THE STRUCTURE OF A CRIMINAL PROCEDURE RULE AND ITS TEST ON ENGLISH CRIMINAL PROCEDURE

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Abstract

According to the positivist legal theory in China, a criminal procedure rule is structurally composed of a procedural direction and the procedural result of its breach and that a procedural deficiency is the breach of a procedural direction. If this structural coupling of a criminal procedure rule is a universal jurisprudence, criminal procedure defect consequences in England as well as perhaps all other common law jurisdictions will be a mess instead of a system. If it is applied to English criminal procedure, its following characteristics will be found: avoidance of overarching theoretical design and integrated doctrines; unsystematic case-law evolution and event-driven legal reform; unprincipled procedural rules with scattered procedural consequences of the breaches; weak structural constraints in various procedural remedies. The structural coupling of a criminal procedure rule can provide certain illuminations to common law world. In the above backdrop, the paper examines relationship between a procedural deficiency and its procedural consequence.

Key words

Criminal Procedure Rule, English Criminal Procedure and Criminal Procedure Defect

I. INTRODUCTION

According to the positivist legal theory in China, it can be inferred that a criminal procedure rule is structurally composed of a procedural direction and the procedural result of its breach and that a procedural deficiency is the breach of a procedural direction.[1] For example, according to s 136a (2) (3) of the Code of Criminal Procedure (*Strafprozeßordnung*, hereafter StPO) in Germany, a confession which is procured from an accused whose memory is impaired shall not be allowed (the procedural direction); if

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[1]It is necessary to exclude purely technical provisions from legal rules, though sometimes they can be applied in conjunction with obligatory rules. For example, the last Article (Art. 552) of the Legal Explanations of the Supreme Court on Particular Issues of Implementing Criminal Procedure Law in China stipulates that if other regulations enacted by the Public Security Ministry prior to implementation of this provision conflict with it, this provision shall be applied. In addition, those rules for conferring rights or powers are also excluded because it is a matter of choice for the rights-holder or the power-holder. For example, according to Art. 43 of the Criminal Procedure Law (hereafter CPL) in China, the accused is entitled to change his defense counsel. There will not be any adverse legal consequence followed if the accused does not exercise his right to change his defense counsel. Herein, the rules are confined to a general type of obligatory regulations.

such a confession is obtained (the procedural deficiency), then it shall not be used, i.e. 'excluded' (the procedural consequence of the breach). The paper briefly outline the sources of law for criminal procedure and then scrutinise, according to this structure of a criminal procedure rule, the remedies for procedural deficiencies in English criminal procedure.

Four complementary aspects of procedural consequences are examined for English criminal procedure: (1) what rationale or doctrine, if any, underpins the procedural consequences of breaches of criminal procedure; (2) the law-making process concerning procedural consequences (how the rules concerning procedural consequences evolve, e.g., by case-law or by legislation); (3) the provision of procedural consequences (e.g., the types of procedural consequences); (4) the procedural mechanisms for ascribing procedural consequences (e.g., allocation of powers to institutions or persons to raise objections to defective procedure). These four aspects are complementary. Firstly, the rationale or doctrine underpins the provision of procedural consequences. It may also influence how the rules concerning procedural consequences evolve. Secondly, the law-making process concerning procedural consequences is related to the pattern of the existing procedural consequences. Thirdly, the specific procedural consequences for breaches of procedure are important for achieving procedural justice. Fourthly, procedural consequences are enforceable only if there are adequate procedural mechanisms (including institutional arrangements and structural constraints) for their enforcement.

If this structural coupling of a criminal procedure rule is a universal jurisprudence, the paper suggests that criminal procedure defect consequences in England as well as perhaps all other common law jurisdictions will be a mess instead of a system.

II. THE RELATIONSHIP BETWEEN A PROCEDURAL DEFICIENCY AND ITS PROCEDURAL CONSEQUENCE

What is the relationship between a procedural deficiency and its procedural consequence? The paper argues that a procedural deficiency inevitably result in a procedural consequence. This logical relationship is derived from the structural coupling of a criminal procedure rule. Before proposing the structure of a criminal procedure rule, it is necessary to understand the structure of a general legal rule.

The Structural Coupling of a Legal Rule

Prior to taking the hypothetical formula (a criminal procedure rule = a procedural direction + a procedural consequence of its breach) for granted, it is necessary to understand the structure of a legal rule. A legal rule is functionally composed of two parts: the prescribed requirement (or direction) and the legal consequence of its breach. If the specified direction is violated then the resulting legal consequence ought to be ascribed; for example, according to Art. 232 of the Chinese Criminal Law, a person shall not intentionally commit homicide (the direction); otherwise, he shall be sentenced to death, life imprisonment or fixed-term imprisonment of not less than ten years (the legal consequence of the breach).[2]

Basically, a complete legal rule 'ought to be' designed in this logical way. Alternatively,

[2] Chinese Criminal Law, Art. 232.

this logical statement can be derived from the specified legal rule. This stable program (…the direction…, otherwise… the legal consequence of its breach…) is the jurisprudential prerequisite for this legal discourse to be scientific. It enables us to employ an objective standard to assess each existing legal rule, as the structural closure of the formula insulates evaluations of the law from value judgments. The prescribed requirement or the direction indicates the inclination of the law-maker. It is an unquestionable part of a legal rule. For example, homicide is legally forbidden by criminal law in every jurisdiction. However, what is the legal consequence of its breach? Is a legal consequence of a breach necessary for a complete legal rule? What is the difference between a legal consequence of the breach and a legal sanction?

