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Analysis of the Factors Influencing the Growth of the Lawyers

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Abstract: In 2025, the number of lawyers in China exceeded 830,000, sparking discussions and concerns within the legal community. A review of the 40-year development history of the legal profession in China reveals that since the restoration and reconstruction of the legal system in China, the number of lawyers has maintained rapid growth. The legal profession in the United States started earlier and also experienced a continuous growth process, but the growth rate has gradually slowed over the past four decades. Through comparative analysis of the development processes of the legal professions in the two countries, it can be found that the main factors influencing the growth of the number of lawyers include economic growth rate, the status of the rule of law, the threshold for practicing law, career development space, regulation models, and competition among peers. It can be predicted that in the current and future periods, the number of lawyers in China will continue to maintain medium-to-high growth.

Keywords: lawyer; growth; influence; factor

Introduction

In September 2025, the Ministry of Justice of China revealed at a press conference organized by the State Council Information Office that the number of lawyers in China had reached 830,000. After this announcement, it sparked widespread attention in the legal profession, leading to discussions on whether the number of lawyers is excessive, whether the legal service market is oversupplied, and whether the entry requirements for lawyers should be strictly restricted. What is the current growth rate of the number of lawyers in China compared to historical levels? What are the reasons behind this growth? What are the future trends? These are all questions that require in-depth research.

In December 2025, the American Bar Association (ABA) released the 2025 National Lawyer Population Survey. The survey results showed that the number of lawyers in the United States has reached 1.37 million, an increase of 18,000 compared to the previous year, marking the first significant growth after years of stagnation. As the world's largest economy, the United States has a long history of legal profession development, with fluctuations in the number of lawyers over the past century. Many of the changes and discussions currently taking place in China's legal profession have occurred in the history of the U.S. legal profession. Therefore, comparing the development of China's and the U.S. legal professions and analyzing the factors

influencing the changes in the number of lawyers in both countries can help better understand the current state of China's legal profession and predict its future trends.

1. Historical review of the growth in the number of lawyers in china

At the press conference in September 2025, the Ministry of Justice of China did not specify the statistical cutoff date for the published lawyer data (i.e., 830,000), and the figure of 830,000 itself is not entirely accurate. Recently, the official website of the National Bureau of Statistics of China updated the statistical data on the legal profession, and annual statistics from 1984 to 2024 are now available for query. For the purpose of research, this article will use the relevant statistical data from the National Bureau of Statistics for analysis. Observations show that the statistical data on the legal profession by the National Bureau of Statistics underwent two changes in statistical scope in 1991 and 2007. In 1991, auxiliary personnel such as legal assistants were included in the statistics on the number of lawyers, while in 2007, auxiliary personnel were excluded from the statistical data, and data on public service lawyers, corporate lawyers, and legal aid lawyers were added. To ensure the continuity and comparability of the data, this article has excluded all auxiliary personnel numbers from previous years and compiled Table 1.

Year	Lawyers Total	Year-on-Year % Change	Year	Lawyers Total	Year-on-Year % Change
2024	798381	9.12%	2004	107841	1.12%
2023	731637	12.51%	2003	106643	4.35%
2022	650312	13.29%	2002	102198	13.23%
2021	574042	9.86%	2001	90257	6.49%
2020	522510	10.46%	2000	84756	7.50%
2019	473036	11.63%	1999	78843	14.32%
2018	423758	15.94%	1998	68966	4.07%
2017	357193	12.27%	1997	66269	-2.72%
2016	325540	9.54%	1996	68122	7.98%
2015	297175	9.48%	1995	63088	3.59%
2014	271452	9.18%	1994	60901	29.04%
2013	248623	6.99%	1993	47194	36.73%
2012	232384	8.10%	1992	34515	16.84%
2011	214968	10.14%	1991	29540	-23.81%
2010	195170	12.60%	1990	38769	-11.31%
2009	173327	10.60%	1989	43715	39.18%
2008	156710	8.85%	1988	31410	61.42%
2007	143967	4.38%	1987	19459	33.86%
2006	130310	6.91%	1986	14537	8.46%
2005	121889	13.03%	1985	13403	60.90%
			1984	8330	N/A

Table 1:Lawyers Population in China 1984-2024

Due to the lack of annual data on public service lawyers, corporate lawyers, and legal aid lawyers before 2006, Table 1 only includes full-time and part-time lawyers for the period prior to 2006. Furthermore, when calculating the annual change rate of lawyers in 2007, only full-time and part-time lawyers were considered to ensure data

comparability.

As can be seen from Table 1, over the past 40 years, the number of lawyers in China has generally maintained a relatively high growth rate, but the growth rate has not been stable, even experiencing some declines. In 1979, the lawyer system in China was restored and rebuilt, with the number of lawyers nationwide being only slightly over 200. In 1980, the "Interim Regulations on Lawyers" were promulgated. This was the first legal provision concerning the lawyer system in China, and its promulgation and implementation put the establishment and development of the lawyer system on a legal track. The regulations clearly stated that lawyers are the legal workers of the state, and the legal advisory office is the working institution for lawyers to perform their duties, which is a public institution funded by the state. During this period, the state strengthened the lawyer workforce by allocating cadres, resulting in a pulsatile growth pattern in the number of lawyers. Due to the low base, the growth rate of the number of lawyers was generally high.

In 1986, China established the lawyer qualification examination system and held the first national lawyer qualification examination, changing the previous practice of assessing and granting lawyer qualifications. That year, due to adjustments in examination policies and other factors, the growth of the number of lawyers slowed down. In 1987, legal advisory offices across the country were uniformly renamed as law firms, and pilot projects for establishing cooperative law firms were launched. The characteristics of cooperative firms, such as "self-financing, self-responsibility for profits and losses, self-development, and self-management," broke the restriction of state control over income and expenditure, endowing law firms with enormous potential to serve the market economy. At the same time, the state-owned law firm system also underwent significant changes, with funding management shifting from full allocation and centralized revenue and expenditure to self-financing and retained surplus, and the distribution system changing from a fixed salary system to a performance-based floating system, effectively stimulating development vitality. From 1987 to 1988, both the number of law firms and lawyers saw substantial growth.

From 1989 to 1990, influenced by various factors, China's GDP growth rate dropped to around 4%. With the changes in the macroeconomic situation, the legal profession, as a service industry, was inevitably affected. At the same time, in response to issues such as the one-sided pursuit of economic benefits, disregard for professional ethics, violation of professional discipline, and unfair competition in the legal profession at that time, China's Ministry of Justice launched a centralized rectification of the legal profession in 1990. During this rectification, judicial administrative authorities strictly implemented access to legal practice, strengthened the management of legal practice certificates, eliminated part-time lawyers who did not meet the requirements, and no longer approved law firms composed entirely of invited or part-time personnel. The strict entry and exit policies led to a significant decline in the number of lawyers in 1990 and 1991.

In 1992, China officially established the socialist market economy system. Subsequently, the reform of the legal profession, guided by market-oriented principles, continued to deepen, and the partnership-based law firm, as an organizational form better suited to the needs of market economic development, was widely introduced into the legal profession. In 1993, the Ministry of Justice of China formulated the "Plan for Deepening the Reform of the Legal Work," which was implemented after

approval by the State Council. This plan explicitly stated that the nature of legal institutions would no longer be defined by the ownership model of means of production or administrative management models, and instead emphasized the vigorous development of self-regulatory law firms that do not occupy state staffing or funding and are adapted to the socialist market economy. Following this, a number of partnership-based law firms were rapidly established, and a group of legal professionals left their institutional positions to start their own law firms or transition into the legal profession. The number of lawyers surged from 34,500 in 1992 to 60,900 in 1994. After experiencing the dividends of market-oriented reforms, China's legal profession entered a phase of steady development.

In May 1996, China promulgated the "Lawyers Law". The law clarified that lawyers are practitioners who provide legal services to society, stipulated three organizational forms of law firms: state-funded, cooperative, and partnership, and strengthened the protection of lawyers 'professional rights. Since then, the Ministry of Justice and the All-China Lawyers Association have formulated a series of regulations, normative documents, and self-discipline norms related to lawyers' profession, ensuring that lawyers' professional activities are basically conducted in accordance with laws and regulations, and making the management of the legal profession more standardized.

Since 1997, judicial administrative authorities have strengthened the management of lawyers 'practice certificates, with each certificate being individually numbered and reported to the Ministry of Justice for record. This has eliminated the arbitrary issuance of lawyers' certificates to unqualified individuals, and those who had obtained practice certificates but were not actually practicing law were also cleared out, making the statistics on the number of lawyers more accurate. Meanwhile, as the number of lawyers increased, the necessity of specially invited lawyers gradually diminished, leading to a gradual reduction in their numbers. In terms of statistical data, the number of lawyers in China saw a slight decline in 1997, and only a modest increase of 2.34% in 1998.

The 1999 revision of the China Constitution added the content of "governing the country according to law and building a socialist country under the rule of law," and the whole society's emphasis on the rule of law has been continuously increasing. In 2001, China joined the World Trade Organization, and the market demand for legal services was further unleashed. This played a promoting role in the development of the legal profession, with the growth rate of lawyers exceeding 13% in 2002. At the same time, the rapidly growing legal profession was uneven in quality, and some irregularities such as illegal and non-compliant practice emerged. Starting from 2003, the Ministry of Justice intensified the supervision of lawyers' practice and launched a centralized education and rectification campaign for the legal profession in 2004. That year, the growth rate of lawyers dropped to 1.12%. After the centralized rectification, the growth rate of lawyers steadily recovered.

In 2007, China amended its Lawyers Law, refining institutional frameworks through multiple measures. The revision introduced two new organizational forms—individual law firms and special general partnership law firms—while detailing lawyers' professional rights. These reforms created a more favorable environment for the legal profession. In subsequent years, a combination of factors drove a surge in lawyers: skyrocketing case volumes, reforms to the judicial examination policy (allowing third-year university students to take the national exam), continuous expansion of law

school enrollments, and mounting employment pressures for law graduates.

After 2014, China's emphasis on the rule of law reached a new level. At the national level, a series of policy measures were introduced to deepen the reform of the lawyer system, further strengthening the protection of lawyers' rights and optimizing the working environment for lawyers. Meanwhile, the systems of public service lawyers and corporate lawyers were widely implemented, with the ranks of government public service lawyers and state-owned enterprise corporate lawyers expanding rapidly. Under the combined effect of these factors, the number of lawyers continued to maintain a high growth rate.

2. Historical review of U.S. lawyers' growth

The American Bar Association released data on the U.S. legal profession from 1878 to 2025 in its National Lawyer Population Survey, as shown in Table 2 below.

Year	Lawyers Total	Year-on-Year % Change	Year	Lawyers Total	Year-on-Year % Change
2025	1,374,720	1.38%	1982	617,320	0.77%
2024	1,355,963	-0.53%	1981	612,593	6.57%
2023	1,363,126	0.07%	1980	574,810	15.37%
2022	1,362,231	-0.06%	1979	498,249	7.18%
2021	1,362,982	0.00%	1978	464,851	7.62%
2020	1,363,017	0.90%	1977	431,918	1.63%
2019	1,350,864	0.69%	1976	424,980	4.99%
2018	1,341,630	0.42%	1975	404,772	5.00%
2017	1,335,963	1.78%	1974	385,515	5.37%
2016	1,312,630	0.87%	1973	365,875	2.05%
2015	1,301,357	1.59%	1972	358,520	4.53%
2014	1,281,022	1.03%	1971	342,980	4.94%
2013	1,268,011	1.83%	1970	326,842	1.67%
2012	1,245,205	1.61%	1969	321,473	1.70%
2011	1,225,452	1.86%	1968	316,104	1.73%
2010	1,203,097	1.92%	1967	310,736	1.76%
2009	1,180,386	1.57%	1966	305,368	1.79%
2008	1,162,124	1.64%	1965	300,000	0.95%
2007	1,143,358	2.36%	1964	297,186	0.96%
2006	1,116,967	1.10%	1963	294,372	0.96%
2005	1,104,766	1.87%	1962	291,559	0.97%
2004	1,084,504	2.44%	1961	288,746	0.98%
2003	1,058,662	0.85%	1960	285,933	2.58%
2002	1,049,751	0.08%	1959	278,746	2.65%
2001	1,048,903	2.59%	1958	271,560	2.72%
2000	1,022,462	2.20%	1957	264,373	2.79%
1999	1,000,440	1.47%	1956	257,186	2.87%
1998	985,921	3.43%	1955	250,000	12.81%
1997	953,260	0.71%	1950	221,605	10.80%
1996	946,499	5.62%	1945	200,000	10.36%
1995	896,140	3.53%	1940	181,220	13.26%
1994	865,614	2.31%	1935	160,000	15.06%
1993	846,036	5.79%	1930	139,059	6.15%
1992	799,760	2.91%	1925	131,000	6.92%
1991	777,119	2.84%	1920	122,519	0.43%
1990	755,694	4.15%	1915	122,000	-0.12%
1989	725,579	1.70%	1910	122,149	3.52%

1988	713,456	2.65%	1905	118,000	3.09%
1987	695,020	2.72%	1900	114,460	27.70%
1986	676,584	3.50%	1890	89,630	39.75%
1985	653,686	0.94%	1880	64,137	0.00%
1984	647,575	4.01%	1878	64,137	N/A
1983	622,625	0.86%			
Table 2:Lawyers Population in USA 1878-2025					

It can be observed that the United States legal profession did not have complete annual statistical data until 1955. Prior to this, only 5-year or 10-year statistical data was available, and some of this data may have been estimated, thus not entirely accurate. Some data showed abnormal increase or decrease, such as the number of lawyers in 1980 increased by 15.37% compared with 1979, which was probably caused by the change of statistical caliber. Nevertheless, the aforementioned data still holds significant research value.

Richard L. Abel once conducted a comprehensive analysis of the development of the American legal profession from its inception to the 1980s. He found that over the century between 1880 and 1980, the number of lawyers increased by ninefold, while the growth rate of the U.S. population during the same period was less than half of that. During this century, the growth of the number of lawyers was erratic and fluctuated greatly.

In the late 19th and early 20th centuries, the U.S. legal profession thrived in a relatively free market, with the number of attorneys growing rapidly—particularly in the 1920s. This expansion mirrored the nation's economic prosperity and was directly linked to the proliferation of low-tuition part-time law schools, as well as the surge in immigrants from Eastern and Southern Europe seeking legal careers.

After a period of expansion in the U.S. legal profession, state bar associations began implementing stringent access controls, including requiring pre-legal education for licensing, excluding graduates from non-accredited law schools, and increasing the difficulty of bar exams. After the 1930s, the Great Depression and World War II's massive economic losses led to a decline in demand for legal services, resulting in a significant slowdown in the growth of the legal profession.

To address challenges and protect the profession's interests, the U.S. legal profession has implemented restrictions on both internal and external competition. Previously, intense rivalry existed among lawyers and between legal professionals and non-lawyers, with lawyers maintaining their monopoly solely through courtroom practice. Legal service advertising and sales were unrestricted and widespread. The American Bar Association and numerous state bar associations established unlicensed legal practice committees to promote legislation limiting the conduct of court clerks, real estate agents, banks, and trust companies. They also reached market-sharing agreements with competing associations such as accountants, banks, collection agencies, insurance adjusters, life insurers, life insurance underwriters, and real estate brokers. Some state bar associations imposed residency requirements to restrict interstate lawyer mobility, banned advertising promotions, and introduced minimum fee plans to curb competition.

After World War II, the U.S. economy entered a period of prosperity, leading to a growing demand for legal services. With the rise of consumer movements and the

prevalence of the "free market" ideology, various professional protections for lawyers were gradually weakened. The Unlicensed Lawyers Commission was dissolved, and market segregation agreements were abolished. The U.S. Supreme Court ruled that the minimum fee plan violated antitrust laws, deemed the ban on advertising unconstitutional due to its infringement on freedom of speech, and declared that requirements for citizenship and residency violated privileges and immunities as well as constitutional provisions on interstate commerce. These developments contributed to the relaxation of legal practice access and an increase in the number of lawyers.

From 1960 to 1980, sustained economic growth created a massive demand for legal services, creating ideal conditions for the expansion of the legal profession. Rising attorney incomes further enhanced the profession's appeal. The civil rights and women's rights movements removed barriers for ethnic minorities and women to enter legal careers. A significant increase in law school graduates provided a robust talent pool. These combined factors led to a rapid surge in the number of lawyers in the United States.

Since the 1980s, the growth rate of U.S. lawyers has been steadily declining. During the 1980s, the average annual growth rate was 2.77%; in the 1990s, it rose to 3.07%; in the first decade of the 21st century, it averaged 1.64%; in the 2010s, it dropped to 1.26%; and since 2021, the annual growth rate has been a mere 0.174%. This trend largely mirrors the broader slowdown in U.S. economic growth. Benjamin H. Barton and Deborah Rhod argue that emerging technologies and service models are fundamentally transforming the legal profession. Between globalization, computerization, outsourcing, insourcing and the provision of legal services over the internet, American lawyers are facing an increasingly diversified and unregulated market.New York and Washington have implemented licensing structures for qualified non-lawyers in certain limited contexts, and other states are considering or have established similar systems. This consumer-oriented approach creates a more socially justifiable governance framework compared to the conventional ban on non-lawyer practice, regardless of its quality or cost-effectiveness. Online dispute resolution also provides a significantly cheaper and potentially more disruptive alternative. These factors collectively hinder the growth of the legal profession.

3. Analysis of the influencing factors of the growth of the number of lawyers

Comparing the development of the lawyers' profession in China and the United States, we can find that there are several main factors influencing the change of the number of lawyers.

The first factor is economic growth rate. The legal profession serves dual purposes as both a productive service and a lifestyle service. During economic expansion or rapid growth, increased market transactions drive demand for legal services, leading to market prosperity, rapid expansion of the legal workforce, and increased service supply. Conversely, during economic contraction or recession, the legal profession faces more complex challenges. On the one hand, reduced market activity and decreased financing activities directly hinder the expansion of legal advisory services. On the other hand, the surge in legal disputes and litigation cases creates short-term opportunities for legal practice. This demonstrates the legal profession's relative

resilience in weathering economic cycles, maintaining stable income in changing market conditions. However, prolonged economic downturns significantly reduce clients' willingness to pay. To cut costs, clients often reduce legal service budgets, with some corporate clients opting to strengthen in-house legal teams instead of hiring external attorneys. In summary, while the legal profession's development remains fundamentally dependent on economic conditions in the long term, it exhibits countercyclical characteristics in the short term.

The second aspect is the status of legal system construction. The more a country values the rule of law and the role of lawyers, the more solid the foundation for the development of the legal profession becomes, thereby enhancing its appeal to legal talent. The development trajectories of the legal professions in China and the United States both confirm this point. The United States has a long-standing tradition of the rule of law and is known as "a nation under lawyers," with lawyers enjoying a high social status. Since the reform and opening up, China has emphasized the construction of the legal system, and the restoration of the Chinese legal profession itself is a result of strengthening the rule of law. The rapid growth of China's legal profession over the past decade is also closely related to the advancement of the strategy of "comprehensively governing the country according to law."

Third, the threshold for practicing law. The threshold for practicing law mainly includes professional knowledge, educational background, and the entrance exam. In terms of professional knowledge, China is a civil law country, where legal knowledge is mostly presented in the form of statutes and legal interpretations, with the focus of learning being memorization and familiarity. In contrast, the United States is a common law country, requiring both the study of legal principles and the development of practical skills. Regarding educational background, American law schools have special admission requirements, mandating that students first obtain a bachelor's degree before entering law school, and only after earning a JD degree can they qualify to take the bar exam. The American Bar Association has established a mechanism for recognizing the implementation of legal education, with approximately 200 law schools accredited by the association. This mechanism effectively controls the scale of legal education. In contrast, China lacks such a control mechanism, with over 620 universities having established law schools (or departments), producing an estimated 150,000 to 200,000 graduates annually, which is 4-5 times that of the United States. In terms of exam difficulty, the pass rate for bar exams in various U.S. states ranges from 40% to 80%. China has not officially released the pass rate for the Unified Legal Professional Qualification Exam, but many insiders estimate it to be between 10% to 18%. Some argue that the pass rate of less than 20% for the unified legal professional qualification exam still indicates its high difficulty. Others believe that although the pass rate for a single exam is not high, the cumulative pass rate after multiple attempts is not low. Overall, the threshold for practicing law in the United States is higher than in China.

Fourth, career development opportunities. The legal profession is often regarded as a representative of "freelance" due to its relatively flexible working hours, strong autonomy, and high income ceiling. According to the Profile of the Legal Profession 2024, which is published by the ABA Center for Bar Leadership, as of May 2023, the average lawyer wage was $176,470. That does not include profits for law firm partners and shareholders. Lawyers are among the highest-paid people in the United

States. The U.S. Bureau of Labor Statistics compiles pay statistics on more than 800 jobs. The average wage for all U.S. workers was $65, 470, while Lawyers ranked 28th in average wages in 2023. The high income of American lawyers is largely the result of restricting practice access and controlling the number of practitioners. In China, there is no specific statistics on the salary or overall income level of the legal profession. However, based on experience, the legal profession exhibits a 80-20 split, with average incomes not being high. Nevertheless, due to the broad growth potential of the legal profession and its high income ceiling, it remains an important career choice for many legal professionals.

The fifth factor is the regulation model of the legal profession. The legal profession has always been a profession that pursues self-regulation. The advantage of self-regulation lies in its professionalism, but it also has some drawbacks, such as a tendency to prioritize the interests of the profession itself over public interests. This necessitates state regulation to impose restrictions. Therefore, in practice, the legal profession regulation models of various countries mostly seek a balance between state regulation and self-regulation of the legal profession. The United States belongs to a regulatory model that emphasizes self-regulation. Under this model, self-regulatory bodies naturally tend to enforce strict access and control the number of practitioners, thereby limiting internal competition and maintaining monopolistic profits. However, in recent years, many countries, including the United States, have strengthened external regulation of the legal profession to better protect consumer interests. China, on the other hand, belongs to a typical state regulation model, where government regulatory bodies must consider both the development of the legal profession and public interests. Under this model, regulatory bodies are more inclined not to impose restrictions on the number of lawyers to promote competition in the legal service market and expand the supply of legal services.

The sixth factor is competition among peers. In the legal service market, lawyers are often not the only service providers. In the United States, the legal profession has promoted the formulation and implementation of a series of legal rules to restrict non-lawyers from engaging in legal activities. But in recent years, a broader consensus has emerged that non-lawyer assistance is critical to addressing America's problems regarding access to justice. With the emergence of legal technology service providers as new competitors, the U.S. legal profession is facing increasing challenges. In China, the legal service market has long been fragmented. In addition to lawyers, grassroots legal service offices and legal consulting service companies are also providing legal services. Grassroots legal service providers are also managed by judicial administrative departments, their numbers are continuously decreasing, and their practice is geographically restricted, making it difficult for them to form strong competition with lawyers. However, legal consulting service companies have long been in a state of regulatory deficiency, leading to numerous issues that harm the order of the legal service market. The Ministry of Justice of China has begun to work with relevant departments to strictly regulate legal consulting service companies. This will help optimize the development environment for the legal profession.

4. Conclusion

There are many factors influencing the development of the legal profession, but most can be categorized into the aforementioned aspects. Based on the above analysis, we

can better understand the logic behind the recent growth in the number of lawyers in China. A favorable external economic environment, continuous strengthening of the rule of law, low entry barriers, abundant legal talent reserves, ample career development opportunities, a state-led regulation model, and limited competition among peers have collectively contributed to the rapid expansion of the legal workforce. It can be anticipated that in the current and future periods, China's economy will continue to maintain medium-to-high growth, the rule of law will be further implemented in all aspects of national work, the regulation model and threshold for practicing law will not undergo significant adjustments, the supply of legal talent will remain at a high level, the legal profession will still be highly attractive, and the number of lawyers will continue to grow at a medium-to-high rate.

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The Predicament and Way Out for Realizing Lawyers' Defense Rights in the Era of Big Data: A Perspective on the Prosecution-Defense Relationship

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Abstract: In the big data era, lawyers' defense rights face many challenges. As a key part of the judicial system, the criminal defense system is crucial for protecting the rights of the accused and ensuring procedural justice. However, in practice, lawyers' defense rights are often not well - protected. While technological progress has provided new support for the judiciary, it has also further compressed the defense space. Traditional problems like difficulties in accessing files, investigating, and cross - examining have taken on new forms in the big data era.

From the perspective of prosecution-defense relationship, this paper analyzes the impact of emerging technologies such as big data and artificial intelligence on the judicial field. It also explores the challenges to lawyers' defense rights in the big data era and proposes solutions. These include improving lawyers' investigation and evidence - collection rights, access - to - files rights, standardizing algorithmic applications, and increasing judicial data transparency. The aim is to ensure lawyers' defense rights and achieve equality between prosecution and defense.

Keywords: big data; defense rights; prosecution-defense relationship

Introduction

In recent years, riding on the waves of China's judicial reform, China's criminal defense system has advanced significantly, as seen in the improvement of the duty solicitor system and the pilot - testing and promotion of the criminal defense full - coverage initiative. But as these systems evolve, it's crucial to address the gaps between theory and practice. Lawyers are pivotal in implementing these systems and are indispensable in the defense mechanism. China's "Criminal Procedure Law" and "Lawyers Law" have codified lawyers' defense rights, such as meeting with clients, accessing files, and collecting evidence.

However, in practice, there are frequent incidents where lawyers' defense rights are not well - safeguarded. Defense lawyers often struggle to exercise their rights when meeting with parties, accessing files, and collecting evidence. These issues have given rise to the traditional "three difficulties" problems, which have become the main challenges for criminal defense lawyers during the defense process. [1]As a result, in the ideal equilateral triangle relationship structure of prosecution, defense, and adjudication, the defense and prosecution have shown a trend of one side rising as the other declines. Lawyers often find themselves in a passive and isolated position when facing public prosecution organs. The equal structure of the equilateral triangle has become a mirage and a symbolic representation, leading to practical distortions. This has also sparked widespread academic and social discussions on the issue of effective defense.

