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Drafting a commentary on the Chinese Criminal Code – German reflections on a Chinese desideratum

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ABSTRACT

Chinese criminal law scholars have increasingly been establishing links with colleagues in other jurisdictions and drawing benefits from comparative research, and more than anything else with those from Germany. This appears to be based on the fact that both Germany and China are at their core civil law systems, and that German scholarship in criminal law tends to have historically had, and still to have, a reputation abroad for a high degree of doctrinal sophistication that may appeal to other legal systems with a similar conceptual DNA. One major factor which keeps recurring in the recent Chinese debate is the dramatically increasing level of interest in a particularly Teutonic tool of legal scholarship, the code commentary. This paper will first interrogate the development of the debate in China about the introduction of commentaries, followed by a look at the German system in particular, in order to find out whether and how it might benefit the discussion in China. Finally, against that background the paper will try to map out some of the conceptual challenges a Chinese endeavour will face, given the current climate of a gradual paradigm shift from the overcome Soviet-based law to a new framework that is, however, still lacking sharp contours.

KEYWORDS

Chinese Criminal Code; code commentary; German commentary tradition; academia and practice

Introduction

Chinese criminal law and its reform have been in the focus of Western comparative research and writings for a long time. In more modern times, comparative engagement – in many instances aided by Chinese scholars – took place from the late nineteenth and early twentieth centuries in the pre-Republic reform period until 1949, and that period has still been the object of more recent research.[1] Coverage in Western academia

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[1]See, for example, Ernest Alabaster, *Notes and Commentaries on Chinese Criminal Law* (Luzac & Co., 1899) (reviews at (1900) The Journal of the Royal Asiatic Society of Great Britain and Ireland 148 ff. and P Fauconnet, Review of: Ernest Alabaster, Notes and Commentaries on Chinese Criminal Law, Luzac & Co., 1899, L'année sociologique, T.4 (1899–1900) 398 ff).; Gustavus Ohlinger, 'Some Leading Principles of Chinese Law' (1910) 8 Michigan Law Review 199 ff.; 'The New Chinese Criminal Code' (1914) 5 Journal of the American Institute of Criminal Law and Criminology 598 ff.; Chi-Yu Cheng, 'The Chinese Theory of Criminal Law' (1948) 39 Journal of Criminal Law and Criminology 461 ff; Geoffrey MacCormack, 'Law and Punishment in the Earliest Chinese Thought' (1985) 20 Irish Jurist 334 ff.; Robert

intensified after 1949, not least, of course, against the background of the differences between the geo-political blocs and the reliance of Chinese criminal law on the Soviet model, spawning a mass of related literature following the adoption of the 1979 Criminal Code well into the 1980s.[2] Considerations of human rights and judicial practice in relation to Chinese criminal law in the broader context made an enhanced appearance from 1990 onwards, not least with the review[3] of the 1979 Criminal Code in 1997 and the continuing issues surrounding the use of the death penalty.[4]

The focus of engagement has more and more been turned on Chinese legal culture in general,[5] and to judicial culture and transparency in particular.[6] Finally, a number of

Heuser, 'Rezeption, Perzeption und Adaption: Erwartungen an die chinesische Rechtsmodernisierung 1904–1930' (2014) 47 Verfassung und Recht in Übersee 319 ff.

[2]David C Buxbaum, 'Preliminary Trends in the Development of the Legal Institutions of Communist China and the Nature of the Criminal Law' (1962) 11 ICLQ 1 ff.; Fu-Shun Lin, 'Communist China's Emerging Fundamentals of Criminal Law' (1964) 13 American Journal of Comparative Law 80 ff.; Derk Bodde/Clarence Morris, *Cases from Hsing-an Hu-ian, a Conspectus of Chinese Criminal Law in the Ch'ing Dynasty* (1964); George Ginsburgs, 'Soviet Sources on the Law of the Chinese People's Republic' (1968) 18 Toronto Law Journal 179 ff.; David Finkelstein, 'The Language of Communist China's Criminal Law' (1968) 27 Journal of Asian Studies 503 ff.; Stanley Lubman, 'Form and Function in the Chinese Criminal Process' (1969) 69 Columbia Law Review 535 ff.; Jerome A Cohen, 'On Teaching Chinese Law' (1971) 19 American Journal of Comparative Law 655 ff.; Hungdah Chiu, 'Criminal Punishment in Mainland China: A Study of Some Yunnan Province Documents' (1977) 68 Journal of Criminal Law and Criminology 374 ff.; Frances Hoar Foster, 'Codification in Post-Mao China' (1982) 30 American Journal of Comparative Law 395 ff.; Harold J Berman/Susan Cohen/Malcolm Russell, 'A Comparison of the Chinese and Soviet Codes of Criminal Law and Procedure' (1982) 73 Journal of Criminal Law and Criminology 238 ff.; Zhu Qiwu, 'General Aspects of the Chinese Criminal Code and Code of Criminal Procedure' (1983) Pacific Basin Law Journal 65 ff; 'Concepts of Law in the Chinese Anti-Crime Campaign' (1985) 98 Harvard Law Review 1890 ff.; Jyun-Hsyong Su, 'Die Struktur des chinesischen Rechtsdenkens und ihre Wirkung auf das moderne Recht' (1967) 53 Archiv für Rechts- und Sozialphilosophie 305 ff; Klaus Mäding, *Strafrecht und Massenerziehung in der Volksrepublik China*, Edition Suhrkamp, 1979 (Review by Oskar Weggel (1981) 14 Verfassung und Recht in Übersee 464 ff.); Susanne Fritz, 'Das Strafgesetzbuch der Volksrepublik China von 1979' (1984) 39 Juristenzeitung 179 f.; Manfred Kulessa, 'Beobachtungen zur Rechtsentwicklung in China' (1987) 20 Zeitschrift für Rechtspolitik 209 ff; Robert Heuser, 'Chinas Weg in eine neue Rechtsordnung – Strukturen und Perspektiven (1978–1988)' (1988) 43 Juristenzeitung 893 ff; Mi Jian, 'Die traditionelle chinesische Kultur und das gegenwärtige Rechtssystem Chinas' (1989) 38 Studies in Soviet Thought 55 ff.

[3]See the current online version of the Criminal Code of the People's Republic of China at <www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm>.

[4]Li Haidong, 'China: Vorsichtige Wandlung' (1991) 3 Neue Kriminalpolitik 13 f ; Donald C Clarke/James V Feinerman, 'Antagonistic Contradictions: Criminal Law and Human Rights in China' (1995) China Quarterly 135 ff; Shizhou Wang, 'The Judicial Explanation in Chinese Criminal Law' (1995) 43 American Journal of Comparative Law 569 ff.; Chen Jianfu, 'Legalism with Chinese Characteristics: The Revision of the Criminal Law in the PRC' (1999) China Perspectives No. 21, 5 ff.; Harold M Tanner, *Strike Hard! Anti-Crime Campaigns and Chinese Criminal Justice 1979–1985* (1999) (Review by Melissa Macauley in (2000) 105 American Historical Review 906 f.); Sida Liu/Terrence C Halliday, 'Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law' (2009) 34 Law & Social Inquiry 911 ff.; Mark Findlay, 'The Challenge for Asian Jurisdictions in the Development of International Criminal Justice' (2010) Singapore Journal of Legal Studies 37 ff; Shizhou Wang, 'On Development of Criminal Law in the People's Republic of China' (2010) 43 Verfassung und Recht in Übersee 292 ff.; Qihua Ye, 'Introduction to the Issue of Rape in China as a Developing Country' in Nicole Westmarland/Geetanjali Gangoli (eds), *International Approaches to Rape* (2011) 57 ff.; Michelle Miao, 'The Politics of China's Death Penalty Reform in the Context of Global Abolitionism' (2013) 53 British Journal of Criminology 500 ff; Susan Trevaskes, 'China's Death Penalty. The Supreme People's Court, the Suspended Death Sentence and the Politics of Penal Reform' (2013) 53 British Journal of Criminology 482 ff.

[5]Shao-Chuan Leng, 'The Role of Law in the People's Republic of China as Reflecting Mao Tse-Tung's Influence' (1977) 68 Journal of Criminal Law and Criminology 356 ff.; Kenneth Winston, 'The Internal Morality of Chinese Legalism' (2005) Singapore Journal of Legal Studies 313 ff.; Guobin Zhu, 'Prosecuting "Evil Cults": A Critical Examination of Law Regarding Freedom of Religious Belief in Mainland China' (2010) 32 Human Rights Quarterly 471 ff; Sida Liu/Terrence C Halliday, 'Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers' (2011) 45 Law and Society Review 831 ff.; Robert Heuser, *Grundriss der Geschichte und Modernisierung des chinesischen Rechts* (Nomos 2013); Larry A DiMatteo, '"Rule of Law" in China: The Confrontation of Formal Law with Cultural Norms' (2018) 51 Cornell Int'l L.J. 391 ff.

