonious society as identified by the then General Secretary of the CCCPC and President of the PRC, Mr Hu Jintao, are (1) democracy and the rule of law; (2) justice; (3) sincerity and amity; (4) vitality; (5) stability and order; and (6) harmony between human beings and nature.<sup>27</sup> These six characteristics indicate that, in the eyes of the Chinese leadership, (a) the concept of social harmony is much broader than that of rule of law; and (b) sincerity, amity, stability, order, and other status of social relationships should be underscored in the pursuit of social harmony, as paralleling the rule of law<sup>28</sup> – therefore, the realisation of social harmony depends on the elimination of all social factors that may negatively affect sincerity, amity, stability, order, the rule of law, and so on.

A main reaction of the judiciary to the proposition of social harmony has been to emphasise mediation – including people's mediation (presided by the people's mediation committees), administrative mediation (presided by administrative organs), and judicial mediation (presided by the judiciary) – as a means of dispute resolution. It is thought that mediation, which leads to agreement between the disputing parties – by 'eliminating social contradictions in their embryonic stage, preventing the escalation of social contradictions, and educating the people',<sup>29</sup> is more effective in restoring the sincerity, amity, stability, or order within a society than adjudication, which imposes a third party's ruling on the hostile parties.

The principle of 'preference for mediation' was gradually erected in the judicature by a series of SPC judicial interpretations issued between 2004 and 2011. These include (i) the Opinions on Strengthening the People's Mediation

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<sup>26</sup> CCCPC, 'Decision on Strengthening the Ruling Capacity of the Communist Party of China' (Chinese), available at [http://news.xinhuanet.com/newscenter/2004-09/26/content\\_2024232.htm](http://news.xinhuanet.com/newscenter/2004-09/26/content_2024232.htm) (last visited 12 July 2014).

<sup>27</sup> People's Daily (website), 'Hu Jintao Emphasizes a Deep Recognition of the Grave Significance of Constructing a Harmonious Society' (Feb. 20, 2005) (Chinese), available at <http://politics.people.com.cn/GB/1024/3187879.html> (last visited 1 August 2012).

<sup>28</sup> See generally eg, Cheng Siwei, 'Constructing a Harmonious Society and Maintaining Social Stability', in *People's Daily* (10 October 2005), p 9 (Chinese), available at <http://theory.people.com.cn/GB/49150/49151/3752985.html> (last visited 12 July 2014).

<sup>29</sup> Wang Gongyi et al (Institute for Justice Administration of the Ministry of Justice), 'Investigation Report on Perfecting the 'Great Mediation' Mechanism Based on the People's Mediation' (Oct. 18, 2012) (Chinese), available at [http://www.moj.gov.cn/yjs/content/2012-10/18/content\\_2787450.htm?node=30053](http://www.moj.gov.cn/yjs/content/2012-10/18/content_2787450.htm?node=30053) (last visited 12 July 2014).

and Maintaining Social Stability (February 2004); (ii) the Provisions on Some Issues of the People's Mediation in the People's Courts (November 2004); (iii) the Opinions on Providing Judicial Safeguard for the Construction of a Harmonious Socialist Society (January 2007); (iv) the Opinions on Further Activating the Positive Roles of Judicial Mediation in the Construction of a Harmonious Socialist Society (March 2007); (v) the Opinions on the Establishment, and Consolidation, of Connections between Litigant and Non-litigant Mechanisms for Dispute Resolution (July 2009); and (vi) the Opinions on Further Implementing the Working Principle of 'Preference for Mediation' and Combining Mediation with Litigation' (June 2010).

The principle of 'preference for mediation' has been further stressed in the ongoing judicial reforms which designate social harmony as its 'main thread'.<sup>30</sup> In 2009, 62 percent of the first-instance civil cases ended in mediation before the People's Courts at various levels; the percentages for 2010, 2011, and 2012 were 65.29 percent, 67.26 percent and 64.6 percent respectively.<sup>31</sup> These numbers clearly manifest the fact that mediation has been heavily relied on by the courts as a means of dispute resolution.

The NPC promulgated the Law on the People's Mediation in 2010 to build the legal foundation for the people's mediation mechanism.<sup>32</sup> Furthermore, the Civil Procedure Law as amended in 2012 legalises the principle of 'preference for mediation' by providing that, 'a civil dispute brought before the court *should* be mediated in the first place wherever appropriate, unless the parties to the dispute refuse to be mediated.'<sup>33</sup> One more noticeable outcome of the ongoing judicial reforms is the erection of social harmony as the ultimate goal that several

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<sup>30</sup> CCCPC, 'Opinions on Some Issues of Deepening the Reform of Judicial System and Working Mechanism' (Chinese), available at [http://www.moj.gov.cn/zt/content/2014-05/29/content\\_5560803.htm?node=70209](http://www.moj.gov.cn/zt/content/2014-05/29/content_5560803.htm?node=70209) (excerpt) (last visited 21 July 2014).

<sup>31</sup> China Law Society, 'Annual Reports on the Construction of the Rule of Law in China' (2009, 2010 and 2011, Chinese), available at <http://www.chinalaw.org.cn/cnfzndbg/> (last visited 3 July 2014). SPC, 'Working Report of the SPC (2012)' (Chinese), available at [http://www.gov.cn/2013lh/content\\_2359159.htm](http://www.gov.cn/2013lh/content_2359159.htm) (last visited 12 July 2014); 'Working Report of the SPC (2013)' (Chinese), available at <http://lianghui.people.com.cn/2014npc/n/2014/0310/c382480-24592263.html> (last visited 12 July 2014).

<sup>32</sup> Law on the People's Mediation (PRC) (promulgated by Order. No 34 of the President of the PRC, 28 August 2010, effectively 1 January 2011).

<sup>33</sup> Civil Procedure Law (PRC) (promulgated by the Fourth Session of the Seventh National People's Congress, 9 April 1991, effectively 9 April 1991, amended in 2007 and 2012), art 122. (emphasis added)

recently-enacted laws serve.<sup>34</sup> Consequently, not only the means of promoting social harmony, such as the people's mediation mechanism and the principle of 'preference for mediation', are solidified by legal rules, but also the political motto of social harmony itself is underscored by the pertinent laws.

## **2. The amending of the CPL pushed by social harmony**

The influence of social harmony on the criminal justice system can be discussed in three respects. First, 'tempering severity with leniency' has become the predominant policy of the criminal judiciary. In December 2006, the SPP issued its Opinions on Implementing the Policy of 'Tempering Severity with Leniency' in the Procuratorial Work ('the SPP Interpretation on Tempering Severity with Leniency of 2006'); the SPC issued subsequently in January 2010 its interpretation on the application of that policy in criminal adjudication – that is, 'the SPC Interpretation on Tempering Severity with Leniency of 2010'. The essence of that policy is 'differential treatment' – that is, to punish crimes that are held as seriously threatening social stability in a severe manner and to handle crimes that are caused by civil disputes and bring minor threats to the public order in a lenient way. A severe way to punish crimes means that the offenders concerned should be investigated, prosecuted, tried, and sentenced speedily and be subject to gravest punishments permitted by the pertinent law; a lenient way indicates that the offenders concerned should (1) be punished with a light or commuted sentence as permissible under the pertinent law; and (2) be handled differently, such as through the process of criminal reconciliation – as discussed in the next paragraph.<sup>35</sup>

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<sup>34</sup> Those laws mainly include the Law on Mediation and Arbitration on Disputes of Contracted Management of Rural Land (promulgated by Order No 14 of the President of the PRC, 27 June 2009, effectively 1 January 2010, art 1), the Law on Tort Liability (promulgated by Order No 21 of the President of the PRC, 26 December 2009, effectively 1 July 2010, art 1), the Law on Social Insurance (promulgated by Order No 35 of the President of the PRC, 28 October 2010, effectively 1 July 2011, art 1), and the Law on the People's Mediation (art 1).

<sup>35</sup> See generally, SPP, 'Opinions on Implementing the Policy of 'Tempering Severity with Leniency' in the Procuratorial Work' (2006) (Chinese), available at <http://www.spp.gov.cn/site2006/2008-06-21/0002419100.html> (last visited 10 July 2014); SPC, 'Opinions on Implementing the Policy of Tempering Severity with Leniency' (2010) (Chinese), available at [http://www.court.gov.cn/qwfb/sfwj/yj/201002/t20100222\\_1513.htm](http://www.court.gov.cn/qwfb/sfwj/yj/201002/t20100222_1513.htm) (last visited 10 July 2014). Crimes deserving severe punishments mainly include those (1) severely endangering social security, social economic order, the environment; (2) deserving the death penalty; (3) committed by civil servants (such as bribery, embezzlement, abuse of power, dereliction of duty, and those triggering wide fury among the people), etc. SPP, arts 5, 10-14; SPC, arts 6-13, 14-24.