Technological progress has provided new technical support for criminal justice. The development of big data and artificial intelligence has brought new opportunities for the informatization of judicial organs. Lawyers, too, have used big data and artificial intelligence to improve their work, building case - law databases and intelligent auxiliary working platforms. Yet, as traditional criminal defense fields collide with emerging technologies, friction is inevitable. Since the 21st century, machine learning and big data have led a new wave of legal technology. [2]Against the backdrop of unaddressed prosecution - defense imbalance, judicial big data and legal artificial intelligence, backed by state public power and supported by fiscal and policy resources, have an inherent pro - public - power nature. Lawyers, however, lack the ability to allocate such resources. Public prosecution organs, as the prosecuting party, bolstered by technological means, have further compressed the defense space. On the one hand, lawyers can't join national - organ - based case - handling auxiliary systems, and the prosecution's monopoly on case - file information makes it harder for lawyers to access files.Algorithmic opacity in judicial systems creates a "black box effect," embedding biases that disproportionately disadvantage defendants and undermine procedural fairness.[3]Big data technology acts as a double-edged sword, enhancing judicial efficiency while exacerbating systemic inequalities, particularly in contexts where public authorities monopolize data resources and widen the prosecution-defense capability gap.[4] On the other hand, data - based information and strengthened data associativity make big data widen the prosecution - defense capability gap, both in data collection and analysis.[5] In summary, given the existing defense - rights dilemmas and lawyers' inherent weaknesses, we need to answer whether legal - technology use will aggravate prosecution - defense inequality and how to safeguard lawyers' defense rights

[1] Han, X. (2023). Where Lies the Path to Safeguarding Lawyers' Defense Rights?*China Reform*, 2023(5), 71–74.
[2] Wei, B. (2024). The Transformation of Legal Technology: From Computerization to Digitization and Intelligentization.*Jurists Review*, 2024(3), 16–29.
[3] O'Neil, C. (2016). Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy, New York: Crown.
[4] Mayer-Schönberger, V., & Cukier, K. (2013). Big Data: A Revolution That Will Transform How We Live, Work, and Think, Boston: Houghton Mifflin Harcourt.
[5] Pei, W. (2018). The Conflict Between Personal Information Big Data and Criminal Due Process and Its Reconciliation.*Chinese Journal of Law*, 2018(2), 42–61.

1. The theoretical basis

1.1 The requirement of the principle of equality between prosecution and defense

Before 1979, China's legal framework for prosecution, defense, and their relationship was nearly non - existent, except for general provisions on defendants' defense rights in the Constitution and the Organic Law of the People's Courts. The first Criminal Procedure Law in 1979 detailed defense rights in a separate chapter and clarified the rights of defenders and lawyers. Subsequent regulations, such as the Interim Regulations on Lawyers, gradually provided a legal basis for prosecution - defense relations. It is necessary to issue that The principle of "equality of arms" in criminal proceedings requires not only formal legal parity but also substantive access to resources, ensuring both prosecution and defense can effectively advocate their positions.[6]However, influenced by traditional concepts and an imperfect system, these relations remained seriously unbalanced.

The 1996 amendment to the Criminal Procedure Law strengthened the protection of the accused's rights, established legal aid, expanded lawyers' defense rights, and introduced an adversarial litigation model to promote equality between prosecution and defense. The Law on Lawyers, enacted in the same year, reduced the administrative nature of lawyers' roles, marking the beginning of a confrontation - dominated stage of prosecution - defense relations. This led to the "old three difficulties" problem, where communication and cooperation were lacking. The 2012 amendment further refined these relations towards rational confrontation. Despite the key role of the prosecution - defense confrontation mechanism in modern criminal litigation, it has also led to problems such as large - scale judicial resource consumption and reduced litigation efficiency. Faced with increasing numbers of criminal cases and tight judicial resources, scholars have advocated transforming prosecution - defense relations into a model combining confrontation and cooperation. This requires defense lawyers to actively perform their duties and the prosecution to adhere to its objective obligations and safeguard lawyers' litigation rights.[7]

Whether it involves prosecution - defense confrontation or cooperation, it must be based on equality between prosecution and defense. Otherwise, confrontation may turn into suppression, and cooperation may become exploitation. In modern criminal litigation, the principle of equality between prosecution and defense is one of the core concepts for ensuring judicial fairness. It requires both sides to have equal legal status, reciprocal litigation rights and obligations, and equal strength to ensure a balanced and cooperative relationship. This principle should apply not only in the trial stage but also throughout pre - trial procedures such as investigation and review for prosecution. The full exercise of lawyers' rights to meet with clients, access files, and collect evidence affects the protection of the accused's legitimate rights and the effectiveness of the defense.

The realization of this principle depends on the "equal arming" and "equal protection" of both sides. Equal arming means providing both sides with equal legal tools to ensure they can fully exercise their rights in litigation. Equal protection requires

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[6] Dworkin, R. (1986). Law’s Empire, Cambridge: Harvard University Press.

[7] Zhang, B. (2020). On the manifestations, impacts, and corrective paths of the formalization of interactions between prosecution and defense. *Journal of Henan University (Social Science Edition*), 2020(5), 70–75.

judges to remain objective and neutral, offering the same level of protection to both sides and giving equal attention and evaluation to the opinions and evidence provided by each. The theoretical basis of this principle includes the requirements of the criminal litigation structure, the theory of checks and balances, and the requirement of human rights protection.

In the adversarial criminal litigation system, the separation of prosecution, defense, and adjudication functions forms an equilateral triangle structure, which is essential for procedural justice. The equality between prosecution and defense reflects the theory of checks and balances in criminal litigation, preventing either side's power expansion and ensuring effective confrontation. It also aligns with human rights protection requirements, as the defendant's exercise of defense rights can effectively restrain and supervise the state's prosecutorial power, ensuring rational power exercise and the purposefulness of criminal litigation. Only on the basis of equality between prosecution and defense can both sides maintain a balance of power in confrontation and achieve mutually beneficial cooperation, jointly promoting the realization of fairness and efficiency in criminal litigation.

1.2 Requirements for building a legal profession community

The legal profession is a social organism. American legal scholar Roscoe Pound defined it as a group pursuing learned arts as a common calling in the spirit of public service.[8]Nowadays, with legal and commercial self - interest on the rise, some legal professionals lose ethical standards. Conflicts arise among judges, prosecutors, and lawyers, and the legal service market is in chaos. To solve these problems, it's vital to re - establish legal professionals' common faith in law and shared pursuit of social order and justice. This is key for the legal profession to fulfill its rule - of - law mission.If legal professionals work outside the common legal dispute - resolution system, using their own methods, languages, and logics, mistrust and blaming will emerge.[9]To build a legal profession community, it's necessary to both seek common ground and respect differences. On one hand, legal professionals share a common foundation: legal education, language, thinking, and courtroom practice. They all bear the responsibility of upholding social fairness, justice, and the accurate implementation of the law. On the other hand, each legal role has a unique positioning, with specific rights, obligations, values, and ethical standards. Every legal professional must fulfill relevant laws and adhere to ethical requirements.

In criminal proceedings, lawyers and procuratorates have natural conflicts due to their different duties. Lawyers defend suspects and defendants to protect their rights and ensure judicial fairness. Procuratorates, as the state's representatives, prosecute to protect public interests and ensure the law is correctly implemented. Despite these differences, both aim for social justice and should cooperate on an equal basis.To build a positive relationship between them and reduce conflicts, their equal status must be ensured. This paves the way for a legal profession community. Take the 1996 Criminal Procedure Law revision, which shifted court trials from an inquisitorial to an adversarial system. But defense lawyers didn't gain equal litigation status with prosecutors. Judges often dismissed their defense opinions with "not accepted".

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[8] Pound, R. (1953). The Lawyer from Antiquity to Modern Times, St. Paul: West Publishing Co.

[9] Ge, H. Y. (2016). One Step Away: The Chinese Legal Profession Facing the Community. *Law Science*, 2016(5), 3–12.

Scholar Liu Sida calls this detachment from the public's daily life a "symbolic process".[10]

To prevent the building of a legal profession community from being just empty talk and only a "symbolic" idea, we must ensure positive interaction between lawyers and procuratorates in criminal proceedings. Only fully protecting lawyers' practice rights and respecting their status can gradually form the initial outline of this community.

2. The predicament in realizing lawyers' defense rights

2.1 Difficulty in collecting evidence

Article 43 of China's Criminal Procedure Law permits defense lawyers to collect case-related materials from witnesses and other entities or individuals with their consent, and to apply to the procuratorate or court to gather evidence or summon witnesses. However, in the face of the informatization and data-driven transformation of criminal proceedings, the right of lawyers to investigate and collect evidence is confronted with numerous challenges. On the one hand, the electronic and data-based case files enhance the efficiency of prosecution, but the accused and their lawyers struggle to access the case-handling auxiliary systems of public security, procuratorate, and court, and thus have difficulty in obtaining electronic data from these systems. At the same time, the construction of multi-departmental information-sharing systems involving administrative and judicial organs has broadened the channels for the prosecution to collect information, but the defense has difficulty in benefiting from these systems. [11]For instance, the procuratorate can extract relevant data, build digital models, and use big-data analysis to uncover case leads from bank accounts, financial records, and property or vehicle registration information.

Article 54 of China's Criminal Procedure Law stipulates that the People's Court, People's Procuratorate, and public security organs have the authority to collect evidence from relevant entities and individuals. Confidentiality is required for evidence involving state secrets, trade secrets, and personal privacy. Article 42(1) of the Cybersecurity Law prohibits network operators from disclosing, tampering with, or destroying personal information without the consent of the individuals from whom the information was collected, except when the information has been irreversibly anonymized. Article 14 of the Government Information Disclosure Regulation specifies that government information classified as state secrets, prohibited from disclosure by law or administrative regulations, or whose release could endanger national, public, economic, or social security, shall not be disclosed. When data crucial to proving the accused's innocence or minor guilt falls under these non-disclosure provisions, lawyers are unable to access it.

On the other hand, big data analysis can integrate fragmented data into a comprehensive dataset. Even if a lawyer only seeks part of the information during evidence collection, they may be denied access if these fragments can be used to derive sensitive data related to national security, trade secrets, or personal privacy

[10] Liu, S. D. (2008). *The Lost City-State: The Transformation of the Legal Profession in Contemporary China* (pp. 4-6), Beijing: Peking University Press.
[11] *Jia, Y. (2023). On Digital Procuratorial Work.China Legal Science, 2023(1), 5–24.*

through big data techniques. This significantly hinders lawyers' investigation rights.[12]

Moreover, with the growing emphasis on personal privacy, lawyers may be refused access to any fragmented data that could be linked to personal privacy during investigations, based on privacy protection grounds.

In contrast, Articles 13 of the 2016 Provisions of the Supreme People's Court, Supreme People's Procuratorate, and Ministry of Public Security on Several Issues Concerning the Collection, Extraction, and Review of Electronic Data in Handling Criminal Cases and Article 41 of the 2019 Ministry of Public Security Rules on Electronic Data Investigation in Criminal Cases stipulate that data holders, network service providers, and relevant departments must assist and cooperate with investigative authorities in collecting electronic data. In this context of judicial promotion of data sharing, public authorities can easily obtain data from third parties. However, defense lawyers lack communication channels and data - access mechanisms, making data acquisition subject to the data controller's willingness. Thus, there is a vast disparity in evidence - collection capabilities between public authorities and defense lawyers.

Furthermore, due to the rapid evolution of electronic data storage methods and technologies, defense lawyers specializing in law may encounter technical challenges. They often lack professional evidence - collection skills and equipment. For complex data, without hiring experts to preserve and replicate evidence, the evidence obtained may be deemed invalid by the court, or even be destroyed, which can affect case - fact determination and may lead to criminal liability. This exacerbates the difficulties lawyers face in evidence collection.

In summary, defense lawyers, especially when conducting their own investigations, face two main barriers in the evidence - collection process: technical barriers and barriers in obtaining assistance from third - party platforms. Hindered by these internal and external factors, they struggle to obtain evidence proving the accused's innocence or minor guilt.

2.2 Difficulty in accessing case files

Under traditional conditions, case - file materials in criminal cases exist in tangible forms such as text and images. With the widespread use of big data and other information technologies, the objects of case - file review have become intangible and numerous. This has impacted the traditional case - file review system and brought serious challenges to the scope and difficulty of lawyers' case - file review rights.

Article 40 of China's Criminal Procedure Law stipulates that defense lawyers may review,copy, and reproduce case - file materials from the time the People's Procuratorate begins reviewing the case for prosecution. Other defenders may also do so with the permission of the People's Court or People's Procuratorate. Traditional case - file review was limited to tangible evidence and related materials disclosed to the defense. However, in the era of big data and artificial intelligence, judicial informatization uses modern technologies such as electronic case files, online platforms, and databases. The materials judicial organs use in case trials no longer only include traditional case - file contents. The traditional scope of case - file review

[12] Li, X. M. (2020). Risks and Countermeasures of Big Data and Artificial Intelligence Intervening in Criminal Proceedings: From the Perspective of Equality Between Prosecution and Defense. *The South China Sea Law Journal*, 2020(3), 66–68.

is relatively narrow and cannot cover modern information carriers like electronic case files. In practice, there are also issues of one - sided evidence collection and deliberate concealment of innocence - related evidence. Due to the closed nature of the investigation stage, some key information derived from big data analysis is only regarded as case - solving clues and is not documented or reflected in case materials, making it inaccessible to defense lawyers. Additionally, whether the data related to big data - assisted investigation in the investigation stage constitutes a state secret and how to ensure data security during case - file review for the defense are issues not yet regulated by existing laws. Thus, in addition to the old problems of unclear case - file review scope and locations, lawyers now also face new problems such as a narrow scope of review and increased difficulty in accessing case files.

Currently, as criminal case numbers and data volumes surge, defense lawyers face two main challenges. On one hand, the massive data acts like an information ocean, making it tough for the defense to pinpoint key evidence favorable to the accused. They often get lost in the complexity, struggling to effectively mine and analyze data that's truly useful for defense. On the other hand, judicial authorities may dump large amounts of unfiltered, untargeted data on the defense. Given the prosecution's technical edge, there's a rising risk of them leveraging this to create a litigation advantage. This boosts the defense's workload and the difficulty of reviewing case files. Lawyers then spend excessive time and effort sifting through data, often without obtaining truly valuable information, which in turn affects the quality and efficiency of defense work.

2.3 Difficulty in effective cross - examination

Against the backdrop of big data and AI in criminal justice, the information gap between prosecution and defense during cross - examination is amplified by algorithms. This compresses the defense's cross - examination and defense space. Also, the lack of algorithmic cross - examination mechanisms and the use of sentencing - assistance systems worsen inequality in the cross - examination process.Automated judicial tools lacking transparency violate due process by denying defendants meaningful opportunities to challenge algorithmic decisions.[13]

On one hand, algorithmic opacity restricts the space for cross - examination and defense. In China's criminal justice practice, smart prosecution - assistance systems are established on big data and run via algorithms. [14]Algorithms play a key role in big data and AI. Under different algorithms, the same dataset can generate varying results. Yet algorithms are often opaque, creating an "algorithmic black box". While the input and output are visible, the processing in - between is partially or fully hidden.[15]Thus, when cross - examining algorithm - based evidence, lawyers can only address procedural legality. Algorithmic systems in justice must adhere to transparency, explainability, and human oversight principles to prevent technology from overriding defense rights.[16]Substantive examination of authenticity and relevance often becomes

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[13] Citron, D. K., & Pasquale, F. (2014). The Scored Society: Due Process for Automated Predictions. Washington Law Review, 89(1), 1–33.

[14] Bian, J. L. (2022). Advancing Digital Judicial Construction Based on the Requirements of Digital *Justice.Journal of Beijing University of Aeronautics and Astronautics Social Sciences Edition*, 2022(2), p. 24.

[15] Zhang, J. H. (2025). Research on Algorithmic Black Box: A Perspective from Cognitive Science. *Studies in Science of Science*, 2025(1), 1–14.

[16] European Commission for the Efficiency of Justice (CEPEJ). (2018). Ethical Charter on the Use of Artificial Intelligence in Judicial Systems. Council of Europe. Retrieved from https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c

superficial due to opacity. Even if some algorithmic models are interpretable, they may be shielded as trade or state secrets.

Currently, judicial organs can't develop smart systems on their own. They usually collaborate with enterprises via social bidding. The algorithms in these systems are core corporate competencies and trade secrets. However, there's a cognitive divide over algorithms' nature. Balancing defendants' cross - examination rights and trade secret protection requires judicial discretion.A typical case is State v. Loomis in the US. The court deemed COMPAS a commercial secret and used its risk assessment in sentencing without infringing the defendant's due process rights.[17] In China, this might be seen as violating defense rights.

On the other hand, in the field of criminal justice, the application of big data and artificial intelligence is mainly focused on the big - data-driven trial assistance and decision - support systems. The most typical application modules are case - law recommendation, sentencing assistance, and deviation early warning. These modules are widely used in the whole process of criminal trial decision - making. But in practice, the big - data intelligent assistance system may change its function and reduce the discretionary space for judges, thus weakening the defense - counsel's influence on the judge's judgment and reducing the effectiveness of defense work. It is hard enough for defense counsel to influence the judge's opinion. When the defense counsel's opinion and the algorithmic results are contradictory, it is even more difficult to achieve this goal. In this sense, this situation indirectly worsens the inequality between prosecution and defense in the cross - examination and courtroom debate.

3. The realization path of lawyers' defense rights

3.1 Improving lawyers' rights to investigation and evidence collection

3.1.1 Clarifying the cooperation obligations of network operators

Article 43 of China's Criminal Procedure Law permits defense lawyers to gather case - related materials from witnesses and other entities or individuals with their consent, and to apply to the procuratorate or court to collect evidence or summon witnesses. When conducting their own investigations, lawyers need third - party consent. In today's big data era, where information and digital technologies are deeply integrated, evidence is mostly in the form of data. However, in practice, network operators and other entities often refuse to assist lawyers in evidence collection, citing commercial secrets or personal privacy concerns.

To safeguard lawyers' evidence - collection rights, it's necessary to use legal means to clarify the scope of electronic evidence collection and delineate the boundaries between personal information protection and criminal investigation. A tiered and categorized approach can be adopted to differentiate data types and prevent conflicts between network operators' confidentiality obligations and their duty to assist. Specifically, network operators should promptly provide lawyers with information not involving personal, commercial, or national security secrets. For information that may involve personal privacy or trade secrets, network operators must state their reasons and provide relevant proof. Lawyers can only access such data with the information

[17] *Zhu, T. Z. (2018).* Uncertainty Risks of AI-Assisted Criminal Adjudication and Their Prevention: Enlightenment from the Wisconsin v. Loomis Case.*Zhejiang Social Sciences, *2018*(6), 76–85.*

owner's consent, or by applying to the court or procuratorate for evidence collection. If the data solely involves the accused's personal information or the commercial secrets of their controlled organization, lawyers' confidentiality obligations to their clients can exempt them from certain restrictions. Network operators cannot simply refuse to assist on personal or commercial secrecy grounds but must cooperate with lawyers. This aligns with China's legislative intent to protect personal and commercial secrets. For other data types, only authorized authorities have the power to collect evidence.

Besides, it is essential to clarify the legal responsibilities of network operators who obstruct lawyers' legitimate evidence - collection activities. If it is proven after the fact that a network operator or other entity has maliciously impeded a defense lawyer's evidence collection and refused to provide evidence critical to the case, the responsible parties should be held accountable through measures such as fines.

To address the technical challenges faced by defense lawyers during evidence collection, a two - pronged approach can be adopted. Firstly, professional technical tools can be integrated into the legal practice workflow. Law firms and bar associations should provide timely training to enhance lawyers' technical skills, enabling them to legally and effectively collect and manage electronic evidence related to the case. Secondly, dedicated electronic storage devices can be provided to ensure the proper preservation of data and prevent data loss due to improper evidence - collection procedures, thereby guaranteeing the smooth conduct of evidence collection and the integrity of the data.

3.1.2 Ensuring the implementation of lawyers' applications for evidence collection

When self - investigation is blocked, lawyers can apply for evidence collection. Compared with self - investigation, this option is often more feasible and has a higher likelihood of success. On the one hand, the backing of public authorities makes the relevant parties more cooperative and lends legitimacy to the evidence - collection process. However, this also means that the discretion over evidence collection is handed over to public authorities. If there is collusion between the judiciary and the prosecution to deliberately obstruct lawyers' evidence collection through various excuses and delays, lawyers' rights to evidence collection still cannot be guaranteed.

In cases where evidence is obviously favorable to the accused, the prosecution may resort to backroom operations, leading to an unequal relationship between lawyers and the prosecution. Therefore, the system of lawyers' application for evidence collection should be strengthened, and the discretion of courts and procuratorates should be reasonably restricted. Specifically, courts and procuratorates should generally agree to lawyers' applications and only reject them in exceptional circumstances. When rejecting an application, they should provide written reasons in the relevant decision for the defense lawyer's reference. This does not diminish the power of courts and procuratorates nor inappropriately expand lawyers' rights. Instead, it adds a written explanation obligation for courts and procuratorates, enhancing the rigidity of lawyers' applications for evidence collection, preventing unfounded rejections, and reducing conflicts and disputes between lawyers and procuratorates.

At the same time, lawyers must meet certain formal and substantive requirements when applying for evidence collection. The evidence to be investigated should be clearly defined, not overly broad, to allow the prosecution to make a judgment. In the

context of big data, if a lawyer applies to collect electronic evidence, they should also explain the facts to be proven by such evidence and whether it involves personal information, trade secrets, or state secrets. This can alleviate the prosecution's review burden and improve efficiency.

Finally, a relief mechanism for lawyers should be established. If a lawyer's application for evidence collection is rejected, they should have the right to apply for a review to the same - level or higher - level judicial authorities. The assistance obligations of bar associations and judicial administrative organs should also be clarified. When a lawyer cannot legally conduct an investigation and collect evidence, the bar association and judicial administrative organs should communicate with courts and procuratorates to safeguard the lawyer's legal rights.

3.2 Refining lawyers' rights to access case files

3.2.1 Expand the scope of lawyers' access to case files

Databases of public security, procuratorates, courts, and other administrative agencies (e.g., financial, ecological) primarily serve the public interest and are highly public. Generally, they should be open. However, in criminal proceedings, massive data growth inevitably includes large amounts of personal and national security information. Thus, while ensuring lawyers fulfill their defense duties, we need to balance multiple interests.

In the traditional scope of case - file review, integrating new big - data - era information into the objects of lawyers' case - file review requires caution and clear boundaries and conditions. A general principle for lawyers' case - file review can be established: data that may influence judges' discretion, prove the accused's innocence or minor guilt, or record other procedural matters should, in principle, be disclosed to lawyers. If such data involves personal privacy, certain confidentiality conditions should be imposed on lawyers' access. Lawyers' case - file review should be subject to certain restrictions, but not prohibitions. These restrictions must comply with the principle of proportionality and should not disrupt main investigation activities.

As public security, procuratorate, and court data - sharing mechanisms mature, lawyers, as key legal - profession - community members, should be included. Dedicated lawyer data - access channels can be set up to offer one - stop data - sharing services. For instance, systems can be configured to automatically push case - related data and case - flow info from handling agencies to these channels. This way, upon accepting a case, lawyers can directly track case progress and access databases used by public - power organs.

On February 5, 2021, the Supreme People's Procuratorate released typical cases of procuratorates protecting lawyers' practice rights. In one case, a city's investigative body added a function to its "Integrated Application System for Law Enforcement and Case Handling." Once defense - lawyer information is entered, the system automatically informs the lawyer via text of the suspect's compulsory measures, detention location, and case transfer during the investigation phase, effectively upholding the lawyer's right to know.

Procuratorates can follow this example by creating a dedicated case - file review section in their internal systems for lawyers. Lawyers using this section must strictly keep case - related information confidential. Those violating this obligation should be promptly reported to the bar association and judicial authorities for punishment.

3.2.2 Assisting lawyers in identifying effective information

As mentioned earlier, on the one hand, there is a phenomenon of "document dumping" in the process of judicial organs providing case files to the defense, which means that a large amount of unsorted and untargeted data is provided to the defense. Given the inherent gap in data - processing capabilities between the prosecution and the defense, the risk of the prosecution leveraging its technical superiority to suppress the defense in litigation also increases. On the other hand, as the prosecution, especially prosecutors, bear the "objective duty" of going beyond the prosecutorial stance to fulfill their legal responsibilities in an objective and fair manner, they are obliged to conduct searches to identify information favorable to the accused. However, given the current surge in case numbers, even if procuratorates are assigned this duty, it is hard to ensure effective implementation in practice.

An effective solution is to involve lawyers in the process of analyzing and organizing data alongside the technical staff of procuratorates, with the latter being responsible for supervision and providing channels for this collaboration. After the relevant procedures are completed, all parties involved should sign to confirm that the prosecution has fulfilled its duty to assist.

Furthermore,lawyer’s participation also supervises the prosecution, preventing improper omissions and processing of information. This avoids judicial risks from relying solely on the prosecution's moral self - restraint. It ensures that big data analysis is used not only to collect information unfavorable to the accused but also to find information favorable to them, such as proving their innocence or minor guilt. This guarantees the impartiality and comprehensiveness of judicial procedures.

3.3 Regulating the application of algorithms in criminal proceedings

In the field of criminal justice, the rise of big data technology and the integration of artificial intelligence into criminal litigation reforms have significantly enhanced the efficiency of judicial proceedings. This advancement has actively alleviated the contradiction between the growing number of cases and the limited judicial resources. However, algorithms, which are the core of these technologies, pose risks due to their opacity and potential for bias. These issues may jeopardize the application of artificial intelligence in criminal trials and sentencing prediction. Therefore, regulating the application of algorithms in criminal proceedings is imperative.

Firstly, to ensure algorithmic transparency, the Supreme People's Court issued the "Opinion on Regulating and Strengthening the Judicial Application of Artificial Intelligence" in December 2022. It outlines five basic principles, including the "principle of transparency and trustworthiness." This requires all aspects of AI systems used in the judicial process to be open to review, assessment, and filing by relevant parties in an interpretable, testable, and verifiable manner.

Based on this, algorithms should be disclosed to defendants and their defense lawyers, and when necessary, to the public. This ensures procedural justice and upholds the procuratorate's authority and credibility. Given that public authorities often collaborate with commercial entities when adopting IT, it is essential to selectively disclose algorithms to balance the interests of all parties. Private companies developing these systems often treat algorithm design and training data as trade secrets with very limited disclosure.

Specifically, algorithms directly impacting defendants, such as those used for evidence and sentencing, must be fully disclosed to defendants and their lawyers. The prosecution should proactively share relevant algorithmic information and cannot refuse to disclose it when requested. In return, recipients of algorithmic information must undertake to use it exclusively for the relevant litigation and comply with confidentiality obligations.

