

CRIMINAL PROSECUTION IN THE P R C AND THE U S A: A COMPARATIVE STUDY

HE JIAHONG
With
JON R. WALTZ



中美检察制度 比较研究

何家弘

著

乔恩·华尔兹 指导

中国检察出版社

CHINA PROCURATORIAL PRESS

D916.3/1

**CRIMINAL
PROSECUTION
IN THE PEOPLE'S
REPUBLIC OF CHINA
AND THE UNITED
STATES OF
AMERICA:
A COMPARATIVE
STUDY**

HE JIAHONG

With

JON R. WALTZ

1513203

CHINA PROCURATORIAL PRESS

S13P34/05

京新登字 109 号

中美检察制度比较研究

何家弘 著

中国检察出版社出版发行

北京市东城区东总布胡同 10 号

新华书店经销

北京市丰华印刷厂印刷

850×1168 毫米 32 开 15.5 印张 375 千字

1995 年 3 月第一版 1995 年 3 月第一次印刷

印数:1-2000 册

ISBN7-80086-289-5/D. 290(外)

02800



The author's family and the Rosenblums.



The author, his wife, Ren Xinping, and
his daughter, He Ran.

CONTENTS

Preface

INTRODUCTION

1. The Difficulties of a Comparative Study 1
2. The Values of this Comparative Study 9
3. The Methods of this Comparative Study 13
4. The Structure of this Comparative Study 17

Part One HISTORY

Chapter One The History of Prosecutorial Systems in Europe

- Section I General Introduction 21
1. Three Major Legal Families 22
 2. Three Historical Sources of the European Legal
Systems 24
 3. Three Types of Criminal Procedure 28
- Section II The History of the Prosecutorial System in France
..... 34
1. The Emergence of the Public Prosecutor (—1539)
..... 34
 2. The Establishment of the Public Prosecution
System (1539—1789) 38
 3. Developments in the Public Prosecution System
(1789—) 43

Section III The History of the Prosecutorial System in England	53
1. The Victim Prosecutor and the Grand Jury	53
2. The Sheriff and the Justice of the Peace	59
3. The Attorney General and the Director of Public Prosecution	61
4. The Police Prosecution	64

Section IV The History of the Prosecutorial System in Old Russia and the Former Soviet Union	69
1. The Prosecutorial System Before the Revolution of 1917	69
2. The Revolution of 1917 and Developments of the Prosecutorial system in the Former Soviet Union	73
3. The Characteristics of the Prosecutorial System in the USSR	76

Chapter Two The History of the Prosecutorial System in the United States of America

Section I The Origins of the Prosecutorial System in the U. S. A.	88
1. Three Viewpoints	88
2. Comments and Discussions	90

Section II The Prosecutorial System in the Colonial Period (1600—1789)	94
1. Private Prosecution	94
2. The Emergence and Early Development of the Attorney General	95
3. The Emergence and Early Development of the	

Local Prosecutor	96
4. The Emergence and Early Development of the Grand Jury	97
5. Two Major Trends	98
Section ■ The Development of the Prosecutorial System of the United States after Independence (1789—)	100
1. Developments from the Revolution to the Civil War	100
2. Developments after the Civil War	103
Chapter Three The History of the Prosecutorial System in China	
Section I The Yu—Shi Institution in Feudal China (—1911 A. D.)	109
1. The Origin of the Yu—Shi Institution	109
2. The Development of the Yu—Shi Institution	113
3. The Function and Significance of the Yu—Shi Institution	118
Section I The Prosecutorial System in the Republic of China (1911—49)	124
1. Influence of Western Legal Systems in China	124
2. The Prosecutorial System of the Republic of China (KMT)	125
3. The Prosecutorial System in Communist China before 1949	129
Section ■ The Prosecutorial System in the People's Republic of China (1949—)	135

1. Establishment of the People's Prosecutorial System (1949—53)	135
2. The Period of Development; Twists and Turns in the Work of the People's Procuratorate (1954—66)	138
3. The Period of the Suspension of Procuratorial Work during the "Cultural Revolution" (1966—78)	143
4. The Period of Reconstruction and Development of the Prosecutorial System (1978—)	145

Part Two ORGANIZATION

Chapter Four The Organization of the Prosecutorial System in the United States and the People's Republic

Section I The Organization of the Prosecutorial System in the U. S. A.	152
1. The Federal Prosecutorial System	153
2. The State Prosecutorial System	155
3. The Municipal Prosecutorial System	158
Section II The Organization of the Prosecutorial System in the P. R. C.	162
1. The Supreme People's Procuratorate	163
2. The Local People's Procuratorate	164
3. The Special People's Procuratorate	166
Section III Centralization and Decentralization	169
1. Merits and Demerits of the Centralized Prosecutorial System	169
2. Merits and Demerits of the Decentralized Prosecutorial System	170
3. Comments and Suggestions	172