The second aspect of the influence of social harmony on the criminal justice system is manifested by the introduction of the criminal reconciliation mechanism. This refers to a restoration of the relationship between the offender and the offended, under which the offender acquires forgiveness from the offended by paying financial compensation, apologising, repenting of crimes, etc.<sup>36</sup> The People's Procuratorate of Chaoyang District, Beijing Municipality took the lead nationwide in introducing criminal reconciliation into criminal adjudication in early 2002 and established an office dedicated to criminal reconciliation in 2007.<sup>37</sup> Since then, further efforts to encourage criminal reconciliation have also been made.<sup>38</sup>

The third aspect of the influence of social harmony on the criminal justice system is the establishment of a community correction mechanism in the execution of criminal punishments. Community correction refers to the execution of non-imprisonment penalties, including surveillance, probation, temporary execution of sentences outside prison, parole, and deprivation of political rights by community correction institutions instead of relying so much on public security organs.<sup>39</sup> The reason for this, in terms of social harmony, is that community correction institutions appear to be more amicable and acceptable to the punished than public security organs, and thus, function more effectively in re-educating those persons and helping them repent and rehabilitate in society.<sup>40</sup>

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<sup>36</sup> SPP, *ibid*, art 20.

<sup>37</sup> Zhao Xiaoxing et al, 'Beijing Chaoyang: Strengthening Supervision to Guarantee the Voluntariness and Legitimacy of Reconciliation', in *Procuratorate Daily* (8 October 2012) (Chinese), available at <http://www.spp.gov.cn/site2006/2012-10-08/0005442492.html> (last visited 13 July 2014).

<sup>38</sup> For example, the People's Procuratorates are empowered to handle cases in a lenient way where reconciliation is reached by the parties concerned. SPP (note 35 above), art 20. The People's Courts are required to take into consideration the fact of criminal reconciliation in measuring criminal punishments. SPC (note 35 above), art 40.

<sup>39</sup> China Law Society (note 17 above).

<sup>40</sup> Meng Jianzhu (General Secretary of the Political and Judicial Committee of the CCCPC), 'A Speech on Pushing Community Correction in All-round Way and Helping Prisoners Rehabilitate Better', addressed at the National Working Meeting on Community Correction on 27 May 2014, available at [http://www.moj.gov.cn/sqjzbgs/content/2014-07/11/content\\_5663779\\_2.htm](http://www.moj.gov.cn/sqjzbgs/content/2014-07/11/content_5663779_2.htm) (last visited 13 July 2014). Public security organs, together with the People's Courts, the People's Procuratorates, and judicial administrations, are now playing a role in organising and supervising community correction. Implementation Measures on Community Correction (PRC) (promulgated jointly by the SPC, the SPP, the MPS, and the MOJ, 10 January 2012, effectively 1 March 2012), art 39.

### ***C. The rhyme of history: the juxtaposition of the rule of law and social harmony***

The coexistence of the rule of law and social harmony in contemporary China can be seen as ‘rhyming’ with some key features of Chinese legal history. In this subsection, the Confucian origin of social harmony is explored, as well as the way in which that emphasis on social harmony became ‘legalised’ into the system of governance.

Before turning to a substantive analysis in this section, it is noteworthy to underscore here three points in respect of that analysis. First, despite the common properties of legal culture in dynastic China and contemporary China, as observed in the following paragraphs, this section by no means indicates that the connotations of some critical concepts which play an important role in sustaining the legal culture concerned, such as ‘harmony’, ‘good governance’, ‘transparency’, and ‘equality’, as used in the context of dynastic China and contemporary China, are identical. On the contrary, it is noted that the meanings of those terms have continuously evolved and expanded as time goes by.<sup>41</sup> Second, the continuous evolvement and expansion of the meanings of those critical concepts have naturally brought about disanalogies between the governance philosophies in dynastic China and those in contemporary China in certain respects. For instance, ‘equality’ of people before the law was

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<sup>41</sup> For example, the term ‘harmony’ as used in the context of dynastic China mainly refers to the ideal social order which could be achieved only by strict adherence to ‘lǐ’. It may also refer to ‘cosmic harmony’ which emphasised ‘the harmony of man and nature.’ For elaborations on cosmic harmony, see generally, Derk Bodde, ‘Basic Concepts of Chinese Law: the Genesis and Evolution of Legal Thought in Traditional China’, in Derk Bodde, *Essays on Chinese Civilization* (Princeton University Press, USA, 1981) 171, pp 189-190. In contemporary China, former President of the PRC, Mr Hu Jintao, defines ‘harmony’ from a comprehensive perspective which embraces, *inter alia*, modern concepts of democracy, sustainability, and justice. See note 27 above and its accompanying text. Another instance is the meaning of ‘transparency’ in dynastic China and the contemporary China. It mainly refers to ‘legal transparency’ in the context of dynastic China, the central issue of which is ‘how much information about legal rules should be made available to the public at large.’ For elaborations on legal transparency in dynastic China, see generally, John W Head & Xing Lijuan, *Legal Transparency in Dynastic China: The Legalist-Confucianist Debate and Good Governance in Chinese Tradition* (Carolina Academic Press, USA, 2013), pp 4-5, 8. In the contemporary world, by contrast, a grand reach of transparency in many aspects of governance has been observed. For elaborations on that grand reach of transparency, see generally Caroline Bradley, ‘Transparency is the New Opacity: Constructing Financial Regulation After the Crisis’ (2011) 1 *American University Business Law Review* 7 at 8-10.

underlined in dynastic China,<sup>42</sup> but, the subjects of such equality in that era did not embrace the leaders (that is, the imperial rulers) of the society. In addition, unlike the term used in contemporary world, ‘equality’ stressed in dynastic China was not accompanied by legal concepts developed in modern society, like freedom, development, human rights, and so on. Nonetheless, the existence of such disanalogies is largely irrelevant to the arguments presented in this article, the overarching aim of which is to crystallise how the approach of alloying two parallel philosophies of state governance in dynastic China has been adopted in contemporary China, rather than identifying to what extent the legal culture of contemporary China can find its roots in that of dynastic China. Third, albeit with the perceived disanalogies, the connection between the legal culture of contemporary China and that of dynastic China is apparent. As elaborated by an expert on Chinese law, ‘both the changed and enduring notions of law in China, as well as any new ideas about law that have come from the West, have been formulated and developed in constant reference to the traditional dominant Chinese cultural orientations and prototypes’, and in the Chinese case, ‘what is described and conveyed through classical works is part of the Chinese cultural prototypes.’<sup>43</sup> The highlighting of the connection between the legal culture of dynastic China and that of contemporary China, as conducted in this section, endeavours to sketch out the similar situations in both dynastic and contemporary China in respect of the co-existence of two parallel philosophies of state governance.

### 1. Confucianism: the origin of social harmony

It is unanimously acknowledged that the political motto of ‘social harmony’ largely, if not completely, stems from Confucianism, the predominant philosophy of state governance in dynastic China,<sup>44</sup> which admired ‘harmony’ most.<sup>45</sup> *Li*, which means the rules of propriety in dynastic China – that is, ‘proper behavior generally, based on the place or status of a person within the

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<sup>42</sup> Head & Xing, *ibid*, p 128.

<sup>43</sup> Deborah Cao, *Chinese Law: A Language Perspective* (Ashgate Pub Ltd, UK, 2004), p 22.

<sup>44</sup> See eg, Song Dongmei, ‘The Confucian Value of Harmony Serves as the Cultural Basis of the Construction of a Harmonious Society’ (Chinese), available at <http://theory.people.com.cn/GB/49157/49165/8204417.html> (last visited 27 July 2012); Xiu Jianjun, ‘Harmony’ in Confucianism and Modern Harmonious Society; (Chinese), available at <http://theory.people.com.cn/GB/49157/49165/8204012.html> (last visited 27 July 2012).