[6]Shizhou Wang, 'The Judicial Explanation in Chinese Criminal Law' (1995) 43 American Journal of Comparative Law 569 ff.; Carl F Minzner, 'China's Turn against Law' (2011) 59 American Journal of Comparative Law 935 ff; Björn Ahl, *Justizreformen in China* (Nomos 2015); Susan Finder, 'China's Translucent Judicial Transparency' in Michael Palmer/Hualing Fu/Xianchu Zhiang (eds) *Transparency Challenges Facing China* (2019) 141 ff.

global political players have engaged in a wider 'rule-of-law dialogue' with China, again based on geo-political concerns and the rift in the understanding of the conceptual foundations of human rights between the Chinese government and the West,[7] which also plays a role in the context of evaluating China's efforts in coming to terms with its history of crimes committed under the Cultural Revolution and its pre-cursors.[8]

In turn, Chinese criminal law scholars have increasingly been establishing links with colleagues in other jurisdictions and drawing benefits from comparative research, and more than anything else apparently with those from Germany,[9] in the last decade[10] mostly[11] under the auspices of the Sino-German Criminal Law Scholars Association (*Chinesisch-Deutscher Strafrechtslehrerverband*), led jointly by scholars from the Würzburg University Law Faculty and Peking University Law School.[12] This appears to be based on the fact that both Germany and China are at their core civil law systems, and that German scholarship in criminal law tends to have historically had, and still to have, a reputation abroad[13] for a high degree of doctrinal sophistication that may appeal to other legal systems with a similar conceptual DNA. One major factor which, as we will see, keeps recurring in the recent[14] Chinese debate – including the civil law – is the dramatically increasing level of interest in a particularly Teutonic tool of legal scholarship, the code commentary.[15]

[7]Nicole Schulte-Kulkmann, 'Förderung von Rechtsstaatlichkeit und Menschenrechten in der europäisch-chinesischen Rechtszusammenarbeit' (2003) 36 Verfassung und Recht in Übersee 529 ff.; Robert Heuser, 'Gegenwärtige Lage und Entwicklungsrichtung des chinesischen Rechtssystems: Eine Skizze' (2005) 38 Verfassung und Recht in Übersee 137 ff; Hui Xie, 'Vom politisierten zum rechtsstaatlichen Verfassungsverständnis: Entwicklungen im China des 20. und Erwartungen des 21. JH.' (2005) 44 Der Staat 289 ff; Hinrich Julius, 'Institutionaliserte rechtliche Zusammenarbeit: Die Erfahrungen der GTZ in China' (2008) 72; Rabels Zeitschrift für ausländisches und internationales Privatrecht 55 ff.; Xujun Gao/Bo Gao, 'The German-Chinese: "Rule of Law Dialogue": Influence and Outlook' (2014) 47; Verfassung und Recht in Übersee 392 ff.

[8]Albin Eser/Ulrich Sieber/Jörg Arnold (gen. eds), Thomas Richter, Strafrecht in Reaktion auf Systemunrecht, Teilband 9: China (Duncker & Humblot 2006).

[9]Eric Hilgendorf (ed), *Das Gesetzlichkeitsprinzip im Strafrecht: Ein deutsch-chinesischer Vergleich* (Mohr Siebeck 2013); Eric Hilgendorf (ed), *Aktuelle Herausforderungen des chinesischen und deutschen Strafrechts* (Mohr Siebeck 2015); Eric Hilgendorf (ed), *Rechtswidrigkeit in der Diskussion* (Mohr Siebeck 2018); Eric Hilgendorf/Bernd Schünemann/Frank Peter Schuster (eds), *Verwirklichung und Bewahrung des Rechtsstaats* (Mohr Siebeck 2019). See also the PhD theses by Daniel Sprick, 'Die Grenzen der Notwehr im Strafrecht der Volksrepublik China' (Nomos 2016) and by Zhengyu Zhang 'Der Straftatbegriff im chinesischen und deutschen Strafrecht' (Tectum-Verlag 2017).

[10]However, German textbooks, etc. had been translated by individual scholars into Chinese long before that – Wechat SMS from Professor Jiang Su to the author.

[11]There are also strong generalist links, for example, to Göttingen University in Germany with the German-Sino Law Institute (*Deutsch-Chinesisches Institut für Rechtswissenschaft* – <http://www.uni-goettingen.de/de/423274.html>), to Finland through the Finnish China Law Center, see <https://blogs.helsinki.fi/chinalawcenter/>, or to the UK through the Great Britain China Centre (<http://www.gbcc.org.uk/>).

[12]See for more information on the remit of the cooperation the links to their conferences and publications at <www.jura.uni-wuerzburg.de/lehrstuehle/hilgendorf/projekte-und-forschung/chinesisch-deutscher-strafrechtslehrerverband/willkommen/>.

[13]See Eric Hilgendorf, 'Contemporary German Criminal Jurisprudence' (2013) 1 Peking University Law Journal 181–95.

[14]However, annotations to codes can be traced back to the seventh century, with the Tang Criminal Code of 653 A.D. See Tang Lv Shu Yi (唐律疏议), ZhongHua Book Company, 1983 and the new annotation by Qian Daqun, *New Annotation on Tang Lv Shu Yi* (Nanjing Normal University Press 2007). Chen Xingliang also published an annotated Criminal Code directly after the 1997 reform, see Criminal Law Annotation (刑法疏议), Publishing House of Chinese People's Public Security University, 1997. – Comments from Professor Yu Gaoneng in WeChat correspondence of 28/29 May 2020; on file with the author.

[15]For an overview of the development of criminal law *textbooks* in the People's Republic see Wenhua Wang, '1949–2014 Review and Reflection Upon the 65-Year History of Textbooks on Criminal Law' (2015) 3 Peking University Law Journal 443–81.

In this paper, we will first interrogate the development of the debate in China about whether commentaries should be introduced and how they should be structured.[16] We will then examine the German system in particular, in order to find out whether and how it might benefit the discussion in China. Finally, against that background we will try to map out some of the conceptual challenges a Chinese endeavour will be facing, given the current climate of a gradual paradigm shift from the overcome Soviet-based law to a new framework that is, however, still lacking sharp contours.

The development of the Chinese debate

Before we turn to the actual development of the debate in Chinese academia regarding the usefulness and desirability of code commentaries, it is helpful to consider whether there is any potential, unlikely as that may be, for conceptual clashes with the Chinese political environment of law reform in general. This means looking at the stance of the CPC, and in the recent context more specifically, of course, to *Xi Jinping Thought*. To sum up the result in advance: The idea of a code commentary is in essence politically conflict-neutral.[17]

Sino-centrism and compatibility with CPC party principles: the Four Comprehensives and Xi Jinping Thought

China is currently carefully reconsidering its previous stance with regard to substantive criminal law, in that reliance on the traditional approach under the old Soviet-based[18] criminal code is gradually being replaced by a concept that is owned by Chinese legal scholars, practitioners and law-makers, and shaped to the indigenous principles influencing and guiding modern Chinese culture and society. In other words, Chinese criminal law is increasingly progressing to a Sino-centric understanding of law based on the founding principles of the People's Republic, the current policies of the CPC and the more recent wider guidance by *Xi Jinping Thought*, for example, in the two volumes of collections of President Xi Jinping's ideas, *The Governance of China*.[19] It is developing its own understanding and interpretation of what Chinese law should look like and does not consider itself as fettered by every detail of the dogmata of a previous political and ideological system that no longer exists or has become outdated, nor by any other foreign or international models. It is obvious, yet useful to note, that China's fast increasing overall geo-political standing has also tilted the playing field, as it were, of

[16]It is striking that the most recent edition of Albert H.Y. Chen's standard work 'An Introduction to the Chinese Legal System' (LexisNexis 2019) does not contain any reference to academic code commentaries.

[17]Some, possibly with first-hand knowledge of the Chinese political system, will see this outcome as so obvious that they might therefore suggest I am attacking my own straw man. I would tend to disagree because I feel that it is in most cases better to analyse, and if necessary to spell out, the precise reasons for so-called undisputed truths or conventional wisdom. The debate about increased academic involvement in law reform in a socialist body politic with a geopolitical position and rapidly consolidating societal identity of a country like China would to my mind appear to be particularly worthy of such enhanced scrutiny and discussion.

[18]See, for example, Liang Genlin, 'The Vicissitudes of Chinese Criminal Law and Theory – a Study in History, Culture and Politics' (2018) 5 Peking University Law Journal 25–49, and id., 'The Criminal Code Amendments – Dimensions, Strategies, Evaluations and Contemplations' (2018) 5 Peking University Law Journal 309–59. See also Jiang Su, 'From "Harsh Justice" to "Balancing Leniency with Severity" – The Transformation of Criminal Policy in Contemporary China' (2017) 5 Peking University Law Journal 139–64.