Secondly, to guarantee the reliability of algorithms, first and foremost, it is essential to establish stringent admission criteria. These criteria should focus on evaluating and testing algorithms across various dimensions, including transparency, interpretability, and reliability. Any algorithm that fails to meet these standards must be barred from being utilized within the realm of criminal proceedings.

Subsequently, it is crucial to define specific technical requirements for algorithms that are to be employed in the domain of criminal proceedings. Given that algorithms operate on the foundation of data and construct models through the analysis and learning of vast amounts of data, the management and utilization of data emerge as critical factors. Beyond merely excluding algorithms that do not conform to the set standards, it is imperative to implement rigorous admission criteria for data that is to be used within the sphere of criminal proceedings. This proactive measure ensures the reliability of algorithms right from the inception.

Finally, it is imperative to define the auxiliary nature of algorithms, reducing their influence on judges' convictions and reserving space for lawyers' defense and cross - examination. As mentioned earlier, when intelligent technologies provide seemingly irrefutable arguments and reasoning, judges may fall into a state of "cognitive stinginess." This indirectly weakens the defense counsel's ability to sway the judge's conviction and diminishes the effectiveness of the defense. During the algorithm - assisted judicial adjudication process, particularly in the application of sentencing - assistance systems, algorithms should not possess mandatory features. Judges should be allotted the discretion to determine whether and to what extent they utilize algorithmic recommendations. They should also be required to provide detailed explanations in their judgments. Otherwise, should judges rely on algorithmic outcomes to achieve consistent sentencing, the defense may, over time, become a mere formality. Eventually, cold digital logic, rather than human reasoning and emotion, would influence the defendant's fate, which is contrary to the principles of criminal proceedings.

4. Conclusion

Lawyers are an essential component of the effective functioning of the defense system. The digitization of justice demands a paradigm shift in legal ethics, prioritizing equitable access to technology while safeguarding against its potential to entrench systemic inequities.[18]The right to defense is a crucial element in countering and preventing wrongful investigations and prosecutions. The development and protection of this right are vital measures for ensuring the objectivity and fairness of prosecutorial actions. In the era of big data, reforms in the criminal justice field present new challenges to the exercise of lawyers' defense rights. The double - edged

[18] Hildebrandt, M. (2016). Law as Information in the Era of Data-Driven Agency. *The Modern Law Review*, 79(1), 1–30.

sword effect of technology is becoming increasingly evident in legal practice. While technology offers the potential to enhance judicial efficiency and achieve justice, it has also, to a certain extent, intensified the inequality between the prosecution and defense.

The digital and technological divides within the prosecution - defense relationship are gradually emerging. Instead of bridging the gap between public authorities and the accused, as well as defense lawyers, new technologies represented by big data and artificial intelligence have caused a polarizing Matthew effect. This has made the prosecution - defense relationship move further away from the ideal of equal confrontation and cooperation.

This paper attempts to strengthen institutional and technical regulation to create more favorable conditions for the effective exercise of defense rights by lawyers. The goal is to promote the development of criminal justice in a more just and efficient direction. This will help ensure that every judicial case can achieve true fairness and justice with the assistance of big data. However, we are fully aware that safeguarding the right to defense and building an equal prosecution - defense relationship are long - term propositions. Finding a middle - way balance amid the intense collision of old and new elements remains a topic for future in - depth exploration.

The Paradigm Shift and Risk Control in Preventive Criminal Legislation

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Abstract: In recent years, both domestic and foreign criminal legislation have exhibited a clear preventive turn. By criminalizing remote-risk conducts such as preparatory acts and possession acts, and by adopting auxiliary preventive measures such as custodial education and occupational prohibition, the function of criminal law has gradually shifted from post-offense punishment to ex ante prevention and control. Although this transformation contributes to addressing emerging risks such as terrorism and cybercrime, it also destabilizes the traditional outcome-oriented and objectivist foundations of criminal law, blurring the boundary between criminal law and police law, and giving rise to a dual crisis of expanding public power and intensifying social antagonism. Preventive criminal legislation entails both internal and external risks. The internal risk lies in the instrumentalization of criminal law and the excessive consumption of criminal justice resources; the external risk manifests in the expansion of state power under the pretext of risk prevention, through which prejudice may infiltrate judicial discretion, thereby aggravating selective enforcement and social injustice. Risk control should therefore be sought both within and beyond the normative framework of law: on the one hand, constitutional review of the necessity of criminal legislation should be strengthened, and reasonable punitive boundaries should be demarcated within the criminal law system; on the other hand, the exercise of public power should be constrained through mechanisms such as public access to information and public participation, so as to reduce the excessive reliance on criminal sanctions.

Keywords: Preventive Legislation; Risk; Principle of Necessity; Substantive Interpretation; Public Participation

Introduction

In the classical paradigm of *criminal law*, preventive punishment, as one of the means of crime prevention, primarily relies on the deprivatory pain inflicted upon the offender by the punishment. It expresses condemnation for the offender's serious deviation from the social order, aims to prevent the offender from re-offending, and serves to warn others against following the same path.[①]

The object of *criminal law's* concern and judgment has always been the offender's consummated act. Prevention was an ancillary purpose of punishment, a derivative value. However, with the increasing prominence of various criminal risks such as terrorism, organized crime, sexual offenses, and crimes against humanity, states have begun seeking more effective preventive measures. These include both preventive legislation that criminalizes conduct and other freedom-restricting measures with a criminal character. Criminal legislation, both domestically and internationally, has concurrently exhibited a certain preventive turn. Its focus has extended from consummated acts to unrealized possibilities. The preventive effects it pursues go beyond the psychological coercion of negative general prevention, the normative recognition of positive general prevention, and the educational correction of special prevention; they lie more directly in preventing the occurrence of "this specific" harmful outcome.

Compared to earlier criminal legislation that also emphasized prevention, contemporary criminal legislation partially presents a facade of "prevention for prevention's sake."[②] Current research has made some progress regarding the expansion of preventive criminal legislation and its associated risks, yet numerous issues remain. Further exploration is particularly needed on how to effectively limit the expansion of preventive legislation, how to balance security and liberty, and how to strengthen social prevention. This article will first delineate the preventive landscape of contemporary criminal legislation, then reveal the risks of preventive criminal legislation and explore pathways for its limitation.

1. Manifestations of the paradigm shift in preventive criminal legislation

The risk society has influenced the concept of criminal responsibility, shifting it from a traditional retrospective responsibility (emphasizing actual harmful consequences, subjective culpability, and retributive punishment) towards a prospective responsibility (emphasizing risk-conduct and crime prevention).[③] Currently, China's preventive criminal legislation is primarily manifested in several categories of crimes that pose significant social harm. China's *Criminal Law Amendment (IX)*, by adding crimes such as preparation for the commission of terrorist activities and illegal possession of items advocating terrorism, has criminalized preparatory acts as well as remote risk-behaviors such as possession and advocacy, significantly expanding the

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① Beccaria, C. (2003). On Crimes and Punishments (F. Huang, Trans.). China Legal Publishing House. (Original work published in Italian) (p. 53).

② Wang, Q. (2019). Concerns over the Over-Criminalization in Social Governance. *Contemporary Law Review*, (2).

③ Jiang, M. (2025). On the Prospective Responsibility of Preventive Legislation in Criminal Law and Its Practical Limitation. *Chinese Criminal Science*, (3).

criminal net to achieve risk prevention and control. Jurisdictions outside China, such as the United Kingdom, Germany, and Australia, have also criminalized behaviors like possessing suspicious items or disseminating terrorist speech, reflecting a global trend in preventive legislation.

1.1 The criminalization of preparatory acts: The preventive expansion of criminal legislation

The most salient feature of preventive criminalization legislation lies in the fact that the acts regulated by these offenses are not the ones that directly cause the harm intended to be prevented, but rather acts preceding them that merely carry a certain risk of harm, thereby enhancing the preventive potential of traditional criminal law.[①] Through measures such as creating abstract endangerment offenses, the criminalization of preparatory acts, the principal-ization of aiding acts, and adding incitement offenses, legislative practice has achieved a thorough preponement of the threshold of punishability, subverted the traditional model of self-responsibility in criminal law, and led to a blurring of the boundaries for initiating investigations in criminal procedure.[②] The new terrorist offenses added by China's *Criminal Law Amendment (IX)* are a typical manifestation of preventive criminalization. The amended *Criminal Law* stipulates the crime of preparation for the commission of terrorist activities. Although China's *criminal law* in principle provides for the punishment of preparatory offenses, in practice, after comprehensively considering the evidence in a case, the social harmfulness of the act, and its degree, situations where judicial organs actually punish preparatory offenses are not common.[③] This provision criminalizing preparatory acts undoubtedly substantially expands the scope of punishment for preparatory offenses. Furthermore, *Criminal Law Amendment (IX)* also added the crimes of illegal possession of items advocating terrorism or extremism, advocating terrorism or extremism or inciting the commission of terrorist activities, and forcing others to wear clothing or symbols advocating terrorism or extremism in public places. Compared to perpetratory acts, traditional preparatory acts are already remotely connected to the harmful outcome one seeks to avoid. However, joining a specific organization, possessing specific items, and advocating certain speech are undoubtedly even more remotely connected to the harmful outcome. The criminalization of these acts demonstrates a clear preventive intent.

In combating organized crime, China adheres to the policy of "taking early and small-scale action" and has also enacted certain preventive criminalization legislation. Examples include the crime of organizing, leading, or participating in a mafia-style organization, and the crime of developing a mafia-style organization within the territory of China. In the realm of cybercrime, the crime of refusing to perform information network security management obligations and the crime of aiding information network criminal activities impose additional criminal obligations on network service providers. Compared to holding accomplices criminally liable under traditional complicity theories, their significance lies more in urging network service providers to promptly block the dissemination of unlawful information, thereby preventing the occurrence of cybercrimes. Furthermore, the acts regulated by the crime of illegal use of information networks, which involve using networks to publish information related to criminal activities, are typically at the preparatory stage of

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① Cornford, A. (2015). Preventive Criminalization. *New Criminal Law Review,* (1).

② Jiang, M., & Li, G. (2023). Preventive Criminal Legislation: The Shift of Punishability Threshold and the Resolution of Its Risks to Criminal Rule of Law. *Journal of People's Public Security University of China*, (3).

③ He, R. (2017). The Expansion of Preventive Criminal Law and Its Limits. *Chinese Journal of Law*, (4).

criminal acts. This legislation, which criminalizes these preparatory acts, is also a response to the characteristics of cybercrime, such as the rapid dissemination of information and the severity of social harmfulness.

In recent years, foreign jurisdictions have also enacted certain preventive criminalization legislation. The *Terrorism Acts* promulgated in the United Kingdom in 2000 and 2006 successively criminalized the possession of suspicious items likely to be for the purpose of committing terrorist offenses, the dissemination of statements that encourage terrorism, the distribution of terrorist publications, and "any preparatory acts." Among these, the possession offense stipulates a reversal of the burden of proof, while the punishment for the acts of disseminating statements and distributing publications does not require proof that actual encouragement has occurred. Articles 86 (Dissemination of Propaganda of Unconstitutional Organizations), 86a (Use of Symbols of Unconstitutional Organizations), and 89a (Preparation of Serious Acts of Violence Endangering the State) of the *German Criminal Code* also criminalize acts that precede the causal process leading to actual harm. Similarly, Australia's *Criminal Code Act* has criminalized a wide range of behaviors, including providing or receiving training related to terrorist acts, possessing items connected to terrorist acts, preparing or planning terrorist acts, joining a terrorist organization, and recruiting persons for a terrorist organization.[①]

1.2 The preponement of sanction measures: The rise of non-custodial preventive means

Preventive measures attached to criminal convictions impose restrictions on the liberty of individuals released after serving their sentences. Article 30 of China's *Counter-Terrorism Law* stipulates that individuals convicted of terrorist offenses or extremist offenses who, after serving their sentence, are assessed as posing a social risk, are subject to placement and education measures. This is similar to preventive detention within the German system of preventive measures ("*Maßregeln der Besserung und Sicherung*"). The community notification system for sex offenders established by the 1994 *Megan's Law* in the United States, as well as the employment prohibition system added by China's *Criminal Law Amendment (IX)*, both restrict the rights of individuals released after serving their sentences. These measures no longer rely solely on the rehabilitative function of punishment to achieve the goal of special prevention. Instead, they proactively exercise preemptive control over dangerous individuals. They do not fall within the traditional sequence of punishments but directly restrict citizens' rights and freedoms, thus possessing a substantive criminal character.

The preventive expansion of substantive criminal law inevitably entails an expansion of police powers, intelligence agencies, and other related authorities. Part 7 to 44 of the UK's *Terrorism Act 2000* granted police more comprehensive powers of stop and search, arrest, and detention.[②] In the 1970s, judges in the United States were still debating the constitutionality of "stop-and-frisk" procedures used against suspicious individuals from whom drugs or weapons were seized.[③] However, following the 9/11

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① Conte, A. (2010). *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (pp. 124-125).

② Ji, Y. (2014). Review and Enlightenment of "Preventive Justice in the UK": The Rise and Regulation of Security Demands in Modern Criminal Law. *Politics and Law*, (9).

③ Fletcher, G. P. (2008). *Rethinking Criminal Law* (Z. Deng, Trans.). Huaxia Publishing House. (Original work published in English) (pp. 164-169).

attacks, "stop-and-frisk" has been applied extremely widely, with greater doubt cast on whether police possessed reasonable suspicion. Taking New York State as an example, in 2011 alone, the New York City Police Department reported 685,724 stops. 84% of those stopped were Black or Latino, and 88% of those stopped were neither arrested nor issued a summons.[①] Furthermore, covert and clandestine investigative measures, once primarily the domain of intelligence agencies, have gradually become part of criminal procedure in various countries. Moreover, surveillance and monitoring measures can continue to be applied to risk individuals even after the criminal procedure has concluded.[②]

2. The dual risks derived from the paradigm shift

Preventive criminal legislation possesses legitimacy and rationality; it is a product of modern rule-of-law societies and offers numerous advantages. However, many scholars have also criticized it. In terms of its internal risks, it tends to instrumentalize criminal law as a tool for risk management and control, while simultaneously consuming criminal justice resources. Regarding its external risks, it easily leads to an excessive expansion of power and exacerbates social biases, resulting in selective law enforcement and group antagonism. This is an unavoidable problem even for states governed by the rule of law.

2.1 Internal risks: The blurring of criminal law's function and resource dissipation

The blurring of criminal law and police law

Traditional criminal law does not only punish acts that cause harmful outcomes. On the contrary, the extensive existence of attempted offenses and concrete endangerment offenses demonstrates that traditional criminal law actively regulates acts possessing dangerous attributes. However, these acts must maintain a relatively close connection to the harmful outcome, generally residing within the same direct causal chain. The forward movement of the line of criminal defense maintained a restrained posture, adhering to an outcome-oriented philosophy. In contrast, preventive legislation aims to achieve control at an even earlier stage. Legislation defines the boundaries of criminalization using phrases such as "*any preparatory act*," enabling acts that are remotely connected and ambiguously related to the harmful outcome to potentially become subjects of criminal law regulation. A disconnect emerges between these acts and the outcome. Such legislation moves further towards an act-oriented approach. The justification for controlling or punishing these acts lies less in their objective dangerousness and more in the personal dangerousness of the offender they reflect, which, to some extent, also manifests a philosophy of subjectivism.

This further shift from an outcome-oriented to an act-oriented approach, coupled with the challenge posed by subjectivism to the dominant position of objectivism, signifies that the criminal justice system is gradually transforming from a system of censure

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① Center for Constitutional Rights. (2019). *Bloomberg Stop-and-Frisk Apology: Too Little, Too Late*. Retrieved July 30, 2025, from https://ccrjustice.org/home/press-center/press-releases/bloomberg-stop-and-frisk-apology-too-little-too-late

② Albrecht, H. J., & Zhao, S. (2014). Security, Crime Prevention and Criminal Law. *People's Procuratorial Semimonthly*, (16).

focused on ex-post facto punishment into a system of danger management and control that prefers ex-ante prevention.[①]

In traditional criminal legislation, the state, through a criminal justice system centered on punishment, purposefully expresses censure towards the offender and deprives them of their rights. The censuring nature of punishment is crucial to the theory of criminalization and also helps explain the principle of proportionality in sentencing.[②] Conviction and sentencing depend, respectively, on whether the act committed by the offender deserves penal censure and the degree of that deserved censure. If it is accepted that an offender should not be censured merely for violating a norm, then the connection between the act and the potential actual harm must be taken into account when determining censure. In contrast, prevention-oriented criminal legislation leans towards an act-oriented approach and subjectivism. The acts it concerns are still remotely connected to actual harm, the hue of censure is exceedingly faint, and a strong desire to control social risk and prevent harm is laid bare. Generally, controlling social risk is the function of police law. Consequently, it is difficult to avoid the conclusion that, under the preventive approach in criminal legislation, criminal law and police law are gradually converging.

Overuse of criminal justice resources

Preventive criminal legislation aims to effectively prevent the occurrence of harm. Effective prevention is predicated on a full understanding of existing risks and the ability to accurately predict their future trajectory. However, such requirements entirely exceed the capabilities of legislators.[③] So long as the partial existence of human free will is acknowledged, it must be conceded that predicting future conduct is not only difficult but impossible. If the failure of the criminal justice system to intervene early, resulting in the occurrence of harm, constitutes a "false negative", an error that is vivid, tangible, and often shocking, then early intervention in situations where the individual chooses not to proceed to commit a harmful act represents a "false positive," an error that is invisible and unknowable. The assessment of legislative benefits and costs becomes systematically distorted within this imbalance.[④]

Due to this failure in assessment, driven by the thirst for security, the state is compelled to intervene in and interfere with individual conduct at an ever-earlier stage to eliminate, as far as possible, the occurrence of "false negative" scenarios. This leads to over-policing, over-detention, and over-criminalization, resulting in the overuse of criminal justice resources.

2.2 External risks: Expansion of power and intensification of social antagonism

Expansion of power

The basis for initiating a preventive criminal justice procedure is a subjective assessment of risk, which creates room for arbitrary exercise of power. On one hand, to combat special and significant social risks, preventive criminalization legislation criminalizes abstract endangerment offenses and even earlier acts preceding

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① Lao, D. (2017). Risk Society and the Functionalist View of Criminal Legislation. *Law Review*, (6).

② Husak, D. (2015). Overcriminalization: *The Limits of the Criminal Law* (M. Jiang, Trans.). China Legal Publishing House. (Original work published in English) (p. 146).

③ Lao, D. (2017). Risk Society and the Functionalist View of Criminal Legislation. *Law Review*, (6).

④ Cole, D. (2015). The Difference Prevention Makes: Regulating Preventive Justice. *Criminal Law and Philosophy*, (3).

preparatory acts. These early-stage acts can also be nested within one another, ultimately forming a parasitic extension of liability. In striving to provide more comprehensive protection, criminal law rules extend their reach as far as possible and retain room for flexible interpretation. This not only renders the theory of criminalization, which is intended to control penal power, increasingly complex and obscure but also breeds the risk of discretionary abuse. On the other hand, preventive policing, represented by "stop-and-frisk" and ubiquitous data surveillance, often does not manifest as overt conflict, making it difficult to attract public attention. The administrative coercive power used for crime control tends to expand silently and without oversight. Even in countries with the most robust democratic systems, people can easily see only the security provided by the state while turning a blind eye to the dangers of tyranny.[①]

The proliferation of prejudice

As power is afforded increasingly broad discretionary space, subjective judgments find easier entry, and sentiments of antagonism and discrimination can proliferate among different social groups. Due to the complex political and religious roots of terrorist crimes, and because some perpetrators belong to specific groups, certain characteristics associated with them are extracted and equated with a higher risk. Stereotypes based on race, ethnicity, and gender often strongly influence our expectations and judgments of others. Legal frameworks pursuing equal protection do not permit the inclusion of these factors. However, because the very nature of preventive legislation is to impose punishment based on predicted events, the aforementioned subjective prejudices enter into the process of judicial practice, heightening the risk of selectively restricting the freedom of certain groups. The preventive logic reflects a "us-versus-them" dichotomy, which has spawned various restrictions, entry and immigration bans, the mandatory collection of citizens' personal information, and numerous bills hostile towards citizens from so-called "rogue states."[②] Both the prejudiced legislation itself and the unequal enforcement of otherwise general laws intensify antagonism and even hatred between different social groups. Although, in form, both theoretical and practical circles firmly assert the need to demarcate a clear boundary from "enemy criminal law" (*Feindstrafrecht*), people often overlook the descriptive stance taken by Professor Günther Jakobs when he introduced this concept. In reality, the future trajectory of preventive criminal legislation carries, to some extent, the hue of "enemy criminal law" and also contains the risk of creating more "social enemies."

3. Constructing multiple pathways for risk control

Preventive legislation is inherently an expansive legislative model, carrying the risk of expanding state penal power, which consequently renders its legitimacy fragile and subjects it to challenges such as the collectivization of protected legal interests, the marginalization of regulated conduct, and the blurring of culpability requirements.[③] To prevent the improper expansion of state penal power, it is imperative to delineate

[①] Bozbayindir, A. E. (2018). The Advent of Preventive Criminal Law: An Erosion of the Traditional Criminal Law? *Criminal Law Forum*, (1).

[②] Hu, X. (2017). Research on the Preventive Approach of Criminal Law from the Perspective of National Security. *Chinese Criminal Science*, (5).

[③] Zhang, Y. (2020). The Legitimacy and Boundaries of Preventive Criminalization Legislation. *Contemporary Law Review*, (4).

reasonable boundaries for preventive criminalization legislation. Confronted with the dual risks of power expansion and rights erosion, there is an urgent need to construct a synergistic restraint system integrating constitutional constraints, criminal law norms, and social governance. At the constitutional level, the Principle of Necessity should be introduced to require public power to prevent and control risks through the least restrictive means, while also refining the standard of criminal law's supplementary role (*Ultima Ratio*) by prioritizing non-criminal measures and comparing the intensity of rights restrictions within the penal system. At the level of criminal law norms, a dual restriction should be implemented: legislatively, by requiring an objective connection of "significant risk" between the conduct and the outcome and progressively raising the threshold of subjective fault based on the gradient of distance from the harm; and judicially, by employing Substantive Interpretation to exclude conduct that formally constitutes a crime but lacks substantive danger. At the social level, emphasis must be placed on oversight and co-governance through establishing a post-legislative assessment mechanism to check public power, promoting a shift in crime governance towards resolving root causes, improving criminogenic conditions such as poverty and discrimination, and fostering collaboration among multiple stakeholders to build a preventive network. These efforts aim to mitigate the value conflict between security and liberty and uphold the legitimate foundation of a criminal rule of law.

3.1 Constitutional control: Anchoring the boundary of necessity with the principle of proportionality

Hobbes posited that humankind relinquishes or exchanges their rights to form a contract and establish a state precisely to escape the incessant warfare of the state of nature and thereby better realize liberty. The very foundation of the state lies in protecting the security of its citizens. The preventive logic of criminal legislation is also grounded on the premise that "the state has an obligation to protect citizens' security," which is entirely legitimate in itself. However, citizen security entails not only freedom from harm by other individuals but also freedom from unnecessary state predation. The state exists to protect the security of citizens, but its ultimate purpose remains enabling citizens to be free from fear and overwhelming external determination, thus truly enjoying liberty. This proposition should hold true whether in the context of the liberal state, the welfare state, or the recently proposed security state. "According to the concept of the social contract, citizens, as the holders of state power, transfer such extensive power of criminal law intervention to the legislator only when it is necessary to achieve a communal life of freedom and peace, and only to the extent that this life cannot be achieved by other, less intrusive means."[①] Therefore, while the state indeed possesses legitimacy in interfering with the private sphere of citizens to protect them from the fear caused by risk, the prerequisite is that such interference must be confined to the necessary minimum extent.

The Principle of Necessity within the broader Principle of Proportionality can provide the relevant theoretical foundation. Originating in Germany as a constitutional principle to limit police power, its fully developed and comprehensive formulation was established in the 1950s by the *"Apotheken-Urteil"* (*Pharmacy Case*) of the German Federal Constitutional Court. Its widely recognized sub-principles include suitability (the measure must be suitable for achieving the aim), necessity (the measure must be necessary, meaning the least restrictive among equally effective

[①] Roxin, C., & Fan, W. (2006). Is the Task of Criminal Law Not the Protection of Legal Interests? *Criminal Law Review*, (2).

alternatives), and proportionality in its narrow sense (the measure must not be excessive in relation to the aims pursued). Among these, the Principle of Necessity requires that, among the various means available to achieve a legitimate aim, the one that causes the least infringement upon citizens' rights must be chosen.[①]

In the constitutional practice of the United States, courts also require that governmental action must "fit" the governmental purpose, often articulated as requiring a "narrow tailoring" to achieve a "compelling" or "important" governmental interest. If other, less restrictive means could adequately serve the government's compelling interest, the governmental action fails this requirement. This shares the same underlying rationale as the necessity (least-restrictive-means) principle within the Principle of Proportionality.[②]

Even in China, where the Principle of Proportionality is not explicitly stipulated in the constitution, the spirit of the principle is inherent in constitutional law. The Principle of Proportionality, which aims to constrain public power, is undoubtedly applicable to criminal law, whose purpose includes controlling state penal power.[③]

Some scholars argue that the Principle of Necessity within the Principle of Proportionality is subsumed by the principle of criminal law's supplementary role (*Ultima Ratio*), which emphasizes the last-resort nature of criminal law application.[④] In reality, the Principle of Necessity cannot be fully encompassed by the principle of criminal law's supplementary role and can, in fact, supplement it within the context of preventive legislation in the following ways:

First, the principle of criminal law's supplementary role presupposes that penal measures are, as a whole, more severe than alternative measures. However, considering civil order legislation in the United Kingdom, and existing placement and education measures in China alongside the abolished system of re-education through labor, it must be recognized that some non-criminal measures focused on personal dangerousness may impose greater restrictions on citizens' rights compared to penalties such as probation or limited incarceration. Therefore, in the selection of preventive measures, while non-criminal means should generally be prioritized, a concrete assessment must examine the actual deprivation of individual rights caused by various measures, selecting the approach that imposes the lesser restriction on individual rights to achieve the aim.

