An Essay honoring my beloved friend Professor Floyd Feeney for his outstanding academic achievements and moral character, which are forever worthy of commemorating.

The Essentials of Dynamic Balance Litigation Ideology

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 Life-time Professor of China University of Political Science and Law. The original title of this Essay is "My View of Dynamic Balance Litigation Ideology," as published in China Prosecutor. Chen Guangzhong, *My View of Dynamic Balance Litigation Ideology*, 13 CHINA PROSECUTOR (2018). It was originally presented in a keynote speech at an academic meeting hosted by the National Prosecutor College and the Chinese Society of Criminology on May 23, 2018. In order to adapt the publication, the author has made textual revisions.

I. DYNAMIC BALANCE IN PHILOSOPHICAL SENSE

The literal meaning of *balance* is that two or more related opposite aspects are equal or roughly equal in quantity or quality. The idea of balance underlies many traditional Chinese philosophical concepts. In ancient China, there was a simple balance philosophy called the principle of yin-yang and five elements. Section one of one of the oldest Chinese classics, *Book of Changes: The Great Commentary* states, "The Yi has Taiji [chaos] . . . which gave birth to the two elementary parts, heaven and death; the two elementary parts gave birth to the four symbols representing seasons." "The two elementary parts" refer to Yin and Yang, two sides of things, like the sun and the moon, the sky and the earth, and men and women. "The five elements," namely, metal, wood, water, fire, and earth, make up everything and inter-promote and restrain each other. Moreover, other Chinese philosophical concepts hold that everything is in a condition of dynamic balance. The "*Mean*" advocated by Chinese Confucianism is in essence a path of balance. *Book of Rites*, *The Doctrine of the Mean* declares: "Let the states of equilibrium and harmony exist in perfection, and a happy order will prevail throughout heaven and earth, and all things will be nourished and flourish." The declaration implies that only in a balanced and harmonious environment can the world survive and develop. In *The Analects of Confucius*, Confucius wrote that "Excess means deficiency," which is another example of balance.

The notion of balance is not unique to Chinese philosophy. There are incisive discussions on the theory of balance in Western philosophy. For example, the ancient Greek philosopher Aristotle discussed the "Golden Mean." Aristotle considered that "[t]here are three kinds of disposition . . . two of them vices, involving excess and deficiency respectively, and one a virtue, viz. the mean."[1] The American jurist Roscoe Pound remarked:

> A legal system succeeds as it succeeds in attaining and maintaining a balance between [the] extreme of arbitrary authority and [the] extreme of limited and hampered authority. This balance cannot remain constant. The progress of civilization continually throws the system out of balance. The balance is restored by the application of reason to experience, and it is only in this way that politically organized societies have been able to maintain themselves enduringly.[2]

[1] ARISTOTLE, NICOMACHEAN ETHICS (Liao Shenbai trans., Commercial Press 2003).

[2] Roscoe Pound, *Individualization of Justice*, 7 FORDHAM L. REV. 153, 166 (1938).

Marxist philosophy also embodies the concept of balance. The law of the unity of opposites is one of the three basic rules of Marxist Dialectics. According to that law, all things are composed of contradictions that are mutually antagonistic but also unified. The contradictions can be divided into major contradictions and minor contradictions in a time-space existential condition. Contradictions that are both antagonistic and unified promote the development of things. In other words, the interaction between unified but opposite forces drives development of the world. The antagonistic state of contradictions can be regarded as imbalance, and the unified state as balance. Things continually develop in the recurring loop of the opposition and unity of contradictions, representing a process of dynamic balance.

II. DYNAMIC BALANCE IN CRIMINAL PROCEDURE LAW

The notion of balance applies in criminal procedure as well as in philosophy. The ideology of dynamic balance in litigation has been the philosophical focus of my academic research throughout my life, and has been an ideological key to the basic ideas and principles for which I have advocated. From the perspective of criminal procedure law, dynamic balance has the following aspects.