A legal consequence of the breach is the residual part of a structured legal rule. It is used to respond to the breach of a legal direction. A lack of legal consequence resulting from the legal direction is a flaw in the legal rule. This conclusion is neither political nor moral. Even though certain extra-legal consequences have the instrumental function of securing obedience to the legal directions, they are not legally stipulated. If the resulting consequence is only extra-legal, the law will be a general norm for human behaviors and cannot be justified as law, as it will not be legally enforceable and legal autonomy cannot be ensured.

The legal consequence of a procedural breach cannot be seen as a sanction. The sanction amounts to an adverse consequence, which indicates a certain element of coercion. However, the notion of a sanction cannot sufficiently embrace all patterns of legal consequences. For instance, some less severe breaches of the law may not inevitably lead to substantial sanctions, but are instead followed by overlooking of deficiency. In other words, even though there might be a technical breach, the law still confirms the anticipated legal result of act/conduct. Admittedly, the majority of legal consequences of the breaches in public law are sanctions. Without enough sanctions, there is more risk of people with an anti-social motive disobeying the law. As Weber argues, a relaxation of law might result in the immediate degeneration of legal order into chaos and disorder.[3] In a word, the inner motivation of the subjects for obedience to the legal rule must be guaranteed by a certain legal consequence of its breach, in particular those in relation to fear.

Admittedly, ascription of the legal consequence to the breach may constitute a new prescribed requirement, which purports to be followed by a new legal consequence. For example, if the legal direction A is breached, the consequence B is followed. However, if the consequence B is not properly carried out pursuant to the law, another consequence - C - might be necessary to deal with the breach of B. Again, if C is not followed due to various reasons then the cycle will continue. This open-ended circular is a problem for all legal rules, whereby more technical arrangements need to be employed. Given this fictitious case, it seems that law, as a body of language, cannot comprehensively deal with any situations encountered.

The Structural Coupling of a Criminal Procedure Rule

[3] M Weber, *Economy and Society: an Outline of Interpretative Sociology* (Bedminster Press, New York 1968) 880-95.

Following the above formula, sufficient legal consequences for procedural breaches are an institutional prerequisite for a complete criminal procedure system. A legal consequence of breach of procedure is necessary for deterring the potential rule-breakers and achieving fairness between violators and those affected, otherwise the rule-breakers may benefit from such a relaxation of criminal procedure. The above formula may provide a standard for legal diagnosis but has not gone far enough to elucidate the exact type of legal consequence of the breach that should be attached to criminal procedure rules. The paper argues that the procedural direction and the procedural consequence of its breach are two indispensable parts for structural integrity of a criminal procedure rule.

Criminal procedure has the unique function of processing criminal cases to finality. This function can hardly be found for substantive law. Criminal procedure should be understood as a continuous process to be gone through. It naturally embraces a dynamic factor that moves the seised case forward. The procedural direction needs to be secured by its functionally irreplaceable consequence, namely a criminal procedure defect consequence. This consequence is not expressed as sanctions in substantive law (e.g., compensation or criminal penalty). It is intended to cure the defect in some way or otherwise resolve the matter. For example, in the case of illegal search, the resulting evidence may be excluded.[4] The exclusion of evidence is not a criminal penalty, compensation or a disciplinary sanction. It is instead nullification of the defective procedural conduct, namely the search, and its resulting evidence.

Then, the question might be alternative consequences for breaking a procedural rule, such as criminal, civil, disciplinary sanctions or government compensation. The branches of law are only man-made divisions pragmatically incorporated into a general legal system. However, it is necessary to point out, compared with these consequences, a procedural consequence has some irreplaceable features: (1) it is a particular response to a procedural defect whilst most of the other consequences focus on the violation of substantive law with incidental reference to procedural propriety; (2) it is a direct response to the procedural misconduct and constitutes a part of the entire proceedings, substantive sanctions meanwhile are only imposed on the violator and functionally contribute nothing to the entire proceedings.

To put specifically, substantive sanctions, for instance, issuing a warning to a police officer, can only be used to cope with a small part of criminal procedural deficiencies because of their own particular subjects of regulation, for instance, the law of employment. Those consequences can only be resorted to when the breaches of procedure are also regulated by criminal law, civil law, disciplinary law or government compensation law. It is clear that most deficiencies cannot be up to the basic conditions to impose criminal sanctions. In addition, they can be hardly proved to the level of certainty - 'beyond a reasonable doubt' or 'inner conviction' (also called 'intime conviction' or 'innermost conviction')[5] or 'clarity of the fact and sufficiency of the

[4] See, *e.g.*, StPO, s 136 (2) (3).

[5] It means that you must feel sure of the conviction.

evidence'.[6] Civil compensation normally arises from material loss and the breach of procedural rules is often difficult to measure in terms of economic interest.[7] The relationship between the agencies and the participants cannot be regarded simply as equal entities in a civil relationship. Disciplinary law can only guide certain agencies and lawyers. It can never be applicable to other lay participants, such as the accused. Government compensation is rather narrow in terms of applicable subjects - chiefly the innocent criminal suspects whose freedom has been wrongfully deprived. Hence, in most jurisdictions, the qualification for government compensation is rather rigorous, whereas the sum of compensation is significantly limited.

