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Psychiatric commitment under the criminal law in China: An empirical perspective

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ABSTRACT

This article examines the legislation and practice of compulsory treatment in China. Part I traces the Chinese history of criminal commitment law, explains the research methodology, and highlights some general empirical findings. Part II provides a comprehensive empirical analysis of compulsory treatment law in China, it covers both substantial issues such as criteria of compulsory treatment and procedural issues such as the commitment hearing, enforcement, and discharge of compulsory treatment. It also explores the compulsory treatment law from the human rights protection perspective. Our primary objective is to present the empirical findings to enable the legislative and other involved government agencies to make informed decisions about the future evolution of Chinese law in this area.

1. Introduction

Over the past two decades, Chinese media reports attracted intensive attention from home and abroad when they covered accidents that involved people with mental illness or criminal acts committed by the same group. There are two reasons for this phenomenon. First, the Chinese population with mental illness has been growing rapidly due to the enormous pressure upon ordinary people during the special period of social transformation.[1](Chang and Kleinman, 2002) Second, the growth of new media, especially the increasing popularity of the internet, makes it possible for the public to learn about these accidents instantly no matter where they occur. The widespread circulation of such media reports has lowered the sense of security among the public and increased the demand to control this special sub-population. Chinese legislature has responded actively to the social demands by reforming the prior legal framework. For example, in 2012 China made major changes in the mental health portions of its Criminal Procedure Law (hereinafter as CPL) and adopted its first modern civil mental health code.[2]

There are two types of psychiatric commitments in China, civil commitment, and criminal commitment, regulated by the Mental Health Law (hereinafter as MHL) and the Criminal Procedure Law,

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[1] As some scholars wisely pointed out, "In the case of China as in other developing countries, gains made in the areas of economics, technology, education, and overall standard of living are being offset by a rise in mental and behavioral problems that suggest the human costs of economic development and rapid social change." For more detailed discussions, see Chang, Doris F. & Kleinman, Arthur (2002), Growing Pains: Mental Health Care in a Developing China. https://www.researchgate.net/publication/241200644_Growing_Pains_Mental_Health_Care_in_a_Developing_China/ Accessed 8 September 2020.

[2] 2012 Mental Health Law is the first mental health legislation in China, but it only deals with civil issues. It delegates the authority of regulating other issues to relevant statutes by its Article 53, which reads, Persons who have a mental disorder who infringe security administration punishments or violate the criminal law will be dealt with according to the provisions of relevant laws. When the person with mental disorder violate the administrative law, he will be dealt with in accordance with relevant administrative law, and while the person with mental disorder violate the criminal law by committing a crime, he will be dealt with according to the criminal law and criminal procedure law. Because criminal commitment procedure is regulated in criminal procedure law, CPL has become one of most important part of criminal mental health law in China.

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respectively.[3] The 2012 CPL added a new chapter on psychiatric commitment under the criminal law, or compulsory treatment literally. Compulsory treatment is interchangeable with "psychiatric commitment under criminal law" or "criminal commitment" in China's context.

This article will examine the legislation and practice of compulsory treatment in China. Part I traces the Chinese history of criminal commitment law, explains the research methodology, and highlights some general empirical findings. Part II provides a comprehensive empirical analysis of compulsory treatment law in China, it covers both substantial issues such as criteria of compulsory treatment and procedural issues such as the commitment hearing, enforcement, and discharge of compulsory treatment. It also explores the compulsory treatment law from the human rights protection perspective. Most of the following sub-parts follow this sequence. Initially, the article describes a feature of the relevant law. Next, the article reviews the empirical results of our surveys about that feature. The survey findings identify both gaps in the law and other problems that have arisen under the law. Finally, the article contains suggestions for filling those gaps and remedying those problems. Our primary objective is to present the empirical findings to enable the legislative and other involved government agencies to make informed decisions about the future evolution of Chinese law in this area.

2. History, methodology and general findings

2.1. A historical overview of criminal commitment law in China

In the U.S., criminal commitment can occur during pre-trial stage on the ground of the person's incompetence to stand trial, after acquittal by reason of insanity, or even during imprisonment (Kadish et al., 2007). The Chinese Criminal Law has no formal counterpart to American category of incompetence to stand trial. The Chinese police usually refer those who have committed crimes but appear to be insane to psychiatrists for evaluations. If the psychiatrists conclude that an individual is insane, that person will generally be released to his or her family, admitted to voluntary treatment at the request of the individual's family, or recommended for compulsory treatment, which is interchangeable with criminal commitment in Chinese context. There is no formal regulation about criminal commitment of prisoners in China. Therefore, there is only one occasion in China in which the person with mental health problems is likely to be criminally committed, i.e., after acquittal by reason of insanity.

Chinese criminal mental health law emerged in the first wave of promulgation of legislations since 1978. China adopted its first modern Criminal Code and its first Criminal Procedure Code in 1979. The Criminal Code contained a section dealing with mentally ill persons accused of crime.[4] Other statutes or regulations ensued in the following years to create new legal and administrative regimes for handling the mentally ill.[5] However, compulsory treatment didn't find its foothold in Chinese Criminal Law until the 1997 Amendment.

According to scholarly analysis, the 1979 Criminal Law did not include compulsory treatment due to multiple reasons. First, as scholars who were involved in drafting the 1979 Criminal Law pointed out, even if the law didn't explicitly provide for compulsory treatment, it was not illegal for the government to impose compulsory treatment on severely mental ill persons in great need of forced treatment if their family or guardians consent. Secondly, since mental health facilities were not adequate at the time, China did not have the capacity to admit all mental patients who needed compulsory treatment. If the law provided for compulsory treatment, chances are high that it cannot be carried out in practice, which would embarrass the government and reduce the public confidence on legal authority. Thirdly, the lack of compulsory government treatment helped prevent the irresponsible guardians or family members from shirking their responsibility to care for and supervise mental patients and shifting that responsibility to the government (Gao, 2012).

The 1979 Criminal Law just provided in the first paragraph of Article 15, "A mentally ill person who causes dangerous consequences at a time when he is unable to recognize or unable to control his own conduct shall not bear criminal responsibility; but his family or guardian shall be ordered to subject him to strict surveillance and arrange for his medical treatment." (Cohen, 1982) It was not until the 1997 revision of Criminal Law that a sentence was added to the first paragraph of Article 18 (the previous Article 15 in 1979 Criminal Law), reading, "When necessary, the government may compel him to receive medical treatment." This is the first time Compulsory Treatment was explicitly authorized by Chinese statute, opening a new chapter in Chinese legal system.

The 1995 People's Police Law of China has granted: (a) police the authority to "take protective measures to restrain a mental patient who seriously endangers public security or other people's personal safety" and (b) the public security organ at or above the county level the authority to approve if the patient needs to be sent to a designated institution or place for guardianship. An obligation to inform guardians without any delay was also included in 1995 Police Law.[6]

Although substantive criminal law has long recognized the threat to public security and personal safety posed by potentially dangerous persons needing mental health treatment, the procedural law has lagged behind in providing mechanisms to ensure the necessary treatment of such persons. It is not until the 2012 amendment to the Criminal Procedure Law that compulsory treatment was explicitly included into the law as a new type of special proceeding. As a matter of fact, when the CPL was amended for the first time in 1996, legal reformers have recognized the necessity of introducing the compulsory treatment into criminal procedure law. There was a chapter on "compulsory treatment for persons acquitted by reason of insanity" in the *Expert Proposed Amendment to Criminal Procedure Law*, which was drafted by a group of leading criminal procedure scholars led by Prof. Chen Guangzhong at the invitation of Legal Affairs Office, National

[3] When a person with mental disorder violates the administrative law, according to Article 13, the Law of PRC on Penalties for Public Security Administration (中华人民共和国治安管理处罚法, Zhonghua renmin gongheguo zhian guanli chufa fa), "Where a mentally disordered person commits an act against the administration of public security at the time when he is unable to recognize or control his own conduct, he shall not be penalized, but his guardian shall be instructed to keep a strict guard on him and to subject him to medical treatment. Where an intermittently insane person commits an act against the administration of public security while in normal mental condition, he shall be penalized." This means the public security organs do not have the authority to commit a person with mental illness because of his violating the Law on Penalties for Public Security Administration. However, in the past, Chinese police had enormous power to commit mentally ill persons whether he violate criminal act, infringe Public Security Administration Punishment Laws, or just possess the risk of endangering others or self. This has changed since the recent mental health law reforms.

[4] Article 15 of 1979 Criminal Law of China provided, A mentally ill person who causes dangerous consequences at a time when he is unable to recognize or unable to control his own conduct shall not bear criminal responsibility; but his family or guardian shall be ordered to subject him to strict surveillance and arrange for his medical. See Cohen, Jerome Alan (1982). The Criminal Law of the People's Republic of China. *The Journal of Criminal Law and Criminology*. 73 (Cao and Xu, 2013), 138–170.

[5] The Provisional Regulations on Psychiatric Evaluation of Mental Illness (1989) and Procedural Rules on Forensic Analysis (Enacted in 2007 and amended in 2015) are the most important regulations in this area.

[6] Article 14, PEOPLE'S POLICE LAW OF THE PEOPLE'S REPUBLIC OF CHINA, Adopted at the 12th Meeting of the Standing Committee of the Eighth National People's Congress on February 28, 1995 and promulgated by Order No. 40 of the President of the People's Republic of China on February 28, 1995.

People's Congress.[7] Although the 1996 CPL reform was a wide-ranging overhaul touching in many respects, the treatment of mentally ill offenders was not a major concern at that time. Consequently, compulsory treatment procedure didn't catch enough attention to be adopted by the legislature. Compulsory treatment law failed to find its way in the 1996 CPL merely because its moment has not come.

However, by the time of the second round of CPL revision, namely the 2012 reform, Chinese society had come to realize that persons with mental illness could be a menace to the public security. Mental health is becoming an increasingly serious problem in Chinese society. According to the World Health Organization, 7% of China's population (about 100 million people) suffers from some form of mental illness. Most of them get no professional help and are left to their own devices. A 2010 Lancet study estimated that roughly 173 million Chinese suffer from a mental disorder (Shi et al., 2020). According to incomplete statistics, 16 thousand to 32 thousand Chinese citizens with severe mental illness have the tendency of violence, and this population is increasing every year (Cao and Xu, 2013). A WHO study estimated that mental disorder has accounted for 20% of the burden of disease in China, compared to the global average ratio 10%; and the ratio in China is anticipated to rise to 25% in the next 20 years (Liu, 2011). Moreover, the prevalence of mental disorder led to frequent violent episodes or crimes committed by mentally ill persons across the country. Although accurate statistics are unavailable, it's estimated that Chinese prosecutors charge the mentally ill with at least 10,000 crimes each year (Chen, 2011), of these charges, 30% involves homicide, injury and other serious violent crimes, and the average death caused by those mentally ill offenders is 1.85 per person. In the most extreme example, mentally ill offenders killed over 70 persons in a single case (Wang and Wang, 2012).

According to Chinese Criminal Law, family or guardians have the primary responsibility to supervise the mentally ill who committed criminal acts.[8] However, because family or guardians are often either incapable of or unwilling to fulfill their duty to supervision or medical care, many mentally ill offenders cannot get the necessary timely treatment,[9](Le, 2010) and continue to pose great threats to social security and public order. The prior model imposing the sole burden of taking care of the mentally ill on family has proven to be inadequate. The government itself should shoulder the responsibility of treating and supervising the mentally ill offenders who have committed violent criminal acts and caused serious damage. Before the 2012 CPL adopted compulsory treatment as a special proceeding, compulsory treatment was imposed by public security organs[10] in accordance with internal regulations issued by the Ministry of Public Security. Most countries' mental health laws protect the rights for persons with mental disorder by introducing a judicial review mechanism to determine involuntary admission and compulsory treatment. China decided to create a similar mechanism. The 2012 CPL established a special proceeding called "Procedures for Compulsory Medical Treatment for Mentally Ill Persons Who Are Not Held Criminal Responsible", allowing the court, an independent agency, to determine whether the mentally ill offender is criminally committable.

2.2. Methodology

As the former American Supreme Court Justice Oliver Wendell Holmes, Jr. wisely stated, "The life of the law has not been logic: it has been experience." (Oliver Wendell Holmes, Jr, n.d) It's not surprising that people concerning about compulsory treatment reforms have questions such as "Has this newly adopted special proceeding been fully implemented?","Do the current provisions in the CPL and relating judicial interpretations adequately satisfy the practical needs?," and "Is it possible to realize the goal of rule of law for the compulsory treatment legislation?" For this reason, the author and her research team have conducted an empirical study on compulsory treatment reform. Field visits were made in Beijing, Guangdong, Heilongjiang, and Shandong provinces from June 2013 to July 2015.[11] (see Fig. 1).