[19]Xi Jinping, *The Governance of China*, vol. I (2014) and vol. II (2015) (Foreign Language Press, Beijing) (hereinafter 'GoC II').

comparative research and collaboration, making the continued observance in some circles of possibly previously existing orientalist attitudes[20] in legal transplant research unsustainable and, indeed, undesirable.

On the initiative of Xi Jinping, the CPC has since late 2014 embraced the so-called Four Comprehensives (四个全面战略布局),[21] the third of which, put forward from 20 to 23 October 2014 at the 4th Central Committee Plenum Session of the 18th Central Committee of the CPC, is entitled 'Comprehensively govern the nation according to law'. What the CPC exactly means by this slogan was set out in more detail in a number of pieces by Xi Jinping in the second volume of his *The Governance of China*. Of particular relevance for our purposes are the following, and it is worth excerpting verbatim in certain parts:

- *Further Reform must be Systematic, Integrated and Coordinated*[22]
  This brief general statement serves as a concise grounding for a project like a code commentary: 'Making sure reform is systematic, integrated and coordinated is an intrinsic requirement of reform as well as an important means for progress. […] We should work to ensure reform measures are consistent in policy orientation, mutually supportive in implementation and complementary in effect, so that all of them concentrate on and contribute to the general goal of comprehensively continuing reform.'
- *Promote Socialist Rule of Law*[23]
  While it is no surprise that the leadership of the CPC as such is not open to discussion,[24] the emphasis is also put on the 'need to improve CPC leadership in law-based governance and continue to raise its capacity to lead in this regard'.[25] Stressing the need to uphold the position of the people, Xi Jinping goes on to say that 'the people are the primary actors in advancing the rule of law. This is a strength of our system and the fundamental distinction between socialist rule of law with Chinese features and capitalist rule of law'.[26] This is then correlated with the duty of the people to maintain and uphold the authority of the law.[27] Given that 'the people' are apparently distinguished from officials throughout this section, it would seem to stand to reason that academics, and not only practitioners such as judges, have a role to play in advancing the rule of law. This is supported further down in the chapter, when he declares: 'The comprehensive advancement of the rule of law requires the involvement of all sectors of society.'[28]

  Under the heading of equality before the law, officials themselves are exhorted to enhance their respect for legal precepts.[29] Encouraging the integration of the rule of

[20] See the seminal work in this context by Edward Said, *Orientalism* (Routledge & Kegan Paul Ltd 1978).
[21] See news coverage for example at <https://www.guancha.cn/culture/2015_05_04_318218.shtml> (in Chinese) and <https://www.bbc.com/news/world-asia-china-31622571>.
[22] GoC II, 115.
[23] GoC II, 119 ff.
[24] GoC II, 120.
[25] GoC II, 121.
[26] ibid.
[27] GoC II, 121–22.
[28] GoC II, 129.
[29] 'They must strive to become more adept at using law-based thinking and approaches to carry out reform, promote development, resolve conflicts, and maintain stability' – GoC II, 123.

law with the rule of virtue, Xi Jinping opines that '[t]his means that only laws that conform to ethics and have deep moral foundations will be conscientiously observed by the majority of the people'[30], while also pointing out that mere moral virtue needs to be underpinned by state enforcement action in cases of grave violations of such virtues by individuals.[31] Deep moral foundations and observance are based on deep insight into the foundations of the elements that make up a virtue, and an in-depth explanation of the law in a publication accessible – in theory – to everyone can surely only aid in that endeavour.

Addressing the need to ground any law reform on the prevailing conditions in China and the need to lay the 'emphasis on what is practical, what is contemporary[32] and what is quintessentially Chinese',[33] Xi Jinping expressly – and, from the point of view of a comparative lawyer, entirely accurately – addresses the benefits and risks of international and comparative engagement in the context of law reform:

> Basing our work on reality does not mean that we can develop the rule of law in isolation from the rest of the world. The rule of law is one of the most important accomplishments of human civilization. Its quintessence and gist have universal significance for the national and social governance of all countries. Therefore, we must learn from the achievements of other countries. However, learning from others does not equate to simply copying them. Putting our own needs first, we must carefully discern between the good and the bad and adopt the practices of others within reason. Under no circumstances can we engage in 'all-out Westernization', or a 'complete transplant' of the systems of others, or copy from other countries indiscriminately.[34]

Indeed, Xi Jinping explicitly recognises the need for legal certainty and clarity through consistent interpretation by stating 'We must place equal emphasis on making new laws, revising existing ones, abolishing those that are outdated, *and interpreting laws that need clarification*' [Emphasis added].[35] While one way of achieving that is through the SPC circulars, another – and a better one, it is submitted – would be the use of commentaries.

If we juxtapose the concept of a code commentary to these political framework parameters, it is difficult to see how it should lead to any unacceptable ideological friction; in fact, it would appear to be fully aligned to, and indeed mandated by, *Xi Jinping Thought*. Yet, is it still necessary to deal briefly with the question why there could be concerns about potential discrepancies, as questions such as those raised at a symposium organised by the China–EU School of Law (CESL) at the China University of Political Science and Law on 12 April 2018[36] on the topic of 'Concept and Technology of Legal commentary' suggest, based on a roundtable discussion with the renowned German criminal law scholar and commentary editor Professor Ulfrid Neumann giving his insights from long years in German academia, incidentally also at the author's *alma mater*, the University of the Saarland at Saarbrücken. The concerns expressed in the

[30]GoC II, 124.
[31]ibid.
[32]Despite repeatedly citing ancient sources in support of the premise, see, for example, GoC II, 125.
[33]GoC II, 124–25.
[34]GoC II, 126.
[35]GoC II, 127.
[36]See <http://en.cesl.edu.cn/info/1090/2358.htm>.

discussion ranged, among others, from the question of how commentators retain their neutrality when analysing the law as promulgated by the legislator – not least because academic views may at least in theory in turn impact on legislative reform – to the interplay with the judicial interpretation of the law for the purposes of practitioners, such as, for example, the judicial guidance circulars of the Supreme People's Court.[37] One Chinese participant queried in particular whether there could be a reverse flow of information and conceptual thinking from academia into (judicial) practice by stating

> that there still remain problems like slow updating of knowledge and refusal to learning the newest theories in the judicial practice in China now. Additionally, […] law schools at Chinese universities also fail to develop students' law explaining ability well. The majority of students read teaching materials only, regardless of the great thinking methods and explaining techniques, so they are weak in practice frequently.[38]

Underlying these comments, apart from lamenting a somewhat disjunctive relationship between academia and practice, seems to be the insight that seasoned – and well-travelled – academics may not feel bound by any direct official chain of command in their daily work to the same degree as state employees or even judges, for example, and hence commentary contributors may express views that could run counter to the official government or judicial policy and possibly lead to politically unwelcome critical thinking. Neither of these objections, while valid as a matter of principle regarding the exercise of academic freedom as understood in liberal Western societies, are ultimately convincing when it comes to the question of the introduction of code commentaries.

The commentary is first and foremost a tool. It is wielded by the hands of those who use it for whichever purpose they wish to use it.[39] Like any other tool, it requires practice before one can master it completely and, of course, one cannot use every tool for the same purpose. Some exposure to the ideological approaches of jurisdictions who already employ them is unavoidable, yet there seems to be no ideological bar in China against even in-depth comparative contacts – which would actually carry the virus of non-system-compliant thinking, if one were to go down that route of argument – in the first place. The current (Chinese) publishing landscape in theory already gives the opportunity to scholars to voice their own views and it is very unlikely that they would take any different approach in the environment of a new publication medium.

The fact that the Western academics and practitioners contributing to commentaries in their countries of origin might subscribe to different political creeds than those wishing to introduce commentaries in China is neither here nor there. In that sense, Marshall McLuhan's adage that 'the medium is the message', or as he said elsewhere 'first we

[37] See on these and their gap-filling function Susan Finder's excellent blog on the Supreme People's Court at <https://supremepeoplescourtmonitor.com/>, as well as her papers How the Supreme People's Court 'makes' criminal procedure judicial interpretations, in Björn Ahl (ed), Chinese Courts and Criminal Procedure: Post-2013 Reforms (forthcoming 2020), and id., 'China's Evolving Case Law System in Practice' (2017) 9 Tsinghua China L Rev 245, and on the increasing reach of the Court Björn Ahl, 'Judizialization in Authoritarian Regimes: The Expansion of Powers of the Chinese Supreme People's Court' (2019) 17/1 International Journal of Constitutional Law 252–77; Chen Xingliang, 'China's Guiding Case System – a Study on the Mechanisms of Rule Formation' (2014) 1 Peking University Law Journal 215–58.

[38] <http://en.cesl.edu.cn/info/1090/2358.htm>.