It is clear that criminal procedure is relatively autonomous in the whole legal system. A procedural consequence is a natural result of the breach of a procedural direction. It is therefore an intrinsic part of a complete criminal procedure rule. It is not necessary to prove a procedural issue or defect as certainly as a material fact in substantive law. For example, in continental legal theory, the liberal proof is particularly referred to for procedural issues as compared to the strict proof for the subject-matter of the criminal case.[8] Substantive law sanctions, such as a criminal penalty, are normally ascribed after the criminal proceeding is closed, otherwise, the whole proceeding would be unduly suspended. Even if a prosecution for assault of a suspect by the police is possible, a further criminal proceeding is inevitably involved. Conversely, a criminal procedure defect consequence is normally instituted inside the existing and self-contained criminal proceedings. Therefore, resort to procedural remedies is much more efficient than other remedies responding to the wrongdoing. For instance, in England, the courts have no authority to directly impose disciplinary sanctions against the police or the prosecution, but they can deny prosecutorial force by imputing their behaviour as an abuse of process and staying proceedings or excluding evidence.[9]

In addition, having outlined the abstract formula that 'a criminal procedure rule = a procedural direction + the procedural consequence of its breach', the test on criminal procedure defect consequences shall be taken in the context of criminal procedure rules in England.

III. A TEST ON ENGLISH CRIMINAL PROCEDURE

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[6]It is mistaken to suggest the fundamental difference amongst three criteria in terms of the level of certainty. These expressions certainly have different origins. However, the three criteria depend upon the state of mind of those seised of the case. In the course of truth-ascertaining, the attitudes of the agents seised of the case harden into certainty. See JR Spencer, 'Evidence' in M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, Cambridge 2002) 601-2.

[7]The English courts tried to provide a principled solution to the assessment of pain and suffering that occurs in the breach of procedure. See *Thompson v Commissioner of Police* [1997] 2 All ER 762; John v MGN [1996] 2 All ER 35. Interestingly, a similar way of measuring rewards for the breaches of procedure is provided in ECHR jurisprudence. But all attempts to assess the damage caused by procedural breach failed. See R Carnwath, 'E.C.H.R. Remedies from a Common Law Perspective' (2000) 49 ICLQ 520-7.

[8]Y Lin, *Criminal Procedure Law I : General Part* (China Renmin University Press, Beijing 2005) (in Chinese) 352-3; Z Xu, 'The Principle of Speedy Adjudication' (2003) 12 Legal Monograph (in Chinese) 121.

[9]For examples, see ALT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (OUP, Oxford, New York 1993).

The Sources of Law

In the absence of an all-embracing code of criminal procedure, English criminal procedure rules are scattered in the form of legislative text as well as an immeasurable volume of case law traced back to the thirteenth century. At present, Acts of Parliament are the major source of English criminal procedure, approximately 150 of which are concerned with procedural matters.[10] In a general sense, some procedural rules belong to Acts with constitutional status, notably Magna Carta 1215,[11] the Bill of Rights Act 1688, and the Human Rights Act 1998 into which the European Convention on Human Rights is incorporated.[12]

Many procedural rules are contained in high-profile legislative rag-bags, such as the Criminal Justice Act 2003. At present, the following important areas of criminal procedure are largely regulated by Acts of Parliament: the structure of the courts and seised proceedings;[13] the authorities and obligations of public prosecutors;[14] jurors and juries;[15] and the authorities of the police to investigate offences.[16]

In some areas, procedural matters are governed both by statutory provisions and case-law, such as the pre-trial process, the trial and criminal evidence.[17] Some rules, such as those regarding sentencing and appeals have been almost entirely consolidated into statute.[18]

The sources for many of the detailed rules are delegated legislation, particularly a myriad of court rules made by a variety of Rules Committees[19] and the Home Secretary.[20] These delegated legislations are supplemented by a range of other secondary documents, including various codes of practice,[21] Home Office circulars, guidelines

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[10]For details, see M Delmas-Marty and JR Spencer (eds), European Criminal Procedures (CUP, Cambridge 2002) 142-3.

[11]Some parts of Magna Carta have been repealed. For example, the clause prohibiting excessive fines was repealed by the Criminal Law Act 1967.

[12]However, Parliament is still entitled to repeal the rules in the Human Rights Act if it desires to do so.

[13]For example, Criminal Appeal Act 1968, Magistrates' Court Act 1980, and Supreme Court Act 1981.

[14]For example, Prosecution of Offences Act 1985 and Criminal Justice Act 1987.

[15]For example, Juries Act 1974.

[16]For example, Police and Criminal Evidence Act 1984, usually known as PACE.

[17]As regards the statutory provisions, the pre-trial stage is regulated by the Bail Act 1976, the Magistrates' Courts Act 1980, the Criminal Procedure and Investigations Act 1996, the Indictments Act 1915, etc.; the trial and evidence is regulated by the Criminal Evidence Act 1898, the Youth Justice and Criminal Evidence Act 1999, etc.