The empirical survey relied on multiple methods including focus group workshop, face-to-face in-depth interview, telephone interview, field visit, case study and literature analysis. As of July 2015, 13 focus-group workshops have been convened in the above-mentioned survey sites. Roughly 100 in-depth interviews were conducted with criminal judges, prosecutors, police officers, lawyers (including private lawyers and legal aid lawyers), psychiatrists, judicial appraisers, and legal scholars. Our interviewees include both those who are involved in compulsory treatment practice in different capacities and those who are interested in the implementation of compulsory treatment law. The interviewees were not large in number, but they covered almost all categories of involved professionals and are geographically representative. Economically speaking, our survey sites included both wealthy regions such as Guangdong province and Shandong province, and intermediately developed regions such as Beijing and Heilongjiang province.[12] Our survey covered three levels of the judicial hierarchies[13] from the basic level courts and prosecutor's offices, to the intermediate courts and prosecutor's offices, to courts and prosecutor's offices at the provincial level. It's worth mentioning, the specialized mental hospitals (Ankang Hospital) we visited represent different models across the country.[14] The focus group workshop we have convened include both specialized symposiums exclusively targeted at Ankang Hospital or prosecutor's office, and workshops including all kinds of practitioners such as judges, prosecutors, police offers, lawyers and psychiatrists. Members of focus groups were selected either randomly or by following the convenience or snowball principle. We also collected some typical cases and local regulations during our empirical survey.

As the purpose of this empirical survey was to try to understand how compulsory treatment law was implemented in practice, I compare the empirical data collected by the surveys with the relevant legislation to see how much of the law has been carried out. To get a general picture of the compulsory treatment practice across the country, I also make comparison between different survey sites, through which I identified some varied practice.

2.3. General findings

The 2012 CPL brought the judicial review mechanism into the compulsory treatment proceeding in China, which effects dramatic changes to the compulsory treatment practice. One major change is that the *police-dominated decision making model*[15] gave way to a *collective*

[7] The 1996 Amendment to CPL absorbed around two thirds of proposals raised by these experts.

[8] Article 18 of Criminal Law of PRC.

[9] On July 23, 2010, in the 2010 National Conference on Academic Exchanges on the Prevention and Rehabilitation of Mental Illness, Prof. Zhang Mingyuan, the vice president of China Disabled Persons Federation (CDPF) and an well-known mental health expert, released a group of new data: Around 173 million Chinese suffer from a mental disorder, and 158 million have never received professional treatment, with a treatment rate of less than 10%. Yu Le (2010). 1.73 billion mental patients in China, less than 10% pursue treatment. https://news.qq.com/a/20100724/000504.htm/Accessed 8 September 2020.

[10] Public Security organ is Chinese police force.

[11] This project was sponsored by the China Law Center of Yale Law School.

[12] According to the 2013 National Ranking of Provincial GDP, Guangdong province was ranked No.1, Shandong province was No.3, Beijing and Heilongjiang were ranked No.13 and No.17 respectively. Due to the difficulty of arrangement, our survey did not cover the poor regions.

[13] There are four levels of judicial hierarchies, basic level, intermediate level, provincial level, and supreme level.

[14] Three are three models for mental hospitals admitting committed criminal patients, i.e., police-run provincial Ankang Hospital, converted Ankang-hospital and other mental institutions. For detailed discussion, see Part II C a).

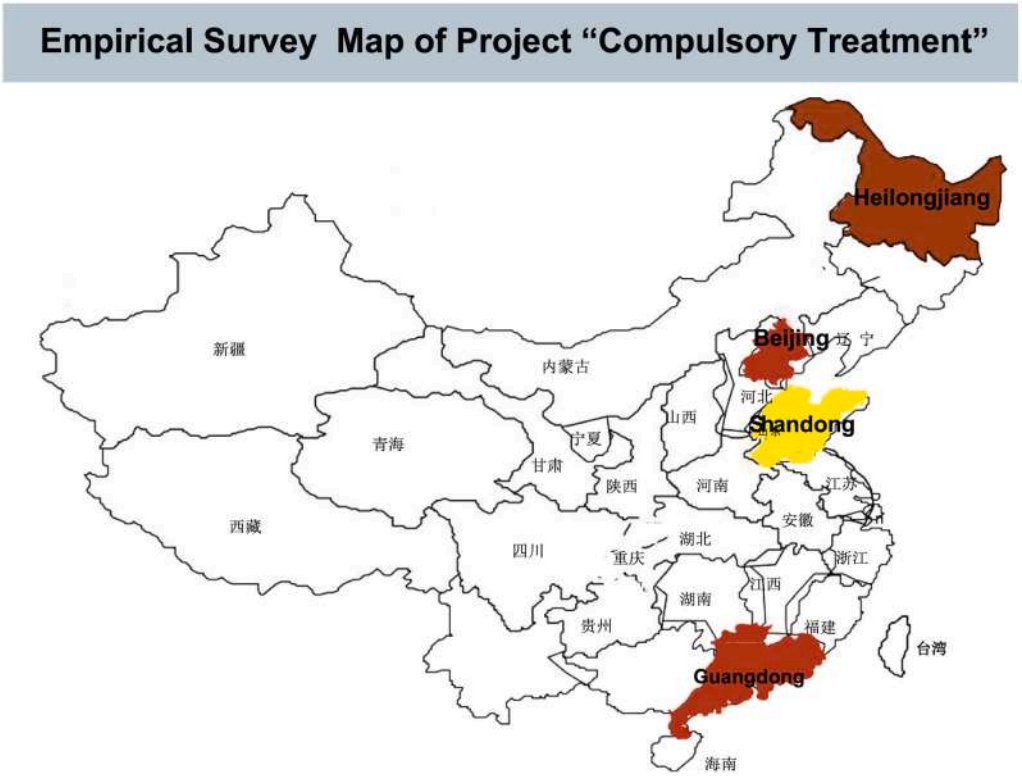

Fig. 1. Empirical survey map of project "compulsory treatment" (2013-2015)

effort model in which police, prosecutors, judges, lawyers and psychiatrists are all involved, and the final decision is made by the impartial judicial agency, i.e., the court. This change has brought Chinese criminal commitment law in line with the international practice. This is quite correctly regarded as the most important step in reforming the criminal commitment law in China. Meanwhile, the 2012 CPL has greatly improved the standardization of compulsory treatment, providing clearer guidance for both legal and medical practitioners.

However, the new law is also inadequate in several aspects. The law just includes a general principle on division of labor but fails to clarify the detailed responsibilities of each agency involved. More importantly, the new law did not touch on how different agencies coordinate each other. The law was silent on several important procedural issues arising when the case is referred from one agency to another. For example, when a criminal offender was determined insane at the time of crime due to mental illness, he did not have to take criminal responsibility under Chinese Criminal Law. But if he met the criteria of compulsory treatment, he would be diverted from criminal procedure to criminal commitment proceeding. In such cases, a frequent question is what to do with the criminal procedure: should the criminal charge be dropped, or should the criminal proceeding be suspended or terminated? Because the new law did not say anything as to this kind of practical issues, the early implementation was unsatisfactory.

Before the compulsory treatment proceeding was established in the 2012 CPL, neither prosecutors nor judges were involved in this practice. Therefore, it is especially hard for these two agencies to quickly fit in. New procedural rules are needed to enable prosecutors and judges to play a proper role in implementing the new law. As some of our interviewees stated, "Handling a compulsory treatment case is like crossing the river by touching the stone, because there is no precedent we can follow to hear the case, there is no existing template we can refer to make the rulings, and there is no experience or methods we can turn to when we have difficulties. "[16] Fortunately, our survey identified initiatives in creating detailed procedural rules to respond to the practical needs by considering the current criminal law, criminal procedural law, judicial practice and local situation. These new rules were largely developed at the local level.

The limitation of national statutory law is that the law often cannot anticipate all the problems and needs that will emerge as soon as the law is implemented. Local practitioners have played a particularly important role in bridging the gap between legislation and practice. The local practitioners we interviewed often worked out effective solutions to unanticipated problems through intensive communication and collaboration among the agencies involved. In some provinces, the agencies involved, including the court, the prosecutor's office, police, lawyers, psychiatrists, jointly issued "minutes of meetings" as interim guidance, which were not legally binding; but the local practitioners usually respected and followed the rules contained in such documents. For example, the police, prosecutor and court in Beijing held a series of meetings and worked out a document listing the materials that the police should provide when the police refer a recommendation of compulsory treatment to the prosecutor's office: prior medical records, history of violence, medical history of family members with mental illness, and testimonies by community members.[17] If the prosecutor thinks the materials are insufficient, he can request the police to supplement materials. This kind of regulation fixed the gap in the legation regarding the division of labor between the police and the prosecutor.

Many of Chinese reforms follow a first top-down and then bottom-up model. Initially, the national legislature enacts a broad statute designing to shift public policy in a major way. The legislature relies on lower-level local agencies to develop regulations to fill the gap in the legislation and effectively implement the public policy reforms.

[15] Before 2012 CPL amendment, compulsory treatment decision was made by police. This is not because the law granted police the authority to do so, but because it's usually the police who discover the need of compulsory treatment.

[16] Interview scripts (BJ, H, G and D)

[17] Interview scripts in BJ.

Compulsory treatment law is a typical example, although the national implementing guideline has not come out yet.

Section II presents a systematic survey of the compulsory treatment law together with a detailed empirical analysis of the implementation of the law. The discussion touches on each stage of compulsory treatment procedure, i.e., initiation of compulsory treatment, commitment hearing, enforcement, and discharge of compulsory treatment. The discussion integrates an analysis of the protection of the human rights of the subject of compulsory treatment. Each subsection of Part II proceeds in three steps: initially, a description of a feature of compulsory treatment law; next, a review of the pertinent empirical findings about that feature; and finally, a suggestion of possible changes addressing the problems identified in the empirical findings.

3. Compulsory treatment in China: an empirical analysis of the implementation of the legislation

Before the 2012 CPL adopted compulsory treatment as a special proceeding, China's compulsory treatment law was almost blank. In practice all compulsory treatments were determined by police, executed by police, and discharged by police. The police exercised virtually unilateral decision-making authority. There was neither neutral third party to review the legitimacy of compulsory treatment nor a chance for involved parties to participate in the proceedings to protect their rights and interests. This unilateral model is not only inconsistent with the fundamental requirement of procedural justice, but also contrary to the practice in most modern countries committed to the rule of law.

The establishment of compulsory treatment procedure in the 2012 CPL is vital to address the long-standing problem of arbitrary compulsory treatment and enhances the transparency of compulsory treatment determination and enforcement.

This section will conduct profound nominal and empirical analysis on compulsory treatment procedure. The subsections contain detailed discussions of topics such as the initiation, determination, enforcement, and discharge of compulsory treatment, as well as relating issues such as legal supervision of compulsory treatment, and human rights protection of involved parties in compulsory treatment, etc.

3.1. Initiation of compulsory treatment procedure

a) Division of Powers in Initiating a Compulsory Treatment Procedure.

The threshold question is who can initiate the procedure. The 2012 CPL provided for the division of powers in initiating a compulsory treatment procedure in its Article 285,[18]

> Where a public security organ discovers that a mentally ill person satisfies the conditions for the compulsory medical treatment, it shall issue the letter of opinions on compulsory medical treatment and refer the case to the relevant people's procuratorate. Where the people's procuratorate finds that a mentally ill person referred thereto by the public security organ satisfies the conditions for compulsory medical treatment or finds the said circumstance during the examination before prosecution, the people's procuratorate shall apply with the relevant people's court for compulsory medical treatment. Where the people's court finds in the trial of the case that the defendant satisfies the conditions for compulsory medical treatment, it may decide on compulsory medical treatment.

Given this division, there are two ways to activate the compulsory treatment procedure: (1) when the prosecutor's office file an application with the court, the court could initiate the compulsory treatment procedure at the application of prosecutor; but (2) when no application is filed, the court can still initiate a compulsory treatment procedure at its own initiative. Under (1), the police could refer the case to prosecutor's office with a recommendation to initiate the commitment procedure, or the prosecutors could file the application on their own initiative.

In contrast to the prior unilateral police-dominated model, the current division of powers not only gets all the agencies involved by assigning them different roles to play in the compulsory treatment process, but also ensure impartial judicial review and a judicial final resolution. While the prior model relied on administrative decision-making, this new model reconstructed the process as a commitment hearing. The new model checks the exercise of public powers and ensures that persons with mental illness in genuine need of treatment can get the timely treatment and aid they need.

Our empirical survey found that in majority cases the compulsory treatment was triggered by the police's recommendation. Then the prosecutors filed the application, and the courts responded by conducting a commitment hearing. The police are typically the first agency to become involved in criminal proceeding for the simple reason that they are ordinarily the first agency to detect that suspects may have a mental illness and need compulsory treatment. The statistic that 70–80% of psychiatric evaluation were requested in investigative stage[19] confirms the prevalence of the early central role of the police.

b) Criteria of Compulsory Treatment and Its Application.

Subsection (a) discussed the question of who has power to initiate the proceeding. The next question that naturally arises is the criteria they should use in deciding whether to initiate.

The 2012 CPL[20] and relating Judicial Interpretations[21] have set three criteria for compulsory treatment. The first criterion (behavioral criterion) requires that the mentally disordered offender has committed acts of violence constituting crime endangering public security or seriously endangering personal safety of other citizens. The second criterion (psychiatric criterion) requires that psychiatric evaluation has found the person with mental illness to be not criminally responsible. The third criterion (potential risk criterion) requires that the person with mental disorder continues to pose a threat to the society.