[39] See in this sense also Han Shiyuan, 'Legal Commentary in China' (2017) China Law Review, No. 5, 157–67 (韩世远: '法律评注在中国',《中国法律评论》2017年第5期, 第157–167页): 'After all, the legal commentary is a tool, and its charm comes from its instrumental rationality.'

shape our tools and then our tools shape us',[40] is certainly worth considering but ultimately not an obstacle to the Chinese endeavour. It is unlikely that China would need to view this with a similarly strong distrust as that displayed famously by the medieval Arab historian Ibn Khaldun in the context of Muslims' engagement with non-Islamic worldviews.[41]

More specifically, and not to put too fine a point on it, the former German Democratic Republic (GDR), another communist/socialist state, also made free use of commentaries and textbooks, often drafted by a collective of authors, as well as using circulars by the Supreme Court of the GDR (*Mitteilungen des Obersten Gerichts*), similar to those of the Supreme People's Court, although maybe not quite as sophisticated. The fact that many contributors to the primary legal journal, the *Neue Justiz* (NJ) were either judges or prosecutors embedded in the system, ensured that the discussion did not stray too far from the baseline of the conceptual assumptions supporting the idea of a socialist state. Nonetheless, even within this framework, doctrinal discussion can flourish and produce interesting results, as for example in the debate about the effects of voluntary intoxication, which was not very different from the judicial interpretation in England and Wales, an arch-capitalist legal system, and which found quite a number of admirers in the politically moderate, liberal post-unification Germany.[42]

The fact remains that using a 'Western' tool does not *eo ipso* equate to crafting Western things with it, in other words: process does not equal substance. From the point of view of a Chinese domestic debate about the pros and cons of commentary use it is ultimately irrelevant whether Western lawyers approve or disapprove of the material and political essence of the legal system which the commentary is meant to elucidate. Elucidation is a worthwhile and unobjectionable aim in and of itself and, as the inevitably patchy practice of the Supreme People's Court in issuing interpretative guidelines has shown, something for which the need is clearly felt at the highest echelons of the Chinese legal establishment. The progress of writing commentaries would thus seem to lie almost solely in the hands of their authors in their striving for a sophisticated new legal tool.

Doctrinal sophistication and the desire for code commentaries

Apart from its move away from the overcome Soviet-based approach,[43] the Chinese legal community is progressively putting a greater emphasis on doctrinal sophistication and consistency, as well as effective dissemination of knowledge of the law among the different sectors, firstly, of the legal community and, secondly, of the wider society. Legal certainty demands that legal principles need to be applied in essentially the same way by all players in the system: judges, prosecutors, attorneys or the administration. In a historically more civil-law-oriented system such as the Chinese, mere and continued reliance on the

[40]Quoted in Derrick de Kerckhove, Book Review (2003) 46 Perspectives in Biology and Medicine 454.

[41]'Such is the fruit of logic. It also affords acquaintance with the doctrines and opinions of the people of the world. One knows what harm it can do. Therefore the student should beware of its pernicious aspects as much as he can. Whoever studies it should do so only after he is saturated with the religious law and has studied the interpretation of the Qur'ān and jurisprudence. No one who has no knowledge of the Muslim religious sciences should apply himself to it. Without that knowledge, he can hardly remain safe from its pernicious aspects.' – Ibn Khaldūn (1332–1406), *The Muqaddimah – an Introduction to History* 1967 (Franz Rosenthal tr, Princeton Classic edn, Princeton University Press 2005) 405.

[42]See my paper From Marx to Majewski: A review of the law on voluntary intoxication in the former German Democratic Republic. In *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine*. Ben Livings, Alan Reed, and Nicola Wake (Cambridge Scholars Publishing 2015) 275 ff.

[43]See Genlin and Su (n 18).

albeit positive phenomenon of gradual inductive development of the case law of the courts is in principle an undesirable anomaly[44]; the state – and the wider legal community – should to the highest degree possible ensure that legal rules and their interpretation are intelligible *ex ante,* i.e. pro-actively promulgated in a deductive fashion, and that all sectors of society can have an input in their creation.

The current reform environment in criminal law – and indeed this can apply to any area of law – thus requires an approach that combines the following criteria:

- Doctrinal sophistication and consistency.
- Practical relevance and user-friendliness.
- Effective dissemination.

In essence, this reform vector demands at least as one major venue of action the creation of systematic commentaries on existing legislation, as opposed to mere textbooks – no matter how detailed these may be. The debate about the creation of legal commentaries to major legislation has been going on for some time in China, however, so far, no real progress seems to have been made in achieving consensus about the function, content and form of a Sino-Centric version of the code commentary, let alone its feasibility (see in more detail below on two recent attempts at commentary drafting).

Discussions were held, among other things, about learning from the example of the German commentary culture,[45] yet the simple transposition of a foreign practice, even if it stems from a related legal system in the civil law family, is fraught with risks and problems. Foreign systems and practices should at best serve as illustrations of different ways of approaching the task of systematic penetration of the law in a certain area, and lead to indigenous system compliance, i.e. the adaptation of their ideas to the requirements of the target jurisdiction.

Work on a commentary to the Criminal Code is thus very much a kind of test case for potential application across the whole of Chinese law. The methodology needs to do justice to two fundamental strands of the trajectory:

- The material criteria according to which the Criminal Code is to be analysed and interpreted.
- The more prosaic technicality of commentary structure, use of sources, etc.

The first strand deals with the underlying epistemological meta-rules which Chinese scholars will bring to bear on their analysis and interpretation of legal norms and can, for example, be reflected in the chosen method of norm interpretation: literal, grammatical, systematic, historical, or teleological. Each of these leads down different avenues and possibly to varying outcomes. Especially in the latter, a wide field opens for taking on board – changing – societal developments over time. Another aspect is the philosophical foundation of norm construction, which does, however, obviously apply to textbooks, etc. equally: Do we, for example, use the concept of the '*Rechtsgut*', i.e. a

[44]Unless one were indeed to interpret the idea behind the SPC guidance as a move towards a *stare decisis* model. – I am grateful to Dr Peter Leibküchler for raising that thought in his email of 20 June 2020, on file with the author.
[45]See above the reference to the 2018 CESL symposium – <http://en.cesl.edu.cn/info/1090/2358.htm>.

protected – and often individual – legal interest, or more generically defined societal interests or obligations? Are we employing the concept of individual guilt and responsibility (*Schuldstrafrecht*), or, for example, of communal responsibility based on some form of *Défense Sociale Nouvelle* as expounded in the middle of the last century by Marc Ancel?[46] This relates to the general part of the Code as much as to the individual offences and the sanctions. The second strand is driven by the first: Once we know what the substance of the analytical approach to the Criminal Code should be, we can – and must – then devise a coherent and consistent methodology, nomenclature and structure upon which the commentary of each provision of the Code must be based.

At the moment, there seems to be a deeply rooted preference in China for the German commentary model, as the following examples,[47] which are not only from the field of criminal law,[48] may show, including practical difficulties that are not that alien to academics in some Western systems which employ periodical publication output quality ranking models such as, for example, the Research Excellence Framework (REF)[49] in the United Kingdom. Combined with the attendant topic preferences of many research funding councils, these models structurally favour certain types of publications, methodologies and topics over others, leading a majority of academics to adopt a largely instrumental strategy when choosing research topics and methods in order to maximise institutionally desired research grant capture and ranking compliance. Black-letter work such as doctrinal research, to which commentary writing belongs, does not figure among the fields with highest chances of funding success.[50]

[46]Marc Ancel, Le défense sociale nouvelle, Editions Cujas, 1954. See for a contemporary review of the work A. Légal, Revue internationale de droit comparé 1954, 842–847. For the more radical approach by the founder of the School of Social Defence Theory, Filippo Gramatica, see his Principi di difesa sociale, CEDAM, 1961.

[47]In order to allow the non-Mandarin speaking reader without access to the original works a taste of the discussion, some translated excerpts were added in the text or footnotes.