A. Balance Between Criminal Substantive Law and Procedure Law

On the one hand, criminal procedure law serves as a tool for implementing the substantive law. On the other hand, criminal procedure law has its own essential, independent value, that is, the spirit of democracy, the rule of law, and human rights directly reflected in criminal procedural law, which is not dependent on substantive law. Judicial justice is the organic unity of substantive justice and procedural justice. Thus, it is necessary to keep the two values balanced. In particular, it is crucial to recognize the instrumental value of procedural law, but not to fall into the trap of treating procedural law as a mere tool; we must recognize the independent value of procedural law, but not exaggerate it so as to yield an incomplete procedure-priority theory.

B. Balance Between Punishing Crime and Protecting Human Rights

Punishing crime and protecting human rights are both purposes of criminal procedure law. First, criminal procedure law must facilitate the investigation and punishment of crime in order to protect citizens' lives, property, and other legal rights; to safeguard national security; and to

maintain social order. Second, criminal procedure law should respect human rights, which is an important indicium of the degree of civilization and rule of law in a country. The core of human rights protection in the criminal field is respecting criminal suspects' and defendants' rights, while also paying attention to victims' rights. Crime punishment and human rights protection stand in a relationship of unity and opposite. Neither can be neglected; rather, they must be properly coordinated and combined in balance.

C. Combination of Objective Truth with Legal Truth

Objective truth refers to the judicial authorities' identification of the case facts through proof activity consistent with objective fact. Legal truth is established when the identified fact meets the governing the standard of legal proof.

In China, the proof standard for criminal conviction is that "the facts of a case are clear [and] the evidence is reliable and sufficient."[3] This level of proof is needed to reach a unity of subjectivity and objectivity. This standard requires that the facts of the case be ascertained by evidence (including some from the person who allegedly committed the crime) that should be conclusive. The final decision must obviously be based on objective reality. The Decision of the Chinese Communist Party Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law (passed at the Fourth Plenary Session of the Eighteenth CPC Central Committee) announces: "Promote a legal system for fact finding conforming to substantive justice, case result conforming to substantial justice, and case process conforming to procedural justice."[4] This Decision is consistent with the concept of objective truth. The ever-expanding application of scientific evidence enhances the ability to ensure that the results of the fact investigation stand in line with objective truth. However, judicial decision-making activities do not regard the discovery of truth as the sole criterion or value. Another is the procedural value of human rights protection.

When there are contradictions and conflicts between values, legal truth can tip the balance. The recognition of a presumption of guilt in cases involving a defendant's possession of a huge amount of property

[3] CRIM. P. P.R.C. LAWS, art. 195 (2018) ("If the facts of a case are clear, the evidence is reliable and sufficient, and the defendant is found guilty in accordance with the law, [the defendant] shall be pronounced guilty accordingly.").

[4] Decision on Major Issues Pertaining to Comprehensively Promoting the Rule of Law (promulgated by the Chinese Communist Party Cent. Comm. Oct. 23, 2014).

from unidentified sources is a typical application of legal truth. In this situation, the unavailability of any evidence of the source prevents the prosecutor from proving objective truth. Yet, the peculiar circumstances may warrant the invocation of the legal truth doctrine and a finding of guilt.

D. Unification of the Confrontation and Concordance Between the Prosecution and Defense in Litigation Structure

In modern democratic countries ruled by law, the relationship between criminal prosecution, defense, and trial can be summarized as follows: there should be separation of the prosecution/investigation and trial stages — at trial there ought to be a confrontation between the prosecution and the defense, and the decision-maker at trial should be neutral. The prosecutor has significant advantages over the defendant with respect to both legal power and technical equipment.[5] Therefore, the legal system must deliberately construct a procedure for equalizing the conflict between the prosecution and the defense, and thereby guarantee a meaningful right to present a defense.

With the enhanced protection of defendants' rights, the promotion of the status of procedure, and the pursuit of litigation efficiency, a plea bargaining system has risen in the common law system.[6] Similarly, a negotiation system has developed in the civil law system.[7] In recent years, China has established a system for imposing more lenient punishments on accused confessing their crimes and accepting punishment in criminal cases.[8] These compromises between the prosecution and the defense play an increasingly important role in improving the efficiency of litigation. Thus, without sacrificing the aspect of confrontation, this type of litigation concordance between the prosecution and defense is promoting a growing number of harmonious agreements.

