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**A Critique of Human Rights Protection for Suspects in the Chinese  
Criminal Justice System:**

An Examination of the Extent to which There Is and Could in Future Be  
Compatibility between Chinese Law and Practice and International  
Human Rights Norms

**YANBIN LU**

**A Thesis submitted for the degree of  
Doctor of Philosophy**

(Three Volumes, Vol. I)

**Durham University  
Durham Law School**

**March 2010**

## **Abstract**

This paper presents a critical analysis of the current human rights protection for suspects in the criminal justice system of China, evaluating them from the view of international human rights law and practice, in particular, the International Covenant on Civil and Political Rights (ICCPR) and European Convention of Human Rights (ECHR). The theme that runs through the paper is whether the right to fair trial is practically and adequately available to the suspect in China according to the established international standards. The hypothesis is that by addressing the distance between the Chinese system and international standards on the issue of human rights protection for suspects in the pre-trial criminal procedure, and the causes for this distance, the direction of further reform for criminal justice system will become clearer and more practical. The ultimate purpose of this paper is to consider how to handle the relationship between crime control and human rights protection, when the crime rates in China have generally been rising along with the high-speed economic development in recent years.

Before outlining the performance of China, this paper considers the current understanding and interpretation of the relevant standards in ICCPR and ECHR. Extensive consideration is then given to weigh criminal procedure law and its practice in China against those international standards in a new detailed part. Taking into account the highly influential effects of China's traditional legal culture and special social situation, the paper is devoted to investigate four most pressing issues regarding the continuing Chinese criminal justice reform on the pre-trial procedure in different chapters: guiding ideologies and basic principles, the pre-trial compulsory measures system, prevention of the use of illegal evidence obtained through torture and the right to legal counsel before trial. This comprehensive examination shows the significant progress regarding fair trial rights for suspects China has made in meeting international standards set in ICCPR, in particular the Criminal Procedure Law of 1996. The barriers and challenges that impair the criminal procedural rights for suspects and impede the proper enforcement of the existing criminal justice system to come in line with international standards are also highlighted with possible suggestions of improvements. These problems root in current social, cultural and

institutional conditions under which the criminal justice system operates, including difficulties in changing the traditional ideology, the deficiencies and failure with the law itself for certain issues, the incorrect and ineffective enforcement of the law, and a severe shortage of professionally qualified judges, prosecutors, police and lawyers. As a result, the practices in human rights violation against suspects that subsequent reforms have been trying to eradicate still remain in the Chinese criminal justice system. The thesis concludes with the allegation that the introduction of some key rights into Chinese criminal justice system to provide greater protection to its suspects for preventing possible stage power abuse is a step in the right direction, but further procedural safeguards are necessary to ensure an effective rebalance of China's criminal justice system. Apart from improving its legal system to fully comply with international human rights standard, the reform must fit within the Chinese culture and way of life. Therefore, the government must consider further actions to address and develop the cultural and social conditions of the Chinese criminal justice system.

## **Copyright Declaration**

The copyright of this thesis rests with the author. No quotation from it should be published in any format without their prior written consent. Information derived from this thesis must be acknowledged appropriately.

## ACKNOWLEDGEMENTS

'Heaven is wonderful, the problem is how to get there.' --*Jerome A. Cohen, October 3, 2005*

Doing research abroad is a precious opportunity to broaden my horizons and to enrich my life. Law to me means not only rules and regulations, but also a record of human society. Therefore, my journey in the exploration of law means learning about reality and the regular patterns of society, observing the changes in human culture and history, and linking there with the world beyond our shores. Modernisation, with its roots in Western culture and science has forced Asian countries, for better or worse, to consider how they are to respond to this culture. In recognition that modernisation is historically inevitable, more strenuous efforts are needed for these countries to accommodate and develop both a program of modernisation and their traditional culture. In this PhD program, I focus my research on legal reform concerning human rights protection for suspects in the Chinese criminal justice system in the context of China's possible ratification of the International Covenant on Civil and Political Rights. Through a comparative analysis of international human rights instruments and Chinese domestic law, the research aims to explore how China in this transitional period could further improve the legal basis for protection of suspects' human rights and also develop the traditional Chinese legal values on issues related to human rights protection in the criminal justice system.