These criteria emphasize two essential principles in the application of compulsory treatment: necessity and priority. Criminal commitment must follow the principle of necessity because the coercive nature of this regime may constitute an enormous intrusion into the personal rights of interested parties. For this reason, not all mentally ill offenders who are involved in criminal justice system need to be committed. On the other hand, the existing mental health service facilities have limited capacity, and the treatment of a patient can consume a substantial amount of state resources. Thus, it is unrealistic to attempt to make compulsory treatment available to every patient with mental health needs. Priority must be given to patients who pose the greatest threat to public order and who suffer from the most serious mental illnesses.

Regarding *the first, behavioral criterion*, Chinese prosecutors and

[18] The CPL of PRC was amended again in October 2018, but the amendments did not involve the compulsory treatment procedure except causing changes to article numbers. For the purpose of convenience, the 2012 CPL is cited in this article.

[19] This statistic was from another empirical survey on the psychiatric evaluation in criminal cases conducted by the author in selective provinces across China from 2010 to 2011.

[20] Article 284 states, A mentally ill person who has endangered public security or seriously endangered the personal security of citizens by committing acts of violence, but who is not criminally liable upon expert evaluation according to statutory procedures may be placed under compulsory medical treatment if he/she is likely to continue to pose a threat to the society.

[21] Article 524 of SPC Judicial Interpretations and Article 539 of SPP Judicial Interpretations. In China, both the Supreme People's Court (SPC) and the Supreme People's Procuracy (SPP) have the authorities to issue judicial interpretations to elaborate or supplement the statutes. They are also considered part of criminal procedure law in broader sense.

judges usually ask two questions, i.e., whether violent behavior is involved and, if so, whether such behavior has endangered public security or seriously endangered someone's personal safety. In determining whether this criterion is met, prosecutors and judges just rely on their experience of examining the case facts of violent crimes. The issue frequently identified in our survey is how to define the scope of "public security". A common question is whether public property security falls under the umbrella of "public security". "[M]ost applications for compulsory treatment were filed against persons with mental illness whose violent behavior has endangered personal safety of other citizens".[22] However, in exceptional cases, there was a division of sentiment between police and prosecutor or among prosecutors over whether a violent mental patient who endangered public property rights is criminally committable. For example, in a case handled by prosecutor's office in D district of Beijing, the person with mental illness smashed dozens of cars in a public parking lot during his psychotic break. There was a debate within the prosecutor's office over whether an application for compulsory treatment should be filed. Some prosecutors thought property security is one kind of public security and that an application for compulsory treatment should be filed. Others thought public security refers only to personal security and that consequently, no application for compulsory treatment should be filed. Still others pointed out that the property vandalism is often random and can pose a threat to personal security. Suppose passengers were in the cars when the mentally ill person smashed the cars, both property and personal security will be endangered. The same issue has arisen at other sites where we conducted surveys. The understanding gap on this issue reflected the different focus of people on the institutional value of compulsory treatment. Those suggesting including property security in the concept of public security favor expanding the compulsory treatment as a means of social defense and protection. In contrast, those who want to favor limiting the scope of the concept stress the protection of human rights. After all, compulsory treatment is a major deprivation of the person's personal freedom.

Regarding *the second, psychiatric evaluation criterion*, our surveys uncovered almost no controversies. Psychiatric evaluation is the gateway entrance to compulsory treatment. Although the evaluation could be requested at any stage from investigation, prosecution through trial, the compulsory treatment procedure cannot be initiated until the offender was determined not guilty by reason of insanity after a psychiatric evaluation. Our empirical survey found that in practice there was usually one evaluation. Multiple evaluations are extremely rare. The reasons were twofold. First, only those who met the violent behavior criterion would be considered for psychiatric evaluation, and such persons usually possessed obvious psychotic symptom. Therefore, the interested parties can rarely successfully challenge the result of psychiatric evaluation. Second, in cases where the mentally ill committed crime, their guardians often could not afford to seek medical treatment for them. Most guardians were eager to avoid that "burden" by having their mentally ill family member committed to a specialized, usually government funded mental hospital. Therefore, guardians would not object to compulsory treatment in most cases. In practice, prosecutors and judges reviewed this criterion by considering whether the expert and the forensic institution he/she affiliated are qualified, whether the forensic examination followed proper professional protocol and procedure, and whether the person in question carried obvious symptoms.

The third, criterion of social risk or continuous dangerousness has generated the most problems. According to our empirical survey, risk assessment is widely regarded as an extremely difficult evaluation. In practice, if the person with mental illness can be proved to have committed violent crimes endangering public security or seriously endangering other's personal safety, he/she would usually be presumed continuously dangerous. The legislation does not list objective factors for the assessor to consider. Government agencies such as police, prosecutor's office or courts all acknowledge that they are incapable of conducting the assessment without assistance from mental health professionals. Even psychiatrists hesitate to assume this responsibility for practical reasons: potential dangerousness assessment is beyond their scope of strictly medical training, and the typical practicing psychiatrist has little experience of conducting this kind of evaluation. Furthermore, some psychiatrists fear that they can be held responsible if they opine that the person is not dangerous, but the person later commits a serious, violent crime.

Prosecutors and judges in some provinces routinely seek professional assistance from psychiatrists. They either consult psychiatrists on potential dangerousness of specific mental illness or entrust psychiatrists to assess whether certain mentally ill offender carried potential dangerousness. For example, the Forensic Science Institute at China University of Political Science and Law was assigned to evaluate the potential dangerousness of mental patients who committed violent criminal acts and were pending for compulsory treatment procedure. Kangning Mental Hospital at Shenzhen, Guangdong province was also frequently entrusted to provide consulting opinion on a specific mentally ill offender's potential dangerousness.

One possible change in this stage of the process would be the development of a collective efforts model: a cooperative undertaking by psychiatrists, prosecutors, and judges. Initially, a professional assessment institution such as forensic science lab or mental hospital could submit a consulting opinion after considering the person's mental illness, medical treatment history and necessity of future treatment. Then, prosecutors and judges will make a judicial decision based on expert opinion, guardianship condition and other relevant factors.

A prosecutor interviewee in H province told us, "In predicting whether a mentally ill person is likely to engage in a dangerous behavior in the future, we first focus on the mental illness itself, considering the mental status by referring to the psychiatrist's opinion. We also consider the circumstances in each individual case. Before making the final evaluation, two prosecutors must interview the mentally ill offender, record his/her physical and mental status, and listen to opinions from the guardians."[23]

Another prosecutor's office in H province has gathered some experience in assessing the potential dangerousness of mentally ill offenders. They put together a list of factors to be considered for the potential dangerousness assessment. These factors include the harm caused by mentally ill offender's violent criminal act, psychiatrist's evaluation report, current mental status and social risk of the mental patient, guardian's capacity to fulfill the obligation of care and supervision, evidence relevant to the case. For the purpose of a thorough investigation, prosecutors are required to intervene as early as possible, such as digging in the medication and treatment history of the mentally ill, finding out how the mentally ill behave in detention center, and paying visits to the mental patient's family, neighbors, friends and former colleagues.[24]

Still another prosecutor's office in H province has set up three tests to make sure potential dangerousness is accurately assessed. According to the prosecutors we interviewed, in handling compulsory treatment cases, they have to review and examine the case files meticulously and thoroughly and make sure: 1) persons with severe mental illness and high likelihood of engaging in dangerous behavior in the future won't harm the society; 2) persons with mental illness can get timely and effective treatment and care; and 3) no persons who don't meet the criteria will be subject to compulsory treatment.

All the above-mentioned experiences suggest that consensus has been reached that the risk assessment need to consider psychiatric

[22] Interview records in B, H, G provinces.

[23] Interview record at H province in July 2014.

[24] Interview with Prosecutor's Office at Nancha District, Yichun City, Heilongjiang province in July 2014.

evaluation, case facts, guardianship condition, guardian's willingness to care and supervise, and all kinds of relevant factors. The assessment needs both the contribution of psychiatrists and the social investigation by prosecutors and judges.

c) Scope of Compulsory Treatment

Given the criteria described in b), a proceeding clearly cannot be initiated against certain categories of mentally ill persons who need help but cannot be criminally committed. Two such groups of persons are especially noteworthy.

First, mentally ill suspects with diminished responsibility.

A psychiatric evaluation in China would yield three results: sane and criminally responsible, insane, and not criminally responsible, and sane with diminished responsibility. The Criminal Law of PRC has explicitly provided for the diminished responsibility, "If a mental patient who has not completely lost the ability of recognizing or controlling his own conduct commits a crime, he shall bear criminal responsibility; however, he may be given a lighter or mitigated punishment."[25]

Prior to the enactment of the 2012 CPL, the mentally ill offender with diminished responsibility could be committed to Ankang Hospital, the specialized mental hospital for compulsory treatment, where he obtained treatment so that he was fit to serve his time in prison. However, the compulsory treatment in the 2012 CPL did not mention this group of mental patients. Ankang Hospital could not admit them now because it would be illegal to do so. Ordinary hospitals also refused to admit them because security measures in such hospitals cannot meet the requirement. Detention centers could put them in custody, but there are neither psychiatrists nor relevant medication facilities within detention centers. Their mental status usually deteriorate in detention centers because no mental institutions can accommodate the mentally ill offenders with diminished responsibility for compulsory treatment.

As a matter of fact, persons with diminished capacity are criminally committable in many jurisdictions such as Germany (German Criminal Code, n.d).[26] Because mental patients with diminished responsibility could be dangerous enough to present a serious threat to public security when they are in psychotic break, just as the totally insane mental patients did, we suggest such group being included into the scope of compulsory treatment.

Second, prisoners who become mentally ill when serving their time in prison.

If a person is sane at the time of committing crime but becomes mentally ill during his time in prison, should he be committed to mental hospital for treatment? The answer is yes. First, the purpose of compulsory treatment is to provide social defense, eliminating the risks posed by persons with mental illness while enabling them to recover and rehabilitate. We cannot deny prisoners who become mentally ill the basic human rights protection such as the right to treatment merely because they were sane when committing the crime thus were culpable. Second, if the prisoner has committed violent crime and is determined by psychiatrist as mentally ill and carry the same likelihood of engaging in dangerous behavior in the future, he met all the criteria for compulsory treatment; and there is no reason not to commit them to mental hospitals. More than that, the potential harm is greater than that caused by a mentally ill outside prison; in a crowded setting such as prison, the mentally ill prisoner can pose greater threat to the personal security of both his fellow inmates and the prison guards. Third, according to the provision on probation for medical treatment,[27] prisoners who develop mental illness in prison cannot be placed on probation for medical treatment because they are dangerous to public security. If this group of persons can neither be probated nor be committed to mental hospitals, their mental condition could deteriorate and cause greater harm to themselves and others. Therefore, prisoners who develop mental illness during prison time should also be criminally committable.

d) Temporary Protective Restraining Measures

Given the new judicial review mechanism, a final compulsory treatment decision of a violent mentally ill offender will not be made until a court eventually hears the case. What steps can be taken in the interim? The empirical survey found out that the average period for prosecutors and judges to review and hear the case is at least three months after the police refers the recommendation to the prosecutor's office.[28] However, before a judicial decision is made, most persons with mental illness are still in their psychotic break, posing a great danger to themselves and the whole society. The central practical question is how to deal with them during this waiting period. Comparative study indicated that it is a common practice for many countries to take temporary protective restraining measures upon the persons with mental illness who committed violent criminal acts. The purpose of this kind of measures is to prevent the mentally ill offenders from engaging in dangerous behavior to harm the society.

As early as in 1995, the People's Police Law of PRC provided that police have the authority to "take protective measures to restrain a mental patient who seriously endangers public security or other people's personal safety".[29] The 2012 CPL has reiterated it in its Article 285, Paragraph 3, "With respect to a mentally ill person who has committed acts of violence, the relevant public security organ may take protective and temporary restraining measures thereon before the people's court renders a decision on compulsory medical treatment." The Procedural Regulations on the Handling of Criminal Cases by Public Security Organs (Revised in 2012) (hereinafter as MPS Regulations) has supplemented some provisions on the imposition and discharge of temporary protective restraining measures (hereinafter as TPRM). Yet, unlike the law in several other countries, the current Chinese legislation and regulation didn't contain detailed provisions on the conditions, times, authorities, place of custody and concreate measures of TPRM. Moreover, the TPRM is imposed by way of administrative decision by public security organs instead of by judicial review. The proportionality principle has not been explicitly embodied in TPRM law.

1. TPRM and Judicial Review

According to Article 333 of MPS Regulations, "Regarding the mentally ill person who commits acts of violence, the public security organs may take temporary protective measures to restrain him upon approval by the chief of the public security organs at or above the county level….". Hence, it is the police's decision whether a TPRM should be taken, and no judicial review of a court is needed in this

[25] Paragraph 3, Article 18, Criminal Law of PRC.

[26] Section 63, German Criminal Code, Mental hospital order, provides, If a person has committed an unlawful act in a state of insanity (section 20) or diminished responsibility (section 21) the court shall make a mental hospital order if a comprehensive evaluation of the offender and the act leads to the conclusion that as a result of his condition, future serious unlawful acts can be expected of him and that he therefore presents a danger to the general public. Https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0421/ Accessed 8 September 2020.