Chapter Five The Organization of the Prosecutor's Office in the United States and the People's Republic

Section I The Organization of the Prosecutor's Office in the U. S. A.	178
1. Variety of the Prosecutor's Office in the U. S.	178
2. Three Examples of the Organizational Structure of the Prosecutor's Office in the U. S.	182
Section II The Organization of the Procuratorate in the P. R. C.	188
1. The Organizational Structure of the Procuratorate	188
2. The Procuratorial Committee	193
Section III Specialization and Generalization	196
1. Individual Leadership and Collective Leadership	196
2. Specialization and Generalization	199

Chapter Six The Personnel of the Prosecutorial System in the United States and the People's Republic

Section I The Personnel of the Prosecutorial System in the U. S. A.	209
1. Selection of the Prosecutorial Personnel	209
2. Training of the Prosecutorial Personnel	214
Section II The Personnel of the Prosecutorial System in the P. R. C.	218
1. Selection of the Prosecutorial Personnel	218
2. Training of the Prosecutorial Personnel	220

Section II Professionalization of Prosecutorial Personnel	224
1. Appointed or Elected Prosecutors	224
2. Career or Temporary Prosecutors	228
3. Political Influence over Prosecutors	230

Part Three FUNCTION

Chapter Seven Investigation

Section I The Investigative Function of the Prosecutor in the United States	241
1. The Prosecutor and the Police Investigation	242
2. The Prosecutor and the Grand Jury Investigation	248
3. The Prosecutor and the Preliminary Hearing	252

Section I The Investigative Function of the Procurator in the People's Republic	255
1. The Function and Procedure of Investigation	256
2. Investigative Function of the Procuratorate	259
3. Investigative Supervision Function of the Procuratorate	263

Section II Investigator and Supervisor	274
1. The Double-track Investigation and the Single -track Investigation	274
2. Preliminary Hearing and Preliminary Interrogation	278
3. Investigation by Prosecutors	280
4. Supervision of the Activities of the Investigator ...	282

Chapter Eight Prosecution

Section I Prosecution in the United States	291
--	-----

1. The Decision to Charge	291
2. Plea Bargaining	297
3. Instituting Prosecution	302
Section I Prosecution in the People's Republic	306
1. Public Prosecution and Private Prosecution	306
2. Examination of the Case for Prosecution	308
3. The Decision to Prosecute	310
Section II Prosecutorial Decision and Discretion	318
1. Discretion	318
2. Plea Bargaining and Confession	325
Chapter Nine Trial	
Section I The Prosecutorial Function in Trial in the United States	335
1. General Procedure of Trial in the U. S. A.	335
2. The Role of the Prosecutor in Trial	349
Section II The Prosecutorial Function in Trial in the People's Republic	354
1. The Examination of a Criminal Case by the Judge	354
2. The Preparation for Trial	356
3. The Courtroom Trial Procedure	357
4. The Supervision of the Prosecutor in Trial	361
Section III Truth and Justice	369
1. Adversary and Inquisitorial Procedure	369
2. Characteristics of the Chinese and American Trial Procedures	372
3. Supervision of the Trial	378

Conclusion and Recommendations	384
1. Administering Justice and Fighting Crime	387
2. The Individual's Right's and the Society's Interest	395
3. The Reform of the Criminal Justice System in the People's Republic of China	411
Appendix I Bibliography	433
Appendix II The Organic Law of the People's Procuratorates of the People's Republic of China	439
Appendix III The Procurators Law of the People's Republic of China	449

INTRODUCTION

1. The Difficulties of a Comparative Study

During my search for information and materials for this book I found that there is no body of literature that contributes directly to the cross—cultural study of prosecutorial systems, although there has been some research on prosecutorial systems in specific countries. The probable reason for this is that cross—cultural studies are often, if not always, more difficult than single—culture studies.

The first difficulty is, of course, the language difference. This is not as evident as it might seem to be because the problem is not merely the difference in spelling and sound. It is rooted in the differences in social and cultural traditions. We may not always find an identical and exact term for comparison. For example, in this Book I often use the word "prosecutorial" but in fact the public prosecutor in China is called Jian—cha—yuan, commonly translated into English as "Procurator", a term borrowed from the French legal system. On the other hand, the public prosecutor in the United States has many different titles, such as U. S. Attorney, district attorney, county attorney, prosecuting attorney, state's attorney, commonwealth attorney (Virginia, Kentucky), county prosecutor (New Jersey), solicitor (South Carolina), district attorney general (Tennessee), assistant attorney general (Virgin Islands), and so on. * 1 In addition, the grand jury also has some prosecutorial functions in the United States. So, for the purpose of this Book, prosecutorial system connotes the system of procurators in the People's Republic of China and the system of prosecuting attorneys, under varying titles, in the United States.