[48]Indeed, most commentary-style publications so far seem to stem from the area of private law in the wider sense – see Zhu Yan/Gao Shengping/Chen Xin, *Commentary on China's Property Law* (Peking University Press 2007) (朱岩, 高圣平, 陈鑫: 《中国物权法评注》, 北京大学出版社2007年版); Lin Jia (ed), *Commentary and Application of the Articles of the Labor Contract Law* (Renmin University of China Press 2007) (林嘉主编: 《劳动合同法条文评注与适用》, 中国人民大学出版社2007年版); Xiong Wei (ed), *Tax Law Interpretation and Jurisprudence Commentary* (Law Press 2010 edition) (熊伟主编: 《税法解释与判例评注》, 法律出版社2010年版); Jiang Bixin (ed), *Review of the State Compensation Law Guidance Case* (China Legal Publishing House 2010 edition) (江必新主编: 《国家赔偿法指导案例评注》, 中国法制出版社2010年版); Yan Xiaoming (ed), *Commentary on Cases of Infringement Cases* (China Legal Publishing House 2010 edition) (奚晓明主编: 《侵权案件指导案例评注》, 中国法制出版社2010年版); Du Jinglin/Lu Wei, *The German Civil Code Commentary: General, Debt Law, Real Right* (Law Press 2011) (杜景林, 卢谌: 《德国民法典评注: 总则·债法·物权》, 法律出版社2011年版); Huang Jin (ed), *Proposal and Description of the Law Applicable to Foreign-related Civil Relations in the People's Republic of China* (Renmin University of China Press 2011 edition) (黄进主编: 《中华人民共和国涉外民事关系法律适用法建议稿 及说明》, 中国人民大学出版社2011年版); Zhou Guangquan (ed), *Interpretation of the Authoritative Interpretation of Criminal Laws* (Renmin University of China Press 2011) (周光权主编: 《刑法历次修正案权威解读》, 中国人民大学出版社2011年版); Xiaoming Ming (ed), *China Intellectual Property Guidance Case Commentary* (China Legal Publishing House 2011 edition) (奚晓明主编: 《中国知识产权指导案例评注》, 中国法制出版社2011年版); Gao Mingzhen/Chen We (eds), *Interpretation and Reflection of the Criminal Law Amendment (8) of the People's Republic of China* (Renmin University of China Press 2011 edition) (高铭暄, 陈璐主编: 《<中华人民共和国刑法修正案 (八)>解读与思考》, 中国人民大学出版社2011年版); Xia Lanlan (ed), *General Commentary on Marriage Law of the People's Republic of China* (Xiamen University Press 2016) (夏吟兰主编: 《中华人民共和国婚姻法评注 总则》, 厦门大学出版社2016年版); Xue Ninglan (ed), *The People's Republic of China Marriage Law Commentary Family Relationship* (Xiamen University Press 2017 edition) (薛宁兰主编: 《中华人民共和国婚姻法评注 家庭关系》, 厦门大学出版社2017年版); Chen Su (ed), *Commentary on the General Principles of Civil Law* (Law Press 2017 edition) (陈甦主编: 《民法总则评注》, 法律出版社2017年版); Yang Kai (ed), *A Commentary on the Styles of New Civil Litigation Documents* (Peking University Press 2018) (杨凯主编: 《新民事诉讼文书样式实例评注》, 北京大学出版社2018年版).

[49]See <www.ref.ac.uk>.

[50]Fortunately, German academia has so far not yet succumbed to the anathema of competitive and managerial research assessment described above to the same degree as, for example, the UK, Australia or more recently the Netherlands.

Huang Hui, for example, writes that commentaries

> can promote the current level of legal education and legal research and promote the teaching of Chinese law to pay more attention to the application of law […]. However, the current academic evaluation system does not support the legal scholars to join the legal commentary career.[51] This situation requires the joint improvement of the academic and publishing circles.[52]

He nonetheless emphasises the reasons for the deep desire in Chinese academia for the emergence of sophisticated commentaries, when he states that

> [a]ny Chinese legal person who has used the German legal commentary will sincerely sigh: When can we have our own legal commentary! Why is this? Because it is a legal reference book that is legally applicable and has […] academic identification. Legal students and legal professionals can get a glimpse of the legal knowledge, important documents, possible legal interpretations […] and important judgments […]. At the moment, such a 'German-style' Chinese law commentary seems to be moving from expectations to reality […]. Perhaps in the near future, legal commentary will become an important writing content for legal scholars, and theoretical research and judicial practice are closely connected. In this case, the preparation and publication of the legal commentary may lead to a 'legal commentary school' that echoes the needs of the times and greatly advances the process of constitutional and ruling the country according to law.[53]

This is reflected in the view of Bu Yuanshi, who also presented a very astute summary of the development of the German commentary culture[54] and that of other European countries.[55] She moreover very clearly understood the relevance of original work being

One can only hope that it will staunchly and successfully resist any attempts at its full introduction. It would mean the end of academic freedom as German academics know it, and very likely even of any remnant of the Humboldtian ideal of the university. The German philosopher Julian Nida-Rümelin also rightly warned in the context of the Bologna Process that a narrow focus on higher education as a mere preparation for the labour market is seriously misguided and that we need to 'choose between McKinsey and Humboldt'; the same can be said *mutatis mutandis* for the neo-liberal attempts to steer academic research according to the policy – and indeed, politics – of the day. See Julian Nida-Rümelin, Bologna-Prozess: Die Chance zum Kompromiss ist da, Die Zeit, 29 October 2009 – available online at <www.zeit.de/2009/45/Bachelor-Kritik>.

[51]Writing commentaries in Germany is also financially quite lucrative, which is why they are rather expensive, with even one-volume commentaries sometimes costing hundreds of Euros: At the time of writing, the Schönke-Schröder commentary on the Criminal Code, for example, cost 179,00 € in its 2019 edition; the Karlsruher Kommentar on the Code of Criminal Procedure in its 2019 edition cost 269,00 €, the same on summary offences (Ordnungswidrigkeiten) of 2018 sold for 259,00 €. Legal literature in China is reportedly much cheaper, hence there may not even be a financial incentive to do so. – Comment by Dr Peter Leibküchler of 20 June 2020, on file with the author.

[52]On the Editing and Publishing of German Legal Commentary Books (2015) Science and Technology and Publishing, No. 6, 36–39(黄卉: '小议德国式法律评注图书的编辑与出版', 《科技与出版》2015年第6期, 第36–39页).

[53]Special Guide to German Legal Commentary, China Applied Law, No. 1, 2017, p. 180 (黄卉: '德国法律评注专题导读', 《中国应用法学》2017年第1期, 第180页).

[54]See also Wang Jianyi, 'The Historical Evolution and Realistic Functions of German Legal Commentary' (2017) China Applied Law, No. 1, 181–99 (王剑一: '德国法律评注的历史演变与现实功能', 《中国应用法学》2017年第1期, 第181–99页): 'China's civil law is undergoing a transition from legislation to interpretation. At the same time, the formulation of the Civil Code in the future requires an in-depth analysis and integration of existing laws and judgments. In this context, the introduction of the legal commentary is a great form of literature.'

[55]'The Status Quo and Prospects of the German Jurisprudence' in Fang Xiaomin (ed), 'The Sino-German Law Forum', Vol. 12 (2015), 45–53 (卜元石: '德国法学界的现状与发展前景', 载方小敏主编: 《中德法学论坛》第12辑 (2015年), 第45–53页). He writes: 'The legal commentary is a topic that is currently discussed in the civil law academic circles in China. The German Law Commentary takes the form of a commentary on the commented law, integrating relevant legislative materials, academic research and judicial precedents[…]. Since the mid-1990s, German law-based publishers have tried to introduce new legal commentaries for market efficiency reasons, resulting in the existence of multiple commentaries in the same law. […] [P]reparation of legal commentary means that all the documents and jurisprudence related to the law of the commentary should be sorted out; and the timeliness of the legal commentary is very strong, which leads to the time and effort of the writing party. On the one hand, the pressure to deliver on time is also great, and the more you participate, the less energy you can invest in other aspects of research. Some new legal

received and absorbed into the mainstream debate through inclusion in a (leading) commentary.[56] The role of commentaries in the education and training of judges, in particular, has been recognised.[57] Conversely, the vital need to involve a sifting and analysis of the judicial case law output for use in commentary writing is equally being increasingly emphasised.[58]

In 2019, I was very kindly given sight of a chapter[59] by one of the contributors – which and who shall remain anonymous – of a forthcoming major academic commentary on the Criminal Code edited by Professor Liang Genlin and others, of a total length of about 3,000 pages. A massive effort, yet – with all due respect to its learned editors and authors – its current form may show the path still to be travelled to a fully fledged commentary, a journey that necessarily and by the very nature of the endeavour currently remains in the initial stages. It also highlights the dangers of possibly taking the second step before the first: While its basic structure is very similar to the basic layout of a German commentary, although it has a – rather short – list of mostly general criminal

commentaries have limited academic value added compared to traditional legal commentary, and even piece together existing literature, so the legal profession has reflected less and less time and energy in conducting truly creative and pioneering research in recent years.' – See also He Jian, 'The Peak of Legal Education – The German Legal Commentary Culture and Its Prospects in China' (2017) Chinese and Foreign Law, No. 2, 376–401 (贺剑: '法教义学的巅峰 德国法律评注文化及其中国前景考察', 《中外法学》2017年第2期, 第376–401页): 'In China, the introduction of legal commentary in judicial practice, legal education, legal research and legislative work is meaningful, the system conditions are generally available, and there is no lack of support from relevant groups. Although there are still some challenges, many details still need to be explored, but the legal commentary is the future […].'