[27] Article 254 of 2012 CPL provides, A criminal sentenced to fixed-term imprisonment or criminal detention may be permitted to temporarily serve his/her sentence outside prison under any of the following circumstances: (Cao and Xu, 2013) Where the criminal is seriously ill and needs to be released on bail for medical treatment; … A criminal shall not be released on bail for medical treatment if such release may endanger public security or if the criminal may injure or mutilate him/herself…….

[28] Interview in B, H and S provinces in 2014.

[29] Article 14, The people's policemen of public security organs may take protective measures to restrain a mental patient who seriously endangers public security or other people's personal safety.

circumstance. The "People's Procuratorate Criminal Procedural Regulation" issued by Supreme People's Procuratorate (Hereinafter as SPP Regulation)[30] contains only a general provision regarding the legal supervision of the temporary measures; that is, the prosecutor's office can submit an opinion as to how the issue should be corrected. However, the relevant provision did not make it clear how prosecutors supervise the TPRM and what kind of consequences the police must face if the implementation of TPRM is not proper. The author holds that lack of judicial review will increase the risk of police abusing their power to take TPRM arbitrarily but imposing a requirement for judicial authorization is impractical given the urgent nature of such decision. Therefore, it may be more appropriate to let the police decide and grant the prosecutor's office or the court the authority to confirm or annul the police's decision.

2. Imposition or Removal of TPRM

Neither the 2012 CPL nor legal interpretations prescribes conditions for TPRM. By default, the Chinese police has plenty of discretionary power to decide whether such measure is needed. Our survey identified varying practices in different provinces. In some provinces, TPRM was taken only in a few cases. In other provinces, TPRM has become mandatory, i.e., public security organs would take TPRM and send the person to Ankang Hospital for treatment as soon as the offender was found not criminal responsible because of insanity. The interviewees pointed out, those who satisfy the criteria of compulsory treatment are usually in a psychotic break. Without the restraint of TPRM and corresponding treatment, their risk of engaging in further dangerous behavior is high. That risk thus basically satisfies the conditions for TPRM. However, it seems to the author, since the TPRM involves depriving the mental patients of their liberty and forcing them to receive anti-psychotic treatment, it should not become a routine to take TPRM in every commitment case. The need for the imposition of TPRM should be evaluated on a case-by-case basis.

MPS Regulations also provides for the removal of TPRM, "Regarding those mentally ill people who do not pose a danger to society, if restraining measures can be removed without creating a danger to society, the public security organs shall remove temporary protective measures to restrain."[31] However, our survey did not uncover even a single case in which imposed TPRM was removed later. Those under TPRM were detained in Ankang Hospital until the court issued the decision, when they either stayed at Ankang Hospital for compulsory treatment or were transferred to other mental institutions for treatment. The author holds that public security organs should remove the TPRM timely and release the mental patients to their family if the guardians can provide effective care, supervision, and treatment, and they filed motions for alteration or removal of TPRM.

3. Place of Custody for TPRM

Because the law did not say where the mental patients should be detained when TPRM are taken, the practice varied significantly. In Beijing, a special "TPRM Center" was established within Ankang Hospital to detain this group of people. In other provinces, no new institutions were established, and mental patients subject to TPRM were either kept in the regular patients wards of Ankang Hospital or mental facilities nearby or detained in local detention centers. However, the special "TPRM Center" in Beijing is just a virtual space. There is no specific space within Ankang Hospital for implementing TPRM. Both mental patients under TPRM and mental patients subject to compulsory treatment stay in the same area, even in the same ward.

Although the doctors in Ankang Hospital thought all patients need treatment, TPRM and compulsory treatment should be differentiated. Perhaps they should be conducted in different spaces. When mental patients under TPRM were kept in regular mental hospitals, the biggest concern is the security issue. Because ordinary mental hospitals do not have the necessary security facilities, some hospitals required the police to send at least two officers to watch and guard the mental patients 24 h a day. Other hospitals asked the police to provide financial stipend so that they can hire more professional safeguards from the safeguard company.

4. TPRM and the Proportionality Principle

The 2012 CPL did not list any concrete methods or measures for TPRM. The MPS Regulations merely contained a vague provision, "While taking temporary protective measures to restrain, the mentally ill person shall be subjected to strict surveillance; the methods, means and the intensity of the restraints shall be carefully observed in order to avoid and prevent endangering others or the personal safety of the mentally ill person himself."[32] From this provision, we can infer that "strict surveillance" or physical restraints is the primary method for TPRM. In practice, TPRM includes not only restraints of the personal freedom of the mentally ill, but also means care, surveillance, and treatment. Again, TPRM has dual purposes: restraints and protection. In terms of treatment of mental patients under TPRM, although the MPS Regulations clearly states "If necessary, the mentally ill person may be sent to a psychiatric hospital for treatment",[33] our survey found that when the public security organs took TPRM, most mental patients were sent to Ankang Hospital for restraints and treatment. Restraining the mentally ill in detention centers was rare, because there were no required mental health treatment facilities in detention centers.

Most of our interviewees thought the main purpose of taking TPRM is to prevent the mentally ill offenders from continuing to endanger the society. Hence, the goal of treatment for mental patients under TPRM should be distinguished from that for committed patients. Quoting from one of the interviewees, "during TPRM, surveillance comes first, then necessary treatment; while during the compulsory treatment, treatment comes first, then necessary surveillance".[34] Some interviewees even pointed out that, "treatment during TPRM should be minimum, because if the symptom is alleviated, the subsequent psychiatric evaluation won't be accurate."[35]

However, the practice varied due to the unclear legislation. In some provinces, the two treatments were not differentiated at all. Being blind to the legislative intention of treatment at different layers, this misunderstanding not only caused confusion on the goals and functions of TPRM and compulsory treatment, but also infringed the personal rights in a hidden way. It could waste medical resources, too.

All in all, the adoption of TPRM should follow the proportionality principle: the methods or measures ought to be proportional to the severity of mental illness and the need for restraint. MPS Regulations mention that "the methods, means and the intensity of the restraints shall be carefully observed in order to avoid and prevent endangering others or the personal safety of the mentally ill person himself".[36] This provision reflects the proportionality principle in some sense. Unfortunately, this principle does not receive much attention in practice. TPRM should be imposed on a case-by-case basis, and ought to be tailored to the nature of the individual's mental illness and the personal situation of the mentally ill person. Of course, only legal physical restraints or medical methods can be employed, any illegal or inhumane or unnecessarily restrict measures should be forbidden.

[30] Article 542, 653, SPP Regulations.
[31] Article 334, paragraph 2, of MPS Regulations.
[32] Paragraph 1, Article 334, MPS Regulations.
[33] Last sentence of Article 333, MPS Regulations.
[34] Interview with the Head of Beijing Ankang Hospital in 2014.
[35] Interview conducted in H province in 2014.
[36] Article 334, MPS Regulations.

e) Converting Regular Criminal Proceedings to Commitment Hearing

The previous sections addressed several questions that arise prior to a commitment hearing, including who can initiate the process, when to initiate the procedure, and what protective steps can be taken before the hearing. This section turns to a related, but frequently ignored pre-hearing issue, namely, the status of the criminal proceeding while the commitment hearing is scheduled.

Once compulsory treatment becomes a potential solution, regular criminal proceeding will be terminated and make way for a commitment hearing. Because compulsory treatment procedure is a brand-new special proceeding, questions have arisen as how to make a criminal proceeding convert to commitment hearing smoothly. Many of these questions are of a procedural nature and were frequently voiced during our survey.

When commitment hearing is held during investigation, a controversial question is when the criminal case should be dropped. Some police officers argue that since the suspect has been determined through psychiatric evaluation not criminally responsible by reason of insanity, he should be released, his criminal investigation should be terminated, the case should be withdrawn and a commitment hearing should be initiated if necessary. Others argue that the criminal case should not be withdrawn until the court decides whether the involved suspect should be committed for compulsory treatment. Practice varied from place to place due to the lack of national legislation.[37]According to the implementing document signed by Beijing public security organs, prosecutor's office, and court, once finding out the suspect is not responsible for criminal act because of his mental illness, public security organs should withdraw the criminal case, then forward the compulsory treatment opinion to the prosecutor's office. This procedural issue in Beijing has been solved, but it persists in other provinces.

When a commitment hearing is held during the prosecution stage, the procuratorate shall file a compulsory treatment application with the court. A controversial question is whether the procuratorate should make a non-prosecution decision before it files the compulsory treatment application. There was no explicit regulation on this question when we conducted the surveys, but now it's clearly stated in SPP Regulations that the procuratorate should make a non-prosecution decision once the accused is evaluated as not criminally responsible by reason of insanity, then the prosecution can decide whether to file an application with the court for compulsory treatment depending on if the criteria are met.

When a commitment hearing is not initiated until trial stage, neither police nor procuratorate identified the necessity of compulsory treatment in pre-trial stages. According to the Supreme Peoples's Court (hereinafter as SPC) judicial interpretation,[38] a commitment hearing can be initiated by court only if it is not until trial that the defendant is found eligible for compulsory treatment. The court shall schedule the commitment hearing after it finds the defendant not guilty by reason of insanity. The current regulation does not clarify whether the procuratorate has the right to file the compulsory treatment application with the court in case the court does not initiate commitment hearing. If the procuratorate has this authority, how should it file the application? Shall the procuratorate file the application directly with the court, or shall it request the court to initiate commitment hearing by means of legal supervision?

Similar procedural issues exist for second-instance trial. Fortunately, the SPC judicial interpretation has touched upon this issue. Article 534 states, “Where a people's court in the course of hearing the second-instance trial of a criminal case discover that a defendant might meet the requirements for compulsory treatment, it may handle the case according to the compulsory treatment procedures, it may also decide to return the case to the original trial court for a new judgment.”

3.2. Commitment hearing

To date, we have reviewed the procedural steps preceding the commitment hearing. After prosecutors or judges decide to initiate the compulsory treatment procedure, the procedure culminates in the hearing to make the final decision on whether to commit a mentally ill offender to specialized mental health facilities. The final decision is a weighty one. Compulsory treatment involves not only limitation or deprivation of personal freedom of mental patients, but also requires someone taking the anti-psychotic medication against his/her will. Therefore, a prevalent practice across the globe is to leave the determination of compulsory treatment with the court, a neutral judicial agency. The most significant innovation of Compulsory Treatment Procedure in the 2012 CPL is the establishment of judicial review in the proceedings. Compared to the former police-dominated administrative decision model, Compulsory Treatment Procedure set out in the 2012 CPL not only injected the spirit of rule of law into this proceeding, but also made it a hearing rather than a nontransparent review. Both imposition and discharge of compulsory treatment are decided by the court. The adoption of judicial review mechanism in criminal commitment hearing has brought Chinese commitment practice in line with international practice and strengthened the protection for persons with mental disabilities.

In commitment hearing, the court makes the decision after an adversarial contest between both parties: on one side, the party who applies for compulsory treatment, prosecutor in Chinese context, and on the other side the mentally ill offender who has been found not guilty by reason of insanity and allegedly satisfied the criteria for compulsory treatment.

Commitment hearing is the core component of compulsory treatment regime. Initially, this section explores the panel that serves as the decision-maker at the hearing and the role of psychiatrists in the hearing. The discussion then focuses on how a commitment hearing should be conducted. This part of the discussion touches on such procedural issues as who may participate in the hearing and the patient's right to legal aid. Last, we shall discuss the time limits for the completion of the hearing.

a) Adjudicative Organization and Roles of Psychiatrists in Commitment Hearing

According to the 2012 CPL, “A people's court shall form a collegial panel to hear an application for compulsory medical treatment upon the acceptance thereof.”[39] But the law made no provision for the composition of the panel. Unlike the criminal trial, the focus of commitment hearing is not on whether the person with mental disorder should take criminal responsibility and, if so, the appropriate punishment; rather, the focus is squarely on whether there is a possibility that if released, the mentally ill offender will commit further criminal acts. Commitment hearing involves evaluation of the mentally ill offenders, and mental health professionals are more qualified of determining such kind of issues. Consequently, psychiatrists, psychologists or other mental health professionals are invited to join the collegial panel in many other countries.

Our survey found that in Chinese practice, however, psychiatrists were not included into the collegial panel. In most cases, they became involved in criminal commitment cases as an appraiser or expert auxiliary.[40] In some provinces, the police, prosecutors, and judges

[37] Minutes of workshop at Luohu People's Procuratorate, Shenzhen.

[38] Articles 532–534, SPC Judicial Interpretation.

[39] Paragraph 1, Article 286.

[40] Expert auxiliary is also a newly introduced participant to criminal proceedings, whose role is to make comments on the expert testimony or pose questions to the expert witness so as to help the court and the parties to

consulted with psychiatrists or other mental health professionals when they were uncertain if the criteria for compulsory treatment are met. However, in most provinces, prosecutors and judges make their decision based on their own judgement without even consulting mental health professionals. Psychiatrists participate in these commitment cases only by submitting an expert opinion. They do not testify and subject to cross-examination. Nor do they provide consulting opinion except an appraisal result. In short, the involvement of psychiatrists and other mental health professionals in commitment hearing is ordinarily minimal.