Second, the principle of criminal law's supplementary role often only emphasizes the overall subsidiary and restrained nature of criminal measures. However, within the criminal system itself, the design of specific criminal measures should also comply with the Principle of Necessity. If a lower penalty or fewer criminal obligations can achieve the corresponding purpose, then the means involving the least intervention and burden should be chosen. For example, for less serious intentional offenses among those subject to preventive criminalization, if imposing a fine alone is

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① Mei, Y. (2020). The Scope and Limits of the Principle of Proportionality. *Chinese Journal of Law*, (2).

② Wang, L. (2020). The Typological Application and Causes of the Principle of Proportionality in American Constitutional Review. *Journal of Comparative Law*, (1).

③ Zhang, X. (2016). Constitutional Control of the Criminal Law System: From the Perspective of the "Liszt Trenches". *Chinese Journal of Law*, (4).

④ Tian, H. (2019). The Function, Orientation, and Scope of Application of the Principle of Proportionality in Criminal Law. *Journal of Renmin University of China*, (4).

sufficient for preventive purposes, then a provision allowing for a fine as the sole penalty should be established.[①]

3.2 Control through criminal law: Maintaining normative boundaries through doctrinal methods

The scrutiny of the necessity of preventive legislation reflects a weighing of different means to achieve an end, which is essentially a consequentialist or utilitarian calculation. The preventive logic itself is also oriented more towards utility than justice. However, criminal law, as a special and severe mechanism of censure, requires stricter triggering conditions of its own. When employing criminal law means to combat social risks, the bottom line of the rule of law must be defended.

Legislative level: Maintaining a normative connection between act and result

First, the acts regulated by preventive criminal legislation must involve a clear "significant risk." If individuals face criminal sanction merely for trivial risks, then almost all human activity would be threatened by criminal liability. Firstly, "significant risk" requires that the harmful outcome which preventive legislation aims to prevent is extremely serious. For instance, China's Criminal Law criminalizes the use of information networks "for publishing information for conducting illegal activities such as fraud." However, the "illegal" activities mentioned here do not themselves constitute crimes, let alone extremely serious harmful outcomes in the criminal law sense. The preventive provision here is highly questionable. Secondly, "significant risk" also requires an objectively identifiable probabilistic connection between the act and the harmful outcome intended to be prevented. If preventive legislation detaches itself from the outcome it aims to prevent and uses acts only weakly connected to the outcome, or even neutral acts, or the personal dangerous factors of the actor as the standard for criminalization or enhanced punishment, it would severely undermine the authority of criminal law. If the intended outcome is of extremely high severity, such as terrorist crimes, the requirement for the aforementioned probabilistic connection can be appropriately lowered to better serve deterrence and behavioral guidance.[②] However, the principle of clarity should still be satisfied as far as possible, avoiding criminalizing situations involving mere intent. For example, regarding the crime of preparation for the commission of terrorist activities, China's Criminal Law stipulates the general clause "planning or making other preparations for the commission of terrorist activities." Similarly, Part 5 of the UK's *Terrorism Act 2006* contains the general provision "any preparatory acts." In contrast, Article 89a of the *German Criminal Code* details punishable preparatory acts without using a general clause and specifically provides for circumstances of mitigation or exemption from punishment during the preparation process. Compared to the legislation in China and the UK, the German approach possesses greater clarity.

Secondly, preventive criminal legislation should establish a high threshold for culpability. Since the acts regulated by preventive criminal legislation do not directly cause the intended harmful outcome—meaning the harm materializes only through the actor's own further acts or the acts of others—the actor should not be punished for their preliminary act unless they were at least negligent regarding the fact that their preliminary act could initiate a subsequent chain of events leading to the ultimate

① Zhang, M. (2017). Legal Interest Protection and the Principle of Proportionality. *Social Sciences in China*, (7).
② Wang, X. (2019). "Remote Harm" and Preventive Criminalization. *Criminal Law Review*, (1).

harm.[①] Strict liability must be firmly excluded in this context. Furthermore, the greater the distance between the act and the intended outcome to be prevented, the lesser the inherent harmfulness of the act itself, and consequently, a higher level of culpability should be required.

For example, the crime of advocating terrorism or extremism or inciting the commission of terrorist activities, as stipulated in China's Criminal Law, already represents early-stage criminalization. In contrast, the crime of illegal possession of items advocating terrorism or extremism is a typical case of criminalizing acts at an even earlier stage—an early-stage criminalization of preliminary acts. The distance between this act and the harmful outcome intended to be prevented (the commission of terrorist acts) is considerable. Therefore, a higher culpability threshold can and should be set, for instance, by requiring that the act be committed with the direct intent to commit or cause another to commit a terrorist act.

Judicial level: Employing substantive interpretation to exclude innocent cases

Unlike perpetratory acts where the harmful outcome is largely unavoidable once the act is committed, whether early-stage acts will lead to the intended harmful outcome remains highly questionable. Furthermore, the artificially constrained standards in abstract endangerment offenses inherently accept the punishment of some individuals who, in substance, pose no harmful risk, as a trade-off for providing the public with clear behavioral guidelines and greater space for self-determination.[②] Preventive criminal legislation inevitably entails injustice to a minority of individuals. Therefore, during the criminal judicial process, flexible application of criminal law interpretation should be employed to minimize the possibility of convicting individuals whose conduct presents no actual danger.

Formal interpretation and Substantive Interpretation correspond to the formal rationality and substantive rationality of criminal justice, respectively. The former emphasizes legality, while the latter focuses on reasonableness. After the enactment of the 1997 Criminal Law, the principle of legality requires that conviction and sentencing be based on formal rationality. Consequently, in special circumstances where legality and reasonableness conflict, formal rationality should be upheld even at the expense of substantive rationality. However, without violating formal rationality, substantive rationality should be pursued as far as possible to achieve the unity of law and reason. Preventive criminal legislation delineates a broadly defined and vaguely bounded sphere of crime, creating space for the exercise of discretion to pursue substantive rationality on the premise of satisfying formal rationality. Within this space, Substantive Interpretation can function to decriminalize conduct that ought not to be punished.

Taking the widely discussed case of "Man Sentenced to 9 Months for Making Jokes Involving Terrorism in a WeChat Group" as an example. In September 2016, Yang Moumou advised a fellow group member in a WeChat group (with 361 members) by saying, "Follow me in believing in Islam, join ISIS." The court held that Yang Moumou's statement in a public platform encouraging others to join the ISIS

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① Husak, D. (2015). *Overcriminalization: The Limits of the Criminal Law* (M. Jiang, Trans.). China Legal Publishing House. (Original work published in English) (p. 146).

② Ashworth, A., & Zedner, L. (2012). Prevention and Criminalization: Justification and Limits. *New Criminal Law Review*, (4).

organization had actual social harmfulness and constituted the crime of advocating terrorism or extremism.[①] Article 120-3 of China's Criminal Law enumerates several behavioral methods of "advocating," including publishing information. In this case, Yang Moumou's act of encouraging his interlocutor to follow him and join ISIS formally met the behavioral elements of publishing information. However, whether it substantively carried the risk of leading to the commission of a terrorist activity required judgment based on other circumstances. The police seized Yang Moumou's mobile phone and tablet computer, searched his temporary residence, and found no other terrorism-related statements or items that could prove his intent to incite the commission of a terrorist activity. Furthermore, no one in the WeChat group reacted to Yang Moumou's statement. It can thus be determined that his act did not pose a substantive risk of leading to the commission of a terrorist activity. Given that the statutory text of this crime does not require the actual occurrence of such a risk, the analysis of substantive risk should be incorporated into the application of the proviso in *Article 13 of the Criminal Law*, which states that an act is not considered a crime if "the circumstances are clearly minor, and the harm is not great." Consequently, Yang Moumou's conduct should have been decriminalized.

3.3 Social control: Alleviating reliance on criminal law through public participation and social governance

First, certain retrospective mechanisms should be established for preventive legislation to create oversight and constraints on the exercise of public power. On one hand, implemented preventive legislation should undergo continuous observation and regular assessment. Such retrospective mechanisms can not only provide the public with comprehensive information to foster more rational and objective public opinion and urge the restrained and normative exercise of preventive public power but also furnish legislators with more sufficient information to formulate relevant normative documents guiding and improving the judicial application of existing legislation.

On the other hand, secret preventive measures should be made more transparent. Beyond preventive legislation, measures such as data collection and surveillance are often implemented covertly. The public lacks channels to understand the resources consumed by these measures, the extent of intrusion into the private sphere, and their ultimate effectiveness. Consequently, a reasonable assessment of the pros and cons of these measures is impossible, leaving this aspect of public power exercise lacking effective supervision. Monitoring citizen data is one practical path for realizing the mindset of technological governance. Only under the premises of data openness and Public Participation can technologies like data monitoring genuinely foster social progress and advance social justice.[②] Conversely, predictive crime governance, alongside the development of data monitoring, risks giving rise to a "digital Leviathan."

Secondly, there should be an active development of social prevention to reduce reliance on the preventive criminal path. On one hand, greater attention must be paid to the social causes of crime, emphasizing the government's positive obligation to improve social conditions. Preventive criminal measures, whether aiming to deter or normatively guide actors through punishment or to interrupt the process of crime through the early intervention of police power, can only target the precipitating

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[①] Beijing First Intermediate People's Court. (2017). Criminal Judgment Document, (2017) Jing 01 Chu No. 45.

[②] Shan, Y. (2020). The Theoretical Connotation of the Technological Governance of Crime. *Journal of National Prosecators College*, (3).

factors at the very end of the causal chain of crime. Focusing crime prevention strategies on the latter part of this causal chain means that while prevention may achieve results within a specific period and region, it cannot, on a holistic and macro level, alter the overarching trend of increasing crime.[①] Therefore, greater attention must be directed towards the deep-seated causes of crime, and improvements must be made to the social conditions that give rise to it. As noted by the English criminal law scholar *Andrew Ashworth*, it may be overly harsh to hold the state responsible for the failure of crime prevention, but the state does have an obligation to improve criminogenic social conditions. If the state imposes severe punishments on offenders without having fulfilled this obligation, it undermines the authority of state punishment.[②]

On the other hand, as the causes of crime become increasingly complex, relying solely on traditional legal means makes effective crime control difficult to achieve. The state is not the only entity responsible for providing security; other social actors can and should be incorporated into the crime prevention process to realize pluralistic and multilateral crime control. For instance, seeking cooperation with communities where specific racial or ethnic minorities reside can maximize the effectiveness of crime prevention, while communication based on respect can effectively eliminate prejudice and antagonism.

4. Conclusion

The rise of preventive criminal legislation signifies a profound paradigm shift in criminal law, moving from "ex-post facto punishment" towards "ex-ante prevention and control." This transformation is an inevitable choice for the state in responding to the complex risks of modern society. However, by extending the reach of punishment to remote risk-behaviors, it profoundly shakes the foundational pillars of traditional criminal law, namely its outcome-oriented nature, objectivism, and the principle of culpability. A necessary corollary of preventive criminal legislation is the diminished centrality of attribution and responsibility within the criminal law system. Criminal measures further shed their moral hue, gradually becoming part of a conventional risk control system. Yet, adopting a demoralized, preventive discourse does not mean a criminal measure ceases to be stigmatizing or burdensome. The limited efficacy and inherently coercive nature of criminal law governance require that we, from a dual standpoint of utility and justice, maintain constant vigilance against the expansive trend of preventive criminal legislation and impose necessary limitations.

This article has pointed out that while preventive legislation enhances the state's capacity to provide social security, it inherently carries the dual risks of instrumentalizing criminal law's function, tacitly expanding state power, and intensifying social group antagonism. This creates a real crisis where criminal law faces the danger of sliding into a mere tool for risk management. Confronted with the structural challenges brought by this paradigm shift, one-dimensional restrictions are insufficient. There is an urgent need to construct a systematic framework for risk control.

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① Wang, Y. (2016). The Shift of the Focus of Crime Prevention and the Return to the Social Standard: From the Perspective of the Interaction Between Crime Causes and Crime Prevention. *Journal of Shandong Police College*, (5).

② Ambos, K. (2017). Review Essay: Liberal Criminal Theory. *Criminal Law Forum*, (3).

At the constitutional level, the scrutiny function of the Principle of Proportionality should be activated to strictly examine the necessity of preventive legislation, ensuring state intervention is confined to the minimum extent, thereby defending the fundamental baseline of citizen liberty at its source.

Within criminal law doctrine, the supplementary nature of criminal law must be steadfastly upheld. This involves legislatively requiring an objective connection of "significant risk" and a tiered setting of subjective culpability, coupled with judicially employing Substantive Interpretation for decriminalization, to preserve the autonomy and legitimacy of criminal law norms.

At the social level, it is necessary to strengthen supervision over public power through mechanisms such as post-legislative assessment and Public Participation, and to promote a transformation of the crime governance model towards addressing root social causes and pluralistic co-governance. This fundamentally limits the over-reliance on criminal law as a tool.

Therefore, the legitimacy of preventive criminal legislation does not stem from a purely utilitarian calculus of its preventive efficiency, but rather from its ability to still abide by the fundamental commitments of a state governed by the rule of law within the new context of the risk society. Future criminal legislation and judicial practice must seek a careful balance between security and liberty, and between efficiency and justice. This implies that the development of preventive criminal law must not descend into the technocratic labyrinth of "prevention for prevention's sake." It must constantly submit to the constraints of constitutional spirit, the discipline of criminal law doctrine, and the test of social democratic deliberation. Only in this way can we effectively respond to risks while safeguarding the core value of human rights protection, formed through centuries of evolution in criminal rule of law, ensuring that criminal law does not lose its normative essence in an era of change.

Nationalisation Of the Insurance Industry?

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Abstract: Insurance has a history that dates back to the ancient world. Over the centuries, it has developed into a modern business of protecting people from various risks. The industry has been profitable for many years and has been an important aspect of private and public long-term finance.

There is one General Insurance Association of Malaysia (also known as "Persatuan Insurans Am Malaysia" ('PIAM') in Malay language) consisting of 21 direct general insurance and four reinsurance companies being set up in June 1961 to maintain tariff discipline, respond to new insurance legislations and promote sound insurance practices. Subsequently, PIAM was incorporated in May 1979 as a statutory trade association recognised by the Government of Malaysia for all registered insurers who transact general insurance business.

Insurance contracts that do not come under the ambit of life insurance are called general insurance. The different forms of general insurance are fire, marine, motor, accident and other miscellaneous non-life insurance.

The list of instances of unfair trade practice can go on and the Writer does not intend to clog this Article with many more similar examples. As mentioned above, the primary objective of any business venture is to maximise the profit and the Insurance Industry is not exempted from this, one way of doing it is to minimise the Gross Claims paid out by repudiating as many insurance claims as possible at the expenses of causing hardship to the Insured. The Insured has to go through the hardship of engaging the Solicitors to pursue his/her claim for a few years before he/she can expect to enjoy the fruit of the litigation (provided if the Insured is successful) while the Insurers have abundance of resources of engaging lawyers and adjusters to defend such repudiation of insurance claims.

What about those Insureds with genuine insurance claims without access to legal recourse for various reasons such as the Insured Sum is too small and not worth the trouble, it is too stressful and tedious for them to pursue the insurance claim and etc? This group of unfortunate Insureds will end up being the losers and the Insurers certainly would be the gainers. As illustrated by the above cases, this unfair trade practice is hurting the interest of the Insureds. It was argued that in order to eliminate such unfair trade and to better serve each individual Insured and the State, the way forward is to nationalise the Insurance Sector.

Keywords: nationalisation of the Insurance Industry in Malaysia; History of Insurance; Insurance Claim Procedure; Ombudsman for Financial Services in Malaysia

Introduction

How insurance began - 3000 years of history?[1] Insurance has a history that dates back to the ancient world. Over the centuries, it has developed into a modern business of protecting people from various risks. The industry has been profitable for many years and has been an important aspect of private and public long-term finance.

In the ancient world, the first forms of insurance were recorded by the Babylonian and Chinese traders. To limit the loss of goods, merchants would divide their items among various ships that had to cross treacherous waters. One of the first documented loss limitation methods was noted in the Code of Hammurabi, which was written around 1750 BC. Under this method, a merchant receiving a loan would pay the lender an extra amount of money in exchange for a guarantee that the loan would be cancelled if the shipment were stolen. The first to insure their people were the Achaemenian monarchs, and insurance records were submitted to notary offices. Insurance was also noted for gifts of substantial value. These gifts were given to monarchs. By recording their gifts in a register, givers would receive help from a monarch by proving the gift's existence if they were in trouble.

As the ancient world evolved, maritime loans with rates based on favourable seasons for traveling surfaced. Around 600 BC, the Greeks and Romans formed the first types of life and health insurance with their benevolent societies. These societies provided care for families of deceased citizens. Such societies continued for centuries in many different areas of the world and included funerary rituals. In the 12th century in Anatolia, a type of state insurance was introduced. If traders were robbed in the area, the state treasury would reimburse them for their losses.

Standalone insurance policies that were not tied to contracts or loans surfaced in Genoa in the 14th century. This is where the first documented insurance policy came from in 1347. In the following century, standalone maritime insurance was formed. With this type of insurance, premiums varied based on unique risks. However, the separation of insurance from contracts and loans was a major change that would influence insurance for the rest of the time.

The first book printed on the subject of insurance was penned by Pedro de Santarém, and the literature was published in 1552. As the Renaissance ended in Europe, insurance evolved into a much more sophisticated form of protection with several varieties of coverage. Until the late 17th century, many areas were still dominated by friendly societies that collected money to pay for medical expenses and funerals. However, the end of the 17th century introduced a rapid expansion of London's importance in the world of trade. This also increased the need for cargo insurance. London became a hub for companies or people who were willing to underwrite the ventures of cargo ships and merchant traders. Lloyd's of London, one of London's leading Insurers, is still a major insurance business in the city.

[1] Whit Thompson, 'How Insurance Began: 3000 Years of History (WSR Insurance, 13 September) http://wsrinsurance.com/how-insurance-began-3000-years-of-history/.

Modern insurance can be traced back to the city's Great Fire of London, which occurred in 1666. After it destroyed more than 30,000 homes, a man named Nicholas Barbon started a building insurance business. He later introduced the city's first fire insurance company. Accident insurance was made available in the late 19th century, and it was very similar to modern disability coverage.

In U.S. history, the first insurance company (alternatively to be known as 'Insurer' in legal term) was based in South Carolina and opened in 1732 to offer fire coverage. Benjamin Franklin started a company in the 1750s, which collected contributions for preventing disastrous fires from destroying buildings. As the 1800s arrived and passed, insurance companies evolved to include life insurance and several other forms of coverage. No type of insurance was mandatory in the United States until the 1930s. At that time, the government created Social Security. In the 1940s, GI insurance surfaced. It helped ease the financial difficulties of women whose husbands died while fighting in World War II. It wasn't until the 1980s that the need for car insurance grew enough that steps were taken to make it mandatory. Although insurance is an established business, it is still changing and will change in the future to meet the evolving needs of consumers.

1. General insurance industry in malaysia

There is one General Insurance Association of Malaysia (also known as "Persatuan Insurans Am Malaysia" ('PIAM') in Malay language) consisting of 21 direct general insurance and four reinsurance companies being set up in June 1961 to maintain tariff discipline, respond to new insurance legislations and promote sound insurance practices. Subsequently, PIAM was incorporated in May 1979 as a statutory trade association recognised by the Government of Malaysia for all registered insurers who transact general insurance business.[2]

Insurance contracts that do not come under the ambit of life insurance are called general insurance. The different forms of general insurance are fire, marine, motor, accident and other miscellaneous non-life insurance.[3]

According to the PIAM Yearbook 2020, the General Insurance Industry registered a total gross premiums of RM17.24 billion for the year of 2020 while the Net Claim Incurred Ratio was 52.9%. The industry's underwriting margin was at 11.5% amounting to RM1.5 billion underwriting profit and the management expenses & commission was 35.6% in 2020.

2. Table of premiums for each general insurance company in malaysia

The Writer has taken the trouble to tabulate each and every General Insurance Company in Malaysia with their Gross Premiums earned, Gross Claims paid out, Management Expenses (including commission) and Profit before Tax for 2020.
Annual Financial Statements for all the General Insurance Companies

[2] Persatuan Insurans Am Malaysia piam.org.my.
[3] https://www.bing.com.

for the period ending in 2020[4]

No.	Name of the Insurance Company in Alphabetical order	Gross Premiums earned5 (RM'000)	Gross Claims paid out6 (RM'000) (% out of the Gross Premium earned)	Management Expenses (Including Commission) (RM'000)7	Profit before Tax (RM'000) (% out of the Gross Premium earned)
1.	AIA General Bhd	291,172	73,862 (25.36%)	126,990 (43.61%)	103,978 (35.71%)
2.	AIG Malaysia Insurance Bhd	655,591	252,768 (38.55%)	226,630 (34.56%)	108,772 (16.59%)
3.	Allianz General Insurance Company (M) Bhd	2,284,122	996,117 (43.61%)	698,337 (30.57%)	428,553 (18.76%)
4.	AM General Insurance Bhd	1,567,409	977,341 (62.35%)	514,334 (32.81%)	282,543 (18.02%)
5.	AXA Affin General Insurance Bhd	1,363,579	698,718 (51.24%)	449,935 (32.99%)	117,634 (8.62%)
6.	Berjaya Sompo Insurance Bhd	881,202	360,485 (40.90%)	314,313 (35.66%)	135,538 (15.38%)
7.	CHUBB Insurance Malaysia Bhd	760,915	310,855 (40.85%)	262,942 (34.55%)	129,128 (16.97%)
8.	Etiqa General Insurance Bhd	1,345,000	407,680 (30.31%)	208,778 (15.52%)	167,305 (12.43%)
9.	Great Eastern General Insurance (M) Bhd	518,528	253,697 (48.92%)	182,236 (35.14%)	71,432 (13.77%)
10.	Liberty Insurance Bhd	594,696	322,774 (54.27%)	207,002 (34.80%)	82,454 (13.86%)
11	Lonpac Insurance Bhd	1,531,064	528,326 (34.50%)	369,546 (24.13%)	417,595 (27.27%)
12	MSIG Insurance (M) Bhd	1,403,123	626,037 (44.61%)	428,791 (30.55%)	371,759 (26.49%)
13	MPI Generali Insurans Bhd	626,899	357,653 (57.05%)	185,363 (29.56%)	42,300 (6.74%)
14	Pacific Insurance Bhd	523,355	376,163 (71.87%)	155,246 (29.66%)	37,916 (7.24%)
15	Progressive Insurance Bhd	127,648	45,246 (35.44%)	50,093 (39.24%)	34,658 (27.15%)
16	P&O Insurance Bhd	271,935	125,497 (46.14%)	110,388 (40.59%)	13,369 (4.91%)
17	QBE Insurance (M)	235,663	122,468	91,583	20,667

[4] The Annual Financial Statements for all the General Insurance Companies for the period ending in 2020 could be obtained from their respective Website except MPI Generali Insurance Bhd, the Writer only managed to obtain the latest Financial Statements which ended in 2018.
[5] Premiums collected from all classes of General Insurance Policies.
[6] Insurance Companies paid out the claims compensation.
[7] The operating cost of the Insurance Company which also include the Commissions paid to the Insurance Agents.

	Bhd		(51.96%)	(38.86%)	(8.76%)
18	RHB Insurance Bhd	695,005	349,813 (50.33%)	197,922 (28.47%)	150,601 (21.66%)
19	Tokyo Marine Insurans (M) Bhd	850,067	397,459 (46.75%)	312,414 (36.75%)	129,607 (15.24%)
20	Tune Protect	417,420	154,649 (37.04%)	173,429 (41.54%)	34,679 (8.30%)
21	Zurich General Insurance (M) Bhd	828,652	371,091 (44.78%)	279,978 (33.78%)	77,523 (9.35%)
	Total	17,773,045	8,108,699	5,546,250	2,958,011

From the above tabulation, it is very obvious that the main components of expenses for each Insurer consisted of Gross Claim paid out and the Management expenses both of which made up of between 64.29% to 95.09% of the total expenses for the respective Insurer. As such, it is very logical for the management of each Insurer to contain the expenses by reducing the Gross Claims paid out and also the Management expenses. By minimising the expenses and naturally flowing from there, the Insurer would have obtained gross maximum profit. For the purpose of this article, the Writer intends to examine whether the Insurers in minimising the Gross Claims paid out have excessively unreasonably repudiate the innocent genuine claims (also commonly known as 'unfair trade practice' or 'malpractice trade practice') lodged by the Insurance Policy Holders (alternatively Policy Holders are also known as 'the Insureds in legal term)? As a result of which, wouldn't the Insureds suffer hardship and prejudice while the Insurers are enjoying maximum profits? While the Writer takes note of prevalence fraudulent claims being lodged by fraudsters against the Insurers in the recent years with the intention to cheat the insurance compensation from the Insurers but on the other hand, unfair trade practice certainly would cause financial hardship on the innocent Insureds too. This would go against the very purpose of buying an insurance i.e. to protect the Insured against financial loss.

As you could observe from the above tabulation, for the period ended in 2020, all the Insurers in Malaysia made profits. While this is great news to the shareholders of the Insurers where they could enjoy the fruits of dividends from the profit which would benefit the class of shareholders, would the majority of the innocent Insureds at large suffer as a consequence of such unfair trade practice? We have the shareholders' interest versus the Insureds' interest to balance.

According to the PIAM Yearbook 2020 mentioned above, the industry's underwriting margin was at 11.5% amounting to RM1.5 billion underwriting profit for the year of 2020. With simplistic assumption, it is presumed that such RM1.5 billion underwriting profit is to be disbursed to the shareholders of the Insurers. Would it be more beneficial if such RM1.5 Billion underwriting profit would be put to good use if we were to nationalise the Insurance Industry to channel such RM1.5 Billion monetary benefit to the State for the benefit of the people?

The Writer would share a few examples of case law to demonstrate the point that there is a new trend of unfair trade practice for the primitive motive of maximum profit and would also further examine whether should we modify our current Insurance Industry practice by nationalising it so that the profit arising from such exercise could be enjoyed by the State and the people?

3. Claim procedure

Before the Writer share the case law to drive home the point that there is a new trend of unfair trade practice, perhaps it would be helpful if we could understand the Insurance Claims procedure first. In the consequence of an Insured suffering an event of loss against the risk insured for, the Insured is required to lodge a police report of such event of loss and then follow by notifying the Insurer whereby the Insured is required to fill up the Claims Form given by the Insurer detailing how the event of loss occur. Such process of Insurance Claims procedure is expressly spelled out in the Insurance Policy.