[56] Huang Hui, ibid: 'The reason why there is an academic tendency is because of the incompleteness of the law itself. It is particularly prominent in civil law. This requires that the commentary not only collects, but also integrates jurisprudence and academic achievements, and perfects statute law. Legal commentary has many functions. In the age when there is no database, legal commentary is an indispensable medium for finding legal literature and jurisprudence. Legal commentary can directly influence the judge's lawmaking. Lawyers and judges must consider the interpretation of the law in the legal commentary when applying the law. It can be said that an important purpose of the German law professor's publication is to hope that his views can be absorbed by the legal commentary […]. If the academic views are not absorbed by the legal commentary, they will generally not be taken seriously.'

[57] Zhang Shuanggen/Zhu Mang/Zhu Qingyu/Huang Hui 'Dialogue: The Status Quo and Future of Chinese Legal Commentary' (2017) China Applied Law, No. 2, 161–73 (张双根、朱芒、朱庆育、黄卉: '对话:中国法律评注的现状与未来', 《中国应用法学》2017年第2期, 第161–73页): '[T]he legal education and the training of judges in any country under the rule of law are an arduous task. The German legal commentary is the best legal tool for this task, and it has entered slowly but surely our legal vision. Several scholars have said that necessity is not equal to feasibility. At present, the quality of legislation, judicial judgments and academic research needs more progress to meet the preconditions for comment writing, and the existing academic system does not support the period of strong labor. It is not yet ripe for outstanding scholars to sink into deep work and write a large-scale legal commentary. Difficulties are the driving force of work. Everyone said that "crossing the river by feeling the stones" and thinking about it is the most practical.'

[58] See, for example, Huang Hui/Zhu Mang/Zhuang Jiayuan/Ji Hailong/Du Yifang, 'Five-People Dialogue: Case Writing in Legal Commentary', Law Application (Judicial Case), No. 8, 2017, 33–40 (黄卉、朱芒、庄加园、纪海龙、杜仪方: '五人对话:法律评注中的案例编写', 《法律适用(司法案例)》2017年第8期, 第33–40页):

> 'The importance of the case for legal commentary is like water to fish. In the face of massive judicial decisions, scholars have raised questions: how to determine the scope and type of case, what kind of writing method to use, and more importantly, How to systematically sort out the case. Regrettably, these questions are still unsolved, and the author of the commentary must also 'cross the river by feeling the stones'. The problem is the starting point and motivation of the work. It is also a strong signal that the legal commentary is an emerging legal undertaking that needs to be worthy of more attention, participation and support from the legal peers. It also requires powerful legal persons and legal institutions to compose the commentary. They set up a good working platform to clean up unreasonable work barriers.' See for a similar view Yao Mingbin, 'Application of Cases in the Writing of Legal Commentary' (2017) Law Application (Judicial Case), No. 8, 45–46 (姚明斌: '法律评注撰写中的案例运用', 《法律适用(司法案例)》2017年第8期, 第45–46页).

[59] The file was sent in Chinese and translated by me using Google Translate. Google Translate was actually evaluated as one of the best machine translation softwares in Chinese-to-English translations in a recent survey from June 2018 of several available products. – See Yiqin Fu, Who Offers the Best Chinese-English Machine Translation? A Comparison of Google, Microsoft Bing, Baidu, Tencent, Sogou, and NetEase Youdao, online at <https://yiqinfu.github.io/posts/machine-translation-chinese-english-june-2018/>.

law literature at the beginning of each section of the Code and although there are critical remarks on the law itself in some places, there is hardly any in-depth and conceptualised discussion of more specific academic literature and/or individual court cases beyond SPC circulars, leave alone a dissection and critique of different opinions on individual questions.[60] I was also provided with the full 2,397-page pdf manuscript of another commentary/handbook edited by Professor Chen Xingliang and others,[61] which has a better use of footnotes and references to case law, yet it also remains somewhat unspecific in its academic reference practice in that it seems to refer mainly – like the previous example – to general works such as textbooks on Chinese criminal law and indeed in places through applying direct comparative reference practice to (often dated) works on German criminal law, but much less to journal articles, etc. It is unclear why that is the case for both books, given that (digital) access to secondary reference and journal literature as well as case law – as a matter of fact, both Chinese and German – as such does not appear to be a logistical or even major linguistic issue in modern Chinese comparative academia, although one reason may be the sheer volume of cases and the comparatively restricted appellate procedural structure.[62]

To sum up this discussion: While it is true that the German commentary tradition has reached a high level of sophistication developed literally over centuries from early Roman law commentators (on this process more below), the legitimate question must be asked if this is a benchmark against which China can or should already measure its ambitions at this early stage of its journey towards a commentary culture: The academic analysis and condensed reproduction of academic and judicial opinions and interpretations of statutes and the Criminal Code in particular displayed in German works is based on wide and easy access to relevant materials. It is also a consequence of the academic training *and* daily *modus operandi* in practice of the judiciary, prosecution and legal profession, as well as of the intense judicial involvement in commentary-writing,[63] something that still seems to be more or less absent in China – possibly due to the very high docket loads of Chinese judges[64] – but which German experience at least has shown to be crucial for keeping the work relevant and the previous case law and academic commentary readily available for practitioner users and which was after all the very basis for the first forays into commentary writing in Germany.[65]

Functions of commentary use

The desire for the conceptualisation or at the very least consolidation and categorisation of different bodies of law is a phenomenon which virtually all jurisdictions over time have succumbed to in one way or another. However, what might go for commentaries in common law jurisdictions such as England and Wales, for example, with the original efforts in William Blackstone's *Commentaries on the Laws of England* from the eighteenth

[60] I was informed by Professor Jiang Su that this chapter followed the general style adopted for the entire work and can thus be seen as representative.
[61] Also in Chinese and translated with Google Translate.
[62] Comments by Professor Su Jiang via WeChat correspondence of 22 June 2020, and by Dr Peter Leibküchler in his email of 20 June 2020; on file with the author.
[63] And not infrequently a consequence of the fact that many law professors either hold a secondary part-time post as judges or practice as private counsel.
[64] Comment by Dr Peter Leibküchler in his email of 20 June 2020; on file with the author.
[65] See the brief historical discussion below.

century,[66] or its time-honoured practitioners' manual *Archbold*[67] and similar works, or even in other civil law systems like the example most often referred to by common lawyers, France, with its equally ancient and venerable annotated code editions published mainly by Dalloz publishers,[68] is not what most German commentary writers would these days understand the purpose of a code commentary to be. There are obviously variations on that theme which have their roots in the legal history and culture of each country, and indeed each jurisdiction can and at the end of the day must choose which model best suits its needs.

The German experience in particular

It seems nonetheless probably fair to say that German scholars and practitioners have so far achieved the highest level of sophistication in blending academic and practical aspects in designing code commentaries, which, combined with their high degree of doctrinal analysis, makes them natural counterparts for the Chinese doctrinal debate. The German historical development, as we shall see, in fact traces the different stages of commentary drafting partly still employed in other legal systems and can serve as a convenient summary of the varying comparative approaches over time.[69] German law, not only criminal law, has for many years relied on and fostered a so-called commentary culture. These commentaries are not just practice manuals that merely digest and present the developing case law in a more or less uncritical manner, as is the case in many common law and international law contexts. They are collective efforts and often written and edited by the most eminent legal scholars in cooperation with highly experienced judges, prosecutors and attorneys working in the state and federal appellate courts. While analysing and distilling existing literature and case law, they also point out areas where the current law appears to be contradictory, to have *lacunae* or to be out of touch with the norms of society as it develops. These commentaries are thus invaluable tools for the consolidation of the law and its reform. They are continuously updated, a task made easier by modern online editions of what traditionally were quite hefty tomes, sometimes running into multiple volumes. No German student, academic or practitioner has not been exposed to their influence, and many of the highest courts refer to them in their judgments – something which currently, however, seems to be forbidden to Chinese judges.[70]

David Kästle-Lamparter, in his veritable treasure trove of a PhD thesis entitled '*Welt der Kommentare*' (World of the Commentaries)[71] of 2016, has explored the development of the idea and conceptualisation of commentaries, and not only legal ones, from ancient

[66]These famous commentaries were first published in 1765. See for an online edition the Avalon Project at Yale University, <https://avalon.law.yale.edu/subject_menus/blackstone.asp>.

[67]Mark Lucraft (Gen. Ed.) Archbold: Criminal Pleading, Evidence and Practice, Sweet & Maxwell, 2020 – The *Archbold* is written by practitioners; the general editor, for example, is a circuit judge.

[68]See, for example, Carole Gayet/Yves Mayaud, Code Pénal 2020, annoté, 117th ed., Codes Dalloz Universitaires et Professionnels, 2020.

[69]These have by the way, and just to mention this more recent development, also had an influence on how international treaties, court statutes, etc. are being analysed, with a sizeable portion of commentaries curiously again being driven and/or written by German scholars on the editorial teams. See, for example, the commentaries on the Statute of the International Criminal Court by Kai Ambos/Otto Triffterer and William Schabas, the Commentary on the UN Charter by Bruno Simma, the one on the 1948 Genocide Convention by Christian J. Tams/Lars Berster/Björn Schiffbauer, etc.