However, the empirical survey revealed that mental health professionals play important roles in commitment hearings in some areas. For example, a psychiatric evaluation institution in Beijing provides regular consulting opinion on compulsory treatment issues at the invitation of the courts. As another example, Kangning Mental Hospital at Shenzhen has furnished consulting opinions on compulsory treatment issues frequently. On two occasions Kangning Hospital was sought for professional assistance. On one occasion the assistance was sought prior to the prosecutor's filing an application for compulsory treatment. Kangning Hospital is entrusted to conduct an initial psychiatric evaluation of the person's mental status at the time of commission of criminal act. If the evaluation finds the person could not tell right or wrong because of mental illness and had lost his capacity to control his behavior when committing an otherwise criminal act, the person is sent to Kangning Hospital for temporary protective restraints including treatment.

On the second occasion, assistance was sought before the court made the final decision on compulsory treatment. Because the mentally ill offender has been treated in Kangning Hospital for a while, the court usually entrust the Kangning Hospital to conduct another psychiatric evaluation to ascertain whether this person still needs compulsory treatment. The second evaluation is not about the criminal responsibility, but instead is a risk evaluation of the question whether the mental patient will engage in future dangerous behavior to harm others or the society. Because continuous dangerousness evaluation is beyond the scope of purely psychiatric expertise, Kangning Hospital can present their evaluation as a mere consulting opinion of whether the potential risk is high or low. Since most mental illness is incurable; the risk of relapse always exists. The consulting opinion provided by Kangning Hospital has two parts: the mental status and the risk. According to our interviewees from Kangning Hospital, they consider the following factors in evaluating the risk: (1) whether the violent act of the mentally ill offender has a repeat pattern. If yes, the potential risk is high; and (2) whether the mental illness has been controlled after medical treatment. The consulting opinion also identifies steps to lower the risk, such as paying subsequent visits to mental hospital regularly, taking medication as required, and the close supervision by guardians.[41]

The experience from Beijing and Shenzhen indicated, if the mental health professionals can play an active role in the determination of compulsory treatment, the decision will have a sounder medical basis, the human rights of the mentally ill persons will be better protected, and unnecessary commitment will be likely to be avoided.

When mental health professionals consult with courts as the expert auxiliaries, our survey identified two problems. One is that the current law makes no detailed provision on how to invite expert auxiliary or to what extent the consulting opinion provided by these expert auxiliaries is admissible. Second, in practical operations, there is no clear standard as to the required qualifications of the expert auxiliary. These problems increase the danger of the courts' overreliance upon expert opinion.[42]

Our empirical survey also found that most courts want the psychiatrists to attend the hearing and play a role of court safety protector. In Hou's case in Daxing District court, Beijing, after interviewing with the mentally ill offender, the prosecutor also interviewed with his doctor. Then at commitment hearing, Hou's doctor was called to participate in the hearing. According to the judges who handled this case, they did this primarily for the purpose of safety. Suppose that the mentally ill offender loses control in courtroom. If his doctor is present, the doctor can intervene immediately. However, the fact that Hou's doctor took the stand is unusual. In majority cases, doctors submit a brief introduction to his patient's mental illness, around 100 to 200 Chinese characters in length. That kind of superficial overview introduction should not be the basis of evaluating the mental patient's potential dangerousness.[43]

b) How Commitment Hearing is Conducted in China and Some Procedural Issues

Having discussed who should be included in the decision-making panel at the hearing, we shall consider the procedures for conducing the hearing. The current procedures differ markedly from the procedures followed under the prior law.

Under the prior law, the police had virtually unilateral authority. To avoid creating a model in which the courts wield such authority, the commitment hearing is structured analogously to a trial proceeding of first instance; the hearing involves both parties, is conducted by oral arguments, and includes five phases: opening the court session, evidence examination, debate, the defendant's final statement, deliberation and judgement announcement.[44] In commitment hearing, the prosecutor's office that files the application for compulsory treatment sends its personnel to appear before the court to support the application. Initially, the public prosecutor reads the application in court. Next, the statutory representative (usually the guardian) and litigation representative (agent ad litem) of the mentally ill offender as well as the victim's litigation representative may present statements. The evidence focuses on three issues: whether the mentally ill person committed the otherwise criminal act; whether the offender is not criminally responsible on ground of mental illness; and whether this mentally ill offender is likely to engage in dangerous behavior in the future. In the debate phase, the public prosecutor, the guardian, and the litigation representative can express their views on the evidence and may debate with each other. Because commitment hearing affects the privacy of the mentally ill offender, this hearing is not open to the public.

Several procedural issues regarding the commitment hearing emerged from our empirical survey. These issues include: whether the mentally ill offender should participate in the commitment hearing—realistically, whether they have the capacity to participate meaningfully; whether the offender's legal representative (usually also the offender's guardian) must participate in the hearing and the consequences of their failure to attend; the offender's need of effective legal aid at the hearing; and whether the time limit for concluding the hearing is reasonable.

1. The Respondent's Right to Attend the Hearing and the Issue Regarding Competency to Stand Trial.

Although the 2012 CPL mentions the participation of only the statutory representative and litigation representative (usually lawyer), the SPC Judicial Interpretation has made provision on the participation

(*footnote continued*)
understand the strength and weakness of certain expert opinion. See Paragraph 2, Article 192 of 2012 CPL, which provides, The public prosecutor, the party concerned, the defender and the agent ad litem may apply to the relevant people's court for notifying persons with specific expertise to appear before the court to present their views on the appraisal opinions made by the expert concerned.

[41] Interviews in Shenzhen Kangning Hospital in 2014.

[42] Focus group workshop at Beijing Ankang Hospital in December 2013.

[43] Interview in Daxing District Court, Beijing in 2014.

[44] See Articles 181–203, 2012 CPL.

of the mentally ill himself. Yet, our empirical survey found that most judges discourage the mentally ill offenders from attending the commitment hearing because they do not think these persons can participate meaningfully. Therefore, most commitment hearings were conducted without the participation of the subject.

The second paragraph of Article 529 of SPC Judicial Interpretation states, "When trying cases where the people's procuratorate has requested compulsory treatment, a meeting shall be convened with the subject of the application." However, the timing of this meeting is unclear. Taking Article 530 into account, the meeting should be before the hearing; the purpose of the meeting is to determine whether the mentally ill is competent to stand trial.[45] The question naturally arises is whether the court can competently determine the issue of competency to stand trial without assistance of mental health professional. In other words, is there a need to conduct a mental examination to determine the subject's competency to stand trial? Compared to criminal responsibility evaluation, evaluations of competency to stand trial are extremely rare in China. This is an area needs developing in the future.

2. Participation of Statutory Agent. Persons other than the mentally ill person himself can potentially play a crucial role at the hearing. To begin with, consider the role of the person's statutory agent. Compulsory treatment targets those who are found not responsible for the crimes they committed because of their (usually severe) mental illness. Since that population group normally does not have legal capacity and is therefore unable to protect their own rights, the participation of statutory representatives in the commitment hearing is crucial. Article 286 of the 2012 CPL announces that statutory agent of the mentally ill must attend the commitment hearing. However, many victims of the violence committed by the mentally ill are their family members, sometimes their guardians themselves. Usually the statutory representatives are also family member or guardians. They often hate the mentally ill offenders and do not show up when the hearing is conducted. When this occurs, the provision mandating the statutory representative's attendance fails as a means of protecting the mentally ill person's interests.

3. Participation of Lawyers. As the preceding paragraphs have explained, the mentally ill respondents often lack full capacity to participate in the commitment hearing, and their statutory agent sometimes refuses to attend for various reasons. Consequently, the law requires the assistance of lawyers to represent the offender's interests at the hearing. Very few mentally ill offenders can afford to hire private lawyers as their legal representatives. Luckily, the mentally ill offenders are granted right to legal aid, the 2012 CPL states, "…Where the respondent or the defendant has not entrusted an agent ad litem, the people's court shall inform a legal aid agency to designate a lawyer to provide him/her with legal services".[46] Thus, legal aid lawyers represent them in almost all the cases. However, since legal aid layers do not have special training on psychiatry and usually lack of experience of representing clients with mental illness, it is questionable if they can provide effective legal service in a commitment hearing.

4. Time Limit for Commitment Hearing.

There are time limits for the decisions and actions of both the prosecutor's office and the courts. According to SPP Regulations, the prosecutor's office has 30 days to decide whether an application of compulsory treatment should be filed with the court.[47] This time limit seems too long considering the mentally ill person's urgent need for treatment.

For its parts, the court has 7 days to complete the review of prosecutor's application and decide if a commitment hearing should be held.[48] After that the court has 30 days to make the final decision on whether compulsory treatment should be imposed. That relatively short time limit is justified because the mentally ill offender may have already been taken TPRM, involving a deprivation of liberty. The court should make its final decision within a reasonable period so that the restriction of the mentally ill offenders' personal freedom will not be unduly prolonged, and they will receive treatment as quickly as possible.

The feedback from some of our interviewees, however, indicated that they cannot make the final decision within a month because the responsible judges need to interview with the mentally ill offenders, guardians, primary physicians, and sometimes close relatives, neighbors and friends, and collect other evidence to make a comprehensive evaluation of the mentally ill person's condition. These investigations may delay the commitment hearing. In the early years of implementing the new compulsory treatment law, judges felt pressured by time limit requirement due to their inexperience in handling this kind of cases. The law did not make detailed provisions on the division of power and the coordination among police, prosecutors, and judges. If necessary, evidence had not been collected, judges had to conduct their own investigation to obtain the information. In those early cases, one month was apparently not enough.

The interviews suggested, however, that many believe that one month is a reasonable time limit for commitment hearing considering the urgent need of the mentally ill for compulsory treatment. However, to make that time limitation feasible, two preconditions must be met. First, judges gradually accumulate experience in handling such cases. In the long term, the first condition can be achieved because in many provinces the court appointed only certain judges to handle criminal commitment cases. It is only a matter of time before these judges become specialists in this area. Second, further legislation is needed to clarify the respective responsibilities in evidence collecting for each agency involved. National implementing guidelines is still lacking, but some provinces have taken initiatives to work out local regulations.[49] When the case is an exceptional, complex one, the time limit for commitment hearing could be extended.

3.3. Compulsory treatment in mental facilities

Once a decision of compulsory treatment is made at a commitment hearing, the mentally ill person is committed to a specialized mental hospital for treatment. This section discusses a number of practical issues relating to this stage of compulsory treatment, including which mental health facilities are responsible for providing the compulsory treatment, and who should bear the cost of compulsory treatment.

a) Ankang Hospital and Other Designated Psychiatric Hospitals for Compulsory Treatment

Although the 2012 CPL does not specify where the mentally ill person should be committed. The longstanding practice is that Ankang Hospitals, a police-run specialized mental facility, assumes this task and becomes the primary institution for compulsory treatment. After the 2012 CPL adopting the Compulsory Treatment Procedure, Ankang Hospitals were officially renamed as "Compulsory Treatment Institute"

[45] Article 530 states, "If the subject of the application requests to appear in court, and the people's court, having reviewed his physical and mental condition, feels he may appear in court, it shall give approval. When appearing in court, the subject of the application may make comments during the courtroom investigation and debate phases."

[46] Second part of paragraph 2, Article 286, 2012 CPL.

[47] Article 539 of SPP Interpretation states, after receiving an opinion on compulsory treatment from the public security organ, the People's Procuratorate should decide as to whether compulsory treatment should be applied within thirty days.

[48] Article 527 of SPC Interpretations, the people's courts shall complete the review of applications for compulsory treatment raised by the people's procuratorates within 7 days.

[49] Beijing created such a legal document in the end of 2012 and it is still effective today.

(强制医疗所, qiangzhi yiliao suo), but due to the long tradition, Ankang Hospitals are still be called that in many provinces. Most Ankang Hospitals are affiliated with the public security organs. They are mental hospitals as well as law enforcement institutions, and they have dual functions of constraints and treatment. As of 2015, there are 26 Ankang Hospitals across the country. However, not every province has Ankang Hospital, some province has more than one Ankang Hospitals, some don't have even a single Ankang Hospital.[50] More Ankang Hospitals are under construction such as those in Chongqing City and Nantong City of Jiangsu province. Because not all the provincial public security organs have established an affiliated Ankang Hospital, the responsible institute varies from place to place. According to our empirical survey, there are three models:

1) *Provincial police-run Ankang Hospital: represented by Beijing and Heilongjiang province.* Most of Ankang Hospitals are affiliated with local police. For example, both Beijing Ankang Hospital and the Heilongjiang Ankang Hospital are police-run. All the compulsory treatment under the jurisdiction of Beijing is provided at Beijing Ankang Hospital. Similarly, all the compulsory treatment under the jurisdiction of Heilongjiang province are provided at Heilongjiang Ankang Hosptial, located in Harbin, its capital city. As of our empirical survey in July 2014, there were around 250 mental patients under treatment at Heilongjiang Ankang Hospital. Except very few voluntary patients, almost all patients were under compulsory treatment, including those committed before the implementation of the 2012 CPL.