[18]The rules regulating sentencing was codified by the Powers of Criminal Courts (Sentencing) Act 2000. Appeals from magistrates' courts and from the Crown Court were respectively consolidated into the Magistrates' Courts Act 1980 and the Criminal Appeal Act 1968, which was later modified by the Criminal Appeal Act 1995.

[19]For example, the Magistrates' Court Rules, the Crown Court Rules and the Criminal Appeal Rules.

[20]For example, the Prosecution of Offences (Time Limits) Regulations, made under the Prosecution of Offences Act 1985, s 20.

[21]In particular, those codes of practices supplement considerable details to the provisions of PACE, explaining how certain powers and procedures are to be implemented: for example, Code C is concerned with the detention and questioning of suspects and Code D is bearing on identification procedures.

issued by the attorney-general, official advices given by the Judicial Studies Board and practice directions issued by the higher judiciary.

As the origin of English criminal procedure is embedded in a common law tradition, case law is unquestionably important. The major statutes are surrounded by innumerable cases that elaborate and interpret them. In addition, some areas of criminal procedure are so far only regulated by case law. The abuse of process, the paper discusses as a type of remedy is a prominent example that only exists in case law.[22]

Test of Criminal Procedure Defect Consequence

Avoidance of Overarching Theoretical Design and Integrated Doctrines

Anglo-American jurists have long rejected the idea of jurisprudence as a science. At the beginning of English legal system, the rules were a strategically contingent creation for reconciling political conflict between the Norman invader and the indigenous population. Thus, a managerial theory for overall rules in criminal procedure was difficult to be instituted whereas the rule of remedy is deemed to be natural. Though the aspiration of jurists for a comprehensive body of rules has been continuing for a century and a half, an overarching system was never really created.[23] The systematic methods of legal thinking and the law of reason have suffered by rejection from the 'traditionalistic conservatism of the English lawyers'.[24] Turning to English criminal procedure, proceduralists refer to the criminal process rather than to 'the criminal justice system'.[25] It might be caused by the fact that English justice agencies, in practice, are 'relatively autonomous' and 'enjoy considerable discretion'.[26]

Therefore, it is not strange that English common law seems to be wary of ambitious theory, especially considering some traditional socio-legal and political factors. Most of the English-originated criminal procedure theories have a characteristic of anti-

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[22]For details of English criminal procedure, see J Sprack, *Emmins on Criminal Procedure* (9th edn OUP, New York 2002); A Ashworth and M Redmayne, *The Criminal Process* (3rd edn OUP, New York 2005); JR Spencer, 'The English system' in M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, Cambridge University Press, 2002; ATH Smith, 'Chapter Three England and Wales' in CD Wyngaert (ed), *Criminal Procedure Systems in the European Community* (Butterworths, London, Brussels, Dublin, Edinburgh 1993); P Fennell, C Harding, N Jörg and B Swart (eds), *Criminal Justice in Europe: A Comparative Study, Clarendon Press* (OUP, Oxford, New York 1995); M Davies, H Croall and J Tyrer, *Criminal Jusitce: An Introduction to the Criminal Justice System in England and Wales* (Longman, London and New York 1995). J Hatchard, 'Chapter Four: Criminal Procedure in England and Wales' in J Hatchard, B Huber and R Vogler (eds), *Comparative Criminal Procedure* (B.I.I.C.L, London 1996). DJ Feldman, 'Chapter Four: England and Wales' in CM Bradley (ed), *Criminal Procedure A Worldwide Study* (Carolina Academic Press, Durham, North Carolina 1999) 91-142,

[23]For example, the Parliament was encouraged to enact a criminal code by prominent rationalist jurists such as Jeremy Bentham and Sir James Fitzjames Stephen; however, it has never been successful. See R Cross, 'The Making of English Law' [1978] Crim. LR 519, 652; ATH Smith, 'Codification of the Criminal Law (1) The Case for a Code' [1986] Crim. LR 285.

[24]T Weir (tr), K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn OUP, Oxford 1998) 136.

[25]A Ashworth and M Redmayne, The *Criminal Process* (3rd edn OUP, New York 2005) 17. Lord Justice Auld also suggests that the use of the word is 'misleading', because there is no 'system' worthy of the name. See Lord Justice Auld, A Review of the Criminal Courts of England and Wales (The Auld Report) (The Stationery Office, London 2001) <http://www.criminal-courts-review.org.uk/> Chapter Eight, para 1, accessed 15 September, 2015.

[26]A Ashworth and M Redmayne, *The Criminal Process* (3rd edn OUP, New York 2005) 17.

formalism with little enthusiasm for divisions.[27] Naturally, English law is not likely to construct an overarching theory of procedural consequence, which only constitutes one aspect of the criminal process. 'Due process', 'abuse of process', 'exclusion of evidence', etc. are only partial solutions for certain procedural deficiencies and cannot provide a complete framework as to how the breach of procedural rules ought to be remedied. Even the terminologies adopted for remedies were randomly coined and are not within a coherent semantic system. They are rather vague and uncertain, rendering their substance difficult to be apprehended and applied.[28] Some of them are neither in plain English nor in a scientific shape of design so it is difficult to unify them. For example, 'abuse of process' and 'judicial stay' are notoriously vague. They can be conceived of as expedient measures to cope with particular patterns of breaches of procedure. In the sequential criminal process, the breach of trial procedure vis-à-vis other procedure is much researched. However unfortunately, it is still far from being systemised into an integrated theory. For example, though the right to a fair trial has been institutionalised in Art. 6 of the ECHR, a consensus as to the reach and standard of fairness of trial has never been achieved.