<sup>45</sup> Head & Xing (note 41 above), pp 87-88.

family or the social and political system',<sup>46</sup> was regarded as the most significant instrument of state governance under Confucianism. Confucius, the founding father of Confucianism, held that, 'In practicing *lǐ*, harmony is to be prized',<sup>47</sup> which means that the aim of the compliance with *lǐ* is to achieve harmony. The Confucianists believed that human beings could be educated and cultivated to behave well by virtues, not by laws; a ruler should set a good example of complying with *lǐ* for his subjects.<sup>48</sup> For them, *fǎ* (published law), which was developed from *xíng* (punishment), served as the last means that rulers should resort to in exercising their reign,<sup>49</sup> in that 'the reliance on *fǎ* was a signal of chaos and tyranny'.<sup>50</sup> The emphasis that the Confucianists placed on 'education and cultivation' as functions of rulers extended somewhat further as well. Beyond serving as a criterion for a ruler's performance, the ruler's enthusiasm (and success) in providing such education and cultivation to the populace also served as a criterion for the ruler's competence.<sup>51</sup> In addition, on the grounds that litigation was an enemy of harmony, Confucius fantastically admired a society with no litigation, taking the elimination of litigation in society as a vital characteristic of good governance.<sup>52</sup> These core propositions of Confucianism – such as educating people instead of punishing people, showing benevolence by rulers, and distaining the reliance on law in state governance – can now find their reflections in the prosperity of community correction (which targets to 'remould the offenders into law-abiding citizens'<sup>53</sup>), tempering severity with leniency, mediation and reconciliation, and so on, under the current legal system within China.

## 2. The Confucianisation of the law: the inspiration for the legalisation of social harmony

Before attaining a dominant position, Confucianism had confronted strong competition from various other schools of thought in its era. The most

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<sup>46</sup> Head (note 2 above), p 465.

<sup>47</sup> *The Analects of Confucius* (Burton Watson trans., Columbia University Press, USA, 2007) (Xue Er).

<sup>48</sup> *Ibid* (Xian Wen).

<sup>49</sup> John W Head, *China's Legal Soul: The Modern Chinese Legal Identity in Historical Context* (Carolina Academic Press, USA, 2009), p 11.

<sup>50</sup> Robert Heuser, *Oriental Experience on Rule of Law* (Peking University Press, PRC, 2010), p 50 (Chinese edition).

<sup>51</sup> Head & Xing (note 41 above), p 94. For elaborations on 'education and cultivation' as a symbol of good governance, see *ibid* pp 93-95.

<sup>52</sup> For more elaboration on an ideal non-litigation society, see *ibid* pp 113-114.

<sup>53</sup> SPC, SPP, MPS & MOJ (note 40 above), art 1.

influential among them was Legalism, which strenuously advocated the overwhelming role of *fǎ* (published law) in state governance by sustaining the propositions like transparency of law (that is, the public awareness of the law and its application), equality of people before the law, strict application of the law, education of people by law etc. The rulers of the Qin Dynasty (221BC-206BC) – the first empire that united the Chinese nationality in history – strictly adhered to Legalism and attempted to eliminate all the other schools of thought, especially Confucianism.<sup>54</sup>

The brutal reign of the Qin emperors, however, were found abhorrent by their subjects, who put the blame squarely on Legalism. Consequently, the emperors of the Han Dynasty (206 BEC-220 CE) – which overthrew the Qin Dynasty – endeavoured to find a new philosophy of state governance that significantly departed from Legalism, in order to control and calm the country; and they finally resorted to Confucianism. The efforts taken by the imperial Confucianists in the Han Dynasty, represented by Dong Zhongshu, to refine the original Confucianism by absorbing other schools of thoughts – such as Daoism, Huanglao School, *Yin-yang*, and the five elements – gave birth to what became known as ‘Imperial Confucianism’.<sup>55</sup>

Despite their purported abandonment of Legalism, the Han emperors in fact followed the administrative regime that had operated in the Qin Dynasty – especially the administrative structure and the practice of developing and publicising various kinds of legal documents. Those legal documents in the Han Dynasty began to assume the task of solidifying the social values purported by Imperial Confucianism.<sup>56</sup> An alloy of Confucianism and Legalism was thus created, under a process called the ‘Confucianisation of the law’. The essence of this process is that ‘Confucianist ideas (whether orthodox or hybrid) would find expression in the application, and eventually the substance, of legal codes.’ All the legal codes in dynastic China, between the Han Dynasty and the Qing Dynasty which collapsed in 1911, featured that alloy of Confucianism and Legalism.<sup>57</sup> Obviously, the legalisation of social harmony in contemporary China revives the spirit of the Confucianisation of the law by finding its expressions in the substance and the application of current Chinese law, as demonstrated by the analysis in the coming parts.

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<sup>54</sup> See Head & Xing (note 41 above), pp 43-54.

<sup>55</sup> The five elements were wood, fire, soil, metal, and water: *ibid* p 57. For more elaboration on the ‘Imperial Confucianism’, see *ibid*, pp 54-67.

<sup>56</sup> Head (note 49 above), p 20.

<sup>57</sup> Head (note 2 above), pp 476-489.



### III. The CPL 2012 under the Rule of Law and Social Harmony

Having offered a historical summary of the development of these two philosophies – the rule of law and social harmony – in China, this article now turns to an examination of how the two philosophies can be seen in the sweeping amendments made to the CPL in 2012 ('the CPL 2012'). The CPL 2012 was adopted on 14 March 2012 at the Fifth Plenary Session of the Eleventh NPC and entered into force on 1 January 2013. It comprises 290 articles, reflecting 111 revisions of its predecessor. In the paragraphs that follow, the major changes introduced by the CPL 2012 are surveyed, by classifying them into two groups – one focusing on consolidating the rule of law, the other focusing on legalising social harmony.

#### *A. The amendments consolidating the rule of law*

The Judicial Reform in China (a white paper released by the SCIO in October 2012) credits the CPL 2012 with building a cornerstone of the Chinese legal system to strengthen human rights protection and consolidate the rule of law.<sup>58</sup> Numerous provisions in the CPL 1996 have been overhauled by the CPL 2012 to significantly enhance procedural justice.<sup>59</sup>

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<sup>58</sup> State Council of the PRC, 'Judicial Reform in China (White Paper) (2012)' (Chinese), available at <http://www.scio.gov.cn/zfbps/gqbps/2012/Document/1226621/1226621.htm> (English) (last visited 22 July 2014).

<sup>59</sup> Despite the noticeable progress made by the CPL 2012 towards the rule of law, insufficiencies of the new law as well as some concerns arising therefrom have been discussed in various scholarships from different perspectives. For example, one commentator takes China's failure to give full force to protections of voices criticising the government in the CPL as a pressing concern. (Margaret K Lewis, 'Criminal Law Pays: Panel Law's Contribution to China's Economic Development' (2014) 47 *Vanderbilt Journal of Transnational Law* 371, p 419.) Another example of critics on the CPL 2012 can be found in the following commentary: 'Article 73 of China's Criminal Procedure Law was amended in 2012 to allow authorities to keep "suspects in detention for up to six months at a location determined by the police in cases involving terrorism, state security, or serious instances of corruption." This new law is arguably an infringement on the freedom from arbitrary detention, with the high potential for other abuses such as torture and other ill treatment.' (Catherine Moore, 'The Game Changer: How The P5 Caused A Paradigm Shift In Norm Diffusion Post-9/11' (2014) 55 *Virginia Journal of International Law* 187, p 225.)

## 1. Human rights protection

China's first CPL was promulgated in 1979,<sup>60</sup> which mirrored the ideological characteristics of the Chinese legal system in that era. Its first article set the aim of the law as 'combating enemies' and 'protecting the people', which classified the citizens of the country into two opposite groups. The CPL 1996 – the successor of the CPL 1979 – has been said to signify 'a major development towards a deeper understanding of the notion of rule of law and justice', but to have taken only 'a moderate step towards improving the criminal justice system in China'.<sup>61</sup>

The hesitation of the Chinese legislature to completely adhere to the principles under the rule of law (or due process) originated in its concern that due process may adversely impair the crackdown on crimes – the ultimate function of the CPL.<sup>62</sup> That concern has been overcome to some extent in the past 16 years as the protection of human rights – especially the rights enjoyed by criminal suspects and defendants – is increasingly underscored by the legal regime that acclaims the rule of law. The CPL 2012 is the first law within China that expresses the principle of 'respecting and preserving human rights' since that principle was introduced into the Constitution in 2004. The term 'to respect and preserve human rights' is inserted into the text of its Article 2, which sets the main tasks of the law.