While doing a comparative study, one often faces difficulty

in finding a proper word or concept in one language to describe what one is talking about in another language and this can result in confusion. For example, the Yu—shi institution in ancient China is an important forerunner of the procuratorates in today's China. However, it is difficult to find an exact English—language counterpart because of Yu—Shi's unique character. Some scholars have used the word "inspector" in English, some have used the word "secretary," but neither term can give Western readers a correct impression of the function of Yu—shi. In his thesis on the institution of Yu—shi in Imperial China, Charles O. Hucker employed the word "censor" or "censurate"; this, too, is misleading to Western readers because the function of Yu—Shi in ancient China was different from that of a censor in Western countries. Hucker himself admitted this in his article.

* 2 Given the institution's original function, a better translation of Yu—Shi in English is "Imperial Secretary." However, in this book, I would prefer to retain the transliteration "Yu—Shi", although at first it may seem meaningless to Western readers.

The second difficulty is posed by the difference in social settings, which is often connected with and reflected in the difference in languages. Since language is molded by practice, we may not always derive sufficient assistance from a dictionary, no matter how meticulous it is. Sometimes the dictionary—indeed, the language—may play a trick on us; for example, one step of criminal procedure in China is called "Yu—shen" (which has nothing to do with "Yu—shi", although the two terms look and sound similar). Professional Chinese—English law dictionaries will give the English translation as "preliminary examination" or "preliminary hearing", but Yu—Shen is very different from the preliminary examination in France and the preliminary hearing in the United States. In China, it is handled by police and its main purpose, in practice, if not in theory, is to obtain a confession

from a suspect.

In many societies the legal process or legal system described in books is quite different from actual practice. In China the variance is even greater than it is in many Western countries. Folsom and his co-authors have said,

A critical examination of any legal system will reveal differences between the criminal law on the books and the criminal law in practice. In Western systems, these differences usually are found at the operational or enforcement level and not at the more general policy level. In China, the differences can be detected at both the operational level and at the general policy level. * 3

This renders comparative studies more difficult. Even between similar societies, such as the western countries, this would be significant. Sometimes the observer will not detect similarities or differences between legal procedures in two countries if he or she is not familiar with the respective societies and makes his comparison solely on the basis of proclaimed legal theories. For example, in the United States, guilty pleas made through plea bargaining play an important role in reducing the caseload of the criminal justice system, while in Germany, a so-called "penal order procedure" has been developed for dealing with the overload problem in the courts. According to the German procedure, the prosecutor asks the judge for issuance of a "penal order" which will greatly simplify the trial process. From a formal perspective, the guilty plea and the "penal order" have nothing in common and, as a matter of fact, German scholars have emphasized that the negotiated guilty plea could never be reconcilable with established criminal procedures in that country. However, when we study the actual functioning of the two legal procedures in the respective societies, striking similarities are found. * 4

The third and perhaps the most important difficulty is a product of the difference in the political and social philosophies of the countries to be compared. The prosecutorial system is a part of the social fabric of a country and it is always influenced greatly by the political system in that country. Some might argue that because of the extreme political and social differences between the United States and the People's Republic of China, there can be no value in comparing their prosecutorial systems. It is certainly true that the social and political systems of the two countries are markedly different and in the past seventy years many commentators have thought that there is little or nothing in common between capitalism and socialism; that they are absolutely irreconcilable. Or, as Harold J. Berman said many years ago:

On both sides there is a tendency to make socialism and capitalism mutually exclusive. Everything that is not capitalist must be socialist, and everything that is not socialist must be capitalist. * 5

However, the world has changed greatly, and it is still changing.

Socialism is labeled as a centrally planned and controlled economy, while capitalism is labeled as free market competition. Theoretically speaking, a planned and controlled economy should be more efficient than an economy without plan and control, if the plan and control are correct and perfect. However, society is so complicated and its economic activities likewise so complicated that the planner and controller must be a superman to achieve perfection. To date neither China nor any other socialist country has produced such a superman. Therefore, the economy in socialist countries has developed slowly and imperfectly.

In practice a socialist economy has a plethora of problems. One of the prominent characteristics of socialism is social equity. The dream of socialism is to make everybody as rich as everyone