Having received the Insurance Claims Form, the Claims Department of the Insurer would have two options of either to approve the Insured's insurance compensation sought or to repudiate/reject the insurance claim. In the event of such repudiation of insurance claim, if the sum insured is less than RM250,000-00[8], The Insured has the option to either refer such dispute of repudiation to an Organisation known as "Ombudsman for Financial Services" for adjudication of dispute or directly proceed to initiate legal proceedings with the Court of Laws.

3.1 Ombudsman for financial services

The Ombudsman for Financial Services (formerly known as 'Financial Mediation Bureau') was incorporated in 2004. The Ombudsman for Financial Services is a non-profit organisation that serves as an alternative dispute resolution channel resolving disputes between its Members, who are the financial service providers licensed or approved by Bank Negara Malaysia, and financial consumers. The Ombudsman for Financial Services provides free service to adjudicate the dispute of repudiation.

Ombudsman for Financial Services' Members are the Financial Service Providers ('FSP') who are licensed persons under the Financial Services Act 2013[9] ('FSA') and the Islamic Financial Services Act 2013[10] ('IFSA'), prescribed institutions under the Development Financial Institutions Act 2002[11] ('DFIA'), and FSPs who are approved persons under the FSA and IFSA. As at 31 December 2020, Ombudsman for Financial Services has a total membership of 213 consisting of Licensed Commercial Banks, Licensed Insurers, Prescribed Development Financial Institutions, Approved Financial Advisers and Islamic Financial Advisers, Licensed Islamic Banks, Licensed Takaful Operators, Approved Insurance/Takaful Brokers, Approved Designated Payment Instrument Issuers (Non-Banks).

The funding structure of Ombudsman for Financial Services consists of annual levies and/or case fees imposed on their Members. The annual levy charged is based on Ombudsman for Financial Services' annual budget requirement, which is shared equally among the Licensed.

Members and the Prescribed Institutions.[12] While the initiative by the members of the Ombudsman for Financial Services to fund the operation cost is lauded and

[8] Ombudsman for Financial Services, '2020 Annual Report' 16 https://www.ofs.org.my/file/files/OFS_2020_Annual Report.pdf.
[9] (Act 758)
[10] (Act 759)
[11] (Act 618)
[12] Ombudsman for Financial Services, '2020 Annual Report' 26 https://www.ofs.org.my/file/files/OFS_2020_Annual Report.pdf.

complimented but since the funding come from its members, the neutrality of such dispute adjudication process is questionable? Would the outcome of the dispute adjudication more favourable towards the members of the Ombudsman for Financial Services rather than the financial consumers? Unfortunately we do not have any data analysis on the outcome of the dispute adjudication process, how many percentage (%) of the outcome are in favour of the members of the Ombudsman for Financial Services and how many percentage (%) of which are in favour of the financial consumers?

In order to alleviate such fear of biasness, perhaps it is the Writer's humble opinion to 'nationalise' Ombudsman for Financial Services and convert it into Tribunals such as Housing Tribunal[13], Strata Management Tribunal[14], Consumer Claims Tribunal[15] under the purview of the government.

The Ombudsman for Financial Services after having adjudicated the dispute and if the Insured is not satisfied with the outcome could proceed to initiate his/her legal proceedings with the Court of Laws against the Insurer.

3.2 Case law no.1: loh swee liang & another vs am general insurance bhd[16]

The Plaintiffs are the administrators of the estate of one Tay Guan Song ('Deceased') pursuant to the Grant of Letters of Administrations dated 2 October 2018. The first Plaintiff is the wife of the deceased while the second Plaintiff is the father of the deceased.

The Deceased husband had driven his vehicle, Mazda CX-5 bearing vehicle registration number WXQ8399 (hereinafter to be referred to as 'the said Car') from Prima Duta Condominium (where both the Deceased and the first Plaintiff lived) to Changkat View Condominium (another property belonging to the first Plaintiff and the Deceased nearby to their residential home) on 3 July 2018. The Deceased had gone to Changkat View Condominium with the intention to clean it up after the unit was left vacant by the previous Tenant.

The first Plaintiff, being the wife of the deceased had waited for her husband's return but when there was no sign of him returning to their residential home on the fateful day of 3 July 2018. The first Plaintiff began panicked and started calling the Deceased's hand phone but the calls were left unattended to and unanswered.

The first Plaintiff, together with her family, then rushed to the Changkat View Condominium and was shocked to find out that her husband had passed away. Immediately discovering the Deceased, the first Plaintiff went on to lodge the first Police Report on the same day itself without realising the said Car had gone missing. Subsequent to the burial ceremony of the deceased, the 1st Plaintiff only realised about the missing said Car and proceeded to locate it but to no avail. She then went on to

[13] It is a special tribunal set up by the government to adjudicate dispute between homebuyer and housing dedveloper.
[14] The Strata Management Tribunal is established pursuant to Section 102 of the Strata Management Act 2013 (Act 757) s 102 to resolve strata management related disputes.
[15] The Tribunal for Consumer Claims established under Consumer Protection Act 1999 (Act 599) s 85.
[16] Court of Appeal number W-04(NCVC)(W)-325-07/2021; Nurbaiti Hamdan, 'Woman succeeds in appeal over claim for late husband's car insurance' *The Star (1 December 2021)* https://www.thestar.com.my; V. Anbalagan, 'Insurance firm told to pay RM85,000-00 to widow over husband's stolen car' *From Malaysia Today* (1 December 2021) https://www.freemalaysiatoday.com.

lodge two more Police reports on 22 August 2018 and 1 September 2018.

At the material time, the Deceased is the registered owner of the said Car which was insured with the Defendant at an agreed Insured Sum of RM85,000-00 under an Comprehensive Car Insurance Policy.

On 13 September 2018 the first Plaintiff submitted a Claims Form to the Defendant in relation to the missing Car. On 3 January 2019 the Defendant repudiated the Plaintiffs' Insurance claim on the ground that the Plaintiffs were not able to prove the said Car was stolen and therefore it was not covered under the Comprehensive Car Insurance Policy as it does not cover a missing car.

The Defendant issued two repudiation letters both dated 3 January 2019 but with two different grounds of repudiation of Insurance claims. On one hand, the first Repudiation Notice addressed to the Deceased stated that :

"Our investigation reveals that the loss of your vehicle did not fall within the ambit of theft. Your wife Loh Swee Liang ['*the 1st Plaintiff*'] has no knowledge on the vehicle whereabout and did not witness the loss as the vehicle appears to be missing after insured demise.

In view of the above, we regret to advise that we are repudiating all liabilities in respect of your claim and any other claims which may arise due to the loss and shall be closing our file accordingly."

It is the writer's respectful view that if the first Plaintiff was aware of the vehicle whereabout, it will no longer be missing and the first Plaintiff would not bother to lodge an Insurance claim with the Defendant. If any of us were to witness the item ('the said Car') being stolen in front of us, this is no longer called a 'theft', it is a 'Robbery' or 'Burglary'.

The Defendant's second Repudiation Notice ("2nd Repudiation Notice") is being reproduced herein for easy reference:

We regret to note that Tay Guan Song ('Deceased') had failed to respond to our adjuster's (M/s Darmani Adjusters & Investigators (M) Sdn Bhd) request for an interview despite their letters dated, _____and _____

Again it is the Writer's humble view that how do one expect the Deceased to respond to the Defendant's Adjuster's request for interview when he is already dead?

Flowing from there on 21 June 2019, the Plaintiffs appealed to the Ombudsman for Financial Services with regard to the repudiation. The Plaintiffs' appeal was rejected by them on 11 September 2019. The Ombudsman for Financial Services concurred with the stance taken by the Defendant.

Subsequent to that, the Plaintiffs initiated a civil Suit against the Defendant with the Kuala Lumpur Magistrate Court in October 2019 and the Magistrate delivered a decision dismissing the Plaintiff's claim and thus has the effect of affirming both the first & second Notices of Repudiation. The Plaintiffs thereafter appealed to the Kuala Lumpur High Court which dismissed the appeal and thus affirmed the Magistrate's decision. As a result of the Magistrate Court and High Court decisions in dismissing

the Plaintiff's claim, this would have the effect of validating these grounds of repudiation contained in both the Defendant's letters of Repudiation. Among the main grounds given by the Magistrate Court and the High Court were that the Plaintiffs could not prove the said Car was stolen but it was missing therefore did not fall within the scope of coverage under the Comprehensive Car Insurance Policy. The relevant ground of the High Court judgment is reproduced herein for easy reference:

24.The evidence given by PW1 (the police Investigation Officer) is this. In his Witness Statement, PW1 had used the word "kehilangan" (loss) numerous times and not 'kecurian' (theft)'. PW1 agreed that the word that was used in the 2nd Police Report is "hilang" and not 'kecurian kereta'. PW1 also agreed that the word "disalahguna" in the 1st Police Report is not the same as 'dicuri'. PW1 stated that he had no choice but to open an investigation for a missing car under section 379A of the Penal Code (the provision concerning theft of a motor vehicle) as there is no provision for missing cars in the Penal Code.

25.The result of PW1's investigation is this. There were no further details available to detect the missing Car and no suspect had been arrested. The case status notification dated 15.11.2018 stated: 'Setelah siasatan dijalankan, didapati tiada keterangan lanjut bagi menges *an kenderaan yang hilang dan tiada tangkapan saspek yang terlibat'. PW1 agreed that he investigated concerning a missing car and not a stolen car. The result of the investigation did not show that the Car had been stolen.* (Emphasis added)

The above grounds of judgment certainly had set a precedent in the Insurance Industry and if not being reversed would set a new trend of requirement to be fulfilled by the Insured in order to successfully make an insurance claim. All future Insured whose vehicles are found to be 'missing' must prove (1) car thief suspect has been arrested and (2) the 'missing' car must be located before the Insurers would compensate the Sum Insured for the 'missing' car. In the Writer's view, this is a perfect proof of a new trend of unfair trade practice.

Not deterred by such failures, the Plaintiffs appeal to the Court of Appeal which, on 1 December 2021, delivered their decision to overturn the Magistrate and High Court decisions. The brief oral grounds given by the Court of Appeal were that based on the overall circumstantial evidence, the Plaintiffs had proven on the balance of probability the said Car was stolen and therefore the Defendant is under the obligation to compensate the agreed sum insured of RM85,000-00 to the Plaintiffs.

The Court of Appeal's decision in reversing the Magistrate and High Court decisions would have the effect of reversing the Ombudsman for Financial Services' decision who had earlier on rejected the Plaintiffs' claim. This would put us to wonder whether they are neutral in their role of adjudicating the dispute between the Insured and the Insurer. I think it is high time for the authorities to consider converting the Ombudsman for Financial Services into government Tribunals just like the Housing Tribunal, Strata Management Tribunal, Consumer Claims Tribunal mentioned above to avoid such misfortune from repeating. In order to instil confidence in the neutrality of the Ombudsman for Financial for Services, perhaps it is best to 'tribunalise' them into a Tribunal for Financial Services to be chaired by government servants and/or qualified individual without any nexus link to the Ombudsman for Financial for Services and/or the Insurers.

3.3 Case law no.2: Naza motor trading sdn bhd v malaysian motor insurance pool[17]

This was an appeal against the decision of the High Court in dismissing the Plaintiff's claim for RM263,779.34 against the Defendant under a policy of insurance. The Appellant (Plaintiff), a car dealer, had procured from the Respondent (Defendant) a policy of insurance, known as Motor Trade Policy providing cover for, inter alia, loss of vehicle by theft. During the currency of the said policy a vehicle, a Mercedez Benz E230, while being test-driven by a potential buyer, was stolen, presumably by the said potential buyer as he had vanished with the car on the day it was test-driven on 20 November 1998. The Plaintiff's claim for the loss of the motorcar under the said policy was rejected by the Defendant, who repudiated liability solely on the exclusion clause B of the policy, namely the loss was due to cheating and not theft. The only issue for determination was whether the events leading to the loss of the Mercedes Benz constituted theft or cheating.

Mohamed Apandi Ali JCA delivering the judgment of the Court of Appeal said there was not a single element to show that the Plaintiff's salesman was deliberately courting danger. He also could not be said to have thrown caution to the winds. In the circumstances leading to the situation where the potential buyer of the test-car had driven off with the car, was beyond any reasonable expectations. The salesman was deceived into leaving the car with a view to oblige the potential buyer who had requested the said salesman to buy fried chicken from a Kentucky outlet. Upon the salesman's return, he discovered that both the said customer and the car had disappeared. No reasonable man would have foreseen that such a potential buyer, who had portrayed himself as a man of some standing in society, would have acted in such a manner. The deceit by the potential buyer was indicative of his dishonest intention to take the car out of the possession of the salesman, without the latter's consent. This situation was similar, by analogy, to Illustration (b) of s. 378 of the Penal Code.[18] What transpired on that day was a theft per se of the Mercedes Benz, by the potential buyer. In such circumstances, under the insurance policy, the defendant could not deny liability and therefore correspondingly they were liable to the insured plaintiff.

In the Writer’s view, this is another classical example of unfair trade practice by the Insurers.

3.4 Case law no.3: Wong kon poh v new india assurance co ltd[19]

This is an appeal against the decision of the magistrate’s court dismissing the Appellant’s claim against the Respondent insurance company for the loss of a motorcycle in a robbery. The Appellant was a person earning only $3 to $4 as a daily-rated labourer. In September 1967,having purchased a new Yamaha 100cc motorcycle BS. 8942 for $1,200,he insured it for $1,000 under a comprehensive policy whereby the Respondent company undertook to indemnify him ‘against loss … by burglary, housebreaking or theft”.On November 24 1967 the Appellant rode to Templer Park for a dip in the river. There he suffered misfortune of *being robbed* by four persons of $5 in his pocket and his *motorcycle* as well.

The Appellant reported the matter to the police the same day and notified the

[17] Case Law No. 2 Naza Motor Trading Sdn Bhd v Malaysian Motor Insurance Pool [2011] 2 MLJ 597; [2011] 1 CLJ 332

[18] (Act 574).

[19] Case Law No. 3 Wong Kon Poh v New India Assurance Co Ltd [1970] 2 MLJ 287.

insurance company of his loss on 4 December 1967. The Insurers repudiated liability on the ground that "robbery" was not "theft". Compelled to pursue his claim in the Magistrate's court - which was defended on the ground that 'the loss was not caused by any of the perils insured against' - the Appellant suffered the second misfortune of having it dismissed with costs simply because the learned magistrate considered that 'robbery' was distinguishable from 'theft'.

The Appellant then appealed to the High Court on two grounds (a) error in law on the part of the magistrate and (b) that the loss 'could not be the result of both theft and robbery'. In other words, the Appellant's contention was that, theft being an essential element of robbery, robbery is still theft, although in an aggravated form. Aggrieved by such decision of the High Court who also dismissed the Appellant's claim, the Appellant appealed to the Federal Court.

It was held by the Federal Court that:[20]

Indeed, counsel was perfectly right in his submission, for section 390 of the Penal Code enunciates that 'in all robbery there is either theft or extortion', and here it was a plain case of robbery. Theft is not severable from robbery any more than is a statue from the marble out of which it was hewed. Unfortunately for the appellant, however, the learned High Court judge considered this argument 'ingenious' but unacceptable. He agreed with the magistrate that the loss was due to robbery and took the view that 'theft' and 'robbery' were *not synonymous*. In his judgment he went on to say, 'The appellant's counsel contended that these two words should be given their legal and technical meaning'. We thought, on reading this sentence, that the negative must have been left out by a printer's error in the published report, on page 132 of [1970] 2 MLJ, but the signed copy of the judgment examined by us showed there was no such fault of the printer. It would therefore appear that counsel must have been badly misunderstood, for the rule of construction in this type of cases is clearly set out in *MacGillivray on Insurance Law* (5th Ed.), 2026 as follows:-

In a policy of insurance ... the words expressing the risk covered are not always used in the strict technical sense which they bear in relation to a criminal offence.'

It is to be observed that 'burglary' is not a technical term used anywhere in our Penal Code. Burglary at common law is the breaking and entering the dwelling house of another person in the night with intent to commit some felony therein. This common law definition was embodied in section 25(1) of the Larceny Act 1916. The term equivalent to burglary in this country is 'housebreaking by night': see sections 445 and 446 of the Penal Code. Since the risk is not described in the technical sense by the term 'burglary', we do not think that, when 'theft' is used in juxtaposition to burglary and housebreaking, it nevertheless had to be construed in the strict technical sense, against the insured. Indeed we are not aware of any insurers hitherto repudiating liability simply on the ground that 'robbery' is not a risk covered by insurance against 'theft'.As Ali F.J. pointed out, where a thief attempted to sneak off on the appellant's motor-cycle and managed to do so, it was of course a case of theft, which was covered by the policy; but, if the thief, while interrupted in the act, drew a dagger and warned the appellant not to prevent his get-away, how in the name of common sense can it be argued that the taking, in the latter case, was not as much a

[20] [1970] 2 MLJ 287, 288 - 289

risk insured against as the taking by stealth?

If, *contrary to common sense*, the insurance company still maintains that the perils insured against are different, so that it is not bound to indemnify the victim of a robbery where the policy covers only loss by theft, then it is the duty of the insurers to say so in plain terms, so that policy-holders may not continue to pay their premiums under a misapprehension as to the exceptions to liability. In paragraph 703 of *MacGillivray* the *contra proferentem* rule is thus set out:-

'*If there is any ambiguity in the language used in a policy, it is to be construed more strongly against the party who prepared it, that is in the majority of cases, against the company. A policy ought to be so framed that he who runs can read'.*

At all events, to *deny the axiomatic truth* of the proposition that 'robbery is an aggravated form of theft' and to dismiss the appeal on that ground is manifestly a denial of justice upon a technical defence which has absolutely no merits. A policy which insures against loss by 'burglary, housebreaking or theft', but says nothing of 'robbery', must on any reasonable construction be held to include 'robbery' within the coverage for 'theft'. Like burglary or housebreaking, robbery is merely a variation of the same theme. Otherwise its exception must clearly and expressly be made known to the party insured – not by implication to be inferred from the omission. To require that the ordinary man taking out a policy should read into it not only what was expressed, but also to construe omissions as exceptions, is an *absurd* proposition which this court cannot countenance. (Emphasis added)

It is to be observed that the Federal Court had used the strong words of '*contrary to common sense',* '*deny the axiomatic truth'* and '*absurd*' which reflected the feeling of the judges with the manner of which the Defendant Insurer repudiated the insurance claim. Although this Federal Court decision was delivered in the 1970, this is yet another example of unfair trade practice.

4. Nationalise the insurance industry

The list of instances of unfair trade practice can go on and the Writer does not intend to clog this Article with many more similar examples. As mentioned above, the primary objective of any business venture is to maximise the profit and the Insurance Industry is not exempted from this, one way of doing it is to minimise the Gross Claims paid out by repudiating as many insurance claims as possible at the expenses of causing hardship to the Insured. The Insured has to go through the hardship of engaging the Solicitors to pursue his/her claim for a few years before he/she can expect to enjoy the fruit of the litigation (provided if the Insured is successful) while the Insurers have abundance of resources of engaging lawyers and adjusters to defend such repudiation of insurance claims.

What about those Insureds with genuine insurance claims without access to legal recourse for various reasons such as the Insured Sum is too small and not worth the trouble, it is too stressful and tedious for them to pursue the insurance claim and etc? This group of unfortunate Insureds will end up being the losers and the Insurers certainly would be the gainers. As illustrated by the above cases, this unfair trade practice is hurting the interest of the Insureds. It was argued that in order to eliminate

such unfair trade and to better serve each individual Insured and the State, the way forward is to nationalise the Insurance Sector.

Perhaps we could learn from the India's experience who has gone through the cycle of Private Insurers (pre-1956) to National Insurers (1956-2000) and back to Private Insurers (post-2000). Prior to 1956, the Insurers in India, be it Life Insurance or General Insurance consisted of Private Insurers. But due to serious allegations of unfair trade practice and some other problems associated with it, the Government of India in 1956 set up one Life Insurance Corporation of India pursuant to Life Insurance Corporation Act of 1956 to nationalise the Life Insurance industry by absorbing all the private Insurers and managed them by the State.[21] While the General Insurance Business (Nationalisation) Act was passed in 1972 to nationalise all private general insurance companies in India.[22]

There are always two sides to a coin, while there are some positive effect from such policy of nationalisation of Insurers, there are certainly some negative impact arising from it too. Among the positive side that the Life Insurance Corporation of India had achieved were:

1) spread the insurance culture fairly widely;

2) mobilised large savings for national development and financed socially important sectors such as housing, electricity, water supply and sewerage;

3) acquired considerable financial strength and gained confidence of the insuring public;

4) and had built up a large talented pool of insurance professionals.

While on the negative side of the Life Insurance Corporation of India:

1) the vast marketing and services network of Life Insurance Corporation of India was inadequately responsive to customer needs;

2) insurance awareness was low among the general public;

3) marketing of life insurance with reference to the customer needs left much to be desired;

4) term assurance plans were not being encouraged and unit linked assurance was not available;

5) insurance covers were costly and returns from life insurance were significantly lower compared to other savings instruments;

6) Life Insurance Corporation management was top heavy and excessively hierarchical, and was overstaffed;

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[21] The Indian Economy by Arjun Bhattacharya & O'Neil Raine: 'Evolution of the Indian Insurance Industry'(*indiainsurance*) https://www.eindiainsurance.com/insurance/evolution-indian-insurance-industry.asp.
[22] M. Saraswathy, 'Explained | The General Insurance Business Nationalisation Bill and Opposition concerns' (money control, 12 August 2021) https://www.moneycontrol.com.

7) work culture within the organisation was unsatisfactory;

8) employee trade unionism had contributed to the growth of restrictive practices; and

9) the functioning of Life Insurance Corporation was constrained in some respects as it was covered by the definition of 'State' as well as governmental interference. [23]

Flowing from there, the India Parliament in 2021 had passed an amendment to the General Insurance Business (Nationalisation) Act 1972 to allow privatisation of Insurers again[24] and thus one cycle from the era of Private Insurers - to National Insurers - back to Private Insurers again.

5. Mixture of both privatised and nationalised insurance sector

Learning from the India experience, neither the Private Insurers nor the National Insurers could yield the desire result, perhaps we could consider to nationalise the Claims Department of the Insurers. In the insurance industry, the Insurers are made up of three main departments, there are (1) Marketing department to expand the business, (2) Underwriting Department who will issue the Insurance Policy; and (3) Claims Department who will process the insurance compensation claims. Each department has its own objective. The Marketing Department to expand the business empire with attractive marketing strategies to attract customers while the Underwriting Department is to issue out Insurance Policy with attractive premium rate, coverage of insurance policy and lastly the Claims Department to repudiate the insurance claims to maximise the profit for their shareholders.

6. Conclusions

Since the Claims Department is the one causing such unfair trade practice, perhaps we could nationalise all the Insurers' Claim Department into one National Institution of Claims Department to be managed by a combination of professionals consisting of Claims Managers, Adjusters, Marketing Managers, Underwriting Managers, Consumers Organisation's representatives, Bankers, Lawyers, retired Judges and qualified person so that a balance view of all the relevant parties are taken into account and the interest of the Insureds certainly would be well protected. After having paid off all the administrative expenses and staff cost of both the Marketing and Underwriting departments, the balance Gross Premiums collected should be channelled into the National Institution of Claims Department. With the elimination of the element of 'profit' from the equation, not only this could eliminate unfair trade practice and the estimated underwriting profit of RM1.5 Billion annually (for 2020, it was RM1.5 Billion) could be channelled to the State for better use rather than enriching a small group of shareholders.

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[23] The Indian Economy by Arjun Bhattacharya & O'Neil Raine

[24] M. Saraswathy, 'Explained | The General Insurance Business Nationalisation Bill and Opposition concerns' (money control, 12 August 2021) https://www.moneycontrol.com.

Dilemmas and Institutional Optimization of Artificial Intelligence Training Data Supply

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Abstract: High-quality training data is critical to the rapid development of artificial intelligence (AI). However, the acquisition of such data is currently hampered by structural obstacles, the conflict between intellectual property rights and data accessibility, and concerns over security and privacy. Drawing on an analysis of legal practices both in China and abroad, this paper identifies the primary bottlenecks as the unequal distribution of interests and inadequate institutional alignment. To resolve these issues, the study proposes a structured framework designed to ensure a high-quality data supply. This framework focuses on refining data property rights, diversifying incentive mechanisms, and strengthening data-sharing platforms, with the ultimate goals of balancing interests, ensuring security, and fostering innovation. By combining these measures with collaborative governance, the paper presents a systematic legal solution to the challenges of AI data supply, supporting the technology's sustainable growth.

Keywords: Artificial Intelligence; Data Governance; Training Data; High-quality Data Supply System

Introduction

In recent years, the development of AI technology has witnessed unprecedented evolution. From ChatGPT to Sora, the functions of products have been significantly upgraded within just two years, fully demonstrating the rapid momentum of AI technological innovation. As an emerging discipline, AI has continuously made breakthroughs in algorithms, data, computing power and other aspects since its birth in the 1950s. Currently, it has become one of the most revolutionary technologies, not only showing great potential in fields such as automation and machine learning, but also being widely applied in various industries including medical care, finance, and manufacturing, driving human society towards a more efficient and intelligent direction. With the continuous progress of technology, AI plays an increasingly significant role in solving complex problems and improving work efficiency. Its rapid development has also prompted countries around the world to accelerate the formulation of relevant industrial policies to seize the strategic high ground of scientific and technological development.

Data is a fundamental factor of production for digitalization, networking, and intellectualization. Enterprises rely on massive, timely, and high-quality data factors to match the needs of all parties through data relevance, activate data value, and promote the quality and efficiency improvement of enterprise products and services. High-quality training data plays a crucial role in the development of AI. For AI products, high-quality training data is the key to improving functions. Rich and diverse datasets enable models to accurately recognize images and texts, thereby boosting recognition rates and user experience. Specifically, large model pre-training depends on large-scale, high-quality, and diverse datasets to understand complex problems and improve generalization capabilities across various application scenarios. Without the support of such data, achieving genuine breakthroughs in AI technology would be difficult.