The principle of human rights protection has been embodied in several CPL 2012 provisions, including those that provide for defence rights, the right not to confess guilt, the right to legal aid, notification of detention or arrest, and the right to present an opinion. The CPL 2012 allows a criminal suspect to engage a defence lawyer after he or she is interrogated by an investigating organ for the first time or from the date on which compulsory measures are adopted against him or her. The legal function of a lawyer in the investigation phase transforms from agent *ad litem* under the CPL 1996 to an actual defender under the CPL 2012, given that his rights in the investigation phase have been expanded to embrace those of (1) applying for changing compulsory measures and, more importantly; and (2) presenting opinions about the case. A meeting between the defence lawyer and the criminal suspect is no longer subject to approval from, or attendance of, the investigating organ, unless certain types of grave crimes are involved.<sup>63</sup>

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<sup>60</sup> Criminal Procedure Law (PRC) (promulgated by Order No 6 of the Chairman of the Standing Committee of the National People's Congress, 7 July 1979, effectively 1 January 1980; amended in 1996 and 2012) ('CPL').

<sup>61</sup> Jianfu Chen, *Chinese Law: Context and Transformation* (Martinus Nijhoff Publishers, the Netherlands, 2008), p 299.

<sup>62</sup> See notes 111-112 below, and their accompanying text.

<sup>63</sup> CPL, arts 33, 36, 37. Grave crimes mainly include those (1) threatening state security; (2) involving terrorism; or (3) relating to grave bribery.

The absence of the right to remain silent from the CPL 1996 has been blamed for abetting extortion of confessions by torture in criminal investigation.<sup>64</sup> To address pertinent concerns, the right of the suspect or defendant not to confess guilt is acknowledged by the 2012 law, which provides for that ‘no one shall be compelled to confess guilt’ and removes one’s obligation of truthfully answering questions raised by criminal investigators as prescribed by the CPL 1996.<sup>65</sup> To guarantee the right not to confess guilt, the CPL 2012 incorporates more provisions into its text to the effect of preventing the extortion of confessions by torture.<sup>66</sup>

Concerns about ‘secret detention’ and ‘secret arrest’ under the 1996 law have also been addressed by the 2012 law, under which notification of a person’s detention or arrest to his or her family may not be withheld by the ‘possibility of hindering the investigation’ arising from such notification, unless certain types of grave crimes are involved.<sup>67</sup> In addition, the CPL 2012 lowers the threshold to obtain legal aid<sup>68</sup> and enhances opportunities for criminal suspects, their defenders or agents *ad litem* to present their opinions in the proceedings.<sup>69</sup>

## 2. Evidence rules

An overall upgrade of the evidence rules in criminal procedure is another accomplishment of the CPL 2012. The law further clarifies the issues as to the scope, proof standard and legality, of evidence. The 2012 law admits new types of evidence including (1) records of verification; (2) investigative experiments;

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<sup>64</sup> See eg, Hatla Thelle, ‘Torture in China’ (2006) 16:3 *Torture* 268.

<sup>65</sup> Compare CPL, art 50 with CPL (1996), art 93 [repealed].

<sup>66</sup> For instance, investigators are required to interrogate a criminal suspect within a detention house if the suspect has been handed over to the detention house for custody. (CPL, art 116.) For crimes punishable by life imprisonment, the death penalty or other heavy punishment, tape- or video-recording of the interrogation process is mandatory. (CPL, art 121.) When interrogating the criminal suspect, investigators should inform him or her that he or she might be punished in a lenient way if he or she truthfully confesses a crime. (CPL, art 118.)

<sup>67</sup> Compare CPL, arts 83, 91 with CPL (1996), arts 64, 71 [repealed].

<sup>68</sup> Compare CPL, art 34 with CPL (1996), art 34 [repealed].

<sup>69</sup> For instance, before the court hearing, judges are entitled to convene public prosecutors, relevant parties, their defenders or agents *ad litem*, enquiring their opinions about the case, the recusal of judges, the list of witnesses appearing before the court, exclusion of illegal evidence and other opinions relating to the trial. (CPL, art 182.) Moreover, the SPC is obliged to interrogate directly a defendant that has been sentenced to death penalty, and to hear the opinion of his or her defender if the defender so requests. (CPL, art 240.)

and (3) digital data,<sup>70</sup> and further defines the proof standard of evidence as established in the 1996 law, that is, ‘reliable and sufficient’.<sup>71</sup> In order to further protect the right not to confess guilt and to prevent the extortion of confessions by torture, the 2012 law establishes the principle and rules of excluding illegal evidence. All the facts and evidence that found a judgment should be subject to examination and debate.<sup>72</sup> The judiciary should examine the legality of evidence if reasonable doubts arise and exclude the illegal evidence if its collectors fail to provide explanations justifying the approach of collection that departs from the legal process.<sup>73</sup>

### 3. Court hearing proceedings

Many aspects of court hearing proceedings are strengthened by the CPL 2012 for the purpose of consolidating due process, including the compulsory presence of public prosecutors, forced appearance of witnesses and expert witnesses, public hearing in second-instance trials, and the remand of first-instance judgments. In order to assure that the Procuratorates effectively fulfil their functions in public prosecutions and trial supervision, the CPL 2012 requires public prosecutors to be present in the court hearings of all cases – including cases heard in accordance with summary procedure or trial supervision proceedings – as long as a public hearing is held.<sup>74</sup> Under the 2012 law, a witness or expert witness should appear before the court and give his testimonies if certain circumstances occur.<sup>75</sup> A witness who refuses, without justifiable reasons, to appear before the court and

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<sup>70</sup> CPL, art 48. Art 42 of the 1996 law acknowledges the following types of evidence: (1) material evidence and documentary evidence; (2) testimony of witnesses; (3) statements of victims; (4) statements and exculpations of criminal suspects or defendants; (5) expert opinions; (6) records of inquests and examination; and (7) audio-visual materials.

<sup>71</sup> Evidence can be regarded ‘reliable and sufficient’ if it meets the following conditions: (1) all the facts used as the basis for condemnation and punishment are proved by evidence; (2) evidence used as the basis for a judgment is verified through the legal process; and (3) reasonable doubts are eliminated from the confirmed facts on the grounds of an overall assessment of all the evidence. (CPL, art 53.)

<sup>72</sup> CPL, arts 54, 193.

<sup>73</sup> CPL, arts 54-58.

<sup>74</sup> CPL, arts 184, 245.

<sup>75</sup> Those circumstances include (1) the public prosecutors, the relevant parties, their defenders or agents *ad litem* challenge the witness testimonies or the expert opinion; (2) the witness testimony has significant impact on conviction and punishment imposed on the defendant; and (3) the court takes it as necessary for the witness or expert witness to appear and give testimony. (CPL, art 187.)

give testimony may be reprimanded or even sanctioned.<sup>76</sup> At the same time, the protection for witnesses is further strengthened in the 2012 law.<sup>77</sup>

Under the 1996 law, a case at the second instance could, in certain circumstances, be heard in closed session (that is, not in public); the 2012 law narrows the circumstances in which the court could decline to hold a public hearing.<sup>78</sup> In a similar fashion, the 2012 law places limits on the number of times that a first-instance judgment can be remanded by the court of second instance; it can be remanded only once – and if the second first-instance judgment is still appealed by the defendant or protested by the public prosecutors, the court of second instance should make a judgment or an order itself, but not remand the judgment again.<sup>79</sup> Moreover, the CPL 2012 broadens the application of the principle of *refomatio in peius* – which means that a person should not be placed in a worse position as a result of filing an appeal. Specifically, the 2012 law applies the principle not just to a judgment made by a court of second instance but also to the judgment of a remanded case, subject to certain exceptions.<sup>80</sup>

#### 4. Other matters

The revisions described above illustrate numerous ways in which the CPL 2012 aims to protect human rights in the context of criminal proceedings. It is worth noting that the CPL 2012 also includes numerous provisions that can be regarded as operating in the opposite direction – although not out of an intention of restricting human rights but rather out of a need to respond to the increasing complexity and technicality of current crimes. For instance, the CPL 2012 vests more authorities with criminal investigators in the investigation of certain types of crimes and the use of certain types of evidence. These include CPL 2012 provisions that (1) give authorities the right to collect biological information – through fingerprints, blood, urine, and other biologic samples – and that (2) legitimise the adoption of technical measures in a secret way

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<sup>76</sup> If the situation is serious, he or she can be detained for 10 days or less upon the approval of the president of the court. If the witness is not satisfied with the decision on detention, he or she is entitled to appeal the decision to the People's Court at the next higher level; however, the execution of detention should not be suspended during the period of appeal. (CPL, art 188.) If an expert witness refuses to appear before the court, the expert opinion he or she presents should not be taken as the basis for a judgment. (CPL, art 187.)