According to field visits and interviews, there are two types of personnel in Ankang Hospitals, mental health professionals or doctors and security guards. Both types of personnel are police, and they all wear police uniforms and badges although they are doing different jobs. Theoretically, Ankang Hospital is the only designated institution for compulsory treatment. However, unlike Beijing Ankang Hospital, the Heilongjiang Ankang Hospital also admit civil patients occasionally.

2) *Converted Ankang Hosptial: represented by Shandong Daizhuang Hospital.* Daizhuang Hospital is also called Shandong Ankang Hospital. Its predecessor is the Shandong Mental Hospital established in 1952. As the first mental hospital in Shandong province, Daizhuang Hospital started admitting patients in 1952 and began conducting forensic psychiatric evaluation in 1955. It was affiliated with Shandong Bureau of Health before 1958 but was transferred to and affiliated with Jining[51] Municipal Public Security Bureau in 1958. Since then Daizhuang Hospital takes professional guidance from the Shandong Bureau of Public Security. Daizhuang Hospital is a typical example of a regular mental hospital converting to an Ankang Hospital. Although it's affiliated with Jining Municipal Public Security Bureau, its connection with police is rather undefined. It has maintained its independence as an ordinary mental hospital. According to our empirical survey, Daizhuang Hospital is the only Ankang Hospital whose personnel don't wear police uniforms and badges. The primary service of Daizhuang Hospital is to admit civil mental patients and drug abusers who needs compulsory detoxification. Criminally committed patients account for only a small portion of the patients they admitted. Our interviewees told us that the number of criminally committed patients has decreased substantially since the 2012 CPL. As of April 2014, Daizhuang Hospital admitted only 5 criminally committed patients. According to the interviewees, there are two reasons for this shrinking number. First, only those imposed compulsory treatment by the courts can be admitted because of the 2012 CPL. Second, the resources for compulsory treatment is still not in place, which maybe the more important factor affecting the number of criminal commitments.

3) *Other mental institutions: represented by Guangdong province.* Although mental health is a serious issue in Guangdong, the most economically developed province in China, there is no Ankang Hospital either at provincial or municipal level in Guangdong province. Local judiciaries and mental health services have worked out different solutions to accommodate criminally committed patients. Our empirical survey found at least two different approaches. For example, Guangzhou Compulsory Treatment and Control Institute (广州强制医疗管制所 Guangzhou qiangzhi yiliao guanzhi suo, hereinafter as the Institute) affiliated with Guangzhou Municipal Public Security Bureau admit only mental patients who have committed otherwise criminal act in the jurisdiction of Guangzhou City. The Institute purchases the medical service from an ordinary mental hospital. As of 2014, there were around 110 personnel in the Institute, including 43 police officers, 44 security guards, and 21 administers. While the medical staff came from the mental hospital affiliated with Guangzhou Civil Affairs Bureau, which is just next to the Institute. The collaborating mental hospital sent 5 psychiatrists and 12 nurses to the Institute, where each psychiatrist oversees dozens of patients. In Guangzhou Compulsory Treatment and Control Institute, psychiatrist and nurses from mental hospital are responsible for the treatment and care of the committed patients, while police officers and security guards are in charge of surveillance and control. The Institute has around 500 beds and admitted 45 criminal patients (including those under TPRM) from January 2013 through January 2015. However, there are no such institute in other cities of Guangdong provinces. When the courts decide to impose compulsory treatment, patients will be placed only in local mental hospitals. For example, both Foshan and Shenzhen adopt this approach.

To sum up, the admission capacity of existing Ankang Hospitals obviously cannot satisfy the needs of compulsory treatment. We join the scholars suggesting that government should increase the fiscal input and attract social resources and other public health resources to meet the practical needs of compulsory treatment (Chen, 2011). We need to allocate reasonable resources for both Ankang Hospital and ordinary public health services. With greater resources, the system can coordinate the role and function of Ankang Hospitals and other mental institutions and ensure a scientific division of labor so that the institutions can complement each other. The experience of other countries in this regard can be helpful. For example, we can place mentally ill offenders in mental institutions of different security levels based on their criminal behavior, mental illness, and potential dangerousness by referring to the provisions of the Criminal Code of Russian Federation.[52] (Criminal Code of Russian Federation, n.d)

We have examined the existing models of enforcing compulsory treatment in different psychiatric hospitals. It should be obvious that in many cases, the provision of such treatment can be awfully expensive. The question that naturally arises is who should bear this cost. Our

[50] The following provinces have at least one Ankang Hospital: at provincial level, it includes Beijing, Shanghai, Tianjin, Heilongjiang, Jilin, Shandong, Inner Mongolian, Ningxia, Xinjiang, Hainan; at municipal level, it includes Tangshan City (in Hebei province), Shenyang City(in Liaoning Province), Dalian City (in Liaoning Province), Hefei City (in Anhui province), Hangzhou City (in Zhejiang province), Jinhua City (in Zhejiang province), Ningbo City (in Zhejiang province), Shaoxing City (in Zhejiang province), Fuzhou City (in Fujian province), Wuhan City (in Hubei province), Xi'an City (in Shannxi province), Chengdu City (in Sichuan province), Deyang City (in Sichuan province) and Mianzhu City (in Sichuan province)

[51] Jining is a city in Shandong, where the Daizhuang Hospital is located.

[52] Under Article 99, mentally ill criminal offenders can be placed in four different mental institutions including out-patient observation and treatment clinics, specialized mental hospital, specialized mental hospital with intensive observation and psychiatric hospital of specialized type with intensive observation, based on the patient's potential risk. See paragraph 1, Art. 99, Criminal Code of Russian Federation, "1. A court of law may impose the following compulsory medical measures: a) compulsory out-patient observation and treatment by a psychiatrist; b) compulsory treatment in a specialized mental hospital; c) compulsory treatment in a specialized mental hospital with intensive observation. d) compulsory treatment in a psychiatric hospital of specialized type with intensive observation. Criminal Code of Russian Federation. http://russian-criminal-code.com/Accessed 9 September 2020.

survey examined this question, and our findings are as follows.

b) Cost-Assuming Models for Compulsory Treatment.

Before conducting the empirical survey, we assumed that all compulsory treatment is government funded. To our surprise, however, the survey revealed that this is not the case in practice. In terms of the question who pay for the compulsory treatment, our survey identified three different models:

1) *All cost is borne by local government.* In Beijing Ankang Hospital, the municipal government allocates funds based on certain standard per patient, which cover medicine and accommodation. However, the funds can provide only a minimum treatment and basic accommodation. In Guangzhou Compulsory Treatment and Control Institute, all the cost is assumed by Guangzhou Municipal Government, which cover not only the compulsory treatment itself, but also related costs such as security guard, administration, and sanitation. According to the interviewees, its annual cost for medicine is 2,800,000RMB. In addition, each patient can get 560 RMB for accommodation and allowance per month. All the funds are guaranteed by independent budget of the Municipal Civil Affairs Bureau.

2)*Costs are borne by local government and other channels*. In Heilongjiang Ankang Hospital, provincial Fiscal Bureau funds a per diem of 7.2 RMB for every mental patient under compulsory treatment, which is used to cover both accommodation and medicine. This amount has not increased even after the implementation of the 2012 CPL and it is far from enough to meet the need of compulsory treatment practice. For this reason, Heilongjiang Ankang Hospital worked out an internal policy that whoever has sent the patients to Ankang Hospital pays the balance of treatment cost. Because most mental patients came from poor families, they are usually unable to pay anything. As a result, Heilongjiang Ankang Hospital can ask only the patients' employer or local government to pay the cost that should have been paid by the patients' family. Sometimes they even asked the public security organ who sent the patient to the hospital to assume part of the cost. The problem is many employers, local governments or police pay preliminary fees when they checked in the patients but refuse to pay the subsequent post-admission fees. The burden of treatment and care was totally shifted to Ankang Hospital. According to our interviewees, 70% of local (Harbin) patients can count on their health insurance, but patients from other cities of Heilongjiang or rural areas are not lucky enough to have a good health insurance plan. Therefore, Heilongjiang Ankang Hospital is a victim of frequent financial defaults and must manage to survive by admitting some civil patients.

3) *Costs are assumed by mental institution itself*. Shandong Daizhuang Hospital represents an unusual model. Since neither provincial nor local government subsidizes the cost for compulsory treatment, Daizhuang Hospital had to raise necessary funds for compulsory treatment by expanding its service to civil patients or drug abusers with the need for compulsory detoxification. Since there is no guaranteed subsidy, Shandong Daizhuang Hospital has no incentive to admit criminally committed patients. That is why Daizhuang Hospital has admitted only 5 committed patients after over one year of implementation of the 2012 CPL.

We suggest establishing a security mechanism for medical costs of compulsory treatment. Family members of mental patients often lack incentives to pay the costs because compulsory treatment is involuntary. Meanwhile, long term treatment of mental illness means a significant expenditure. If the family is supposed to assume all the costs, many mental patients may lose the opportunity of being admitted to mental institution or cannot achieve desirable treatment. Since compulsory treatment promotes the special prevention function of criminal law, the expense should be assumed by the government and society as beneficiaries.

In the interim period when government funds are not in place, the expenses should be jointly covered by local government and families of mental patients based on their specific situation and capacity. First, local government should subsidize special funds for the prevention and treatment of mental illness, and allocate the funds considering such factors as the population, economic development, status of mental illness prevention and treatment. Second, the family (including members live in a household) income in reference to the Ordinance on Minimum Living Security of Urban Residents could be calculated. The patient's family should pay the medical costs if the family's living standard is higher than the so-called the poverty threshold, but government ought to cover at least the balance of the medical costs if the patient's family is in poverty.

c) Procedural and Other Practical Issues in Enforcing Compulsory Treatment.

Once compulsory treatment is imposed by the court, Ankang Hospital or other mental institutions do not conduct a second psychiatric evaluation in most cases. Treatment is officially conducted after doctors diagnose the patient. In exceptional cases, however, when doctors at Ankang Hospitals have a concern that the committed patient is malingering, there are no clear rules on how to deal with the situation. Consider the case of a mentally ill criminal offender, a drug abuser, who was committed to Beijing Ankang Hospital. Psychiatric evaluation did not identify the offender as a malinger; sometimes even experienced psychiatrists cannot distinguish temporary drug-induced delusion from mental illness. When he was committed to Beijing Ankang Hospital, after a preliminary diagnosis doctors suspected that he was malingering. No procedural rules exist for dealing with such situations. Three questions need to be answered: who is supposed to bring up the issue of malinger and correct the error of compulsory treatment decision? By what procedure the judicial decision on compulsory treatment can be corrected? And when the judicial decision on compulsory treatment is corrected, how can police resume the crime investigation? In our opinion, the prosecutor's office should bring the issue before the court. Then the court should seek a second psychiatric evaluation. If the outcome of the reevaluation confirms the diagnosis of Ankang Hospital, the court should overturn the compulsory treatment decision and issue a ruling of reinstating the criminal proceeding in which the offender can be made accountable for his crime.

In carrying out the compulsory treatment order, Ankang Hospital and other mental institutions confronted four other issues.

1. Should mental patients subjected to compulsory treatment be treated in isolated wards excluding civil patients? Because some Ankang Hospitals and many mental institutions also admit civil patients, it is unavoidable to put committed patients and civil patients in the same ward when there is an insufficient number of beds. This may warrant a higher standard of security.

2.Should Ankang Hospitals and other mental institutions take responsibility for treating the patients 'physical diseases? If yes, there will be a need for general medical practitioners who are not only good at mental illness treatment but also know how to cure other diseases. But apparently, such general practitioners are scarcer than mental health professionals. Considering the tension between doctors and patients in China,[53] it may be inappropriate to treat physical diseases in Ankang Hospital or any other mental hospitals. Especially when potentially fatal physical diseases are involved, Ankang Hospitals and other mental institutions worry that the already complicated doctor-patient relationship will worsen if the mental patient die of physical diseases during compulsory treatment. The related questions include "may the mental patients under compulsory treatment order be transferred to general hospital if the physical disease is beyond the capacity of Ankang Hospitals or other mental institutions", "What kind of transfer

[53] In recent years, media coverage in China has reported a growing number of doctor-patient conflicts caused by alleged malpractice.

procedure should be followed?", "Who is responsible for the medical costs when hospital transfer is needed?", "How to solve the problem of security guard during the mental patient receive treatment in general hospitals?", and "When the seriousness of physical disease requires termination of compulsory treatment, should the same court issuing the compulsory treatment order decide whether termination should be granted or not?"

3. Since mentally ill offenders often commit criminal act in more than one jurisdiction, how could the liaison and cooperation among Ankang Hospitals and other mental institutions across the country be improved? Would it be possible to build a national compulsory treatment network?

4. Is deportation applicable to foreign mental patients? In one instance, Guangzhou Compulsory Treatment and Control Institute has admitted a female patient from Vietnam, who murdered her own ten-year-old son when she was in psychotic break in November 2014. Her family in Vietnam did not want her. Nor did her boyfriend in China. As of January 2015, when we made field visit to the Institute, she was under TPRM in the Institute. Our interviewees wonder if the court can issue a deportation order together with compulsory treatment order after acquittal by reason of insanity. This kind of case is not common, but it does occur. Relevant legal provisions should be put in place sooner or later.