Moreover, the status of criminal procedure has been suspect in the eyes of English jurists. They tend to observe criminal procedure empirically in practice rather than to focus upon the black-letter rules. In the field of criminal procedure, unethical conducts are particularly looked at and justified.[29] Formal rules are clearly circumvented instead of being enforced. In addition, codes of ethics are regarded as an indispensable part of criminal procedure. However, they definitely dilute the legitimacy of criminal procedure because they have no legal force. These attitudinal phenomena as to English criminal procedure are consistent with what Roberts and Zuckerman argue:[30]

Rules which appear clear and settled on their face, but which in practice are frequently circumvented without warning or explanation, produce only the illusion of certainty and predictability.

Empirically, rational theory and the structure of criminal procedure rules receive little attention from common lawyers. Their overly pragmatic view of criminal procedure can be exemplified again by what Roberts and Zuckerman claim,[31]

If we do not trust our judges to discharge the duties of their office, the answer is to appoint new judges, rather than to place inflated demands on procedural rules which, no matter how well-drafted, are bound to disappoint unreasonable expectations.

The method they prefer to ensure the judges' enforcement of procedural rules is not improving procedural rules but a rather contingent way - appointing new judges. Generally, most English criminal proceduralists favour a socio-legal study in dealing with procedural irregularities. However, this cannot preclude the value of structural

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[27]Andrew Ashworth divides the decisions into 'processual' and 'dispositive'. See ibid 8. However, in this monograph, this division is not used to construct a fundamental theory for evaluating criminal process.

[28]H.F. Stone, 'Some Aspects of the Problem of Law Simplification' (1923) 23 *Colum. L. Rev.* 327.

[29]A Ashworth and M Redmayne, *The Criminal Process* (3rd edn OUP, New York 2005) 71. See also P Roberts and A Zuckerman, Criminal Evidence (OUP, Oxford 2004) 56-7.

[30]*Roberts and Zuckerman, ibid*. 30.

[31]*Ibid* 27.

analysis of a procedural rule in positive law. Lack of research in this area might be owing to the lack of a civilian, academic tradition that claims that law needs to be planed prior to being made.

Unsystematic Case Law Evolution and Event-Driven Legal Reform

From a historical perspective, English solutions to procedural deficiencies are fragmented due to their unsystematic evolution. Generally, they are mainly based on case-law appeal systems and a series of judicial reforms recently.

In common law tradition, the most important aim of appeal system is clarification of the law and a reflexive development of the entire system.[32] It means that law has been evolving bit by bit through the mechanism of an appeal system, so the body of common law is not consciously planned.[33] In this course, common lawyers tend to proceed by analogy with concrete cases, and avoid large generalisations, thus eventually arriving at temporary formulations or principles.[34] For example, errors in the trial are the most common ground of appeal. They can be misdirections in the judge's summing-up, including, inter alia, 'failing to leave to the jury a defence for which a foundation has been laid by the evidence', and 'failing to give an adequate direction on the burden and/or standard of proof.'[35] There can also be other procedural errors in the course of trial, including, inter alia, 'allowing the prosecution to amend the indictment when that involved the risk of injustice,' 'allowing evidence to be admitted when it should have been excluded,' 'failing to deal properly with a note from the jury,' 'failing to comply with the statutory limitations on majority verdicts.'[36] However, potential errors are not defined clearly in a conceptualised structure but must resort to a vague test: 'was the conviction safe'.[37]

The appeal system can be seen as the engine of common law, in that it offers a process for detailed review of the law, including the remedies for procedural deficiencies. In performing the role though, appeals only allow the higher court to exert passive control over the lower courts. Specifically, the appeals offered to challenge procedural defects need to be initially requested by the defendant or the prosecutor, which normally means that the 'serious' legal issues rather than the 'less serious' are more possible to be analysed and clarified. This circumstance impedes blueprinting a complete picture for procedural consequences of the breaches. Moreover, case-law itself restricts the imagination of the related agencies on how the law should be designed.

In addition, the appellate process has not been researched enough. It is manifested by the fact that little is known about the appellate process in the Appeal Court. Criminal

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[32] Andrew Ashworth even argues that 'unless there is no appeal system, the common law system could hardly exist'. See A Ashworth and M Redmayne, *The Criminal Process* (3rd edn OUP, New York 2005) 338.

[33] M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, Cambridge 2002) 142.

[34] See Lord Goff of Chieveley, 'The Wilberforce Lecture 1997 The Future of the Common Law' (1997) 46 ICLQ 753.

[35] J Sprack, *Emmins on Criminal Procedure* (9th edn OUP, New York 2002) 427.

[36] *Ibid*.

[37] *Ibid.*

procedure only recently demonstrates its tendency to rationalisation[38] and codification.[39] This recent inclination purports to be caused by legal approximation with European continental law under the structure of the ECtHR and the European Union.