<sup>77</sup> Special attention has been given to the protection of those testifying in cases involving crimes that (1) endanger state security; (2) are committed by terrorists; or (3) are committed by criminal gangs. (CPL, art 62.)

<sup>78</sup> Compare CPL, art 223 with CPL (1996), art 187 [repealed].

<sup>79</sup> CPL, art 225.

<sup>80</sup> CPL, art 226.

by investigators if certain types of grave crimes are involved.<sup>81</sup> The 2012 law also amends the provisions as to the adoption of coercive measures, maximum periods of trials, summary procedure, and trial supervision proceedings.<sup>82</sup>

## ***B. The amendments legalising social harmony***

In addition to consolidating the rule of law, the CPL also incorporates amendments to its text to the effect that social harmony can be legitimised in criminal proceedings.

### **1. Different treatment for corruption-related crimes**

As revealed in the discussion above, ‘differential treatment’ is the essence of the criminal policy of ‘tempering severity with leniency’. Against the backdrop that crimes relating to corruption have been classified into the group that severely undermines social harmony and deserves severe punishment, the CPL 2012 establishes special criminal proceedings for corruption-related crimes. In many situations, crimes of grave bribery are treated in the same way as those (1) endangering state security; or (2) involving terrorism – which should be differentiated from other crimes and punished in a severe way. For instance, treatments for crimes (a) endangering state security; (b) involving terrorism; and (c) relating to corruption are different from those for other crimes and are differentiated in the provisions prescribing the right of a criminal suspect to meet a defence lawyer in the investigation phase, the compulsory measures under residential surveillance, the adoption of technical measures in a secret way etc.<sup>83</sup> The CPL 2012 also introduces new proceedings for the confiscation of illegal property gained by a suspect or defendant who died or escaped after being wanted, in crimes of bribery or embezzlement.<sup>84</sup>

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<sup>81</sup> CPL, arts. 130, 148. Nevertheless, the adoption of technical measures in a secret way is subject to rigorous proceedings for approval, which are further prescribed in the Provisions on Proceedings of Handling Criminal Cases in Public Security Organs issued by the MPS in December 2012 (‘the MPS Provisions on the Criminal Proceedings of 2012’). MPS, ‘Provisions on Proceedings of Handling Criminal Cases in Public Security Organs’ (effectively 1 January 2013) (Chinese), available at <http://www.mps.gov.cn/n16/n1282/n3493/n3823/n442421/3486957.html> (last visited 31 July 2014).

<sup>82</sup> CPL, arts 75, 117, 165. Compare CPL (1996), art 168 [repealed] with CPL, arts 156, 202, 206, 232. Compare CPL (1996), art 187 [repealed] with CPL, art 223. Compare CPL (1996), art 204 [repealed] with CPL, art 242.

<sup>83</sup> Art 37 of the CPL 2012 focuses on the right of a criminal suspect to meet a defence lawyer during the period of investigation; art 73 concentrates on the compulsory measures under residential surveillance; art 148 deals with the adoption of technical measures in a secret way in the investigation of crimes.

<sup>84</sup> CPL, arts 280-283.

## 2. Community correction

Public security organs used to be the major executor of criminal punishment outside prison before the enactment of the CPL 2012. The pursuit of social harmony has led to the community correction mechanism being involved gradually in the criminal justice system, as mentioned in the discussion above. The 2012 law legalises the status of community correction organs as the executor of criminal punishment outside prison, such as public surveillance, suspended execution of sentences, release on parole and temporary service of sentences outside prison.<sup>85</sup> The incorporation of the community correction mechanism into the CPL is expected to consolidate the enforcement of the criminal policy of 'education and rescue'.<sup>86</sup>

## 3. Juvenile delinquency

Also called on by the criminal policy of 'education and rescue', the CPL 2012 provides special protection to juveniles. The principle that 'education is complemented by criminal punishments' has been written into the new provisions regarding juvenile delinquency. In order to help with the rehabilitation of juvenile offenders, the CPL 2012 requires the sealing of criminal records of a person who was under 18 years old when convicted of an offence and sentenced to a fixed-term imprisonment of five years or less.<sup>87</sup>

## 4. Immediate family members as witnesses

Social harmony in contemporary China features harmonious relationships within families, which echoes the fundamental Confucian proposition that familial relationships were the cornerstone of social relationships. Among the three major human relations underscored by Imperial Confucianism – that is, ruler and subject, father and son, and husband and wife – two of them were familial relationships. Accordingly, Confucianism took conduct that contradicted the public interest but sustained familial relationships as still adhering to *li*. For example, under Confucianism, family members were encouraged to cover for each other's inappropriate conduct that departed from common morality, instead of reporting them, in order to maintain harmonious relationships within families.<sup>88</sup> A new provision in the CPL 2012 mirrors that Confucian value by exempting the obligation of the immediate family members

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<sup>85</sup> Compare CPL, art 258 with CPL (1996), art 217 [repealed].

<sup>86</sup> Fan Chongyi, 'The Necessity to Legislate on Community Corrections' (Chinese), available at [http://www.legaldaily.com.cn/bm/content/2011-08/17/content\\_2871657.htm?node=20737](http://www.legaldaily.com.cn/bm/content/2011-08/17/content_2871657.htm?node=20737) (last visited 12 July 2012).

<sup>87</sup> CPL, arts 266, 275.

<sup>88</sup> Head & Xing (note 41 above), pp 21, 57, 197.

of the defendant – including his spouse, parents, and children – to testify against him before the court,<sup>89</sup> on the grounds that ‘forcing immediate family members to testify against the defendant departs from the Chinese traditional ethics’.<sup>90</sup>

## 5. Criminal reconciliation

Under the 1996 law, criminal reconciliation applies only to private prosecution cases – the private prosecutor may reconcile with the defendant prior to a judgment is pronounced by the court.<sup>91</sup> Having been pushed in judicial practice, the application of criminal reconciliation in public prosecution cases is finally legalised by the CPL 2012. The criminal suspect or defendant and the victim may reconcile with each other where three conditions are met. First, the criminal suspect or defendant is sincerely repentant of his or her crimes and has acquired forgiveness from the victim by paying financial compensation, offering an apology, and so on, and the victim agrees to reconcile out of his or her own free will. Second, the crimes concerned are either (1) arising from civil disputes, prescribed in Chapters IV and V of Part II (Specific Provisions) of the Criminal Law, and punishable by a fixed-term imprisonment of three years or less; or (2) arising from negligence, and punishable by a fixed-term imprisonment of seven years or less, except those relating to dereliction of duty. Third, the suspect or defendant has not committed intentional offences in the preceding five years.<sup>92</sup>

The public security organ, the Procuratorate, or the court which presides over the reconciliation, is obliged to examine the voluntariness and legitimacy of the reconciliation and guide the conclusion of a reconciliation agreement. Where a reconciliation agreement is concluded, the suspect or defendant might be treated in a lenient way.<sup>93</sup>

## 6. Mediation in incident civil actions

Mediation, as the preferred means of dispute resolution in judicature to promote social harmony, is also introduced into the provisions of incident civil actions under the CPL 2012. According to pertinent provisions, the court hearing a criminal case with an incident civil action may preside judicial mediation in respect of the incident civil action and rule on civil liabilities for compensation arising from the crime concerned based on the outcome of the medication.<sup>94</sup>

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<sup>89</sup> CPL, art 188.

<sup>90</sup> Chen (note 19 above), p 271.

<sup>91</sup> CPL (1996), art 172; also, CPL, art 206.

<sup>92</sup> CPL, art 277. Chapters IV and V of Part II (Specific Provisions) of the Criminal Law regulate crimes infringing upon individuals’ democratic rights and rights of the person or property.

<sup>93</sup> CPL, arts 278, 279.

<sup>94</sup> CPL, art 101.