4. Discharge of compulsory treatment

After receiving compulsory treatment for a period of time, mental patients can be discharged to their community if their symptoms are relieved. Their discharge from compulsory treatment is not only important to restore the patients' personal freedom, but also to make hospital beds available for others. The discharge procedures therefore deserve discussion.

According to the 2012 CPL and the SPC Judicial Interpretations,[54] Ankang Hospitals and other mental hospitals providing compulsory treatment have the authority to propose a termination of compulsory treatment and discharge. The mental patients subject to compulsory treatment and his close relatives are also entitled to apply for a termination. The court that issued compulsory treatment order will determine whether this order should be removed. To make that determination, the court must decide whether the patient's mental illness is under control and recovered to the extent that he won't threat the society without further compulsory treatment. When a mental institution proposes a termination of compulsory treatment, a diagnosis and evaluation report should be attached. The court can require the proposing mental institution to submit such a report if the institution has not attached it. The applicants are also entitled to file a motion to the court, and in that event the court can require the mental institution to submit the evaluation report accordingly. The court can request other forensic institutions to conduct a psychiatric evaluation of the committed patients. Once the court receives the removal proposal or application for terminating compulsory treatment, the court should convene a collegial panel and make the final decision within a month.

Our empirical survey identified some major problem areas with the discharge procedures: the insufficiency of the psychiatric evaluation for the purpose of discharge; the lack of incentives for some persons with the right to initiate the discharge hearing to exercise that right; and the patient's re-integration into the community after release.

a) Diagnosis and Evaluation by Mental Institutions

Two Situations in which evaluation is conducted. According to the local implementing documents,[55] there are two types of evaluation for the purpose of discharge: periodical evaluation and ad hoc evaluation.

Regarding *the periodical evaluation*, the practice varies in different provinces. In Beijing Ankang Hospital, the first regular evaluation is conducted after six months of compulsory treatment. Then a regular evaluation will be conducted by the doctors every six months. In Heilongjiang Ankang Hospital, however, the first regular evaluation will not be conducted until the patient is committed for two years. Such evaluation will be conducted every six months. In Guangdong province, both Guangzhou Compulsory Treatment and Control Institute and Kangning Hospital at Shenzhen follow a three-month interval. According to the interviewees, there were heated debates over when the first regular evaluation should be conducted and how long the interval between two evaluations should be. In the sake of rights protection, some local documents set six months as the interval. However, many interviewees expressed the opinion that six months is too brief. Some suggested that one year may be a better choice. Sometimes more time is needed to alleviate the patients' symptom and stabilize his mental condition. Relapse is frequently seen when the patient is discharged too soon. We suggest enacting a national implementing guideline with a uniform starting point and interval for the regular evaluation.

Evaluation could also be conducted under other circumstances, and this is called *an* ad hoc *evaluation.* An ad hoc evaluation can be requested by the court if the patient or his close relatives file an application for discharge, or it can be initiated by the primary doctor if he thinks the patient has recovered. The patient and his family are entitled to challenge the outcome of any evaluation, regular or ad hoc, and the court will decide if a re-evaluation should be granted on a case-by-case basis.

The most troublesome question is what the substantial criteria for discharge of compulsory treatment should be. According to the SPC Judicial Interpretation, the most important criterion is "where the person under compulsory treatment is no longer dangerous and there is no need to continue compulsory treatment;…"[56] Since the determination involves judgement of dangerousness, it can be very difficult to make the determination. A doctor can confidently diagnose whether a patient has recovered from a certain illness, but he may feel uncomfortable making a prediction of the potential risk. Risk assessment is often made on a global basis for a group of persons. Nowadays risk assessment typically targets a group, summarizing indicators common to the whole group and drawing a general assessment. However, the 2012 CPL requires individual risk assessment. Individual risk assessment is especially hard. Individual assessments are usually inaccurate because it often depends on dynamic, unpredictable factors. In our empirical survey, doctors tended to restrict their diagnoses to current dangerousness and balked at predicting future risk.

For example, Shandong Daizhuang Hospital applied the same standard of hospital discharge for civil patients. Daizhuang Hospital thought they can just evaluate the mental illness of the patient. This is only a clinical diagnosis, not a determination of continuous dangerousness. The determination needs to consider factors in the committed patients' living background, and the capacity of their guardians. Mental institutions in most other places thought it not appropriate to determine this issue by applying the standards of hospital discharge for civil patients. However, it is not clear when the committed patients should be regarded not dangerous anymore after being cured. Some think the observation period should be at least two years, but no professional standard exists. In practice, the potential dangerousness assessment is usually based on severity of the patient's mental illness, and guardian's capacity to care and control. For patients with curable mental illness, the determination can be made only after the illness is cured. For patients with incurable mental illness, a finding of low risk is supportable only when the patients grow older or contract physical diseases that

[54] Article 288, 2012 CPL; Article 541, 542, SPC Judicial Interpretations.

[55] Beijing Implementing guideline

[56] Article 542, SPC Judicial Interpretations.

reduce or eliminate their ability to pose a threat to public safety.

According to our survey, Compulsory Treatment establishments tend to strictly apply the criteria of removal of compulsory treatment because there are no concrete standards. In evaluating the potential dangerousness, they usually consider factors such as mental illness itself, performance of patients in compulsory treatment establishments, treatment records, outcome of auxiliary inspections (for example the statement by TPRM establishment), guardians' capacity including the willingness to take the responsibility of guardianship and necessary financial and human resources, the nature of the criminal act committed by the mental patients, and the act's consequences. The sooner patients are released to their own community, the easier they can re-enter the community and resume a normal life; the longer they are held in compulsory treatment and isolated from the community, the harder they are likely to find it to readjust. We suggest that compulsory treatment ought to be removed when the patient's mental illness is under control and their family would like to take them back.

Some compulsory treatment establishments have accumulated valuable experience in evaluating committed patients for discharge. For examples, practical experience has persuaded Beijing Ankang Hospital to consider multiple factors[57] contributing to dangerousness, inter alia: whether the patient is stable, the stage of the patient's illness, and whether he is potentially dangerous. For another example, Heilongjiang Ankang Hospital rely on the following indicators in evaluating the committed patients after two-year compulsory treatment: general evaluation of the mental illness; evaluation of impulsive behavior; considering the patients' performance in hospital, records in medical history, and community investigation.

According to the mental health professionals, apart from the fact that mental illness is under control, family care and community monitoring also play an important role in ensuring the rehabilitation of released patients. There must be assurance that the patients will take medication prescribed by their doctor after they are discharged. For this reason, compulsory treatment establishments should coordinate with communities and the latter should conduct periodical evaluation of the released patients to strengthen social monitoring and reduce the possibility of relapse.

b) Who is entitled to initiate the discharge hearing?

Even if a proper psychiatric evaluation could be prepared, that potential evaluation will not lead to the termination of the person's compulsory treatment and their re-integration into the community unless a discharge hearing is held. The questions are who has a right to initiate a hearing and whether those persons have adequate incentives to exercise that right to effect the person's discharge.

The 2012 CPL has granted compulsory treatment establishments the primary authority to initiate discharge hearings. Ankang Hospitals or other mental institutions can submit a recommendation of discharge to the same court that has issued the compulsory treatment order when periodical or ad hoc evaluation finds the committed patient has met all the statuary criteria for discharge. As a matter of right, the committed patients and their guardians can also file an application to the court to remove compulsory treatment.

In practice, one obstacle for discharge is the guardian's or family members' refusal to accept the discharged mental patients. Some patients in Beijing Ankang Hospitals have been committed for over three decades but couldn't be discharged, because their parents have passed away, their siblings were unwilling to accept them, and they have nowhere to go if they are released from the hospitals. According to our survey, 36 patients in Heilongjiang Ankang Hospital met the criteria for discharge, but their family didn't want them back home. This problem may generate negative feelings among abandoned patients who might be driven to commit self-harming or even suicide. In other cases, patients may escape from the compulsory treatment establishments to take revenge against their family or commit further crimes. As time passes, the patients stuck at compulsory treatment establishments may develop new physical diseases, and when the patients die because of such diseases, their family would ask huge amount of compensation from the mental hospitals. For this practical reason, the crucial precondition to initiate discharge hearing is whether family agrees to accept the patients. Unless guardians apply for discharge, compulsory treatment establishments seldom made recommendation for discharge until they confirmed that the family was welcoming the patient home. According to our interviewees from Ankang Hospitals and other mental institutions, after they find the patient is ready to be released, the first step is to persuade their family to accept him. These mental facilities will not proceed until the family agrees to receive their cured patients.

c) *Re*-integration into community after release from a compulsory treatment

Once the mental patient is released to communities, their continued mental health depends on whether they take their medications regularly and whether they are irritated by any new stressor. However, current statutes make no provisions to prevent the relapse of mental illness after they are released from compulsory treatment and how they can be better integrated into the community. Due to their already burdened workload and limited staffing, Ankang Hospitals do not have any follow-up patient visits or continuing treatment mechanism. Most Ankang Hospitals have not made it a mandatory requirement that the patients should come back to Ankang Hospitals for medical checkup periodically, because the patients have the right to choose a nearby mental hospital for checkup or further treatment.

The 2012 CPL does not contain the supervision mechanism of taking medicine after release, but the Mental Health Law includes related regulations.[58] For example, the Heilongjiang Disabled Persons' Federation provides “free medication” service for persons with severe mental illness. When the patients are committed to Heilongjiang Ankang Hospital, their information is included to the online database, including information such as the county and community they come from. In supervising the released mental patients, some communities can provide free medicine and supervision, even periodical doctors checkup or consulting. In other communities without such good service, the patients' family must accompany them to Ankang Hospital for checkup and prescription, or doctors from Ankang Hospital will pay them a periodical visit for checkup and deliver them more medicine.

Community follow-up and supervision for severe psychotic patients started to develop in China since the 2012 Mental Health Law was enacted. However, criminal patients cannot enjoy these services provided by community because the MHL only addresses civil patients. The author suggests community should expand their service to cover criminal patients, who have similar, if not more urgent needs than that of civil patients. The following steps could be taken: (1) Build special ward within Ankang Hospital or other mental institutions to simulate the real social context. Patients who are near ready for discharge can spend some time in this special ward for a transitionary treatment, preparing them for the life they are facing after release. Beijing Ankang Hospital has such a special ward, which has played positive roles in

[57] They used some over behavior scales recognized by China and the international psychiatry, for example observing the patients to record what he said and what he did in a whole week.

[58] The Mental Health Law of PRC (2018 amended) contains a whole chapter entitled “Rehabilitation of Mental Disorders”, which provides for the roles of relevant organizations in helping community-based mental patients to rehabilitate. Relevant organizations include community rehabilitation institutions, medical institutions, community health service institutions, township hospitals, village clinics, and the organizations of disabled persons, etc.

helping patients to rehabilitate. (2) The communication between compulsory treatment establishments and the communities should be strengthened. Doctors from compulsory treatment establishments ought to provide the community doctors with the information about released patients. Community doctors would take over the responsibility of treatment and supervision of the released patients with the assistance of their guardians. (3) To prevent the relapse after stopping taking medicine due to financial constraints, the civil affairs bureau can work with Disabled Person's Federation, health bureau, street committee, and communities to provide medical subsidy for released patients with financial problems, or set up free medication service in community clinics where the patients can show up for medication every day and the community doctors supervise their taking medicine regularly and conduct periodical checkup for them.

5. Legal supervision on compulsory treatment

To guarantee that the compulsory treatment process is fair, the 2012 CPL and relevant judicial interpretations have brought compulsory treatment under procuratorates' legal supervision, which is a unique characteristic of China's criminal proceedings. This section examines how legal supervision is conducted in compulsory treatment cases. The section discusses both pertinent legislation and our empirical findings about the practices implementing the legislation.