Both the successes and the failures of modernization raise fundamental questions about the meaning of life. 'I can do everything through him who gives me strength.'<sup>1</sup> I am thankful to the almighty God who 'gave us life and gave us liberty'.<sup>2</sup> Under his grace, I live, learn and flourish. Doing research requires a great deal of passion, skill and discipline. Also, the completion of this thesis would not have been possible without the help, support, and encouragement of so many people in different ways, as God often works through men. I am deeply indebted to my supervisor Professor Helen Fenwick, whose constant support, patience and understanding helped me throughout my research and writing of this thesis. Without her stimulating

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<sup>1</sup> (Philippians 4: 13)

<sup>2</sup> Thomas Jefferson.

suggestions and guidance, this paper would probably be less than intelligible. The support of all my colleagues and staff at the University of Durham Law School is much appreciated. In particular, I will never forget the positive attitude and warmheartedness of Michelle Zang, who studied with me at the PG 29 office every day. I am also bound to thank Professor Michael Bohlander, who allowed me to sit in on his course and offered me a great deal of useful material and information. My thanks are extended to the Secretariat of the Law school, especially Joanne Emerson, Helen Hewitson and Rachel Tucker, who offered me great help and the use of facilities and kindly answered all my queries.

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My school provided me with new concepts and knowledge as well as playing huge role in shaping my view of others and of cultural differences. However, my perceptions and understanding of the world have also been profoundly shaped by the words and deeds of my family, who have provided me with a harmonious and loving home. In particular, the care, patience and understanding shown by my parents Yuxun and Wanqin and my brother Xuyang during these years are greatly appreciated. I also wish to express my special and sincere gratitude to my maternal grandmother Mrs Wen Xu, who has greatly influenced my view of the world and opened up new ways of thinking. Her stories and games on the bus or on our walks, where questioning and discussion was encouraged, her devotion to her career, her



sense of fashion and beauty as well as the smell and taste of her amazing food will never be forgotten. I am indebted to my paternal grandmother Mrs Liang Xiaorong, for her unending care and love. Her resolute emotional support and loyalty during my long absences from home I regard as a great sacrifice. Although she is no longer with us, she will be forever remembered. It is impossible to describe and evaluate all the unconditional support, financially, intellectually and emotionally, that I have received from my family over the years and so my deepest gratitude goes to them.

Last but not least, I owe a special debt of gratitude to Mr Yuk Lau who has always been with me, patiently taking care of me and providing a delightful distraction from this research. I am also grateful to him for our many stimulating conversations, for helping me grow personally and intellectually, and for the true affection and dedication he has always shown towards me, even in the most difficult times.

## **To My Family**

Who give me courage and strength to follow my dreams,  
and teach me to be responsible for my actions

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## Abbreviation

|                                                      |                |
|------------------------------------------------------|----------------|
| All China Lawyers Association                        | ACLA           |
| Chinese Communist Party                              | CCP            |
| Criminal Procedure Law of People's Republic of China | CCPL           |
| Criminal Law of People's Republic of China           | CCL            |
| Convention against Torture                           | CAT            |
| European Convention on Human Rights Protection       | ECHR           |
| European Court of Human Right European Court         | European Court |
| Human Rights Committee                               | HRC            |
| International Covenant on civil and Political Rights | ICCPR          |
| National People's Congress                           | NPC            |
| Ministry of Justice                                  | MOJ            |
| Ministry of Public Security                          | MPS            |
| Ministry of State Security                           | MSS            |
| People's Republic of China                           | China          |
| Supreme People's Court                               | SPC            |
| Supreme People's Procuratorate                       | SPP            |
| United Kingdom of Great Britain and Northern Ireland | UK             |
| United Nations                                       | UN             |
| United Nations Special Rapporteur                    | SR             |
| World Trade Organization                             | WTO            |