[70]Comment by Dr Peter Leibküchler in his email of 20 June 2020; on file with the author.

[71]David Kästle-Lamparter, Welt der Kommentare – Struktur, Funktion und Stellenwert juristischer Kommentare in Geschichte und Gegenwart, Mohr Siebeck, Tübingen, 2016 (hereinafter: Kästle-Lamparter). – The title is apparently

to modern times.[72] Apart from the above-mentioned Chinese scholar's concern expressed at the 2018 CESL symposium about the possibility of the commentaries almost taking over as the prime source of reference, which in German history from time to time actually resulted in the imposition by the government of a *Kommentierungsverbot*, i.e. a ban on commentary writing on a particular piece of legislation,[73] and the related German experience of the empirically evidenced massive influence of major commentaries which can occasionally tend to eclipse even the authority of the primary legislation itself,[74] the study shows that early commentaries across all areas of law were in their vast majority written by practitioners rather than academics[75] and sometimes even by the very government officials involved in the drafting of the legislation.[76] Of added relevance in this context is the fact that there was a period from the early sixteenth to the late nineteenth century when courts would (have to) send difficult cases to law faculties (the so-called *Spruchfakultäten*) (or to higher courts) for an advisory opinion,[77] the so-called *Aktenversendung*. However, this *mélange* of functions between academia and practice lost ground increasingly and was formally abolished for all of Germany in 1879. This led Karl Binding to complain in 1881 that since the abolition of the *Spruchfakultäten*, 'academic scholarship had lost all incentive of becoming involved in practice'.[78]

Fortunately, that complaint by Binding has proved to be unfounded over the years: The form and style of commentary drafting gradually progressed from the mere addition of materials from the legislative process to sequential annotations – incorporating previous case law – based on the wording and structure of the referenced legal text, and finally to a more structured and conceptualised analysis based on the material substance of the law in its context, a precursor of the style still currently used. Despite the drafters' continued affirmation – and related efforts – that commentaries were meant to be practitioner-friendly, the emphasis shifted more and more to a scholarly exploration of the essence of the legislation.[79] Scholarly engagement by academics in code commentary writing has been a stock-in-trade for many decades, and indeed it is in Germany widely considered to be a solid mark of having fully arrived in – or even at the apex

taken from an earlier article by Justus Wilhelm Hedemann, 'Aus der Welt der Kommentare' (1926) 31 Deutsche Juristen-Zeitung 926–30.

[72] See for an historical overview Kästle-Lamparter 19–101.

[73] ibid 24–30, 59–61, 94, 102, 214, 302–03, 329–30.

[74] ibid 332–36. The author as a former German judge can attest to the forceful sway held by highly authoritative commentaries of long standing in judicial practice, and to the almost religious observance they can command from the majority of practitioners, especially at the lower, first-instance court levels. In one memorable instance, a colleague of his opined that it was not for the lower courts to question the standing jurisprudence as summarised in a commentary, but that this should be left to the appellate courts. Incidentally, however, the author made the same experience during his time on secondment to a State Supreme Court. – The ranking between different commentaries and the ensuing effect of a 'citation competition' is also evidenced by another colleague's comment on a draft decision by the author, that she had looked at a *Großkommentar*, i.e. a more detailed multi-volume commentary, and not found any support for the in her opinion novel (read: incorrect) view expressed by the author. Apparently, the SPC guidance has the potential of creating a similar effect in the present Chinese legal environment. – Comment by Dr Peter Leibküchler in his email of 20 June 2020; on file with the author.

[75] Kästle-Lamparter 213–15, 240–43.

[76] ibid.

[77] ibid 283.

[78] Karl Binding, Strafgesetzgebung, Strafjustiz und Strafrechtswissenschaft in normalem Verhältnis zu einander (1881) 1 Zeitschrift für die Gesamte Strafrechtswissenschaft (ZStW), 4–29 at 26; translation of the quote by the author.

[79] Kästle-Lamparter 282–88.

of – the profession if one is asked to take over a well-established commentary or to join its team of authors.

Based on the different phases and periods of the development of the commentary in a wider sense, Kästle-Lamparter has developed a number of helpful – if partially overlapping – analytical categories of what a commentary can be employed for, and what publication characteristics these may entail:

- Explanation: This would seem to be the basic function immediately associated with the idea of a commentary: It is meant to explain the substance of the law, not only, for example, the meaning of its literal wording, legal terms, etc. The commentary is in a sense meant to be an authentic 'interpreter' with the role of making explicit what the law itself is already saying implicitly[80]
- Repository of knowledge: A good commentary cannot restrict itself to merely expressing the view of the commentator(s) of the day; it must also take in to account any relevant work preceding the particular piece of legislation, and possibly previous and diverging views of others, be it scholars or the judiciary. The commentary thus becomes at the same time on the one hand a repository of the accumulated opinion and knowledge on certain legal issues, and on the other hand, provides the basis of the variety of possible conceptual approaches on which further attempts at advancing the doctrinal sophistication can be built. It serves as a compacted library, which is of particular usefulness for generalists such as judges and other practitioners who do rarely, if ever, have the time to read monographs or a multitude of journal papers and to distil the essence of the discussion for themselves. Indeed, it is a well-known fact that any publication not referenced in a commentary will stand little chance of being noticed in legal practice – something which admittedly may have become somewhat less of an obstacle in the time of digital databases and the increasing tech-saviness of legal practitioners (or academics, for that matter).[81]
- Filtering knowledge: Linked to the previous function is the effect of the commentary of filtering the (most) relevant sources. This is especially true of the task of keeping the mass of new publications and judicial decisions on any topic manageable and to avoid 'information overkill' – and not least up-to-date if laws are amended, possibly even in related provisions not within the code that is being primarily commented upon; it also is of great importance in the context of changing views in the case law, for example, if and when an appellate court abandons its long-standing jurisprudence. Again, modern digital databases, email alerter services or RSS feeds tend to mitigate the awareness aspect of the problem, although they are often provided without the added benefit of a clarification, for example, of which previous cases are still good law, or any preliminary doctrinal assessment and critique of the new approach.[82]
- Organising knowledge: Somewhat akin to the function of explaining the reference text, a commentary also leads to a systematisation of the discourse about the law, not least by creating a specific vocabulary or terminology that can reach across the linguistic idiosyncracies of individual monographs, textbooks, articles or even judicial decisions

[80]ibid 312–13.
[81]ibid 313–16.
[82]ibid 316–18.

and thus helps to create a conceptual *lingua franca* in the legal conversation. With an increasing distance from a slavish adherence and submission to the textual terminology, sequence and structure of a code's provisions also comes the effect of abstracting and organising the substance of the related systemic paradigmata underlying the area of law the code is embedded in. It leads to the emergence of (a hierarchy of) systemic tiers and overarching principles to which the individual specific factual scenarios can then be subordinated and hence classified into conceptual categories, not least making it easier to recognise potential (hypothetical) 'outliers' and recommending solutions as to which categories might be the most appropriate to assign them to. In other words, a commentary aids in the efforts at achieving a higher level of doctrinalisation (*Rechtsdogmatik*).[83]

- Shaping knowledge: The more a commentary tries to free itself from the basic function of a mere interpreter as described above and liberates itself from the structure of the legislation, and if it performs the functions of filtering and organisation to a high standard well, a commentary has all the potential to become a factor in shaping the future development of the law, be it by convincing the judiciary of a preferable view, or even alerting the legislature of *lacunae* or conceptual contradictions or discrepancies in need of harmonisation (the issue of the so-called *Wertungswidersprüche*). These kinds of commentaries, often written by highly respected scholars and practitioners, are eventually given the title of 'standard commentaries' (*Standardkommentare*) by their users, signifying that they represent more or less the benchmarks of the discussion. In this context, it is, however, crucial to note that while any commentator is free – and indeed encouraged – to present their own personal view on a certain matter or debate, this must always be sign-posted very clearly as one of several points of view; (ab-)using the influence of a (standard) commentary – as opposed to, for example, a monograph or a journal paper – to peddle a subjective view and, as it were, to try to smuggle it in as *the* view on that issue, tends to meet with raised collegial eyebrows and to be considered methodologically and ethically questionable.[84]
- Specifying knowledge: As a reverse or possibly simply an extended function of those on systematisation and abstraction etc. addressed above, the commentary also needs to provide guidance on how to apply the typically generalising or generic drafting style of modern legislation to the individual case, especially in scenarios for which there is no pertinent case law yet. It has the task of 'fine-tuning'[85] the code for the needs of legal practice, and thus possibly also introducing a modicum of potential for addressing the concerns of individual justice as opposed to the 'cool consistency'[86] of the formality of equal application of the law.[87]
- Harmonisation and building bridges: In all of its above-mentioned functions, a commentary also always provides an intellectual conduit between a primary reference text and the reader; as such it can help to build bridges across linguistic, cultural and historical divides, make the tendentially monolithic and permanent text of the law