Although training data is crucial for the development of AI technology, its supply process faces many legal issues that restrict the development of the AI industry. Firstly, the legal boundary of data acquisition is vague, especially in scenarios such as web crawling and cross-platform data sharing. There is still a lack of clear standards for defining legal data acquisition behaviors and illegal intrusion or data theft behaviors[1]. Secondly, issues such as the use of copyrighted works in training data, the circulation of personal information, and enterprise data sharing have also triggered disputes in terms of intellectual property protection, privacy security, and technical ethics[2]. Generative AI may face risks such as compliance, data breach, and bias during the process of training data collection and processing. These issues not only threaten the healthy development of technology, but also may disrupt social order. In terms of training data supply, on the one hand, the current laws have relatively principled provisions on the training data review system, lacking specific implementation guidelines, which makes it difficult for enterprises to effectively eliminate biased data during the data preprocessing and model training process. On the other hand, the ambiguity of public data authorization and operation rules further hinders the process of data opening, especially in terms of the definition of public data ownership and profit distribution mechanism, which urgently requires more clear legal norms[3]. The existence of these problems not only increases the difficulty of data governance work, but also poses severe challenges to the sustainable development of the AI industry[1].

Consequently, existing research and practices reveal several critical gaps. Firstly, regarding the refined standards for the legality of training data acquisition, current studies predominantly focus on macro-level principles, lacking operational guidelines for specific scenarios. For example, in the context of data crawling, although existing literature has proposed reference factors, a unified standard has not yet been formed, leading to difficulties in achieving consistency between law enforcement and judicial institutions in practice[4]. Moreover, with the application of emerging technologies such as knowledge distillation, the boundary of training data use has become increasingly blurred. Protecting the legitimate rights of data owners while promoting technological innovation remains an urgent problem to be addressed[5]. Secondly, concerning legal regulation under emerging technologies, existing studies have not fully accounted for the complexity introduced by the rapid iteration of AI. The large-scale training of generative AI models relies on massive data involving complex ownership relationships and sensitive information; however, how to promote data circulation while ensuring security remains insufficiently addressed in current

research[6]. Simultaneously, regarding enterprise data sharing, existing literature mostly remains at the theoretical level, lacking in-depth analysis of practical cases and solutions. Thirdly, in terms of international cooperation and legal coordination, current studies have paid insufficient attention to legal conflicts arising from cross-border data flows. As the cross-border acquisition and use of training data become prevalent alongside the global development of AI, significant disparities in data protection standards and intellectual property rules persist across regions. Therefore, building a unified data governance framework remains a critical direction for future research.

1. Practical challenges of training data supply

Despite the critical role of high-quality training data as a fundamental production factor in the artificial intelligence ecosystem, its actual supply is currently impeded by a complex array of practical barriers. These challenges are not merely technical but deeply rooted in the socio-economic structure of data ownership, the legal frameworks governing intellectual property, and the ethical imperatives of security. This section dissects the dilemmas of training data supply from three key dimensions: the structural obstacles arising from data monopolies and fragmentation, the inherent conflict between copyright protection and data sharing, and the escalating risks regarding data security and privacy compliance.

1.1 Structural obstacles to data acquisition from monopolies and fragmentation

There are numerous difficulties in the process of AI training data acquisition. Limited data sources are the primary problem. Although we are in an era of data explosion with massive amounts of data generated every day, high-quality data suitable for AI training is extremely scarce. Taking the humanoid robot scenario as an example, the environment it faces is diverse and complex, and the required data is difficult to collect, resulting in a serious shortage of data supply. Based on the theoretical framework of Informational Capitalism[7] (also known as Surveillance Capitalism or Data Capitalism), from the perspective of ownership of means of production, there are structural obstacles to data acquisition. The penetration rate of five major Internet platforms such as Douyin among 238 million high-value active users across the network reaches 85.7%. Super-large platforms rely on their extensive business layout and large user groups to accumulate a large amount of original data resources such as system transaction data and user behavior data[8]. Super-large platforms continue to focus on algorithm competition and talent competition, carry out killer acquisitions around algorithm talents[9], dominate the iteration of cutting-edge algorithms such as GAN and VAE, and consolidate their monopoly position in synthetic data production through technical patents and core code closure.

Data dispersion is also a major obstacle to data acquisition. Data is scattered in different institutions, departments, and platforms, and has different formats. For example, policy data released by the government has scattered release channels and inconsistent formats. Extracting effective information requires a lot of human and material resources, and it is also prone to cause information update lag. It is even more difficult for enterprises to screen out data relevant to themselves from massive information. The phenomenon of data silos is widespread. All parties are reluctant to share data due to interest considerations, which further limits the channels for data

acquisition. These problems have seriously hindered the acquisition of AI training data and affected the development process of AI technology.

1.2 Conflict between intellectual property protection and data sharing efficiency

Existing theoretical studies not only focus on the antitrust regulation of specific monopolistic behaviors such as traditional data-driven algorithmic collusion[10], platform most-favored-nation clauses[11], algorithmic price discrimination[12], and platform self-preferencing[13], but also discuss the risk governance rules of generative AI and data risk governance rules[14]. However, there are still sharp contradictions between the use of AI training data and intellectual property protection. On the one hand, AI technological innovation requires massive data support for the optimization and upgrading of training algorithm models; on the other hand, data often contains a large number of works protected by intellectual property rights.

There is controversy over whether behaviors such as copying training data in large model training infringe copyright. More and more lawsuits between AI enterprises and copyright owners have emerged in the United States. In China, there are also cases where copyright owners sue AI painting software companies for using their works to train models without permission. These cases reflect the conflict between the use of training data and copyright protection. In terms of data sharing, intellectual property protection restricts the free circulation of data. In order to protect intellectual property rights, data owners may set many restrictions on the use of data, making it difficult for data to be widely shared for AI training. However, the development of AI technology urgently needs the sharing of a large amount of data to promote technological innovation. This contradiction makes it an urgent problem to be solved to balance intellectual property protection and data sharing while promoting the development of AI.

1.3 Data security risks and challenges in privacy protection

AI training data faces many security and privacy risks during the process of collection, storage, and use. In the data collection stage, the data sources are complex, making it difficult to ensure the authenticity and security of the data. Data collection methods such as web crawlers may obtain forged or tampered data, leading to biases in the trained models, and even potential malicious use. According to the Personal Information Protection Law and other relevant laws and regulations, the collection and use of personal information must follow the principles of legality, legitimacy, and necessity, and obtain the explicit consent of the information subject[15]. However, in the training process of generative AI, the collection and processing of large-scale data often involves the use of massive personal information, which poses a severe challenge to the existing legal framework. ChatGPT used a large amount of dialogue data containing personal information during its training process. Whether the use of these data complies with the principle of informed consent and how to realize the effective use of data while ensuring privacy have become urgent problems to be solved[16].

For data storage, Article 9 of the “Interim Measures for the Management of Generative Artificial Intelligence Services” requires service providers to take necessary measures to prevent data breach and abuse, but the specific implementation rules still need to be refined[17]. Storage devices may face the risk of physical damage, leading to data loss or breach. If there are vulnerabilities in the data management system, hackers may take the opportunity to invade, steal or destroy data.

During the data use process, privacy leakage problems may occur in both the model training and prediction stages. Untrusted servers or participants can use the intermediate results of training to construct attack models to infringe on user privacy. Attackers can also steal target training data by accessing the model prediction interface. These risks will not only cause serious harm to personal privacy, but also affect the trade secrets of enterprises, and even threaten national security. Data security and privacy protection issues have become a major obstacle on the path of AI development, which must be highly valued and effectively addressed.

2. Policy practices and limitations on the supply of AI training data

In terms of legislation on AI training data supply, the United States follows the traditional legislation-first approach. In order to ensure its global leadership in the field of AI, it has made many attempts at the administrative order and legislative levels in recent years. Although some bills have not yet become laws, the proposal and debate process of relevant bills provide important reference for the subsequent formulation and implementation of mature AI security governance regulations. The "California Consumer Privacy Act" (CCPA) endows consumers with the right to know, delete, and opt out of their personal data, which puts forward clear requirements for the processing of personal information involved in training data[18]. In the case of HiQ v. LinkedIn, there was a dispute over whether the act of third-party crawling of public data from social media platforms constitutes unfair competition. The court finally ruled that LinkedIn could not prevent HiQ from crawling its public data. This judgment provided an important reference for the legal boundary of data crawling.

The European Union regulates the supply of training data through a series of data bills. The General Data Protection Regulation (GDPR) in 2016 had a profound impact on data protection in various member states. The ePrivacy Regulation (draft) released in 2021 supplemented the GDPR in the field of electronic communications. The European Data Strategy and European Artificial Intelligence White Paper released in 2020 outlined the blueprint for building a healthy common data space. The European Union also intends to establish a global standard for AI supervision through the Artificial Intelligence Act (AI Act), which to a certain extent avoids potential harms such as discrimination and surveillance, and clarifies control measures to reduce risks. Article 6 of the GDPR stipulates six legal bases for data processing, such as consent, performance of contracts, and public interest. These provisions directly affect the compliance of generative AI in the process of training data acquisition[19]. In addition, the European Union also put forward additional requirements on the data use of high-risk AI systems through the draft AI Act , such as prohibiting data analysis based on sensitive personal characteristics, which further limits the sources and scope of use of training data[20]. In the case of Google v. CNIL, Google was fined heavily for failing to comply with the requirements of the "right to be forgotten" in the GDPR, which shows that the European Union has extremely strict law enforcement in data protection[19].

China attaches great importance to the supply of AI training data and has issued a series of relevant policies. Normative documents such as the Development Plan for the Next Generation Artificial Intelligence have repeatedly mentioned industrial

policies such as building public data resource libraries, standard test data sets, and cloud service platforms for AI, so as to promote the orderly opening of public data by classification and grade and expand high-quality public training data resources. At the specific implementation level, the State Intellectual Property Office has clearly listed stem cells and regenerative medicine, immunotherapy, cell therapy, etc. as one of the key industries that the country focuses on developing and urgently needs intellectual property support. The China National Center for Biotechnology Development has also announced the proposed projects of the key special projects of the national key R&D plan for 2018, such as “Stem Cell and Transformation Research”. These policies provide support for the supply of AI training data from different angles and create a good development environment[21]. The “Interim Measures for the Management of Generative Artificial Intelligence Services” puts forward specific requirements on the source legality, quality requirements, and labeling specifications of training data, reflecting China's refined governance ideas in the field of AI[17]. On the one hand, courts have gradually clarified the legal boundary of training data acquisition through judgments in specific cases, providing relatively clear compliance guidelines for enterprises; on the other hand, the existing legal system is still insufficient in dealing with complex problems brought by emerging technologies. For example, issues such as the interest distribution mechanism of data sharing and the intellectual property ownership of knowledge distillation technology have not been fully resolved[16]. Therefore, it is necessary to further improve the relevant legal system in the future to adapt to the rapid development of AI technology.

3. Core institutional construction for guaranteeing the high-quality supply of training data

To effectively resolve the structural dilemmas and interest conflicts impeding the supply of AI training data, it is not sufficient to rely solely on market forces; a systematic legal and institutional framework is required. This section proposes a comprehensive guarantee system centered on three strategic pillars: property rights, incentives, and platform infrastructure. Specifically, it advocates for a refined definition of data property rights to clarify legal boundaries, the coordinated allocation of diversified incentive mechanisms to mobilize high-quality resources, and the robust institutional support for data sharing platforms to ensure secure circulation. These measures aim to reconstruct the interest distribution pattern among stakeholders, thereby fostering a sustainable environment for AI innovation.

3.1 Refined design of data property rights system and intellectual property rules

In the institutional construction for the high-quality supply of AI training data, the data property rights system is crucial. The ownership of data property rights needs to be clarified. Currently, training data comes from a variety of sources, involving multiple subjects such as individuals and enterprises. If the ownership is not clear, disputes are likely to arise. For example, there is a dispute over the ownership of information posted by individuals on social platforms if it is used for AI training. To solve this problem, we can learn from the “Twenty Provisions on Data” and establish a property rights operation mechanism that separates data resource ownership, data processing and use rights, and data product operation rights.

Constructing intellectual property rules adapted to the needs of AI training data is an important part of improving the legal system guarantee. With the development of

generative AI technology, copyrighted works are increasingly used in training data, but there are still great disputes over how to reasonably define the scope of their use. Therefore, it is recommended to start from two aspects: first, clarify the fair use boundary of copyrighted works in training data. For example, through judicial interpretation or legislative revision, include specific types of AI training into the scope of "fair use"; second, improve the intellectual property authorization mechanism and explore flexible and diverse licensing models to reduce the cost of enterprises in obtaining training data and improve efficiency[6]. In addition, considering the challenges brought by emerging technologies such as knowledge distillation to the ownership of intellectual property rights, it is also necessary to study the contribution and right distribution of different participants in the process of knowledge generation, so as to form a more fair and reasonable intellectual property protection system[17].

In terms of interest protection, a sound mechanism should be constructed. When using data, training data processors need to respect the prior rights of data source owners, such as copyright and portrait rights. For public data, the scope of opening and use conditions should be clarified to prevent abuse. For enterprise data, it is necessary to protect the trade secrets of enterprises and promote the reasonable circulation of data. Through the formulation of detailed rules, the fair and reasonable distribution of interests in the process of data use is ensured, so that data subjects can fully enjoy the benefits brought by data, effectively solve the contradiction between data use and intellectual property rights, and provide a solid property rights guarantee for the high-quality supply of AI training data. Break through the lag limitation of traditional laws, take the technology development trend as the guide, and formulate special legislation to clarify the core rules of training data supply. We can learn from the refined governance ideas of the European Union's GDPR, combine the data property rights separation principle established in China's “Twenty Provisions on Data”, and clarify the boundaries of data resource ownership, processing and use rights, and product operation rights in special laws, and refine the legality standards of data use in technical scenarios such as knowledge distillation. At the same time, dynamically fill the rule gaps through judicial interpretations and guiding cases. For example, regarding the scope of “fair use” of copyrighted works in generative AI training, clarify specific applicable conditions such as “non-commercial training” and “small proportion quotation”, so as to not only ensure the space for technological innovation, but also prevent the risk of abuse of rights.

3.2 Coordinated allocation of diversified incentive mechanisms and benefit distribution

In order to promote data providers to actively participate in the supply of AI training data, it is necessary to carefully design incentive mechanisms. Material incentives are important means. A data trading market can be established, and data pricing rules can be clarified to allow data providers to obtain benefits by selling data. Data pricing should comprehensively consider factors such as data quality, scarcity, and application value. Methods such as pay-per-use and time-based charging can be adopted to ensure that data providers can obtain reasonable returns according to the value of data. In the field of data trading, use blockchain technology to build a trusted deposit platform to realize the whole-chain traceability of training data sources, processing, and circulation, and solve the problems of ownership definition and transaction security; in the supervision link, introduce AI technology to develop a compliance review system, and automatically implement requirements such as data

desensitization and permission management through smart contracts to improve the real-time supervision efficiency of behaviors such as data crawling and cross-border transmission. At the same time, it is necessary to clarify the boundaries of technology application in laws, such as stipulating the judicial effect of blockchain deposit data, and preventing new risks caused by technology abuse.

In order to promote enterprise data sharing, it is necessary to clarify the interest distribution and risk-bearing rules in the sharing process through legal means. First of all, legislation should be adopted to establish the basic principles of data sharing, such as fairness, transparency, and mutual benefit, to ensure that enterprises participating in sharing can achieve a win-win situation in cooperation[4]. Secondly, it is necessary to formulate detailed operating specifications, clarify the scope, methods, and duration of data sharing, and establish a corresponding supervision mechanism to prevent data abuse or improper use[19]. In addition, regarding data security issues, it is recommended to introduce advanced technologies such as blockchain to realize the secure sharing and controllable access of data through distributed ledgers and smart contracts. Blockchain technology can effectively record the whole process of data sharing, ensure the authenticity and immutability of data, and thus enhance enterprises' trust in data sharing[23]. It is also possible to establish an integral incentive and data contribution integral system. The integrals can be used to exchange data services, technical support, etc., so as to enhance the participation enthusiasm of data providers. Incentive measures should be combined with data security and privacy protection to ensure that data providers do not face security and privacy risks while providing data. Through a sound incentive mechanism, the enthusiasm of data providers is fully mobilized to provide a continuous driving force for the supply of AI training data.

3.3 Regulatory support and architectural optimization for data sharing platforms

Data sharing platforms are the key to realizing the effective circulation and sharing of AI training data. The platform architecture design should be scientific and reasonable. Technologies such as cloud computing and big data should be adopted to build a unified cloud platform overall architecture. The platform can be divided into a five-layer data exchange ecosystem including data layer, consent layer, data supply layer, exchange layer, and consumption layer to ensure the whole process of data from collection, storage, processing to use is safe and controllable. Since training data involves complex legal issues, such as the definition of data ownership, the identification of intellectual property infringement, and the division of personal information protection responsibilities, the judgment results of courts in different regions in similar cases often vary greatly. This not only weakens the credibility of the judiciary, but also increases the uncertainty of enterprise operations[31]. Therefore, it is recommended to unify the judicial judgment standards by issuing judicial interpretations or releasing guiding cases, and clarify the handling principles and methods for various controversial issues. In data crawling cases, the identification standard of "substantial damage" should be clarified; in disputes over the use of copyrighted works, the specific applicable conditions of "fair use" need to be refined[32].

Establish a national AI ethics committee, which includes technical experts, legal scholars, public representatives and other parties, to evaluate the ethical risks in the supply of training data and put forward legislative suggestions; encourage industry

associations to formulate self-regulatory norms, such as the qualification review standards of data trading platforms and the security guidelines for enterprise data sharing; smooth the channels for public participation, and ensure that legal rules take into account both technological innovation and people's well-being through legislative hearings, online opinion collection and other methods. In addition, promote the establishment of a normalized communication mechanism among enterprises, scientific research institutions, and judicial organs to timely feedback new problems in practice. In terms of functions, the platform should have preprocessing functions such as data cleaning, labeling, and integration to ensure data quality. It should also provide convenient services such as data retrieval, download, and analysis to facilitate users to quickly obtain the required data. The platform should establish a sound data security and privacy protection mechanism, conduct encrypted storage and access control of data, and prevent data breach and abuse. Through the construction of a fully functional and secure data sharing platform, data silos are broken, cross-departmental and cross-industry circulation and sharing of data are realized, rich high-quality data resources are provided for AI training, and the innovative development of AI technology is promoted.

4. Conclusion

The sustainable development of artificial intelligence is fundamentally contingent upon the effective supply of high-quality training data. However, current practices are severely constrained by multiple dilemmas, including structural obstacles to data acquisition, acute conflicts between intellectual property protection and data sharing, and pervasive risks regarding data security and privacy. While domestic and international legal policies have begun to address these issues, existing frameworks still suffer from limitations such as imbalanced interest distribution, vague implementation standards, and a lack of regulatory coordination.

To overcome these challenges, this study proposes the construction of a comprehensive guarantee system for the high-quality supply of training data, anchored in the goals of interest balance, security controllability, and innovation adaptation. This system relies on three core institutional pillars: first, the refined design of the data property rights system to clarify ownership and usage boundaries; second, the coordinated allocation of diversified incentive mechanisms to mobilize high-quality data resources; and third, the regulatory and technical support for data sharing platforms to ensure secure circulation. By integrating these institutional innovations with multi-subject collaborative governance and cross-domain legal coordination, a systematic legal solution can be formed to resolve the dilemma of data supply, thereby providing a robust foundation for the continuous innovation and application of AI technology.

Acknowledgments

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Reflections on Several Issues Regarding the Chinese New Arbitration Law Amendments

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Abstract: As a vital ADR method for commercial dispute resolution, the 17th Session of the 14th National People's Congress Standing Committee voted on September 12 to adopt the revised Arbitration Law of the People's Republic of China. This revision enhances multiple arbitration systems, including: Expanding the scope of cases accepted by arbitration institutions; Establishing an arbitration venue system, clarifying that the arbitration venue shall serve as the basis for determining the applicable procedural law and the court with jurisdiction, unless otherwise agreed by the parties; Specifying that arbitration proceedings may be conducted online unless the parties expressly disagree; Introducing new provisions for interim relief in arbitration, pre-arbitration property and conduct preservation, and evidence preservation in arbitration; Clarifying the sequence for determining service methods: first by agreed method, then by arbitration rules; Added provisions allowing parties to choose institutional arbitration or ad hoc arbitration for foreign-related maritime disputes or foreign-related disputes arising from enterprises registered in free trade pilot zones, Hainan Free Trade Port, or other areas designated by the state; Additionally, it includes several other important provisions. This revision marks a new stage in the development of China's arbitration system.

Keywords: Jurisdiction; Arbitration venue; Online Arbitration; Interim Measures; Ad Hoc Arbitration

Introduction

To align China's arbitration institutions with international standards and narrow the legislative gap between China's Arbitration Law and the UNCITRAL Model Law on International Commercial Arbitration, In late 2018, the General Office of the CPC Central Committee and the General Office of the State Council issued the “Several Opinions on Improving the Arbitration System and Enhancing the Credibility of Arbitration.” This document called for "accelerating the reform and innovation of the arbitration system, supporting the integration of arbitration into grassroots social governance, actively developing internet-based arbitration, and promoting industry collaboration and regionalized development of arbitration. It is necessary to serve the national strategy of comprehensive opening-up and development, enhance the international competitiveness of arbitration commissions, strengthen

international exchanges and cooperation, and deepen cooperation with arbitration institutions in Hong Kong, Macao, and Taiwan.“ Against this backdrop, the revision of China's Arbitration Law has undergone three stages: First, the Ministry of Justice released the “Draft Amendment to the Arbitration Law of the People's Republic of China (for Soliciting Opinions)" in July 2021; Second, the “Draft Amendment to the Arbitration Law of the People's Republic of China” (First Reading Draft) released by the NPC in November 2024; Third, the “Draft Amendment to the Arbitration Law of the People's Republic of China (Second Reading Draft)” released by the NPC in April 2025. The final enacted Arbitration Law remains largely consistent with the Second Draft. This article will systematically analyze the core legislative revisions of the ultimately adopted Arbitration Law, offering affirmations and suggestions for improvement.

1. Determination of the seat of arbitration in foreign-related arbitration

1.1 Current revision content

Article 16 of China's 1994 Arbitration Law stipulates: An arbitration agreement includes an arbitration clause stipulated in a contract and an agreement requesting arbitration reached in other written forms before or after the occurrence of a dispute. An arbitration agreement shall contain the following elements: (1) an expression of intent to request arbitration; (2) the subject matter of arbitration; (3) the selected arbitration commission.

Drawing from the UNCITRAL Model Law on International Commercial Arbitration, the new Arbitration Law establishes the arbitration seat as the core basis for determining the applicable procedural law and jurisdiction. Article 81 of the revised Arbitration Law provides that parties may agree in writing on the arbitration seat. Unless otherwise agreed by the parties regarding the governing law of the arbitration proceedings, the place of arbitration shall serve as the basis for determining the governing law of the arbitration proceedings and the jurisdiction of the courts. The arbitral award shall be deemed to have been made at the place of arbitration. Where the parties have not agreed on the place of arbitration or their agreement is unclear, the place of arbitration shall be determined according to the arbitration rules agreed upon by the parties; where the arbitration rules do not provide for such determination, the arbitral tribunal shall determine the place of arbitration based on the circumstances of the case and in accordance with the principle of facilitating dispute resolution. Article 87 encourages parties to international arbitration to select arbitration institutions in the People's Republic of China (including its Special Administrative Regions) and to agree to conduct arbitration in the People's Republic of China (including its Special Administrative Regions) as the place of arbitration.

This amendment establishes the following hierarchy for determining the place of arbitration: the parties' agreement takes precedence; where no agreement exists, the arbitration rules shall apply; and where the arbitration rules are also silent, the arbitral tribunal shall determine the place of arbitration based on the principle of facilitating dispute resolution.

1.2 Conflicts with the provisions of the law on the application of laws to foreign- related civil relations

The newly revised Arbitration Law stipulates that the place of arbitration shall serve as the basis for determining the applicable law of the arbitration proceedings and the jurisdiction of the competent court. The scope of "arbitration proceedings" and "competent court" requires consideration from the perspective of legal doctrine. Fundamentally, "arbitration proceedings" should encompass the determination of the governing law for the arbitration agreement. Thus, under the new Arbitration Law, the arbitration agreement should apply the law of the place of arbitration to establish its validity.

However, Article 18 of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations provides that parties may agree on the governing law for the arbitration agreement. Where no such agreement exists, the law of the seat of arbitration or the law of the place of arbitration shall apply. This provision clearly conflicts with the newly amended Arbitration Law, both of which are laws enacted by the Standing Committee of the National People's Congress. The fundamental principle for resolving such logical conflicts is that "special laws prevailover general laws," provided both laws are enacted at the same time. Under this principle, the Arbitration Law constitutes a special law governing arbitration dispute resolution. Consequently, the latest amendments to the Arbitration Law should prevail in determining the applicable law for arbitration agreements.

1.3 The significance of the law of the place of arbitration

The law of the place of arbitration governs the arbitration proceedings. Theoretically, arbitration proceedings encompass all stages from the filing of the arbitration application to the issuance of the award. Generally, institutional arbitration proceedings can be divided into four phases: (1) the commencement phase, including the parties' arbitration application and the institution's acceptance of the application; (2) the phase from acceptance to the hearing; (3) the hearing phase; (4) The award stage. Consequently, various issues arising during arbitration proceedings—such as the composition and jurisdiction ofthe arbitral tribunal, interim measures, rules of evidence, and arbitral awards[1]—shall all be governed by the law of the arbitration seat pursuant to this provision.

The seat of arbitration serves as the basis for determining the court with jurisdiction. From a semantic perspective, the court with jurisdiction over arbitration proceedings encompasses the court's determination of the validity of the arbitration agreement, the court's supervision of the arbitration proceedings, and the court's oversight of the arbitral award. Specifically, the court's determination of the validity of the arbitration agreement encompasses: litigation concerning the validity of the arbitration agreement accepted by the court before the commencement of arbitration proceedings; the court's supervision of the arbitration agreement after the commencement of arbitration proceedings; and the court's supervision of the arbitration agreement after the arbitral award is rendered. The law of the place of arbitration serves as the primary governing law for determining the validity of arbitration agreements, providing clear grounds for assessing, interpreting, and enforcing such agreements to ensure the solid foundation of the arbitration process's legitimacy. Court supervision of arbitration proceedings

[1] Zhao Xiuwen: International Commercial Arbitration Law, China Renmin University Press, 2007 edition.

includes appointing arbitrators or revoking their appointment in accordance with the law, as well as taking provisional preservation measures against the disputed subject matter. Court oversight of arbitral awards encompasses supervision of both domestic international commercial arbitral awards and foreign arbitral awards.