## **Part I Introduction**

## Chapter One Introduction

The criminal justice system in People's Republic of China (China) is at the stage of being developed just like its economy. Many problems are apparent, not only in law but also in practice. The essence of criminal procedure law is to combine the punishment of crime with the protection of human rights.<sup>1</sup> On one hand, the state must use harsh measures such as detention and arrest to restrict the freedom of citizens in order to punish crime and maintain social and public order. On the other hand, in order to protect the innocent against being investigated unjustified for criminal responsibility and prevent the state from infringing upon the citizen's rights, the design of criminal proceedings must be focused on human rights protection of suspects. The concept of due process is central to fundamental human rights because it requires equal protection for all individuals. In particular, human rights protection for all legal actions concerning the suspects, who are in a situation of inferiority and weakness remains a major challenge in the area of overall improvement in respect of the individual. Therefore, there are long-term struggles between public safety and individual freedom with serious conflicts between crime control and due process. Striking the appropriate balance between these interests is always a complex issue for law enforcement agencies. Such issues have become much more urgent, especially after 9/11 all over the world. China is one of the countries actively seeking the balance between crime control and due process in its reform of the criminal justice system.<sup>2</sup> In 1996, China completed a major revision of its *Criminal Procedure Law of People's Republic of China* (CCPL), which was originally enacted in 1979.<sup>3</sup> Considerable attention has been paid to ensure due process and establish fundamental

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<sup>1</sup> The best-known framework for evaluating the criminal process is that of Herbert Packer, developed in the 1960s, see H. Packer, *The Limits of the Criminal Sanction*, (Stanford University Press, 1968).

<sup>2</sup> Packer's theory was introduced into China in early 1990s, See Xingjian Li, *On the Structure of Criminal Procedure*, (Chinese University of Political Science and Law Press, 1992).

<sup>3</sup> Criminal Procedure Law of the People's Republic of China (1996 Amendment), 17/03/96, [hereafter CCPL 1996].

human rights for suspects and defendants in modern criminal justice systems in China.

At the same time, human rights have become of increasing relevance and demanding, nationally and internationally, in recent years. International human rights law, such as the United Nations International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR), contain strict rules about human rights protection for suspects which are applicable at all times.<sup>4</sup> As reviewed in this thesis, the principles established by these instruments include the presumption of innocence, prohibition against arbitrary detention, prohibition against torture, and right to defence, etc. They represent common agreed principles of desirable practice by which governments can assess and upgrade their own criminal justice systems, harmonise legislative provisions and operational procedures across national frontiers, and so contribute to the development of the concept of the international rule of law. In particular, the ICCPR has become the universal standard of achievement and has played an active guiding role in criminal justice and its reform for both the East and the West, as those standards and norms express common human values and the vast majority of the countries in the world have signed and ratified the ICCPR. The performance of governments, and even their legitimacy, is being measured against the standards of these international standards. The member States are under legal obligation to take the necessary legislative and practical measures to put an end to all practices that violate the rules set forth in the ICCPR and therefore to raise the standards of human rights protection to the same level as the international community.

As an active participant in globalisation and also one of the signatories to the ICCPR, China demonstrates its desire to ratify the ICCPR and effectively implement it.

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<sup>4</sup> International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), 16/12/66 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, 5/11/50 [hereinafter European Convention].



Criminal justice is an area of great potential for improvement in implementing the ICCPR standards in China. China is becoming more receptive to international monitoring too, even though “the predomination of Western Values in the international human rights regime” and “interference into internal affairs” are still often an issue for debate.<sup>5</sup> While reforms to the laws of criminal procedure in China have begun to recognize and redress the inadequacies and limitations according to the requirements and spirit of the ICCPR, the ongoing progress may have demonstrated many clear signs of positive progress in the right direction. But a realistic view suggests that the procedural changes promulgated in the CCPL of 1996 cannot currently be relied upon to guarantee a fair trial for suspects as required by international standards. Sustained effort over a period of years will be needed for China to be able to meet its ICCPR commitments on human rights protection laws. This thesis is intended to demonstrate the gap, challenges and prospects for China to promulgate amendments to the Law and practice of the criminal justice system in conformity with ICCPR provisions and to finally grant suspects the right to a fair trial. Obviously, any discussion of the changes to this legal system is based on a fundamental belief that the ICCPR standards are common standards for the protection of human rights.