Apart from the slow pace of case-evolution, legislative reform occurs sometimes but is often 'event-driven'.[40] It means that reform is only performed when a random matter has been exposed to the general public and gained enormous societal influence. For example, the collapse of miscarriage of justice cases, particularly the Birmingham Six case led to the institution of a Royal Commission on Criminal Justice, promulgation of the Criminal Appeal Act of 1995 and the creation of the Criminal Cases Review Commission. The reform somehow only occurs haphazardly when a severe problem is noticed by the authority. Ashworth and Redmayne even observed,[41]

If the failed prosecution of the suspects in the Stephen Lawrence case had not received adequate media attention, it seems unlikely that the double jeopardy rule would have been the subject of provisions in the Criminal Justice Act 2003.

It is noteworthy that the fundamental cause for reform of criminal process is the political climate when the case happens. Taking advantage of this, the politicians attempt to attract enough support by announcing their particular attitude towards criminal justice.[42] This rarely requires systematic thinking or logical coherence with the rest of the law. Thus it is self-evident that so-called 'fundamental reform or change' is only a contingent weapon for democratic votes. In a word, English criminal procedure is not only unsystematic but also susceptible to inconsistency and politics.[43] Though criminal procedure in other jurisdictions may share a similar inclination, it occurs more frequently in the Anglo-American liberalist tradition.

Unprincipled Procedural Rules with Scattered Procedural Consequences of the Breaches

Clearly, there is neither a systematic code nor a uniform and hierarchical structure of legal sources in English criminal procedure. In contrast, there is only a collection of unprincipled laws detailing the directions for handling criminal cases. These procedural rules sometimes overlap with each other and much confusion arises as a result. In addition, many loopholes need to be clarified in English criminal procedure. Though greater endeavor has been tried to introduce guidance and accountabilities into chaotic English criminal procedure, there is still much unfettered discretion, some of which is deliberately left by the legislators. These conditions inevitably mean that criminal

[38]In the Auld Report, Lord Justice Auld proposed a comprehensive inquiry into English criminal justice systems to the government. Rationalisation of the entire system is a main theme in this report.

[39]In both the Auld Report and the governmental White Paper codification is strongly supported. It is claimed that codes of criminal procedure, criminal evidence and sentencing should replace the existing sources of law; For the latest proposal of the White Papers, see the White Papers Criminal Justice: The Way Ahead, Cm 5074(February 2001) and Justice for All (Cm 5563)(July 2002).

[40]A Ashworth and M Redmayne, The Criminal Process (3rd edn OUP, New York 2005)16.

[41]*Ibid*.

[42]*Ibid, s* 17.

[43]Justice, Remedying Miscarriages of Justice (British Section of the International Commssion of Jurists United Kingdom, London 1994) 8.

procedure defect consequences are similarly scattered without being designed in an orderly way.

In fact, the appeal measures in a broad sense constitute the main body of procedural sanctions: (1) if a procedural error is found to result in an 'unsafe' conviction by the Court of Appeal, the appeal must be allowed and the appellant's conviction should be quashed.[44] If the interests of justice so require, a retrial may be followed[45]; (2) If the conviction, order, determination or other proceeding of a magistrate's court is wrong in law[46] or in excess of jurisdiction, the party can appeal to the Crown Court or by stating a case to the High Court. If the appeal is successful, the Crown Court or High Court can 'reverse or vary any part of the decision appealed against', 'remit the matter to the magistrates with its opinion thereon' or 'make such other order in the matter as it thinks just'[47]; (3) If the Crown Court's decision in matters not relating to trial on indictment is wrong in law or in excess of jurisdiction, the party can also appeal by case stated to the High Court. And the consequence in the second situation is also applicable; and (4) If a procedural irregularity occurred prior to or at the beginning of Crown Court proceedings, which causes a fundamental mistrial, with the consequence of the defendant being never put in danger of a valid conviction, a writ of venire de novo should be passed, and a retrial should follow.[48] Despite a myriad of appeal measures, the demarcations of applicable conditions of appeals are not clearly provided.

Many procedural rules are created to loosely guide practice rather than to regulate it. However, if the rule is effective, it must at least have some extent of density and rigidity. For example, the 'National Standards for Cautioning' is supported merely by a Home Office circular, and thus cannot be binding in law.[49] Some guidelines, such as the Codes of PACE, are too generally phrased to make the regulated persons accountable.[50] Even though the House of Lords tends to interpret the Codes of PACE strictly, in a lot of cases, such as *R. v. Forbes*,[51] there is no clear consequence for a breach of Code D.[52]

The common law tends to always fall into the trap of repeatedly clarifying definitions of certain procedural faults, such as 'abuse of process', 'technical error', and 'substantive error'. Use of these terminologies usually results in flexible ascription of criminal procedure defect consequences depending on which particular fault is deemed to have arisen. The remedies for irregularities are usually temporarily provided after a judicial

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[44]Criminal Appeal Act, s 2(2).

[45]*Ibid*, s 7.

[46]The conditions that are wrong in law include, *inter alia*, that 'the information was bad for duplicity', 'the magistrates had no power to try the case', 'the inadmissible evidence was received or admissible evidence excluded' etc. See J Sprack, *Emmins on Criminal Procedure* (9th edn OUP, New York 2002) 459.