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[5] *See generally* SIDA LIU & TERENCE C. HALLIDAY, CRIMINAL DEFENSE IN CHINA: THE POLITICS OF LAWYERS AT WORK (Cambridge University Press 2016).

[6] *See* Lafler v. Cooper, 566 U.S. 156, 170 (2012) (stating that in the United States, "criminal justice today is for the most part a system of pleas, not a system of trials").

[7] *See* Elizabeth M. Lynch, *Why Was There a Trial When Gu Kailai Confessed - China's "Plea Bargaining,"* CHINA L. & POL'Y (Aug. 29, 2012), https://chinalawandpolicy.com/tag/plea-bargaining [https://perma.cc/SV84-ZUSZ].

[8] Alexandra Harney, *China Passes Pilot Program for Plea Bargains*, REUTERS (Sept. 2, 2016), https://www.reuters.com/article/us-china-courts-plea-bargains-idUSKCN11904W [https://perma.cc/Z3G7-B6RK].

E. A Reasonable Balance Between Litigation Justice and Efficiency

Improving litigation efficiency can not only reduce the cost of the justice system, but also more importantly, ensure that criminals are punished in a timely manner, that the innocent are free from the heavy burden of being the subject of a criminal investigation, and that victims receive respect and financial compensation. In this way, criminal procedure law can be more effectively implemented.

In striking a balance between litigation justice and efficiency, justice must be the primary consideration, since justness is the soul and lifeline of judicial justice. Without judicial justice, the pursuit of litigation "efficiency" will almost inevitably become inefficient and generate great costs. An obsession with speed in litigation and the disposition of large numbers of cases can easily lead to wrongful convictions. Such convictions not only damage justice in the short term, but in the long term, they also necessitate the expenditure of more resources to correct the errors and compensate for incorrect judicial decisions.

The above points are in line with the general rules of criminal justice. The reason for emphasizing "dynamic" balance in criminal justice is that the criminal procedure system must not only consider time and space factors in different historical conditions in different countries, but also evaluate them from a modern perspective with an open mind. In my view, differentiating between simple and complex cases, the reconciliation of confrontation with concordance, and a recognition of multi-value procedure are the leading current trends in modern judicial reform. These trends underscore that we must constantly explore how to achieve a scientific and rational balance in criminal procedure between the values of crime punishment and human rights protection, substantial justice and procedural justice, and justice and efficiency.

III. SEVERAL SPECIFIC ISSUES OF CRIMINAL JUSTICE REFORM FROM THE VIEW OF DYNAMIC BALANCE LITIGATION IDEOLOGY

In general, Chinese criminal legislation and judicial practice of criminal procedure are developing positively in accordance with the domestic principle of dynamic balance. However, there remain certain deficiencies that need to be addressed.

A. The Balance Between Crime Punishment and Human Right Protection

There is an imbalance between punishing crime and protecting human rights. In some respects, the protection of the rights of the parties is inadequate. To an extent, the phenomenon of extorting

confessions by torture persists,[9] and it can be difficult to later exclude the illegally obtained evidence.[10] In other words, the problem of preventing and correcting wrongful convictions has not yet been fundamentally resolved. In the spirit of the rule of law, we should strictly implement the principle of judicial protection of human rights, and respect the principles of adjudication based on the evidence and not punishing in cases in doubt. We must make a firm commitment to the exclusion rule of illegally obtained evidence and both effectively prevent and promptly correct wrongful convictions.

B. Equal Relationship Between the Prosecution and Defense

A considerable degree of inequality between the prosecution and defense is reflected in the low rate of lawyer participation in criminal procedure. This can be traced to deficiencies in the legal aid system. At present, the government is improving the legal aid system by broadening the scope of assistance. It is recommended that in all cases with a statutory sentence of more than three years of imprisonment the government should provide a full legal defense, rather than only limited legal advisory assistance by duty lawyers for defendants who have neither their own lawyer nor an assigned public defender.[11] Death penalty cases warrant special safeguards. After all, the procedure for review of death penalty review relates to the deprivation of human life. Thus, a defense lawyer should always participate in a capital procedure.[12]

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[9] Zhiyuan Guo, *Torture and Exclusion of Evidence in China*, 2019 CHINA PERSP. 45, 45 (2019).