## IV. Legal Culture Solidified in the Implementation of the CPL

Having surveyed the ways in which the CPL 2012 reflects increased attention to both (1) the rule of law and (2) social harmony – the two pillars of the current legal culture in China – the following paragraphs address this very practical question: How has the CPL 2012 been implemented in its first year of effectiveness? In particular, how does the enforcement of the CPL 2012 further strengthen the rule of law and social harmony?

### *A. The rule of law*

In November 2013, the CPC passed its Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform at the Third Plenary Session of the Eighteenth Central Committee. It accentuates the CPC's determination to build 'a *country* under rule of law, a *government* under rule of law, and a *society* under rule of law'.<sup>95</sup>

This political atmosphere ensures that the consolidated due process under the 2012 law be adhered to by the judiciary in a careful and strict manner. In 2013, 25, 211 criminal cases filed by public security organs were revoked by the Procuratorates in exercising their authority of supervision on the grounds that the filing of those cases either was not sustained by sufficient facts or evidence or had deviated from prescribed legal proceedings – increasing by 25 percent from those in 2012. In 2013, the Procuratorates also suggested rectifications for 72,370 criminal investigation activities that departed from prescribed legal proceedings, such as: (1) abuse of compulsory measures; (2) collecting evidence in an illegal way; and (3) extorting evidence by torture – an increase of 27.3 percent from those in 2012. On the grounds of insufficient evidence or non-offence, the Procuratorates made, in 2013, decisions of non-arrest for 100,157 persons, and decisions of non-prosecution for 16,427 persons – an increase of 9.4 percent and 96.5 percent respectively from those in 2012. They also exercised the authority of supervision in 2,153 cases by correcting the judicial practices that impaired the defenders' procedural rights.<sup>96</sup> The people's courts at various

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<sup>95</sup> CCCPC, 'Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform' (Chinese), available at <http://cpc.people.com.cn/n/2013/1115/c64094-23559163.html> (last visited 23 June 2014) (emphasis added).

<sup>96</sup> SPP, 'Working Report of the SPP (2014)' (Chinese), available at [http://www.spp.gov.cn/tt/201403/t20140318\\_69216.shtml](http://www.spp.gov.cn/tt/201403/t20140318_69216.shtml) (last visited 26 July 2014).

levels acquitted 825 defendants in 2013 as a result of strict application of: (1) the principle of presumption of innocence; (2) the proceedings for excluding illegal evidence; and (3) other provisions that safeguard procedural rights enjoyed by the defendants.<sup>97</sup>

In 2013, a number of wrongful convictions pronounced prior to the enactment of the CPL 2012 – the emergence of which could be largely attributed to judicial practices departing from due process – were also detected and rectified by the Procuratorates and the courts.<sup>98</sup> Preventing wrongful convictions has naturally become one of the working priorities within the judiciary since the enactment of the CPL 2012. The CCCPC published the Provisions on Effectively Preventing Wrongful Convictions in August 2013.<sup>99</sup> The SPC, the SPP, and the MPC also released their own regulations respectively on avoiding wrongful convictions by the end of 2013. Those judicial documents aim to erect an effective system within the Chinese legal regime to eradicate the institutional roots of wrongful convictions by underscoring strict enforcement of the CPL provisions regarding defence rights, evidence rules, prohibition of extortion of confessions by torture, trial proceedings, etc.<sup>100</sup>

## ***B. Social harmony***

The CPL provisions that legalise the propositions under social harmony have also been reported to operate smoothly and fruitfully, especially in the field of promoting criminal reconciliation. For cases involving minor crimes or negligence, so long as the suspects have sincerely repented their crimes and acquired forgiveness from the victims, the Procuratorates have actively brought reconciliations between the two parties, and made either (1) decisions of non-arrest or non-prosecution; or (2) suggestions on the commutation of sentences to the courts. Under the policy of ‘tempering severity with leniency’, the Procuratorates made, in 2013, decisions of non-arrest for 82,089 persons and

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<sup>97</sup> SPC, ‘Working Report of the SPC (2014)’ (Chinese), available at <http://lianghui.people.com.cn/2014npc/n/2014/0310/c382480-24592263.html> (last visited 26 July 2014).

<sup>98</sup> SPP (note 96 above); SPC, *ibid.*

<sup>99</sup> CCCPC, ‘Provisions on Effectively Preventing Wrongful Convictions (2013)’ (Chinese), available at [http://www.gov.cn/jrzg/2013-08/13/content\\_2466100.htm](http://www.gov.cn/jrzg/2013-08/13/content_2466100.htm) (last visited 2 July 2014).

<sup>100</sup> State Council of the PRC (note 7 above). SPC, ‘Opinions on the Working Mechanism of Establishing, Perfecting, and Preventing Wrongful Convictions’ (2013); SPP, ‘Opinions on Effectively Fulfilling the Function of Procurement, and Preventing and Correcting Wrongful Convictions’ (2013); MPS, ‘Notice on Strengthening and Improving Criminal Judicature and Effectively Preventing Wrongful Convictions’ (2013).

decisions of non-prosecution for 51,393 persons, on the grounds that the arrests were not necessary or the crimes were minor – an increase of 2.8 percent and 34.3 percent respectively from those in 2012.<sup>101</sup> Owing to the wide application of criminal reconciliation and the policy of ‘tempering severity with leniency’, the total number of first-instance criminal cases that were filed before the courts nationwide in 2013 – which was 971,567,102 – showed a decreasing trend for the first time in the past decade, with a decrease of 3.5 percent from that in 2012.<sup>103</sup>

In addition, both the coverage of community correctional institutions and the number of persons submitting thereto have been speedily increasing. By the end of 2013, community correctional institutions have been erected under 92 percent of the Bureaus of Justice at the municipal level and 88 percent of the Bureaus of Justice at the county level; the aggregate numbers of persons admitted into, and released from, the community correctional institutions nationwide as of that time point are 1,757,392 and 1,076,397 respectively.<sup>104</sup>

## **V. Questions Arising from the Juxtaposition of the Rule of Law and Social Harmony under the CPL**

Since the rule of law and social harmony are purported by the country’s leadership as two parallel paths toward good governance, either of them may be pursued at the refraining the other under the same regime, as indicated by the analysis above. This part explores preliminarily the questions arising from the juxtaposition of the rule of law and social harmony under the amended CPL.

### ***A. Which is the final benchmark: due process or truth-finding?***

As revealed in the discussion above, the attitude of the Chinese legislature and judiciary is ambivalent as to which is the ultimate goal of criminal procedure,

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<sup>101</sup> SPP (note 96 above).

<sup>102</sup> SPC, ‘Statistics of First-Instance Criminal Cases in the Courts Nationwide in 2013’ (Chinese), available at [http://www.court.gov.cn/qwfb/sfsj/201407/t20140725\\_196837.htm](http://www.court.gov.cn/qwfb/sfsj/201407/t20140725_196837.htm) (last visited 26 July 2014).

<sup>103</sup> The number for 2012 is 996,611. SPC, ‘Statistics of First-Instance Cases in the Courts Nationwide in 2012’ (Chinese), available at [http://www.court.gov.cn/qwfb/sfsj/201312/t20131213\\_190136.htm](http://www.court.gov.cn/qwfb/sfsj/201312/t20131213_190136.htm) (last visited 26 July 2014).

<sup>104</sup> China Law Society (note 14 above).

due process or truth-finding. That ambivalence can even explain the practice of the legislature to insert the term ‘respecting and preserving human rights’ into Article 2 of the CPL – whose status is a little inferior to that of Article 1 in establishing the ultimate goals of the law.<sup>105</sup> It is indicated by that practice that the missions set by Article 1 – including ‘cracking down on crimes, protecting the people, safeguarding state security and public order’ – are slightly superior to the tasks set by Article 2 which embrace the ‘respecting and preserving of human rights’. This observation can be somehow echoed by the following amendments.

### 1. Lawyers’ role in criminal defence

Despite the enhanced participation of lawyers in criminal proceedings under the CPL 2012 (as discussed above), the role of lawyers in criminal defence is still limited. For example, a defence lawyer is not allowed (1) to attend the interrogation of a suspect; or (2) to examine case-related materials or evidence in the investigation phase. He or she can look up the files only after the case is handed over by the public security organ to the Procuratorate for examination before prosecution – which indicates that a defence lawyer cannot verify evidence in the investigation phase. In addition, the main responsibilities of a defender in criminal proceedings do not include evidence collection under the CPL 2012, except the three types of evidence enumerated by the pertinent provisions.<sup>106</sup> By contrast, lawyers are entitled to collect all kinds of evidence in civil and administrative proceedings under the Chinese legal regime.<sup>107</sup>

In court hearings, a defender is entitled (a) to examine, and debate over, the evidence; (b) to request the court to call on witnesses; (c) to request the court to obtain new physical evidence; and (d) to apply for re-conducting evaluation or inquisition;<sup>108</sup> but he or she is not entitled to present new evidence. In addition, a criminal suspect can access legal consultation only after he or she has been interrogated for the first time, which triggers concerns about the protection of his or her defence rights because it ‘would allow the first, often crucial, interrogation to take place without the benefit of a lawyer’s advice.’<sup>109</sup>

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<sup>105</sup> Chen (note 19 above), p 4.