[47]See *ibid* 458, 464.

[48]See *ibid* 429.

[49]However, the 1993 Royal Commission recommended that police cautioning should be governed by statute, under which national guidelines, drawn up in consultation with the CPS and the police service among others, should be laid down in regulations. See Royal Commission on Criminal Justice, *Report* (Cm 2263 HMSO, London 1993) para 5.57.

[50]A Ashworth and M Redmayne, *The Criminal Process* (3rd edn OUP, New York 2005)161.

[51](2001) UKHL 40.

[52]See Royal Commission on Criminal Justice, *Report* (Cm 2263 HMSO, London 1993) 32.

balancing of conflicting rules. Meanwhile, different judges may use different procedural consequences to deal with similar irregularities. Without clear definitions of terminologies and enough overarching rules, the remedy for breach of a procedural rule is largely unpredictable. In these circumstances it is difficult to decide whether certain procedural consequences will be applied when a defect occurs.[53]

Many other types of consequence are frequently employed instead of using a procedural consequence to deal with procedural defects. These legal consequences consist of administrative consequences, disciplinary consequences, civil consequences, criminal consequences, etc. For example, non-compliance with PACE, such as illegal arrest and trespass to premises, can result in civil actions and criminal proceedings as well as disciplinary proceedings.[54] Again, extracting a confession through violence might also have various similar consequences. It seems that the categorisation of legal consequences, especially according to legal branches, receives little attention. What is perhaps more concerning is whether the sanction is severe enough to deter procedural irregularities. The remedies for irregularities can be quashing the conviction with or without a retrial, a financial award, a reduction in sentence, or a simple declaration that there has been a breach of rights.[55] However, the relationship between different types of remedies is not clarified, which creates too much unfettered discretion for the choice of a solution to a procedural breach.

Weak Structural Constraints in Various Procedural Remedies

Criminal justice agencies in England have been relatively independent in terms of their mutual relationships. The authority is not only diffused between superior agency and inferior agency, but also isolated between two agencies at the same level. Clearly, this is partly owing to the long-term evolution of English law in a relatively close space resistant to the influence from outside jurisdictions. The loose structural constraints for the remedial measures leads to many cases of unaccountability, which further contributes to the inadequacy of criminal procedure defect consequences in the case-law context.

The relationship between prosecutor and police is relatively isolated so the necessary check between them is almost absent. Initially, the police, as private citizens, undertook the responsibility both of investigation and of prosecution. The Prosecution of Offences Act 1985 created the Crown Prosecution Service (CPS). It is operated under the orders of the Director of Public Prosecutions (DPP), who acts 'under the superintendence of the Attorney-General'.[56] The primary reason for introducing the CPS was to bring a professional prosecutorial review into the system, to prevent weak or inappropriate cases from going to courts,[57] and for this they were given a power of discontinuance.[58]

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[53]For example, in the case of illegally or improperly obtained evidence, it is difficult to predict in advance whether it shall be excluded or not.

[54]C Elliott and F Quinn, *English Legal System* (6th edn Pearson Longman, Essex 2005) 257.

[55]See I Dennis, 'Fair Trials and Safe Convictions' (2003) 56 CLP 211, 223; B Emmerson and A Ashworth, *Human Rights and Criminal Justice* (Sweet & Maxwell, London 2001) 17-33.

[56]See Prosecution of Offences Act 1985, s 3 (1).

[57]Royal Commission on Criminal Procedure, *Report* (Cmnd.8092 HMSO, London, 1981) para 7.6.

[58]Prosecution of Offences Act 1985, s 23.

When compared with counterparts in other countries, however, the Crown prosecutors play a less important role in the criminal justice system. They have few rights to control the activities of the police.[59] It is a well-known characteristic of the police that the supervision of constables is not great, and that they have much *de facto* discretion.[60]

The police are locally organised and largely independent of direct government control. Accountability for individual decisions depends largely on the internal structure of the agency. However, a hierarchy of the police within the broader criminal process is absent and they play rather confused roles. Generally, the police have two distinguishing features: firstly, when investigating crimes, they are left largely on their own. Although they must procure a warrant from a judge or a magistrate before they are allowed to take certain coercive measures, they do not carry out their investigations under the direction of a public prosecutor or a juge d'instruction. Secondly, having completed their investigations and identified a suspect, they may make the decision to launch a prosecution. This is odd when compared to most other jurisdictions, where the initial decision to prosecute is made by the public prosecutor.[61] Although, now the CPS has the authority to discontinue the prosecution, it is a rather difficult and ambiguous route, since the CPS does not usually challenge the police decision. The route for reform chosen was partially due to the police trying to avoid losing power to the newly created CPS.

English common law has arrived at a peculiar legal structure, which is somehow in contradiction to the standard structure of a legal rule clarified above. Historically, a law of remedies instead of a complete structure of legal rules had been shown in the clause 29 of Magna Carta 1215:

No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him nor condemn him, unless by the lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

The development of habeas corpus has been tremendously influenced by this clause. It indicates that any person detained under criminal procedure is entitled, as a right, to have the legality of his or her detention re-examined by the judge.[62] Hence, habeas corpus became an efficacious mechanism for political opponents to challenge an arbitrary order of imprisonment made by the king. In ordinary criminal cases, it was once regularly used for challenging a refusal by local justices to grant defendants bail and excessive pre-trial detention.[63] In modern English criminal procedure, habeas corpus is hardly mentioned, as such challenges gradually evolved into a slightly different legal machinery of remedies.[64]

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[59]Code for Crown Prosecutors 2010, s 3.1.