[10] Zhiyuan Guo, *Exclusion of Illegally Obtained Confessions in China: An Empirical Perspective* 21 INT'L J. EVIDENCE & PROOF 30, 31 (2016); Zhiyuan Guo, *The First Step of the Long March: Implementing the Exclusionary Rule in China*, 25 ASIA PAC. L. REV. 48, 48 (2017).

[11] The position of "duty" or "on-duty" lawyers was created by the 2018 amendments to the Chinese Criminal Procedural Law. *See generally* Long Changhai & V.V. Sonin, *The Criminal Legal Aid in China*, 1 LAW ENFORCEMENT REV. 175 (2017); Mi Yunjing, *Duty Counsel Available in Criminal Cases*, CHINA LEGAL INFO. CTR. (Feb. 12, 2018), https://www.chinadaily.com.cn/m/chinalic/2018-02/12/content_35698207.htm [https://perma.cc/388P-399E].

[12] The procedure for review of death sentences in China refers to the special procedure for the court to review the death sentences in accordance with the provisions of the Criminal Procedure Law. The procedure includes that a case in which the death sentence is immediately executed must be reviewed by the Supreme Court; the case in which the death sentence execution is suspended for two years must be reviewed by the Higher Court. Only after approval by the Supreme Court can the death sentence be executed.

C. Balance Between Criminal Authorities

Another instance of imbalance between powers of the criminal authorities is the incomplete implementation of the trial-centered system,[13] evidenced by the low rate of witnesses' attendance at court,[14] and the consequent difficulty of elevating the status and importance of the trial. As the new supervisory system has been established in China, the supervision committee should adhere to the provisions of Supervision Law.[15] The committee ought to invigorate the spirit of "trial-center" and promote a more balanced relationship between authorities, especially the public security authorities, the prosecution and the court.[16]

CONCLUSION

Just as we strive for dynamic balance in philosophy, we must work toward that objective in criminal procedure. There are currently several problems in Chinese criminal procedure that must be addressed in order to achieve a proper dynamic balance between protecting society from crime and respecting human rights. My hope is that this Essay will focus a spotlight on those problems and thereby encourage their solution.

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[13] *See* Decision of the Chinese Communist Party Central Committee on Some Critical Issues of Fully Advancing the Rule of Law (promulgated by the Chinese Communist Party Cent. Comm. Oct. 23, 2014); Sun Changyong, *Principle of Trial-Centered Procedure and Its Legal Effects*, 21 MOD. L. SCI. 93 (1999).

[14] *See* Congressional-Executive Comm. on China, Prosecutorial Daily Highlights the Problem of Witness Absence at Chinese Trials (Feb. 8, 2005); Zuo Weimin & Ma Jinghua, *Appearance Rate of Witnesses Testifying at Trial in Criminal Proceedings: Theoretical Analysis Based Upon Empirical Research Studies*, 6 CHINA LEGAL SCI. 173 (2005); *Summary of Symposium on Improving the Criminal Live Witness System*, PEOPLE'S CT. DAILY, Oct. 26, 2016, at 6.

[15] Two examples show how the Supervision Law facilitates the "trial-centered" spirit. Article 4 of the Law stipulates: "Supervisory organs shall, in handling duty-related violations or crimes, cooperate with judicial organs, prosecutorial organs, and law enforcement organs, with mutual checks." SUPERVISION P.L.C. LAWS, art. 4 (2018). Article 33 provides: "The supervisory organ shall collect, fix, examine and use evidence in compliance with the requirements and standards for evidence in criminal trials." *Id.* at art. 33.

[16] *See generally* CHEN GUANGZHONG, CRIMINAL PROCEDURE LAW 3 (China University of Political Science Press 5th ed. 2015).