## **1. The Current Situation of the Criminal Legal System and Human Rights Protection in China**

### **1.1 Human Rights Protection in the Constitution**

The law should keep up with the times. The 1982 Constitution of the People’s Republic of China is still in place today, and its amendments have largely been concerned with adjusting the Constitution to reflect practice. The 15th National Congress of the Communist Party of China (CCP) decided in September 1997 to

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<sup>5</sup> See State Council of the People’s Republic of China, Human Rights in China (White Paper), 11/91; for a good overview and a literature study on this issue see, Stijn Deklerck, “Human Rights in China: Tradition, Politics and Change”, (2003) 6, *Studia Diplomatica*, Vol 56., pp. 53-108.

ensure that the people should enjoy extensive rights and freedom endowed by law, and that human rights are guaranteed and respected.<sup>6</sup> In 1999 China's National People's Congress (NPC) amended the Constitution of the People's Republic of China to insert "the rule of law" into that document as a leading principle for the first time. Later the term "respect for and protection of human rights by the State" was adopted in 2004 in the Chinese Constitution as well. This is the first time for China to mention the word human rights in its Constitution, which points to progress in the development of human rights in China.

The President of China and CCP Secretary-General Hu Jintao has reiterated the importance of the Constitution on behalf of the government, and stated that the Constitution should be a legal weapon to safeguard citizens' rights and for this purpose, education on the Constitution must be provided, especially at Party and cadre schools. No organization or individual is privileged to stand above the Constitution and other laws.<sup>7</sup> The implementation of human rights concepts will take time in China. But with a highly significant move to include a human rights provision into the Constitution and the express pledge to the same from the government, full commitment to the international human rights law is logically a further development for current law and practice in China.

## **1.2 Criminal Procedure Law in China**

Implementation of the human rights treaties will involve both international and domestic action on the part of China. But it is the domestic implementation that is the most crucial and most elusive obligation. Briefly speaking, in China, the criminal legal system mainly consists of the CCPL and the *Criminal Law of the People's*

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<sup>6</sup> See Zemin Jiang, "Further Improving Reformation of the Political System in Order to Have a Great Development on the Construction of Socialist Democracy and the Legal System", *Speech at the 14<sup>th</sup> National Congress of Communist Party*, 12/10/97, [http://alszq.gov.cn/sh/News\\_View.asp?NewsID=197](http://alszq.gov.cn/sh/News_View.asp?NewsID=197)

<sup>7</sup> See Jintao Hu, "Honor Constitution's Guarantee for Citizens' Rights – Speech at a Rally Marking the 20<sup>th</sup> Anniversary of the Promulgation and Implementation of Current Constitution", (2003) May No. 3 Human Rights, p.2

*Republic of China* (CCL) with relevant legal interpretations.<sup>8</sup> In many contemporary western countries, criminal procedure features procedural protection afforded to suspects, such as right to notification, right to silence, right to bail, the exclusion of wrongly obtained evidence, and the right to legal counsel, and much more. In these countries, the public shares the horror at the prospect of wrongly convicting an innocent person, and hence commits to the basic protection of human rights with a broad spectrum, and besides, most notably values the relentless pursuit of truth. However, much of what has been accepted as fundamental to a Western criminal justice system has only now entered public discourse in China. Human rights protection is especially inadequate in China's criminal justice system. This position of current CCPL is a result of a combination of factors embraced in the political structure, social ideology of individual rights and the traditional culture of Chinese characteristics as illustrated in this thesis.

One of the principal goals of the revisions of CCPL in 1996 was to strengthen human rights protection available to suspects and defendants in criminal proceedings. The reform in 1996 has attracted almost universal acclaim and has been seen as a milestone on the road to the rule of law in the field of criminal justice in China.<sup>9</sup> The amendment introduces some key rights and procedural safeguards for suspects into China's criminal justice system, such as the recognition of the presumption of innocence, the expansion of the right to counsel, the limits set to non-judicial determination of guilt, and the establishment of a more transparent trial process. It shows the intention of the Chinese government to follow the trends in the development of human rights and move towards being a country that respects the rule of law. There are high expectations that the amendment will afford suspects more procedural protection in China's criminal justice system and bring China's criminal procedure closer to international standards.

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<sup>8</sup> Criminal Law of the People's Republic of China, 1/10/1997, [hereafter Criminal Law 1997].

<sup>9</sup> For a fuller assessment of the form of criminal trials in China, refer to Ruihua Chen, *Cutting-edge Issues of Criminal Procedure* (Beijing: China People's University Press, 2000), Chapter 7.3.