[60]M Maguire and C Norris, *The Conduct and Supervision of Criminal Investigations* (HMSO, London 1992).

[61]M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, Cambridge 2002) 151.

[62]RJ Sharpe, *The Law of Habeas Corpus* (2nd edn OUP, Oxford 1989).

[63]M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, Cambridge 2002) 146.

[64]*Ibid*.

Most issues of possible nullity of conduct should be settled by the court. The check of legality by the court has not inevitably led to clear guidance. In a sense, the court is the fundamental pillar for dealing with procedural impropriety. At present, the legitimacy of police decisions at the prosecution stage of the process can be challenged in the form of judicial review before the court but this is a civil procedure. An active restraint by the agency seised of the case to prevent procedural breaches is almost absent within the criminal procedure system. If there is no challenge from one party, especially the defence, there will be no nullification procedure.

An unaccountable body, the jury, might be one plausible reason for weak structural constraints in decision-making. In England, the jury was originally introduced as a substitute for the judgment of God pronounced through ordeal. The lay participation injects a certain degree of unpredictability into a criminal justice system. The division of responsibility between judge and jury in Crown Court trial indicates an additional relationship to be regulated. Subject to soft control from the judiciary, a jury may even set aside criminal law embodied in the judge's instructions and make their own decision.[65] It is clear that considerable trust is put in the jury during the criminal proceeding. As Ashworth and Redmayne observe,[66]

If the Court of Appeal interfered with jury verdicts too readily, it would put itself in the uncomfortable position of questioning the ability of the jury to reach correct verdicts: it might be thought to be undermining the very system which it oversees.

In addition, it is not required for the jury to give reasons for its decisions and its deliberations are secret. Thus the Court of Appeal cannot identify the precise reason(s) why the jury makes a certain decision.

Since 1964 the Court of Appeal has been entrusted with the power to order a retrial, whereby the court can 'combine a concern for the integrity of the original trial with respect for the jury as the final decision maker in the criminal process'.[67] Even so, it is still difficult to deal with adjudicative faults committed by the jury. Although the Criminal Appeal Act provides that the Court of Appeal 'shall allow an appeal against conviction if they think the conviction is unsafe' and shall 'dismiss such an appeal in any other case',[68] the Court is generally reluctant to interfere with a jury's decision as to conviction. Under these circumstances, many appeals from defendants have been dismissed unjustly.

In English criminal proceedings, there are large-scale buffer zones due to the existence of the jury. In many cases, clear-cut measures against non-compliance with legal rules as to decision-making are absent. For example, the House of Lords have held that the jury should be informed if Code D of PACE has been breached and requested to consider the significance of the breach. In some cases the breach may result in exclusion of identification evidence. If not excluded, the judges are obliged to warn juries about the

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[65]M Damaška, 'Structures of Authority and Comparative Criminal Procedure' (1975) 84 YLJ 491. See also J Feinberg, The Right to Disobey (1989) 87 Mich. L. Rev. 1702-4.

[66]A Ashworth and M Redmayne, *The Criminal Process* (3rd edn OUP, New York 2005) 345.

[67]*Ibid* 346.

[68]Criminal Appeal Act 1968, s 2(1). The amendments were introduced by the Criminal Appeal Act 1995.

dangers of mistaken identification.[69] This warning should be reasonably concrete to juries, at least including the information that convincing witnesses can be mistaken. If the identification evidence is of poor quality, for example, if it is procured from a fleeting glance or derived from a longer observation in a rather difficult condition, the judge should go further. If a case hinges 'wholly or substantially' on identification evidence, the judge should request the jury to be cautious when convicting the defendant based on such evidence. In most situations, the case should be withdrawn from the jury unless there is evidence to support the identification. If there is supporting evidence, then the judge should identify it for the jury. Clearly, the relationship through which the judge supervises/assists the jury is rather flexible and relaxed, which definitely results in quite vague rules. Therefore whether the evidence should be excluded or the case should be withdrawn depends on the politics of the game playing between them.

IV. CONCLUSION

The above description of the existing procedural consequences for defective criminal procedures in England shows how incomplete and unsatisfactory the links between criminal procedural consequences and defects are. From my studies, it becomes clear that weaknesses in remedies for procedural deficiencies exist in English criminal procedure. It is particularly demonstrated by the fact that many regulations only have directions, but they do not have procedural consequences for breaches. Lack of procedural consequences is rather detrimental to the efficacy of criminal procedure. It is here necessary to repeat the argument made at the start of this chapter: from the perspective of the integrity of a criminal procedure rule, the establishment of a procedural consequence for a procedural deficiency is necessary; otherwise, criminal procedure simply becomes a set of guidelines for handling the case. Maybe it reflects the essence of criminal procedure in common law jurisdiction. Even though common lawyers rejects my criticism from their inner mind, I wish that they may receive certain illuminations from a Chinese law or more widely, continental law perspective.

[69] *R. v. Turnbull* (1977) QB 224.