Statutory Supervisory Provisions. The 2012 CPL grant supervisory authority to the procuratorates. Chinese Constitution defines procuratorates as a legal supervisory authority.[59]The supervision spans the whole process of criminal proceedings except prosecution stage. As a statuary entity of legal supervision, prosecutor's office has the authority to supervise the decision-making, enforcement, and discharge of compulsory treatment.[60] According to SPP Regulations, "The prosecution agency handling opinions on compulsory treatment sent by public security organ should submit applications for compulsory treatment to the People's Court and have its public prosecution section to oversee decisions regarding compulsory treatment."[61] The SPP Regulations also list provisions on contents of supervision and provide detailed procedure for supervision.[62]80

After the People's procuratorate has reviewed a case for compulsory treatment sent by the public security organ, if the procuratorate finds that the case does not meet the requirements of Article 284 of the 2012 CPL, a decision should be made not to apply for compulsory treatment and an explanation of the reasons should be given to the public security organ. When the procuratorate finds the evidence must be supplemented, it can submit a written request to the public security organ. When necessary, the People's procuratorate may itself engage in the investigation.[63]

Art.540 of the SPP Regulations provides that when the people's procuratorate concludes the Public Security Organ (PSO) should have initiated the Compulsory Treatment Procedure but failed to do so, the procuratorate may ask the PSO to justify their nonfeasance in written form within 7 days. Upon review, if the procuratorate disagrees with the PSO's justification, the procuratorate shall notify the latter to initiate the compulsory treatment procedure.[64]

The law also assigns procuratorates the responsibility to supervise the enforcement of compulsory treatment. SPP Regulations empower the detention facility's inspection department (监所检察部门jiansuo jiancha bumen) to supervise the execution of compulsory treatment at Ankang Hospitals and other mental institutions.[65] To be specific, When the People's Procuratorate realizes that authentication procedures used by the public security organ regarding the mentally ill person violate the law or that the temporary protective and restrictive measures were not appropriate, it should submit an opinion as to how the issue should be corrected. When the public security organs should have employed temporary protective and restrictive measures, but have not, the People's Procuratorate should recommend that the public security organs employ temporary protective and restrictive measures.[66] When the People's Procuratorate discovers that the temporary protective restrictive measures employed by the public security organs include corporal punishment, abuse, or other illegal actions, it should submit an opinion as to how the issue should be corrected.[67]

If the People's Procuratorate finds that the person under compulsory medical treatment does not meet the conditions for compulsory medical treatment or should be investigated for criminal liability during supervision over compulsory medical treatment or a decision for compulsory medical treatment made by the People's Court may be wrong, a report shall be made to the chief prosecutor for approval within five days. Relevant materials will also be rendered to the People's Procuratorate at the same level as the People's Court deciding on compulsory medical treatment. The public prosecution department of the People's Procuratorate that received the materials shall carry out an examination within 20 days and provide feedback concerning examination and disposal recommendations to the People's Procuratorate responsible for supervision over compulsory medical treatment.[68]

After the People's Procuratorate's inspection department from the detention facility receives the application for terminating compulsory medical treatment from the person under compulsory medical treatment, his/her close relative, or legal representative, it shall transfer the application to the compulsory medical treatment institution in a timely fashion for examination and supervise whether the compulsory medical institution conducted an examination in a timely fashion and whether the examination and decision are legal.[69] The People's Procuratorate shall supervise decision in which the People's Court agrees to terminate compulsory medical treatment. If it is found that a People's Court inappropriately terminates compulsory medical treatment, the People's Procuratorate shall submit a corrective recommendation to the People's Court according to the law.[70]

The Implementation of the Statutory Supervisory Provisions in Practice. Our survey identified two models of prosecutorial supervision over compulsory treatment in practice: supervision by prosecutors stationed in compulsory treatment establishments (驻所检察监督zhusuo jiancha jiandu) and supervision by walkaround prosecutors (巡视检察监督xunshi jiancha jiandu). Under the first model, the inspection department for detention facilities send one or two prosecutors to be stationed in Ankang Hospitals or other mental institutions. These stationed prosecutors would carry out a synchronous supervision over compulsory treatment on a case-by-case basis, from the temporary protective restraining measures to removal of compulsory treatment. Stationed prosecutors hold their offices within compulsory treatment facility; they can inspect the wards, review the medical records of each patient during their hospitalization, learn about details of treatment and restrains, etc. Currently we found this model only in Beijing. During our survey, the new established Third Branch of Beijing People's

[59] Article 134, Constitution of PRC.

[60] The 2012 CPL merely established a principle of legal supervision, the relating judicial interpretations have more detailed provisions.

[61] Article 534 of SPP Regulations. Public prosecution section is the one in charge of filing a charge with the courts.

[62] Art.547, SPP Regulations.

[63] Art.539, SPP Regulations.

[64] One problem with this provision is the issue of procedural backflow. Would it be better to authorize the procuratorate to file the application directly?

[65] Article 547, section 2, SPP Regulations (2012). Article 661, section 2, SPP Regulations (2012) also provides, The People's Procuratorate's inspection department for detention facilities is responsible for supervising the execution of compulsory medical treatment.

[66] Article 541,542, SPP Regulations

[67] Article 653, SPP Regulations

[68] Article 652, SPP Regulations.

[69] Article 549, SPP Regulations

[70] Article 550, SPP Regulations

Procuratorate will be responsible for supervising the TPRM and compulsory treatment. Before the Third Branch of Beijing People's Procuratorate can take the full responsibility, Shunyi District People's Procuratorate was temporally responsible for the supervision over compulsory treatment in Beijing, because Beijing Ankang Hospital lies in Shunyi District.

In other provinces we visited where stationed prosecutors are not in place, our survey identified a second model. In this model, the local compulsory treatment supervision could count on only walkaround prosecutors. These walkaround inspection could be periodical or non-scheduled. For example, Luohu District People's Procuratorate send prosecutors to Kangning Hospital (compulsory treatment establishment in Shenzhen) for periodical inspection on hospitalization costs, treatment, and guardianship. For another example, the inspection section for detention facilities at Heilongjiang Province People's Procuratorate is responsible for the supervision of compulsory treatment in Heilongjiang Ankang Hospital. The prosecutors carry out the supervision over admission, procedure, inpatient treatment, and discharge, etc., by way of non-scheduled field visits or telephone inspections.

6. Rights protection for persons with mental illness

As stated in previous sections, the new Chinese compulsory treatment law tries to strike the delicate balance between social control and respect for rights, especially the protection of the rights of persons with mental illness. The 2012 CPL has specifically devoted several provisions to rights protection. This section examines those provisions and identifies a number of problems in administering the provisions. As we shall see, although the 2012 CPL effected major reform, there is still room for improvement.

In addition to a more detailed commitment hearing and all-around prosecutorial supervision, the 2012 CPL endows mentally ill criminal offenders with several important rights.

a) Right to professional assistance.

To effectively participate in a commitment hearing, a mentally ill criminal offender needs assistance from both legal and mental health professionals. Because the subject of commitment hearing may be a patient with severe mental illness and is not responsible for what he did, the 2012 CPL requires the court shall inform the legal aid agency to appoint legal aid lawyer for mentally ill offenders if they have no private lawyers. However, free psychiatrist assistance is missing from current law and regulations. The 2012 CPL grants the persons with diminished responsibility a right to retain their own experts to help with confronting the prosecution expert, but when it comes to the commitment hearing, assistance by mental health professionals is not mentioned in the law. Of course, the mentally ill offenders can retain their experts to help with confronting the prosecutor's recommendation for compulsory treatment, but no free expert is available in such cases.

A problem arises when the mentally ill offender attempts to revoke their right to free counsel. According to the 2012 CPL, persons with diminished responsibility enjoy the right to free counsel from the investigative stage.[71] When it comes to those not criminally responsible by reason of insanity, a free counsel won't be appointed until the court has decided to conduct a commitment hearing.[72] It is unclear if the mentally ill offender has the right to free counsel prior to commitment hearing. The proportionality principle suggests that mentally ill offenders without criminal responsibility should enjoy the right to free counsel from the very beginning, the investigation stage. This suggests the right to free counsel should attach since the stage where the mentally ill offender is found not guilty by reason of insanity and has satisfied all the criteria for compulsory treatment. It is a loophole that the 2012 CPL made no provision on the right to free counsel in pre commitment hearing stages. But some local implementing documents such as Beijing implementing document has already noticed this gap and have expanded the committable mentally ill offenders' right to free counsel to stages prior to commitment hearing. It requires the prosecutor's office to notify the legal aid agency to appoint free counsel to represent those mental patients not criminally responsible on ground of insanity.

Another problem with the right to free counsel is legal aid lawyers' limited role in criminal commitment cases. Our survey found almost all the mentally ill offenders in commitment hearing are represented by legal aid lawyers. However, the involvement of these lawyers was just a formality. These lawyers did not conduct any out of court investigation and usually follow the family's opinion. Most family members or guardians tended to agree with compulsory treatment decision because often, they had financial constraints and hoped to reduce the family burden by way of compulsory treatment. Under such circumstance, the legal representative would not oppose compulsory treatment. Some lawyers we interviewed did point out some questions deserve further exploration. For example, on whose behalf should the lawyer represent, the person subject to compulsory treatment or his guardian? How to guarantee that guardians express their opinions in the best interest of the mentally ill offender? Should the lawyer consider the mentally ill offenders' opinion? Can legal representatives submit the independent opinion of their own after conducting out of court investigations? Is the standing of legal representatives in commitment hearing regular legal service provider or protector of his clients' rights?

b) Right to challenge the compulsory treatment decision

To strike a balance between the rights protection of mentally ill offenders and the rights protection of victim of crimes, the 2012 CPL grants both offender and victim a right to challenge the compulsory treatment decision.[73] This is an important right of procedural remedy. Unfortunately, the 2012 CPL includes only a general provision on this right, specifying no provision on how the procedure looks like when either party challenges the compulsory treatment decision. Neither do judicial interpretations detail any procedural rules for the reconsideration of a compulsory treatment decision. Due to lack of regulation, practice varies from province to province. Hearings were used as a model in some jurisdictions such as Guangzhou city. In other jurisdictions such as Beijing City, Shannxi province and Qinghai province, trials were conducted as a model. In our opinion, no matter what format it takes, priority should always be protection of rights and legitimate interest. Both criminally committed patient and victim of crimes should be able to participate in the reconsideration procedure, presenting their evidence and expressing their opinion. The superior court must make their decisions after carefully examining and confirming all the evidence presented, listening to both parties' opinions including expert opinions from appraisers and medical professionals, and so on, and conducting necessary supplementary investigations. Another tricky problem is, since the law does not limit how many times the parties can

[71] Article 34, section 2 provides, "Where the criminal suspect or defendant is blind, deaf or mute, or is a mentally ill person who has not completely lost his capacity to comprehend or to control his behavior, and such person has not appointed a defender, the people's court, the people's prosecutor's office or the public security authority should notify the legal aid agency to assign an attorney as his defender."

[72] Article 286, section 2, "…Where the respondent or the defendant has not entrusted an agent ad litem, the people's court shall inform a legal aid agency to designate a lawyer to provide him/her with legal services."

[73] Article 287, section 2 provides, "The person against whom the decision on compulsory medical treatment is made, or the victim and his/her statutory representative or close relatives who raise objections to the decision on compulsory medical treatment may apply for reconsideration with the people's court at the next higher level."

apply for reconsideration, what if the parties are still not satisfied with the result of reconsideration? Can the parties apply for another reconsideration, or can they appeal to a higher court? Should the parties turn to the procuratorate for legal supervision? All these practical questions need explicit answers.

c) Right to initiate a discharge hearing

As mentioned earlier, the criminally committed patient and his close relatives is entitled to apply to the court for terminating the compulsory treatment. This suggests the patients and his family also enjoy the right to initiate a discharge hearing.

d) Right to rehabilitate in community.

Discharge from mental hospitals does not mean a patient is completely cured. Lots of efforts need to be made to help him rehabilitate. Community support is crucial to realize this goal. However, there is an enormous stigma attached to people who have been categorized as both mentally ill and as offenders, and it is thus extremely difficult to place them in community treatment and housing (Roskes et al., 1999). The difficulty is especially great when they have been in jails and prisons or in a forensic hospital (Lamb et al., 2004). Although Mental Health Law has spared a chapter to guide community rehabilitation, the implementation of these institutions is poor. There is a long way to go to protect the released criminally commitment patient's right to rehabilitate in community.

7. Conclusion

The 2012 Criminal Procedure Law Amendment adopted Compulsory Treatment as a new special proceeding. This is an important step forward in the reform of China's criminal mental health law. The new compulsory treatment law effects a fundamental policy shift by introducing a judicial review mechanism. However, as our empirical survey disclosed, there are still gaps in the new law, and questions have arisen on how to fill these gaps.

For example, practitioners need explicit guidance on understanding the criterion of continuous dangerousness. The current scope of compulsory treatment cannot cover all the mental patients in need thus should be expanded to include mentally ill suspects with diminished responsibility and those who become mentally ill when serving their time in prison. The Temporary Protective Restrictive Measure is imposed by way of administrative decision by public security organs instead of by judicial review. The proportionality principle has not been explicitly embodied in TPRM law. Questions have arisen as how to make a criminal proceeding convert to commitment hearing smoothly. The time limit for handling the commitment cases is either too long or too short. The admission capacity of existing Ankang Hospitals obviously cannot satisfy the needs of compulsory treatment.

For another example, the new Chinese compulsory treatment law tries to strike the delicate balance between social control and respect for rights, especially the protection of the rights of persons with mental illness. Although the 2012 CPL effected major reform, there is still room for improvement. Criminal patients in commitment hearings should be able to obtain free assistance from both legal and mental health professional. They should also enjoy the right to challenge the compulsory treatment decision, initiate a discharge hearing and rehabilitate in the community they come from.In the past, China has successfully used the model of top-down national reform followed by bottom-up refinement at the lower governmental levels. The experience at the lower levels can always point the direction for revision of the top down reform. The national, provincial, and local governments in China can now capitalize on the experience they have accumulated with the 2012 Law. Our empirical study collected and synthesized the local and provincial experience with the top down legislation. In some cases, a careful review of the survey's findings may suggest amendments to the national law. In other cases, a critical evaluation of the findings may help local authorities improve their own implementing regulations. Our survey found many examples of local authorities learning from each other in improving their implementing guidelines. Our hope is that the findings of this empirical study will help reformers at all levels of Chinese government make informed decisions about the future of the compulsory treatment procedure. We also hope that this article will help the reader understand the recent reform of Chinese mental health law and gain a sense of the major effort that Chinese society is making to improve law and practice in this vital area.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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