1.4 Determination of the place of arbitration

The new Arbitration Law does not explicitly define the concept of the place of arbitration. The internationally accepted notion of the place of arbitration extends beyond mere geographical location to encompass multiple legal institutional characteristics, forming the foundation for conducting arbitration. The place of arbitration is regarded as the location most closely connected to the arbitral proceedings, and regulating various procedural aspects under the laws of that place aligns with the parties' expectations. Referencing Article V(1)(a) of the New York Convention, which states that "an award may be refused recognition and enforcement if the arbitration agreement is null and void under the law chosen by the parties or under the law of the country where the award is sought tobe enforced," and Section 53 ofthe UK Arbitration Act 1996, which provides that The place of arbitration is the place where the award is made. Unless otherwise agreed by the parties, any award shall be deemed to have been made in England, Wales, or Northern Ireland ifthe place ofarbitration is in those places, regardless of where the award was signed, transmitted, or served on the parties."

China's shift from initially favoring the seat of the arbitral institution to adopting the seat of arbitration standard evolved through a series ofjudicial precedents. From the 2004 Supreme People's Court ruling recognizing an ICC arbitration award rendered in Hong Kong SAR as French in origin[2], to the 2010 case where French company DMT sought recognition and enforcement of an ICC award arbitrated in Singapore—which was treated as a Singaporean award—to the 2016 case involving U.S. EID Architecture seeking enforcement of a Hong Kong award, These developments progressively established the shift in determining the nationality of arbitral awards from the seat of the arbitral institution to the place of arbitration. For instance, in cases where parties choose Beijing as the place of arbitration at the Hong Kong International Arbitration Centre, under the previous standard based on the seat of the arbitral institution, recognition and enforcement of such awards would still require compliance with the "Notice on the Enforcement of Hong Kong Arbitral Awards in the Mainland." Since judicial review practices have not adopted the arbitral venue as the general standard for determining the nationality of an award, introducing the arbitral venue system fundamentally resolves this issue.

However, international judicial practice distinguishes between the nominal and actual arbitral venues. Particularly with the advancement of AI, some arbitral awards are issued, dispatched, or served from different locations. AI poses significant challenges to determining the physical location of legal entities, while legislation inherently lags behind technological advancement. Therefore, how to address and clearly define discrepancies between the nominal and actual places of arbitration in future judicial practice requires further clarification based on evolving judicial precedents.

[2] See the Reply Letter of the Supreme People's Court Regarding the Request for Non-Enforcement ofthe Final Award No. 10334/AMW/BWD/TE of the International Chamber of Commerce Arbitration Court.

2. Establishment of the online arbitration system

2.1 Latest amendments

Since the 1990s, online dispute resolution mechanisms have gained momentum worldwide, with digital dispute resolution emerging as a global trend[3]. Subsequently, emerging technologies such as big data and artificial intelligence have profoundly reshaped the form, mechanisms, and principles of legal systems, sparking continuous discussions on cutting-edge issues like digital jurisprudence, AI judges, and the metaverse[4]. The digital transformation of dispute resolution is an inevitable trend, and arbitration, as a vital form of dispute resolution, is no exception. To align with international online arbitration systems, Article 11 of China's newly revised Arbitration Law stipulates that arbitration activities may be conducted online via information networks, unless the parties expressly disagree. Arbitration activities conducted online via information networks shall have the same legal effect as offline arbitration activities.

2.2 Issues with the newly revised provisions

The latest regulations fail to clarify whether "disagreement" requires consent from only one party or explicit consent from both. They also do not specify how the arbitration venue is determined for online arbitration. Since online arbitration relies on the internet, the venue cannot be confirmed based on the physical location of hearings. Whether the venue is established by agreement between the parties or determined by the arbitral tribunal or arbitration institution, it often differs from the actual location where proceedings take place. Under current commercial arbitration practice, the validity of arbitration agreements is typically assessed according to the laws of the jurisdiction where the arbitration seat is located[5]. However, in the online arbitration context, where proceedings occur in the virtual space of the internet and parties and arbitrators may be geographically dispersed, determining the arbitration seat becomes problematic.

Online arbitration agreements must also address formal and substantive validity, particularly the requirement for "written form" and the legal standing of electronic signatures, which raise disputes regarding the recognition of traditional signature validity. The inherent risks in applying electronic signatures have garnered widespread attention, necessitating practical and effective strategies to ensure the security, reliability, and confidentiality of information in online arbitration scenarios. This safeguards the smooth progression of arbitration proceedings and protects the integrity of their outcomes.

Online hearings also present challenges such as difficulties in admitting evidence, insufficient safeguards for parties' procedural rights, and enforcement difficulties for online arbitral awards. These are potential issues in online arbitration. If not explicitly addressed and safeguarded in arbitration legislation and practice, they could ultimately become significant factors leading courts to deem arbitral awards illegal or invalid. First, despite the widespread adoption of diverse electronic evidence types on digital platforms, judicial practice still faces challenges in conclusively verifying the authenticity of such evidence. Second, many parties, constrained by educational background or technological limitations, cannot participate in online hearings. Arbitral

[3] Long Fei: "The Current Status and Future Prospects of China's Online Dispute Resolution Mechanism," Legal Application, Issue 10, 2016.
[4] Ma Changshan: "Theoretical Expressions of Digital Jurisprudence," China Juris, Issue 3, 2022.
[5] Qiao Xin, ed., Comparative Commercial Arbitration (Beijing: China Law Press, 2004), p. 140.

tribunals rendering decisions in an electronic format under such circumstances may indirectly impact or infringe upon the rights of the opposing party. As a specialized arbitration method, online arbitration should strengthen the protection of parties' procedural rights. Third, the current online arbitration system remains in its formative stage, with no unified and mature global regulatory framework established. This lack of clarity regarding the applicable law in the absence of a defined seat of arbitration ultimately leads to inconsistent acceptance of online arbitration awards within the international community and significant challenges and difficulties in their enforcement.

3. Revision of the interim measures system

3.1 Latest amendments

Arbitration interim measures refer to temporary relief granted by courts or arbitration tribunals prior to the issuance of an arbitral award. Their purpose is to protect the rights and interests of parties, facilitate the smooth progress of proceedings, and ensure the enforceability of awards.[6]The current draft of the Arbitration Law explicitly defines the types of interim measures, including preservation of evidence, preservation of conduct, preservation of property, and other short-term measures deemed necessary by the arbitral tribunal. However, the final enacted Arbitration Law disperses provisions on interim measures across Chapter IV (Arbitration Procedure) Articles 39 and 58, and Chapter VII (Special Provisions on Foreign-Related Arbitration) Article 82. Article 39(1) adds that where a party's conduct or other circumstances may "cause other damages to the parties," a party may "request an order requiring a party to perform or refrain from performing certain acts." Where a party applies for preservation, "the people's court shall handle it in a timely manner in accordance with the law." Paragraph 2 of Article 39 adds: "Where circumstances are urgent, a party to the arbitration agreement may, prior to applying for arbitration, apply to the people's court for property preservation or request an order requiring the other party to perform or refrain from performing certain acts in accordance with the relevant provisions of the Civil Procedure Law of the People's Republic of China. Where a party applies for preservation, the people's court shall handle it in a timely manner in accordance with the law." Article 58, concerning evidence preservation in arbitration, adds the following provisions to the original text: "The people's court shall handle such applications in a timely manner in accordance with the law"; "In urgent circumstances, a party to an arbitration agreement may, prior to applying for arbitration, apply to the people's court for evidence preservation in accordance with the relevant provisions of the Civil Procedure Law of the People's Republic of China. Where a party applies for evidence preservation, the people's court shall handle such application in a timely manner in accordance with the law." The newly added Article 82, Paragraph 2 on ad hoc arbitration also clarifies that parties may apply for preservation in ad hoc arbitration: "Where a party applies for property preservation, evidence preservation, or requests that the other party be ordered to perform or refrain from performing certain acts, the arbitral tribunal shall submit the party's application to the people's court in accordance with the law, and the people's court shall handle it promptly in accordance with the law."

[6] Cui Qifan: "A Study on Interim Measures Taken by International Investment Arbitration Tribunals to Interfere with Host State Criminal Proceedings," Commercial Arbitration and Mediation, No. 2, 2024, p. 47.

3.2 Issues with the newly revised provisions

Regarding the conditions and standards for issuing interim measures, international arbitration has developed "best practices." Generally, conditions for issuing interim measures include prima facie jurisdiction, likelihood of success, urgency, necessity, and proportionality. However, no internationally uniform conditions or standards exist, and arbitral tribunals must still determine them based on specific circumstances in individual cases. Although the revised Arbitration Law provides relatively comprehensive provisions for typical forms of interim relief—property preservation, conduct preservation, and evidence preservation—as stipulated in Article 17.2 of the Model Law, it fails to address the relatively common "interim payment measures" in international arbitration. Interim payment measures refer to situations where a party may urgently require the arbitral tribunal to issue an interim payment order for part or all of the claimed amount. Furthermore, numerous scholars advocate that China's arbitration legislation and practice should recognize the tribunal's authority to issue orders for security for costs.

Regarding the allocation of authority to issue interim measures in international arbitration, the Model Law and the arbitration legislation of most countries adopt a concurrent authority model. Among the very few countries that previously adopted a model of exclusive court authority, some are now choosing a path of reform. For instance, Greece amended its Arbitration Act in 2023, adopting nearly all provisions of the 2006 Model Law while simultaneously abolishing its prior model of exclusive court authority[7] China's 2021 draft consultation paper established concurrent authority for arbitration institutions and courts to issue interim measures in arbitration. However, the 2024 draft revision removed the authority of arbitration institutions, retaining only the courts' power to issue interim measures in arbitration. Arbitral institutions' issuance of interim measures possesses inherent advantages—respecting party autonomy, deeper case familiarity, and preserving arbitration confidentiality—that cannot be fully replaced by court-issued measures. Moreover, international arbitral tribunals typically do not apply domestic civil procedure rules when issuing interim measures. For instance, the Model Law specifies conditions for tribunals to issue such measures, and international arbitration practice has gradually developed convergent standards for their issuance[8]. Although arbitration commissions such as the China International Economic and Trade Arbitration Commission, Beijing Arbitration Commission, and Wuhan Arbitration Commission have sought to adopt interim measures through their arbitration rules—which generally provide that, upon request by a party, the arbitral tribunal may decide to take any interim measures it deems necessary or appropriate based on the applicable law or the parties' agreement— However, Article 81 of the newly revised Arbitration Law stipulates that "unless otherwise agreed by the parties on the applicable law of the arbitration proceedings, the place of arbitration shall be the basis for determining the applicable law of the arbitration proceedings and the jurisdiction of the courts." The law does not explicitly clarify whether "arbitration proceedings" in this agreement should include "arbitration interim

[7] Cui Qifan: "Improving China's System of Interim Measures in International Arbitration Against the Background of the Revised Arbitration Law," published in Commercial Arbitration and Mediation, Issue 3, 2025.
[8] Ali Yesilirmak, Provisional Measures in International Commercial Arbitration, Kluwer Law International, 2005, pp.170-189.

measures." However, since arbitration interim measures constitute a type of measure within arbitration proceedings, it can be inferred that they should fall under arbitration proceedings. Therefore, the law governing arbitration interim measures should also be the law of the place of arbitration. If the law of the place of arbitration does not grant the arbitration institution the authority to issue arbitration interim measures, then if the arbitration institution issues such measures, it would be contrary to the spirit of the rule of law. Furthermore, interim measures in arbitration typically involve ordering a party to perform or refrain from performing certain acts, or imposing restrictions on a party's property. According to Article 11(5) and (10) of China's Legislation Law, coercive measures restricting personal freedom, penalties, litigation systems, and fundamental arbitration systems can only be established by law. Therefore, the authority of an arbitral tribunal to issue interim measures can only be explicitly authorized by China's Arbitration Law.

4. Clarification of arbitration document service methods

4.1 Latest amendments and issues with electronic service methods

Article 41 of the Arbitration Law stipulates that arbitration documents shall be served by reasonable means agreed upon by the parties; where the parties have not agreed or their agreement is unclear, service shall be conducted in accordance with the methods prescribed by the arbitration rules. This provision is a newly added clause based on the original Arbitration Law. Among the various service methods, paperless delivery—represented by email—is most prone to disputes. In practice, a common phenomenon arises: when a party finds itself at a disadvantage, it may deny receipt of specific documents or falsely claim a document was sent, attributing such issues to equipment malfunctions or network problems to evade responsibility. This poses a threat to the fairness and efficiency of arbitration proceedings. Furthermore, different arbitration institutions have varying requirements for the service of arbitration documents. It is essential to understand these requirements, serve documents accordingly, and retain proof of service. According to research, a significant proportion of cases seeking to set aside arbitral awards in China involve service issues, a trend also observed in applications to set aside foreign-related arbitral awards. Common questions include whether service to the address specified in the contract, the party's usual address, the registered address of the corporate entity, or via other electronic means would be deemed valid service.

4.2 Requirements of the duty to make reasonable efforts to serve

Take the 2019 Yancheng Hongmingda Textile case as an example. In this case, the arbitration award issued by the China International Economic and Trade Arbitration Commission in 2017 was ultimately set aside because the court found a "procedural error" in the service process. This set-aside award involved approximately RMB 20 million plus interest, with legal fees and arbitration costs totaling over RMB 500,000[9]In this case, the court proposed serving the opposing party through the "most reasonable manner to reach the addressee." The interpretation of "proper notice" under Article 5(1)(b) of the New York Convention, as outlined in its commentary, hinges on whether the party was aware of the arbitration proceedings, whether they substantially participated in the arbitration, and whether there was a reasonable expectation that the opposing party knew of the proceedings.

[9] Case Regarding the Application by Yancheng Hongmingda Textile Co., Ltd. et al. to Set Aside an Arbitration Award, Civil Ruling (2017) Jing 04 Min Te 30 of the Fourth Intermediate People's Court of Beijing Municipality.

Fulfilling the duty of diligent service primarily involves three issues: First, failure to accurately determine the service address. Empirical research indicates that current practice often involves annulment or refusal of enforcement due to "incorrect or improper service addresses."[10] Determining the address for service often relies on the reasonable inquiries of the party responsible for service. Therefore, the assessment of service is fundamentally an evaluation of the duty to conduct reasonable inquiries. The duty of "reasonable inquiry" is the fundamental prerequisite for "deemed service" or "substitute service." The reasonable inquiry into the address for service is a crucial criterion for distinguishing between actual service and the application of deemed service. Second, when the address is correct, failure to employ feasible mailing methods for service. As in the aforementioned Yancheng Hongmingda Textile case, the arbitral tribunal's insistence on using notarized service—specified in CIETAC Rules as "deemed service"—despite being informed by the post office of an alternative mailing method, clearly undermined the validity of the service. Finally, failure to allow sufficient time for service. In addition to documents such as the Notice of Arbitration and the Notice of Appointment of Arbitrator, certain documents like the Hearing Notice require the party responsible for service to allow a reasonable period during the service process. This ensures that the documents being served have the maximum possibility of reaching the recipient before the hearing.

5. Ad hoc arbitration in foreign-related disputes and related preservation measures

5.1 Latest amendments

Ad hoc arbitration represents the original form of arbitration, while institutional arbitration has developed continuously in China for over sixty years. Article 27 of China's Arbitration Law stipulates that the parties' selection of an arbitration institution is an essential condition for an arbitration agreement. Only in this year's revision of the Arbitration Law was ad hoc arbitration limited to the scope of foreign-related maritime disputes or foreign-related disputes arising between enterprises registered in free trade pilot zones, Hainan Free Trade Port, and other areas designated by the State Council, as provided in Article 82 of Chapter VII on Special Provisions for Foreign-Related Arbitration. Ad hoc arbitration involves establishing an arbitration body specifically for resolving disputes under a particular agreement, with relevant rules selected by the parties. This differs from institutional arbitration.

Article 82 of the revised Arbitration Law stipulates that for foreign-related maritime disputes or foreign-related disputes arising between enterprises registered in free trade pilot zones, Hainan Free Trade Port, or other areas designated by the approval of the State Council, the parties may opt for arbitration by an arbitration institution if they have agreed to arbitration in writing. Alternatively, they may choose to conduct arbitration in the People's Republic of China, with an arbitral tribunal composed of persons meeting the conditions prescribed by this Law and operating under agreed arbitration rules. Such tribunal shall file with the arbitration association within three working days after its constitution the names of the parties,

[10] Zhang Chunliang, Huang Hui, and Xu Zhihua: The Setting Aside of Foreign-Related Commercial Arbitration Awards in China: Mechanisms and Empirical Analysis, China Law Press, 2019 edition, p. 159.

the place of arbitration, the composition of the tribunal, and the arbitration rules.

5.2 The significant importance of this revision

Ad hoc arbitration grants parties greater autonomy to freely agree upon all aspects of the arbitration process. For instance, parties may independently select arbitration procedures, rules, and arbitrators—choices that are often constrained by pre-established rules and procedures of arbitration institutions in traditional arbitration[11]. Although the scope of application for ad hoc arbitration is significantly narrower than that of the Arbitration Law (Revised Draft), and the selection of arbitrators is restricted to those listed in the arbitration roster, with no explicit provisions for the interface between institutional and ad hoc arbitration or mechanisms to prevent excessive judicial interference in ad hoc arbitration, the establishment of this ad hoc arbitration system remains a significant achievement. It will inevitably strengthen China's voice in the international resolution of foreign maritime commercial disputes. Ad hoc arbitration holds an important and undeniable position in the global maritime arbitration field. The establishment of this system fills a gap in China's maritime arbitration framework and clears obstacles in the internationalization process of domestic maritime dispute resolution mechanisms.

6. Clarification of arbitration scope

6.1 Latest amendments

Article 93 of the newly amended Arbitration Law, under Chapter VIII Supplementary Provisions, clarifies the scope of the Arbitration Law's applicability. It specifies that labor dispute arbitration, rural land contract operation dispute arbitration, and sports arbitration shall be governed by the relevant provisions of the Labor Dispute Mediation and Arbitration Law, the Rural Land Contract Operation Dispute Mediation and Arbitration Law, and the Sports Law, respectively, and shall not be subject to the Arbitration Law. This amendment expands the original Article 77 of the Arbitration Law, which covered labor disputes and arbitration of agricultural contract disputes within agricultural collective economic organizations, to include sports arbitration. This amendment also responds to Article 3(2) of the Sports Arbitration Rules adopted by the General Administration of Sport of China on December 22, 2022, which states: “Disputes arbitrable under the Arbitration Law and labor disputes under the Labor Dispute Mediation and Arbitration Law shall not fall within the scope of sports arbitration.” Following the revision of the Arbitration Law, the scope of arbitration under both the Arbitration Law and the Sports Arbitration Rules remains consistent.

6.2 Significant implications of this revision

Article 94 stipulates that arbitration institutions and tribunals may handle international investment arbitration cases in accordance with the arbitration rules agreed upon by the disputing parties, based on the provisions of relevant international investment treaties and agreements concerning the submission of investment disputes to arbitration. This provision codifies existing judicial practices of arbitration institutions at the legislative level of the Arbitration Law. For instance, Article 2 of the China International Economic and Trade Arbitration Commission International Investment Dispute Arbitration Rules (Trial), formulated and implemented by the China

[11] Notice of the Supreme People's Court on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to Which China Is a Party,http://gongbao.court.gov.cn/Details/e4defa983a153b314590d73e5a0c60.html, April 10, 1987.

International Economic and Trade Arbitration Commission and the China Chamber of International Commerce on October 1, 2017, stipulates: The China International Economic and Trade Arbitration Commission shall accept international investment disputes arising from contracts, treaties, laws, regulations, or other documents, where one party is an investor and the other party is a state or intergovernmental organization, any other institution, department, or entity authorized by the government or whose acts are attributable to the state (hereinafter collectively referred to as the "Government"), based on an arbitration agreement between the parties. This provision also recognizes the authority of Chinese arbitration institutions to hear investment disputes between investors and host country governments, thereby expanding the scope of arbitration services.

7. Conclusion

With the rise of the digital economy and the expansion of cross- border trade, issues such as outdated foreign-related rules, insufficient credibility, and procedural delays have hindered the advancement of China's arbitration rule of law. Revising the Arbitration Law has become an inevitable choice for promoting foreign- related rule of law and improving commercial dispute resolution mechanisms. The arbitration system is also a vital component of foreign-related rule of law. The Arbitration Law has achieved multiple breakthroughs in incorporating internationally recognized commercial arbitration rules, laying the foundation for China to establish itself as a hub for international arbitration and further advancing the development of China's international commercial arbitration centers.

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Cross-border Asset Succession under Research into Optimising Foreign-related Legal Services:Comparative Analysis of Domestic and Foreign Trust Systems and Innovations in Legal Practice

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Abstract: Against the backdrop of cross-border asset succession demands among China's high-net-worth individuals, this paper systematically compares the differences between civil law and common law trust systems to delve into legal conflicts and practical challenges in international inheritance matters.Addressing practical issues such as the risk of offshore trusts being "pierced" and the dilemma of determining the governing law for intestate succession, it proposes innovative pathways and service optimisation strategies for mainland lawyers handling cross-border inheritance matters. These include solutions such as refining methods for applying applicable law, technology-enabled mediation mechanisms, and coordinated planning involving family trusts and wills. The research aims to establish a specialised, collaborative, and technology-driven legal service system for cross-border asset succession, providing theoretical support and practical guidance for enhancing China's cross-border legal services.

Keyword: Trust Law; Cross-border Asset Succession; Family Trust; Dual Ownership

Introduction

Presently, overseas asset allocation among China's high-net-worth individuals represents a pronounced trend, further catalysing a new normal in family wealth patterns characterised by cross-border flows, asset diversification, and increasingly complex inheritance relationships. Consequently, conflicts in the application of law within international inheritance cases have become increasingly prominent.The recent inheritance dispute over the estate of Wahaha founder Zong Qinghou exemplifies this trend. His three non-marital children—Zong Jichang, Zong Jieli, and Zong Jisheng—initiated separate lawsuits in Hong Kong and Hangzhou, claiming rights to assets within a US$1.8 billion family trust established by Zong Qinghou and a 29.4% stake in Wahaha Group. This has ignited a fierce inheritance conflict with his marital daughter, Zong Fuli.[1] This dispute over the distribution of family wealth, involving substantial trust assets and domestic equity holdings, not only reflects the governance challenges of cross-border asset succession but also places the institutional efficacy of offshore family trusts under scrutiny.Faced with the increasingly complex legal landscape of cross-border asset succession, this paper argues that foreign-related legal services should not be confined to reliance on offshore trust instruments. There is an urgent need to broaden the application of domestic trust supplementation mechanisms while integrating technological means to empower governance throughout the entire inheritance cycle.

1. Comparative analysis of domestic and overseas trust systems and identification of practical risks

Originating in Britain and evolving since the Middle Ages, the trust system has consistently centred on achieving efficient and secure property transfers. Through prolonged refinements within the Anglo-American legal tradition, it has matured into a rigorously structured, clearly defined institutional framework.[2] At the turn of the last century, China successfully introduced the trust system, formally enacting the Trust Law of the People's Republic of China (hereinafter referred to as the "Trust Law") in 2001. This marked the commencement of China's standardised process for property trusts. Relying on the institutional framework established by the Trust Law, the trust system has taken root and flourished within China's legal system, with its practical application and operational exploration advancing in an orderly manner.As a core legal instrument for cross-border asset succession, the intrinsic legal structure and functional realisation of trusts exhibit significant variations across different jurisdictions. In practice, there exists a tendency to blindly establish offshore trusts and pursue risk isolation, while overlooking the portability and practicality of domestic trusts. Some even adopt a dismissive attitude towards the domestic trust system.Mainland lawyers handling foreign-related inheritance matters must accurately grasp the practical risks arising from these institutional differences, which is a key prerequisite for constructing effective cross-border succession solutions. The following discussion will begin with an examination of the legal rationale behind domestic and foreign trust systems, culminating in addressing the scepticism towards domestic trusts.

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[1] Xing Tan: "Hong Kong High Court Judgment Reveals Further Details of Zong Qinghou Estate Case," published on The Paper WeChat Official Account, https://mp.weixin.qq.com/s/cOwNoUwdnANQ2I1MX8lxZg (accessed 2 August 2025).

[2] Zhang Shurong and Zheng Junlin: "Legal Issues in Trust Property: An Examination from the Perspective of Ownership," Journal of Taiyuan City Vocational and Technical College, Issue 10, 2024, p. 121.

1.1 Fundamental divide in legal foundations and institutional design

As a unique legal construct, the trust system centres on the contractual relationship established between settlor and trustee, achieving a dual separation of management rights over trust assets and beneficial enjoyment rights.Rooted in the Anglo-American legal tradition's dual ownership structure, which coexists with common law and equity, [3] the trust system confers legal title upon the trustee under common law principles, while the beneficiary holds equitable title under the principles of equity.[4] The trustee may fully exercise management authority for the beneficiary's trust interests based on fiduciary duty, while simultaneously ensuring the independent security of trust assets to effectively safeguard beneficiary interests. [5] Within this framework, the trust system renders trust assets legally distinct from both settlor and beneficiary, thereby establishing an effective barrier for risk isolation.[6] To enhance the trust's asset protection function, the Anglo-American legal system specifically grants beneficiaries certain rights. [7] Beneficiaries may not only demand the trustee distribute trust benefits but also actively supervise the trustee's management and disposal of trust assets. Specifically, beneficiaries possess legal rights to access trust-related information, including inspecting trust accounts, requiring the trustee to disclose relevant trust documents, and seeking explanations regarding trust income. [8]

Although China's trust system draws upon Anglo-American legal practices, it has opted to respect the civil law principle of "one thing, one right" while adapting it for localised implementation. This principle emphasises that only one ownership right may exist over a single object. [9] To maintain clarity and stability in property relations and resolve disputes, it precludes the coexistence of multiple ownership rights.[10] Given the prevalence of this principle across civil law jurisdictions, it has emerged as one of the key obstacles to the localisation of the trust system.