<sup>106</sup> CPL, arts 38, 40.

<sup>107</sup> Civil Procedure Law, art 61; Administrative Procedure Law (promulgated by Order No 16 of the President of the PRC, 4 April 1989, effectively 1 October 1990), art 30.

<sup>108</sup> CPL, arts 58, 192.

<sup>109</sup> CPL, art 33. Amnesty International, ‘Bringing China’s Criminal Procedure Law in Line with International Standards’ (Mar. 2012), available at <http://www.unhcr.org/refworld/type,MEM,,4f59e75f2,0.html> (last visited 1 August 2012).

Some legal scholars explain the reason for the CPL 2012 to exclude the function of ‘proving’ from the main responsibilities of a defender in this way: under the principle of presumption of innocence, it is the public prosecutors, rather than defenders, who assume the burden of proof; therefore, the main responsibilities of a defender do not need to include the function of ‘proving’ – that is, it is the ‘right’ not ‘obligation’ of a defender to present evidence.<sup>110</sup> This opinion, however, is apparently flawed because the CPL 2012 *ad hoc* refrains the ‘right’ of a defender to collect evidence by specifying the types of evidence he or she can collect and obscuring him or her from presenting new evidence in the court hearings, as revealed above. To maintain the dominant status of the judiciary in criminal investigations and to gain more time for investigators to find the truth seems to be the two strongest motives of the legislature to restrain the lawyers’ rights in that regard.

## 2. The right not to confess guilt

The efforts to incorporate the right not to confess guilt into the CPL 2012 have turned out to be onerous. This representative right under due process does not appear in the Draft Amendments to the CPL released by the Standing Committee of the NPC in August 2012 for public comments (‘the Draft Amendments’).<sup>111</sup> The absence of this right from the Draft Amendments has been attributed to furious resistance from the judiciary, especially public security organs. In cracking down on crimes, the judiciary has relied heavily on confessions and believed that the right to remain silent would definitely be an obstacle to truth-finding.<sup>112</sup> Its recognition by law is held to possibly assist criminals to escape from punishment and, thus, to undermine social stability.<sup>113</sup> On the opposite side, the right to remain silent is advocated on the grounds

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<sup>110</sup> Chen (note 19 above), p 23.

<sup>111</sup> Standing Committee of the NPC, ‘The Draft of Amendment to the Criminal Procedure Law’ (30 August 2012) (Chinese), available at [http://www.npc.gov.cn/npc/xinwen/lfgz/2011-08/30/content\\_1668503.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/2011-08/30/content_1668503.htm) (last visited 7 August 2012).

<sup>112</sup> *People’s Daily*, ‘Focusing on the Amendment to the Criminal Procedure Law: Controversy Exists in Terms of Whether to Clarify the ‘Right to Remain silent’ (14 September 2011) (Chinese), available at <http://www.chinanews.com/fz/2011/09-14/3324814.shtml> (last visited 7 August 2012). Jinhua Times, ‘Public Security Organs, Procuratorates, and Courts Reject the Incorporation of The Right to Remain silent into Law’ [an interview of Professor Chen Guangzhong] (19 September 2011, A 17) (Chinese), available at [http://epaper.jinghua.cn/html/2011-09/19/content\\_701594.htm](http://epaper.jinghua.cn/html/2011-09/19/content_701594.htm) (last visited 7 August 2012).

<sup>113</sup> *People’s Daily*, *ibid*.

that it would effectively help to eliminate wrongful convictions, like those in the cases of Mr She Xianglin and Mr Zhao Zuohai discussed earlier, by precluding the possibility of extorting confessions by torture.<sup>114</sup> In rebutting this opinion, the opponents of the right to remain silent argue that firm adherence to the principles of 'the presumption of innocence', 'reliance on evidence', 'no credulousness on confessions', and 'no extortion of confessions by torture' would be sufficient to avoid wrongful convictions.<sup>115</sup>

Despite the sharp debates within the country as to whether the right to remain silent should be accepted by Chinese criminal procedure, the final version of the amendments admits the right of a criminal suspect or defendant not to confess guilt,<sup>116</sup> an approximation of the right to remain silent. Again, this admission illustrates somehow the compromise between due process and truth-finding. On the one hand, the right not to confess guilt demonstrates China's determination to comply with its international obligation of respecting human rights under treaties such as the International Covenant on Civil and Political Rights,<sup>117</sup> Article 14(3) of which establishes the principle that any person should not be compelled to testify against oneself or to confess guilt.<sup>118</sup> On the other hand, the legislature avoids using the term 'right to remain silent' or 'right not to testify against oneself' in the CPL 2012, which implies that there exists a difference between them and the 'right not to confess guilt',<sup>119</sup> even though it has not been clear under the law what the difference is. In addition, the protection of the right not to confess guilt in practice may also invoke concerns. The CPL 2012 does not embrace provisions that directly explain or enforce the right. The MPS Provisions on the Criminal Proceedings of 2013, which aim to provide specific instructions to police investigators in implementing the CPL, still provide that a criminal suspect should answer the questions raised by investigators truthfully.<sup>120</sup>

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<sup>114</sup> Southern Metropolitan Daily, 'Right to Remain Silent' (15 September 2011, p A30) (Chinese), available at <http://gcontent.oeeee.com/c/78/c786b08d66ede405/Blog/66b/9e9836.html> (last visited 7 August 2012).

<sup>115</sup> Wen Jinrang, 'The Right to Remain silent Does not Represent Judicial Justice' (13 October 2011) (Chinese), available at [http://www.qstheory.cn/lg/clzt/201110/t20111013\\_116356.htm](http://www.qstheory.cn/lg/clzt/201110/t20111013_116356.htm) (last visited 8 August 2012).

<sup>116</sup> CPL, art 50.

<sup>117</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967) ('ICCPR').

<sup>118</sup> ICCPR, art 14(3)(d). China signed the covenant on 5 October 1988.

<sup>119</sup> Chen (note 19 above), pp 58–59.

<sup>120</sup> MPS (note 81 above), art 198.

### 3. Admission and exclusion of evidence

Evidence rules have been significantly strengthened in the 2012 law, and the principle of excluding illegal evidence is established. The pertinent provisions, however, still confront a balance between due process and truth-finding.

#### *a. The legality of evidence*

The provisions establishing the principle of excluding illegal evidence<sup>121</sup> prescribe differential treatment for (1) confessions, witness testimonies and victim statements; and (2) physical or documentary evidence, in respect of the exclusion proceedings. The exclusion of confessions, witness testimony or victim statements is unconditional if they are obtained in an illegal way; while, the exclusion of physical or documentary evidence is subject to two conditions if it is collected in a way that departs from legal procedures – first, the illegal way of evidence collection may severely impair judicial justice; second, no corrections or justifications are provided by the evidence collector.<sup>122</sup>

The reason for the legislature to give more tolerance to illegally-obtained physical or documentary evidence is that, unlike confessions, testimony or statements, the objectivity of this type of evidence is relatively high and the impact of collection means on its authenticity is limited; if this type of evidence is completely excluded just because of the way it is collected, a criminal may easily escape from punishment.<sup>123</sup> Apparently, this differential treatment illustrates the legislature's endeavours to pursue a balance between substantive and procedural justice and between suppressing crimes and protecting human rights. The enforcement of these provisions may also trigger concerns, in that a unified and practical criterion is not in place as to (1) whether the way of evidence collection 'severely impairs judicial impact'; and (2) what constitute 'corrections' of, or 'justifications' for, a violation of evidence-collecting proceedings, despite the efforts of the SPC and the SPP to provide general meanings of those pertinent terms in their judicial interpretations.<sup>124</sup>

#### *b. The discretion to examine the legality of evidence*

Under the 2012 law, a Procuratorate or a court is obliged to examine the legality of evidence only when it (1) receives pertinent reporting, accusation or clues;

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<sup>121</sup> CPL, art 54.