[83]ibid 318–21.
[84]ibid 321–24.
[85]Thomas Henne, Die Entstehung des Gesetzeskommentars in Deutschland im 19. und 20. Jahrhundert, in David J Kästle/Nils Jansen (eds), *Kommentare in Recht und Religion* (Mohr Siebeck 2014) 317–29 at 321.
[86]Mirjan Damaska, *The Faces of Justice and State Authority* (Yale University Press 1986) 28.
[87]Kästle-Lamparter 324–25.

understandable to and operable by its users in any time period and harmonise its original mandates with changing real-life circumstances and societal views.[88]

- Stabilisation: The heightened degree of doctrinalisation achieved by scholarly commentaries can have a stabilising or canonising effect for the primary text, partly associated with the effect caused by the quasi-primary influence described above, which especially great standard commentaries can achieve. They contribute to a better degree of legal certainty and of uniformity in the application of the law.[89]
- Critique: Depending on their overall mission, commentaries can also serve as a medium for a critical view at a legislation's underlying ideological tenets. This can overall be seen as a positive endeavour but such criticism may also happen in a deleterious and even destabilising fashion in periods of great societal upheaval, when commentaries are used to 'override' existing legislation short of their abolition and reform, as happened, for example, during the regime of National Socialism in Germany in the last century.[90]
- In-/Renovation: Apart from their potential for fine-tuning the reach of the primary text and incidental critique of individual provisions or concepts, commentaries – although untypical in this generality – have on occasion also been employed as more direct vehicles for promoting law reform. In twentieth-century Germany, this was especially the case with the so-called *Alternativkommentare* (alternative commentaries) written by teams of contributors who had a more progressive interpretation of the existing law in mind than the traditional mainstream commentaries would usually have been prepared to countenance. One of the main criticisms levelled against them was that they neglected the collection and analysis of the *status quo* in favour of a pointedly critical and reformist stance.[91]

It has taken the development in Germany a long time for all of these different facets to emerge in the debate with the necessary clarity. It is unlikely that the Chinese debate can wholly afford to omit an in-depth contemplation of the effects these insights might have on the future use of commentaries.

By way of conclusion: some prospective issues surrounding a future Sino-centric debate

Having looked at the Chinese discussion, its preference for the German model and the long development German commentary writing with its attendant panoply and conceptual range of functions has gone through, we shall in conclusion try to identify a few of the parameters the future conceptual discussion in China may (have to?) face.

Choice of conceptual lenses – community vs individualism?

The choice of analytical or conceptual lenses, as discussed above, is paramount for the contribution a commentary can make to the development of any area of law, but certainly

[88]ibid 325–27.
[89]ibid 327–29.
[90]ibid 329–30.
[91]ibid 330–32.

in the field of criminal law. This process of choice begins, however, even with the meta-question of who decides these analytical parameters: Will they be ordained by the Party structures or the Supreme People's Court or will each academic (team) be free to choose their own?

In the former case, it is to be expected that a much wider array of society- or community-related criteria will find their entry into the endeavour and serve as a more or less tight strait-jacket for the development. These will very likely be at the very least formally tinged with socialist values: Even if the overall tendency might be away from the old Soviet-style model, it is unlikely that a major shift towards an ideology incompatible with modern Sino-socialist thinking would be advocated or tolerated.

Similar concerns, if not even stronger, could be foreseen if the choice of parameters was left to individual academics. While some degree of more or less voluntary adherence to party lines can be expected in this scenario as well, many of those involved in the commentary discussion will inevitably be engaged in comparative research and hence have been exposed to the overwhelmingly individualist thinking prevalent in Western doctrine and policy-making, and the influence that protective human rights concepts have on the interpretation of the law.[92] It seems futile to assume that these experiences will not have any impact on the way those scholars will tend to view the general shape and contours which a desirable future legal environment should have. In this alternative, Marshall McLuhan's adage or Xi Jinping's reservations about the permissible impact of comparative research might after all still rise to a more prominent, because political, relevance.[93]

Roles of academia and legal practice – worlds apart or warm embrace?

It seems that it might be highly beneficial for the Chinese context to rethink the relationship between academia and practice. Judicial and wider practitioner involvement in commentary writing would appear to be crucial in order to achieve a harmonious blend of scholarly penetration of the material on an analytical basis with the views and practical experience of seasoned – and ideally also scholarly-minded – judges, prosecutors and counsel.

Two of the most famous *Großkommentare* in German legal history, the *Leipziger Kommentar* of the Criminal Code[94] and the (since its 12th edition of 1978–2000 apparently discontinued) *Reichsgerichtsräte-Kommentar* (*RGRK*) on the Civil Code were initiated and drafted by judges of the *Reichsgericht* (Reich Supreme Court) at Leipzig and continued in the post-war Federal Republic by judges of the *Bundesgerichtshof* (Federal Court of Justice); however, academic commentators were later also invited to contribute. The two standard one-volume practitioner commentaries on the Criminal Code, *Fischer*,[95] and the Code of Criminal Procedure, *Meyer-Goßner/Schmitt*,[96] each now at around 2,700

[92]See in the context of the presumption of innocence in criminal proceedings in China recently Yu Mou, *The Construction of Guilt in China – an Empirical Account of Routine Chinese Injustice* (Hart/Bloomsbury 2020).

[93]However, it seems worth pointing out again that the occasional practice of making reference only, or even only mostly, to foreign sources to annotate Chinese legislation might be viewed as a methodologically questionable exercise. – For the Chinese civil law environment, this phenomenon was also affirmed by Dr Peter Leibküchler, email of 20 June 2020, on file with the author.

[94]Online version available at <www.degruyter.com/view/db/lko>.

[95]See <www.beck-shop.de/fischer-strafgesetzbuch-stgb/product/27664828>.

[96]See <www.beck-shop.de/meyer-gossner-schmitt-strafprozessordnung-stpo/product/29658826>.

pages in length, are written and updated annually by judges of the *Bundesgerichtshof*; they enjoy an equally high reputation in academia and are widely admitted as aides in open-book legal state examinations. Similar things can be said of commentaries in other areas of law.

If the diagnosis by one of the Chinese academics at the above-mentioned 2018 CESL symposium about the lack of academic interest of judges and the dearth of abilities for principled legal reasoning among current students and hence future practitioners is correct, then the Chinese debate may have to address this aspect at a much more fundamental level, possibly, of course, with an eye on the role of the Supreme People's Court and other (appellate) courts, not least given their position in the overall political and constitutional framework. Equally, legal practice as a whole is as a matter of course always well-advised to reflect on the scholarly exploration and explanation of legal texts and principles. Judging from the perspective of the German experience, it seems a lamentable waste of resources not to try to combine the potential of both branches to the benefit of the whole.

Impact of comparative role models – copy and paste of Western models or Chinese calligraphy?

Finally, what shape should Chinese commentaries adopt? The easy avenue of copying the mere phenotype of the various German commentaries may make it difficult, if not to say unattractive, for the Chinese debate to reflect on its own approach from scratch, as it were. One might be tempted to say that the quite vociferous desire for a working commentary culture and the apparent respect for, and the wish to catch up with, the German experience may have forestalled a proper fundamental debate within the Chinese legal community about the merits and aims of engaging in commentary writing, its underlying philosophical parameters and policy directions – in other words: Is there a particularly Chinese DNA that would give rise to a different genotype?

While the focus of this paper has been on exploring the lessons that can be drawn from the German case, owing to the Chinese predilections, it is far from clear that this model is best-suited for the Chinese legal environment, possibly adding the further qualifier: At this time? The current, to all appearances rather disjuncted, relationship between academia and practice and the alleged lack of practitioner interest in scholarly exploration may militate in favour of a less ambitious format, at least initially: Judicial practice may be unlikely or unwilling to have recourse, leave alone contribute, to commentaries if their impetus is too much focussed on the academic debates of scholars and does not sufficiently address the needs of practitioners.

A commentary, as was discussed above, is by its very nature practice-facing to a large extent. It cannot and should not serve as a sanctuary for academics who may have given up on educating practitioners, unless that impression gained of the Chinese environment were to be deceptive. As a form of academic literature, a commentary is also ill-suited for even that purpose: Purely academic debate typically takes place in scholarly journals and monographs, with occasional focal points provided in themed conferences and journal issues or edited collections in book form etc. A commentary is actually a much too unwieldy forum for such a purpose given the length of time and the efforts it takes to prepare an initial edition or to update the content to the next edition.

Overall, the situation appears rather more complex than it might seem at first glance. There are two Chinese proverbs, 'Be not afraid of being slow, be afraid of standing still' (不怕慢, 就怕停), and 'Teachers open the doors, you enter by yourself' (师父领进门, 修行在个). In the debate about the proper use of the foreign idea of commentaries in China, it seems that these proverbs may prove to be wise counsel.

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