Taking Japan—another civil law jurisdiction—as a point of comparison, its legal framework establishes the trustee as the property owner, effectively adopting the concept of "dual ownership" through systematic reception.[11] However, upon transplanting the trust ownership system to China, the dual structure of the Anglo-American dual ownership system has created profound tension with China's single ownership system under the "one property, one right" principle. This has left the attribution of trust property rights in China long mired in theoretical debate and

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[3] See Wu Yiming, Anglo-American Property Law (Shanghai: Shanghai People's Publishing House, 2011), p. 74; Zhao Cuicui, Research on the Estate in Anglo-American Property Law (Beijing: China Law Press, 2015), p. 26.
[4] See Wen Shiyang and Feng Xingjun: "On the Ownership of Trust Property: With Reference to the Improvement of Relevant Legislation in China", Journal of Wuhan University (Philosophy and Social Sciences Edition), No. 2, 2005, pp. 203-209.
[5] See He Jinxuan, "Trust Legislation Should Not Be Rushed", in Peking University Law Review, 1998, Vol. 2; He Jinxuan and Li Yingzhi (eds.), Trust Law in Asian Civil Law Countries and Regions, China Law Press, 2020, p. 93;See Ronald J. Scalise, "Some Fundamentals of Trusts: Ownership or Equity in Louisiana?", Tulane Law Review Vol.92 (2017), p.61.
[6] See [Japan] Higuchi Norio, Trusts and Trust Law, translated by Zhu Daming, Beijing: China Legal Publishing House, 2017, p.28.
[7] See Graham Virgo, The Principles of Equity & Trusts (4th ed.), Oxford University Press, 2020, pp.45-46.
[8] See Xu Wei, Research on the Protection Mechanism for Trust Beneficiary Interests, Shanghai Jiao Tong University Press, 2011, pp.73-78;
[9] See Liao Huanguo, "The Dilemma and Solutions of the One Thing, One Right Principle", published in Times Law Review, Issue 1, 2006, pp. 68-72.
[10] See Dou Dongchen, "Constructing Dual Rights in Trust Property from the Perspective of One Thing, One Right", Science, Economy and Society, No. 1, 2019, pp. 99-106.
[11] See Ruiqiao Zhang, "A Comparative Study of the Introduction of Trusts into Civil Law and Its Ownership of Trust Property", Trusts & Trustees Vol.21 (2015), pp.902-922.

practical exploration within an ambiguous zone.Academic perspectives are diverse, encompassing theories such as "the settlor ownership theory," "the beneficiary ownership theory," "the trustee ownership theory," and "the independent property purpose theory."

From a comparative law perspective, Scotland—a traditional civil law jurisdiction—enforces a trust law that strictly adheres to the principle of "statutory property rights" and the unitary ownership system. It stipulates that ownership of trust property vests in the trustee, while the beneficiary holds rights of a creditor nature.[12] This "debt-like" treatment ingeniously circumvents the rigid requirement for public notification of property rights transfers, thereby robustly safeguarding the core value of confidentiality inherent in the trust system.Moreover, having evolved over nearly a century, Japan's trust system has innovatively established a parallel framework where trustees hold formal property rights (ownership) and beneficiaries hold substantive creditor rights (entitlement to benefits), while remaining grounded in civil law theory. This demonstrates remarkable institutional resilience and offers valuable lessons.Specifically, the settlor transfers ownership of trust property to the trustee (typically a trust company). Upon acquiring ownership, the trustee manages and disposes of the trust property, while the beneficiary exclusively holds the right to claim trust benefits. To prevent trustee abuse of ownership rights that could harm beneficiaries, the law grants beneficiaries supervisory powers, creating essential checks on trustee authority. [13]

Drawing upon the experience of civil law jurisdictions, Article 2 of China's Trust Law deliberately employs the term "entrustment" rather than "transfer" to describe property rights. It stipulates that trustees shall "manage and dispose of" trust property in accordance with the trust's intent. This legislative phrasing effectively diminishes the legal finality of property rights transfer.Articles 15-16 of the Trust Law, together with Article 95 of the Ninth Civil Judiciary Guidelines, jointly establish the principle of trust property independence, explicitly requiring trust property to be distinguished from the settlor's non-trust property and the trustee's own property.This institutional design aims to circumvent the "dual ownership" dilemma inherent in Anglo-American legal systems, striving for compatibility with the civil law principle of "one thing, one right". It also represents a significant innovation in China's legislative approach to the trust system.

1.2 Challenges and responses to domestic trusts

China's trust system has long faced scrutiny from both academic and practical circles, with challenges primarily crystallising around two focal points: the practical challenges to the independence of trust property; and the rigid constraints of formal requirements for establishment. However, in-depth analysis through empirical research and practical experience indicates that such issues are fundamentally attributable to deviations in practical operations from legal norms, rather than inherent flaws within China's trust system itself.

1.2.1 Substantive controversy over property independence: Legal analysis of piercing grounds

The enforcement proceedings concerning the property aspects of the criminal judgments against Cui, Zhang, and Chu – the third family trust piercing case in China to

[12] See Yu Haiyong, "On the Attribution of Ownership of Trust Property", Journal of Sun Yat-sen University (Social Sciences Edition) 2010, No. 2, pp. 189-200.
[13] See Yu Haiyong, "On the Localisation of Dual Ownership of Trust Property in Anglo-American Law in China", Modern Law Review, No. 3, 2010, pp. 159-168.

date – are highly illustrative.[14] Public discourse has largely centred on the court's ruling to "seize ¥41.43 million from a family trust fund entrusted to a third-party factoring company under the name of the judgment debtor," with media outlets tending to question whether this disregarded the inherent risk isolation function of trusts. However, a thorough examination of the relevant case details and facts already established by criminal investigation authorities reveals thatthe funds used to establish the trust were in fact illicit proceeds transferred by the suspect. The court's ruling, precisely grounded in Article 64 of the Criminal Law of the People's Republic of China concerning the recovery of illegal gains and coupled with the mandatory provision of Article 11 of the Trust Law that "a trust established with illegal property shall be invalid," effectively pierced the protective shield of trust property independence. This constituted a legitimate and necessary intervention by criminal judicial authority into civil trust relations.Moreover, offshore trusts are not an absolute safeguard, as evidenced by the well-known Zhang Lan case.Given that the dual ownership system itself does not classify the settlor as a statutory rights holder, coupled with the fact that offshore trusts established for wealth succession purposes typically adopt an irrevocable structure—whereby the settlor generally loses direct control over trust assets upon establishment—judicial practice applies exceptionally stringent scrutiny to whether the settlor genuinely relinquished control.Why was the trust in the Zhang Lan case invalidated? Precisely because Zhang Lan retained "apparent unfettered operation" over the trust account. Notably, she frequently executed substantial transfers without supporting documentation after the trust's establishment, with funds directed towards personal purposes (such as purchasing apartments), thereby failing to achieve the core requirement of trust law: the separation of ownership and beneficial rights.The court firmly anchored its ruling on the pivotal fact of "apparent unfettered operation," conclusively establishing that the settlor retained substantive control over the trust assets. Consequently, the court denied the independence of the trust property. A comparable precedent is the Deposit Guaranty National Bank v. McBeath case adjudicated by the Mississippi State Court in the United States.The court ultimately ruled that even though the drafters of the trust agreement (including the trustee) lacked subjective malice and the settlor had not actually withdrawn principal during his lifetime, the settlor retained the right to withdraw principal in excess of the principal amount. Combined with the clear wording of Articles 5 and 9 of the agreement indicating the trust was established for the settlor's benefit, this resulted in the trust losing its independence. Creditors were therefore entitled to obtain the trust property from the estate administrator to discharge debts.[15]

Furthermore, two additional primary scenarios warranting the piercing of offshore trusts exist: unlawful trust purposes and sham trusts, with corresponding legal principles universally recognised within domestic regulations. Firstly, unlawful trust purposes (fraudulent conveyance).Turkish ultra-high-net-worth individual Demirer was accused of deep involvement in a series of financial frauds in the late 1990s, triggering a banking crisis in Turkey. The Turkish government's takeover authority, TMSF, pursued billions of dollars in debts owed by Demirer, targeting assets held in multiple discretionary trusts established in the Cayman Islands.This case involved cross-jurisdictional litigation spanning the Cayman Islands, the United Kingdom, and Australia, encompassing complex legal disputes concerning the recognition of foreign

[14] See Enforcement Ruling (2023) Su 0602 Zhi 6286-1 of the Chongchuan District People's Court, Nantong City, Jiangsu Province.
[15] Deposit Guaranty National Bank v. McBeath, 204 So. 2d 863 (Miss. 1967).

judgments, trust law, asset protection, and enforcement. Ultimately, the Privy Council of the United Kingdom, acting as the court of final appeal, ruled that TMSF could enforce against Demir's trust assets in the Cayman Islands. The rationale was that the settlor had effectively retained the right to revoke the trust at any time, and the purpose of establishing the trust was manifestly to evade creditor recovery.[16] Secondly, Sham Trust. This case involved allegations that a Russian ultra-high-net-worth individual had illegally transferred hundreds of millions of dollars from a bank he controlled into five discretionary trusts during the 2008 financial crisis. The case was heard in the High Court of Justice of England and Wales, with core disputes centring on trust law, fraud, and conflict of laws.The court's final ruling determined that, given the settlor simultaneously acted as trustee with full control over the trust property and the trusts were established with the intent to mislead third parties and evade creditors, all five trusts constituted sham trusts. As the settlor retained beneficial ownership of the trust property, creditors were granted permission to enforce against such assets. [17]

In summary, the efficacy of the trust system in achieving risk isolation fundamentally hinges upon the parties' adherence to trust regulations. The independent status of trust assets necessitates collaborative maintenance by all parties within the statutory framework.

1.2.2 Judicial flexibility regarding formal requirements for establishment: Practical breakthroughs and rule evolution

Addressing criticisms of rigid establishment formalities, judicial practice has progressively established flexible standards through incremental rulings, demonstrating respect for the essence of trusts.

In the retrial of the inheritance dispute between He and Li et al., the deceased Li W set forth corresponding rights and obligations in his will, detailing the establishment of a public welfare fund, charitable investment plans, and specific funding methods for designated individuals, while appointing an executor.He argued that the will failed to meet statutory requirements for a testamentary trust, constituting instead a legacy that merely clarified post-bequest estate usage, thereby demanding statutory inheritance of the contested assets.The Beijing High Court fully considered the testator Li Wǔ's fervent dedication to public welfare and his intention to care for relatives and friends. It held that the testamentary disposition arrangements—namely, "the testator establishing a trust through his will and making systematic arrangements regarding the operation plan for the public welfare fund and the designation of executors"—should respect the true intentions of the settlor rather than mechanically applying the rules governing legacies.[18] The second case in the Shanghai High Court's third batch of 2023 reference cases (Li v Qin et al. Inheritance Dispute over Testamentary Disposition) took this further. The testator's will did not explicitly establish a trust, and certain provisions presented execution difficulties. The defendants thus argued that the estate should be distributed according to statutory succession on the grounds that the will was unenforceable.Upholding the judicial principle of maximising testamentary effect, the Shanghai High Court innovatively recognised the validity of establishing a trust through a holographic will. The testator, Li Ming, stipulated in his will that a property valued at RMB 6.5 million be incorporated into a "family foundation" for unified

[16] TMSF v Merrill Lynch Bank [2011] UKPC 17.
[17] Gregor Hogan, "Mezhprom Bank v Pugachev [2017] EWHC 2426 (Ch)", Trusts & Trustees Vol.24 No.2 (2018), pp.212-215.
[18] See the Civil Ruling of the Beijing Higher People's Court (2021) Jing Min Shen No. 5415.

management by an administrator. Employing a systematic interpretation approach, the court stated:The interpretation of a will must seek its true intent and consider its entirety; provided the trust property is lawful, it possesses the basis for execution." [19] The aforementioned cases clearly outline the progressive logic of judicial practice: the former establishes the legal positioning of testamentary trusts as distinct from legacies, while the latter breaks through the strict formal requirements for written trust contracts, demonstrating substantive judicial recognition of flexible forms for trust establishment.

Consequently, onshore trusts retain significant legal value and utility within China's cross-border asset succession framework. Their institutional merit should not be entirely dismissed due to potential piercing risks in specific scenarios, nor should they be excluded from the legal toolkit for cross-border asset succession in favour of offshore trusts alone.

1.3 Specific risks of offshore trusts and targeted mitigation through localised approaches

Whilst offshore trusts possess distinct advantages in cross-border asset succession, they harbour inherent risks that demand attention. Consider a typical scenario involving a US beneficiary: the FGT model often stipulates automatic conversion to FNGT upon the settlor's death. This triggers a transfer of control from the settlor to the beneficiary, simultaneously activating US tax reporting obligations on the trust's appreciation.Hong Kong's innovative "dual settlor" mechanism, whilst extending the FGT's duration through committee structures to defer control transfer, carries inherent risks. Such arrangements may exacerbate familial conflicts, potentially triggering intense disputes over control that undermine the trust's stability.When assisting clients in structuring and utilising offshore trusts, mainland lawyers must not only rigorously avoid the aforementioned risk of trust piercing due to excessive settlor control, but also urgently focus on institutional design across two dimensions:

Firstly, establishing a multi-jurisdictional compliance coordination mechanism. The core objective lies in harmonising requirements across different jurisdictions, particularly when trust structures involve US-based beneficiaries. This necessitates meeting the dual compliance demands of both the complex US tax regime (such as FATCA and estate tax) and China's stringent foreign exchange controls (e.g., Article 19 of the Foreign Exchange Administration Regulations) through a look-through approach.This demands that solicitors not only possess deep expertise in relevant substantive laws but also demonstrate the foresight to anticipate and resolve regulatory conflicts, such as effectively managing the tension between cross-border asset transfer reporting and US tax disclosure obligations.

Secondly, embedding a preventive contingency governance framework. This hinges on establishing systematic emergency protocols that transcend mere trustee replacement procedures. Such mechanisms should encompass efficient dispute resolution for beneficiaries—including pre-set arbitration clauses, family council decision-making rules, contingency plans for key personnel absence, and corrective procedures for trust purpose deviation.Such institutional arrangements proactively prevent familial conflicts from escalating into governance crises, ensuring the trust's long-term stability and fulfilment of its objectives through generational transitions and familial changes.

[19] See Civil Judgment (2022) Hu 0115 Min Te No. 525 of the Pudong New Area People's Court, Shanghai.

2. Systematic advancement of mainland lawyers' cross-border inheritance practice

Cross-border asset succession confronts complex challenges arising from multiple jurisdictional conflicts, compelling mainland lawyers to transcend reactive approaches. Service frameworks must be reconfigured across three dimensions: innovation in legal application methodologies, deep integration of intelligent technologies, and structured coordination of succession tools. This paradigm shift in cross-border inheritance expertise will enhance professional efficacy in handling such matters.

2.1 Hierarchical construction and operational refinement of legal application strategies

Within the legal application domain of cross-border inheritance, mainland lawyers must transcend the limitations of simplistic application of conflict-of-laws rules, developing multi-tiered, forward-looking legal application strategies.

Regarding intestate succession, Article 31 of China's Law on the Application of Laws to Foreign-Related Civil Relations establishes a "distinctive system" for foreign-related intestate succession: "Intestate succession shall be governed by the law of the decedent's habitual residence at the time of death, except for the succession of immovable property, which shall be governed by the law of the location of the immovable property." This approach, which applies different laws to the succession of movable and immovable property, contrasts sharply with the increasingly prevalent "unitary system" internationally.The unity system, by applying the decedent's personal law uniformly to the entire estate without distinction, better aligns with the personal nature inherent in inheritance relationships. While the distinction system offers greater convenience in judicial practice, it risks creating legal fragmentation in estate disposition. This is particularly pronounced when the decedent's assets are distributed across multiple jurisdictions, significantly increasing procedural complexity and uncertainty in inheritance outcomes.Consequently, in practice, some courts handling cross-border inheritance cases place significant emphasis on the parties' intentions. They may either adopt the fundamental approach of "party autonomy taking precedence over general conflict rules" or entirely abandon conflict rules for cross-border inheritance, directly determining the applicable law based on the "principle of party autonomy". [20] Taking the appeal case of Pei Mou 1 and Pei Mou 2 et al. concerning testamentary inheritance disputes as an example,the court first invoked Article 3 of the Law on the Application of Laws to Foreign-Related Civil Relations to confirm that parties to foreign-related inheritance disputes may expressly choose the applicable law. Subsequently, relying on Article 8 of the Interpretation (I) of the Application Law, it held that all parties in the original trial had invoked Chinese law in presenting their arguments and had raised no objection to the application of Chinese law in adjudicating the case. Thus, it concluded that applying Chinese law was entirely appropriate.[21] This constitutes a misrepresentation. Pursuant to Article 4 of the Supreme People's Court's Interpretation (I) on Several Issues Concerning the

[20] See Civil Ruling No. (2014) Haizhong Min San Zhong Zi No. 56 of the Haikou Intermediate People's Court, Hainan Province, and Civil Judgments Nos. (2013) Fosun Min Jun Min Chu Zi No. 764, (2014) Fosun Min Jun Min Chu Zi No. 56,[2014] Fosun Minjun Minchu No. 160 Civil Judgment, (2014) Fosun Minjun Minchu No. 377 Civil Judgment, [2014] Fosun Minjun Minchu No. 605 Civil Judgment,[2014] Fosun Fajun Minchu No. 658 Civil Judgment, [2014] Fosun Fajun Minchu No. 677 Civil Judgment,[2014] Fosun Court Civil Initial No. 678 Civil Judgment, (2017) Yue 0606 Min Chu No. 19212 Civil Judgment, [2017] Yue 0606 Min Chu No. 19213 Civil Judgment.

[21] See Beijing No. 2 Intermediate People's Court Civil Judgment No. 11660 of 2015.

Application of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations, a contractual choice of law must be made under explicit legal guidance; otherwise, the choice is invalid. Yet current Chinese legislation does not permit parties to contractually select the law governing foreign-related inheritance matters.

To circumvent the rigid application of the "distinctive rules" benchmark established under Article 31 of the Law on the Application of Laws to Foreign-Related Civil Relations, the domain of validity confirmation may leverage testamentary instruments. This should harness the "pooling of connecting factors" effect under the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions—where a will is valid if its form complies with the law of any connecting factor, such as the place of execution or the testator's nationality.This approach innovates a "jurisdictional optimisation for defective wills" technique: guiding clients to select jurisdictions with the broadest connecting factors for will rectification.A typical example involves cross-strait inheritance scenarios: where a Taiwanese resident's oral will meets the requirements of the island's Civil Code and simultaneously satisfies the formal requirements under Article 32 of the Law on the Application of Laws to Foreign-Related Civil Relations, mainland courts may utilise cross-jurisdictional legal validity integration techniques to confirm its validity. This judicial logic provides a conversion pathway for resolving inheritance conflicts across the strait.

2.2 Technology-empowered preventive justice and cross-border inheritance dispute resolution system reconstruction

The cross-border enforcement framework established by the Singapore Convention on Mediation is driving profound reforms in foreign-related mediation systems, with consensus emerging on establishing mechanisms for the cross-border enforcement of mediation agreements. Leveraging the unique advantages of "One Country, Two Systems," the Guangdong-Hong Kong-Macao Greater Bay Area has pioneered institutional experimentation. The Hong Kong and Macao Special Administrative Regions, exercising their high degree of autonomy, have developed internationally aligned foreign-related mediation systems. Their role as "super connectors" inherently endows relevant legislation with cross-border compatibility.Hong Kong has further established a bidirectional transmission mechanism of "internalising international rules and exporting local experience," providing a reference for the transformation of mainland China's foreign-related mediation system. Presently, all three regions collectively face the challenge of modernising their mediation systems, and the exploration of cross-border enforcement mechanisms has become a pivotal lever for advancing China's mediation paradigm from regional practice towards international standards.

This institutional evolution must be grounded in a preventive justice philosophy, embodied by the development of "Fengqiao-style People's Courts": leveraging judicial big data to anticipate conflict trends and empower source governance; cultivating grassroots conflict management capabilities through exemplary mediation; and establishing procedural safeguards while performing mediation guidance functions to ensure non-litigious dispute resolution operates within the rule of law.[22] Notably, while expanding the scope for flexible dispute resolution, vigilance is required against the

[22] See Cao Ting: "The Operational Logic and Optimisation Pathways for Building 'Fengqiao-style People's Courts'", published in Law Review, Issue 3, 2025, p. 82.

erosion of parties' procedural rights through jurisdictional expansion. This very challenge provides a balancing point for technological intervention.

Traditional cross-border inheritance procedures have been hampered by high costs and lengthy timelines, yet the integration of digital technology with alternative dispute resolution mechanisms has pioneered new pathways.In 2025, Xuhui District Court pioneered the "Headquarters-to-Headquarters Online Litigation-Mediation Interface Mechanism for Taiwan-Related Cases" in a "three-region spanning" inheritance case. Integrating resources from the court, Taiwan Affairs Office, and Justice Bureau, it actively employed online mediation and online applications for judicial confirmation. Leveraging electronic seals and cloud-based evidence storage technology, it achieved a fully digitalised closed-loop process—from paperless case filing and cross-border electronic service to cloud-based signing and enforcement—completed within 45 days.[23] This model proactively responds to the "Opinions of the Central Committee of the Communist Party of China on Strengthening Judicial Work in the New Era," bolstering judicial efforts concerning Taiwan affairs and deepening cross-strait integration. It innovatively incorporates "age-friendly adaptations," bridging the digital divide for the elderly through large-font interface design and video-assisted guidance, thereby providing a human-centred solution for inheritance matters involving seniors.

Taking this as a blueprint,this paper proposes that mainland lawyers may establish a dispute resolution model combining "blockchain evidence storage + asynchronous mediation + online judicial confirmation": Firstly, blockchain technology fixes key evidence such as the deceased's medical records and will drafts, while biometric verification authenticates cross-border parties' identities. This enhances evidence preservation and identity verification at the dispute's outset. To bolster the validity of cross-border electronic evidence, the Additional Certificate under the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents may be incorporated.Secondly, during dispute proceedings, cross-time-zone "asynchronous negotiations" are conducted via the People's Court mediation platform, permitting parties to submit submissions at staggered intervals. Mediators familiar with local cultural norms are invited to observe proceedings, clarifying jurisdictional and cultural differences when parties disagree on inheritance arrangements. Finally, the model connects to online judicial confirmation channels, conferring enforceability upon mediation agreements to facilitate dispute resolution.This model both inherits the humanistic core of the "Fengqiao Experience"—reinstating family ethics as the foundation for inheritance disputes—and achieves procedural efficiency through technological rigour. It fundamentally resolves the resource constraints of traditional cross-border inheritance, demonstrating the dialectical unity of flexible dispute resolution and procedural justice enabled by technology.

2.3 Synergistic planning of family trusts and wills

The fundamental breakthrough in cross-border asset succession lies in transcending the limitations of single instruments. Through synergistic innovation between domestic and offshore trust systems and testamentary tools, systematic optimisation of intergenerational transfers is achieved.Mainland lawyers should spearhead composite solutions combining "offshore trust disposal of overseas assets with onshore testamentary trusts for fixed asset succession." This approach harnesses offshore trusts'

[23] See He Zhongting and Chang Shimeng: "The Judicial Warmth Across the Strait", published on the "Shanghai High Court" WeChat public account, https://mp.weixin.qq.com/s/RGLjFRAYh8DQBvh5SukP6w (accessed 20 July 2025).

institutional advantages in tax planning and transfer efficiency while adhering to mandatory frameworks governing domestic real estate inheritance.

Regarding asset classification and disposition, a refined tool-matching logic must be established: when disposing of domestic real estate via testamentary trusts, Article 1141 of the Civil Code concerning reserved shares must be considered beforehand due to its rigid constraints on disposal rights; offshore financial assets should be placed within offshore trust structures (e.g., FGT/FNGT) to leverage their flexible governance for tax optimisation and cross-border transfers;Succession of family business equity requires the Private Trust Company (PTC) model to establish a dynamic equilibrium between retaining control and facilitating generational transfer; while allocating highly liquid assets to insurance trusts can mitigate inheritance dispute risks through the certainty of statutory payouts.

Selecting offshore trust types demands an artful balancing of values—where clients prioritise flexible asset control and amendable arrangements, the revocable FGT offers adaptability yet requires rigorous safeguards against piercing risks under US Internal Revenue Code anti-avoidance provisions. Conversely, when asset protection and intergenerational stability are paramount, the certainty of an irrevocable FNGT holds greater institutional appeal.Throughout this decision-making process, mainland solicitors should guide the establishment of a "pre-agreed family governance mechanism," embedding mandatory mediation clauses within trust instruments. These require beneficiary disputes to be prioritised for arbitration or mediation, thereby institutionalising conflict resolution through contractual provisions.

The ultimate regulatory coordination challenge lies in reconciling the efficacy of wills and trusts. When employing a revocable FGT trust, testamentary provisions must strictly avoid direct disposition of trust assets, fundamentally preventing the risk of commingling under Article 15 of the Trust Law.Should the trust structure incorporate a "settlor committee" governance model, the will must pre-emptively establish member succession rules. Drawing upon the succession procedures outlined in Section 37 of Hong Kong's Trustee Ordinance, legal techniques can be employed to pre-emptively resolve decision-making deadlocks following the settlor's demise. Only through the seamless integration of trust instruments and testamentary provisions can a truly impregnable legal shield for cross-border succession be forged.

3. Conclusion

Innovation in legal services for cross-border asset succession fundamentally constitutes a professional response to the challenges of family wealth governance in the era of globalisation. Mainland lawyers must transcend traditional agency thinking to assume the role of "cross-jurisdictional succession architects". This entails deepening legal understanding through institutional comparison, enhancing service efficacy through tool innovation, and integrating professional resources through ecosystem construction.

Regarding trust applications, domestic and international institutional differences should be viewed dialectically.Although China's principle of trust property independence conflicts with the dual ownership concept of Anglo-American law, the "risk isolation" function established through Articles 15 and 16 of the Trust Law and Article 95 of the Ninth Civil Judiciary Guidelines provides an effective pathway for domestic asset protection. Offshore trusts, meanwhile, offer unique value in family succession

involving multi-jurisdictional asset allocation due to their flexibility and maturity.Looking ahead, the deepening Belt and Road Initiative and the integrated development of the Guangdong-Hong Kong-Macao Greater Bay Area will expand service opportunities for mainland lawyers in cross-border inheritance matters. The industry must accelerate the development of standardised, technologically advanced, and human-centred foreign-related legal service systems. This will enable the provision of more professional and efficient succession solutions for the global asset allocation of high-net-worth families, ultimately achieving a service standard where "the warmth of the rule of law is felt from fingertips to heart."

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