<sup>122</sup> Chen (note 19 above), p 71.

<sup>123</sup> *Ibid*, p 72.

<sup>124</sup> SPC, 'Interpretations on the Application of the Criminal Procedure Law of the People's Republic of China' (enacted 20 December 2012), art 95; SPP, 'Rules on Criminal Litigation in the People's Procuratorates' (enacted 22 November 2012), art 66.

or (2) perceives the violation of evidence-collecting proceedings itself. If the parties, defenders or agents *ad litem* request the court to examine the legality of evidence, they should provide pertinent clues or materials.<sup>125</sup> All these provisions can be implemented to the effect that the Procuratorate or the court can presume the legality of evidence in finding the truth, and adjudicate the case based on that evidence, unless the legality of evidence is explicitly challenged. In other words, it is not the obligation of the Procuratorate or the court to voluntarily assure that prescribed legal process regarding evidence collection has been adhered to. Therefore, despite the unprecedented emphasis given to the legality of evidence by the new CPL, the accentuation on the adherence to legal process is still moderated by the need for truth-finding.

### ***B. Which sets the boundary of the law: legal principles or social morals?***

The question as to what sets the boundary of law arises because the new CPL reflects a trend of the Chinese legal system that both legal principles and social morals are influencing the boundary of the law – that is, what the law is entitled to do.

#### **1. Differential treatment of crimes in criminal procedure**

Differential treatment is the essence of the criminal policy of ‘tempering severity with leniency’: crimes are treated differently not only with regard to the way they are punished – lenient or severe – but also in respect of the criminal proceedings they submit to.

One example is proceedings established by the CPL 2012 relating to corruption-related crimes as discussed above. Corruption in contemporary China has been extremely abhorred by the common people and believed to be the origin of most unfairness, contradictions and even the sentiments of questioning the CPC’s leadership in Chinese society. Accordingly, corruption-related crimes are classified into the group that would severely impair social stability and harmony and thus should be punished in a severe way.<sup>126</sup> As analysed above, under the CPL 2012, corruption-related crimes have been treated in the same way as the crimes that endanger state security or involve terrorism. The law establishes special proceedings for the confiscation of illegal property of a criminal suspect or defendant under corruption- or terrorism-

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<sup>125</sup> CPL, arts 55, 56.

<sup>126</sup> See SPP (note 35 above); SPC (note 35 above).



related crimes if the suspect or defendant is dead or on the run.<sup>127</sup> Nevertheless, proceedings for a default trial are absent from the Chinese legal system – theoretically, a suspect on the run, who has not been tried by the court, is not guilty under the principle of presumption of innocence. Consequently, the confiscation of the property of a suspect on the run may risk departing from that principle sustaining procedural justice.

The other example is the differential treatment given to crimes arising from civil disputes. Although crimes arising from civil disputes can still result in fateful consequences, it is held that in many such cases both the offending and the offended parties could be somehow attributed to for the occurrence of the civil disputes that caused crimes – therefore, a reconciliation between the two parties and a lenient punishment on the offending party may effectively contribute to restoring a harmonious relationship between the two parties in a civil relationship, such as a marriage or two people who are neighbours. Accordingly, crimes arising from civil disputes, which are classified into the group that should be punished in a lenient way under the policy of ‘tempering severity with leniency’, constitute one of the premises for criminal reconciliation under the CPL 2012.<sup>128</sup>

It would be difficult to find legal justifications in traditional legal theories for the differential treatment in criminal proceedings given to crimes such as those relating to corruption or arising from civil disputes – only the presumption that the differential treatment as revealed above is justified by social morals in contemporary China (but not by traditional legal theories), and is expected to help construct social harmony. Thus, it is safe to present the observation here that the CPL in contemporary China also assumes the function to legalise social morals and political policies.

## 2. Criminal reconciliation and mediation

The essence of criminal reconciliation in China is financial compensation, given that it is the only measurable factor among those that could justify lenient treatment for the crimes concerned. The wide application of criminal reconciliation may expose the new criminal justice system to the risk of abetting the social psychology of ‘paying money for a commuted sentence’. In order to address the pertinent concerns about the mechanism, the provisions under the CPL 2012 have been delicately designed. Where the crime concerned arises from a civil dispute, the suspect or defendant is entitled to request reconciliation with the victim only when the crime (1) infringes upon an individual’s democratic

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<sup>127</sup> CPL, art 280.

<sup>128</sup> See SPP (note 35 above); SPC (note 35 above). CPL, art 277.

rights or rights of the person and property; and (2) is punishable by a fixed-term imprisonment of three years or less. If the crime is caused by negligence (except dereliction of duty), the suspect or defendant may request reconciliation with the victim only when the crime is punishable by a fixed-term imprisonment of seven years or less.<sup>129</sup>

The above provisions indicate that the commutation of sentences as the result of criminal reconciliation (which centres on financial compensation) is possible in minor offences only, but it is not the case if they are read and applied together with other provisions under the CPL – for instance, those regarding criminal cases with incidental civil actions. Mediation as a means of dispute resolution has also been introduced into adjudication of incident civil actions (as discussed above) – an agreement concluded under the mediation between the two parties on the amount of financial compensation should be taken into account by the court in determining the extent of the defendant's repentance of his or her crime and measuring the punishment.<sup>130</sup> Since, under the CPL, any offended party is entitled to bring an incident civil action before the court as long as that party bears economic losses caused by the offence,<sup>131</sup> commuted sentences for crimes that do not justify the applicator of criminal reconciliation can still be legalised as long as financial compensation is made under the mediation for incidental civil actions, regardless of the severity and nature of the crimes concerned.

The application of reconciliation and mediation in criminal proceedings, therefore, would trigger concerns about 'inequality before the law' – the rich are more likely to be punished by a lighter penalty than the poor if they commit the same crime. Advocates for criminal reconciliation argue that it is sustained by the legal theories on restorative justice – an approach to justice that focuses on the needs of victims and offenders, instead of rigidly obeying legal principles or punishing the offender.<sup>132</sup> However, the substance, and the implementation, of pertinent CPL provisions – as discussed above – have made financial compensation the decisive factor for assessing the 'restoration' of justice. A question naturally arising from these observations and still awaiting delicate answers is that, where it is increasingly acceptable to the popular opinion that financial compensation may be more helpful to the victims than severe punishment of the offenders in certain circumstances, whether the law is entitled and justified to make financial compensation and criminal punishment mutually convertible on the basis of that popular opinion.

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<sup>129</sup> *Ibid.*

<sup>130</sup> SPC (note 117 above), art 157.

<sup>131</sup> CPL, art 99.

<sup>132</sup> Eg, Song Yinghui, *Delicate Interpretations on the Criminal Procedure Law of the People's Republic of China* (China University of Political Science and Law Press, PRC, 2012), p 344.

## VI. Concluding Remarks

The explanations and assessments that have been provided above should be regarded as abbreviated and preliminary – much more could be said about the CPL 2012 and its significance. It should be clear, however, from the narrative that has been offered in this article that legal culture within China has just gone through another significant transition. That transition involves both the rule of law and social harmony – the two pillars of good governance as emphasised by the leadership of the country. Specifically, two fundamental and important approaches have been adopted in the ongoing judicial reforms to reshape the Chinese legal regime (including the criminal justice system); these are, as have been explained above: (1) consolidation of the rule of law; and (2) legalising social harmony.

It has been emphasised that the juxtaposition of these two values in contemporary China – which would be the overwhelming characteristic of its legal system after this new transition – revives in important ways the essential characteristics of the traditional Chinese legal tradition, which featured the ‘Confucianisation of the law’. Indeed, it has been asserted that the alloy of Confucianism and Legalism in dynastic China can help us understand why and how the current legal culture in China features the juxtaposition of the rule of law and social harmony.

In summary, the enactment of the CPL 2012 marks the completion of a new transition of legal culture in China because it is the first legislation that achieves the mixing of the rule of law and social harmony and faces up to the parallel functioning of these. Most amendments to the CPL are dedicated to either consolidating the rule of law or legalising social harmony; some illustrate the efforts taken by the legislature to balance between them. Despite the smooth operation of the CPL 2012 since its coming into effect, some provisions therein still present questions to be answered that touch upon the roots of the criminal justice system and even the entire legal regime.