However, there is still a long way to go for China to realize human rights protection and development. Noticeably, the CCPL of 1996 has merely 225 Articles, and does not have specific provisions on many issues, which can barely meet the practical needs. Soon after the revised CCPL was put into practice, the different legislative and judicial organs, under pressure from all sides, again have had to issue a series of detailed, and sometimes conflicting, amendments and supplementary provisions to this law in the form of legal interpretations.<sup>10</sup> Expedient countermeasures against the reforms of criminal justice abounded. Up till the present, the status of Chinese suspects and defendants is not satisfactory, which can be indicated by the simple fact that the rate of defence lawyers appear in court is very low.<sup>11</sup> Doubts have been raised as to how much impact the reform since 1996 has had in practice. In recent years, numerous reports have been issued, based on international and domestic observation and studies, highlighting the human rights abuses in the criminal process of China.<sup>12</sup> All these reports raised serious concerns, particularly regarding three main areas of implementations related to the legal interests of the suspects under the CCPL of 1996.<sup>13</sup> First, they found the various time limits on detention had been widely ignored. Second, torture had reached epidemic proportions, although both the CCPL and the CCL prohibit it. Third, lawyers representing defendants or suspects in criminal cases encountered a great deal of difficulty in carrying out their professional duties. These situations reflect the fact that the promised protection of human rights

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<sup>10</sup> See e.g. Supreme People's Procuratorate (SPP), Rules (Trial) for Implementation of the Criminal Procedure Law, (no longer effective), 30/01/97; Supreme People's Court (SPC), Interpretation (Trial) of Certain Issues regarding the Implementation of the Criminal Procedure Law, 20/12/96; The Ministry of Public Security (MPS), Regulation on the Procedures of Handling Criminal Cases by Public Security Agencies (Trial), 14/05/98; Furthermore, the SPC, SPP, the MPS, the Ministry of National Security (MNS), the Ministry of Justice (MOJ) and the Commission for Legislative Affairs of the NPC Standing Committee, Joint Regulation on Several Issues in the Implementation of the Criminal Procedure Law, 19/01/98 [hereafter Joint Regulation 1998].

<sup>11</sup> For detailed information, see Shunyi Li, "Risks and Protection When Lawyers are Involved in Criminal Procedure", (1997) 4 China Lawyer, p.44.

<sup>12</sup> See, e.g. Zongbin Hou, "Problems in the Implementation of the Criminal Procedure Law that Cannot be Ignored", Xinhua News, 28/12/00; Report of the Working Group on Arbitrary Detention: Mission to China, E/CN.4/2005/6/Add.4, 29/12/04; Concluding Observations of the Committee against Torture: China, CAT/C/CHN/CO/4, 12/12/08.

<sup>13</sup> See Zongbin Hou, "Report from Standing Committee Law Enforcement Inspection Group of the National People's Congress on the Implementation of the Criminal Procedure Law of People's Republic of China", at the 19th Meeting of the Standing Committee of the Ninth National People's Congress, December 27, 2000, [hereafter Report on Implementation of CCPL 1996]

for suspects in the CCPL of 1996 has not yet reached international standards and this issue needs to be solved by further revising the CCPL. The amendment of the CCPL has been included in the legislature plan of the 10th NPC.<sup>14</sup> It is important to investigate the most pressing issues during the coming revision.

## **2. China and the ICCPR**

### **2.1 The Meaning of Ratification of the ICCPR to China**

With the development of society there is no excuse for China to say it does not want to ratify the ICCPR. This international guideline is the minimum requirement wherein criminal justice ensures basic human rights, so every civilization and legal state should obey these basic guidelines. Internationally, China has claimed in relation to international human rights law that any convention acceded to by China becomes binding as soon as it has been signed. The process of signature, ratification and deposit signifies that the state identifies with and has committed itself to the human rights standards laid down in the international treaties. The signature is the first step in this identification. China signed the ICCPR on 5 October 1998 and is now studying it with a view to early ratification. It is an important step in committing the Chinese government to the protection of those internationally recognized human rights embodied in the Covenant. But signing a document is a very different matter from abiding by it. Ratification in the ICCPR is the process whereby a state finally confirms that it intends to be bound by a treaty which it has previously signed, consent not being effective until such ratification takes place.

Ratification of the ICCPR by China as early as possible is the earnest desire of the many Chinese scholars, the Chinese government and the whole international community.<sup>15</sup> China has been reiterating in its reports to the United Nations (UN)

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<sup>14</sup> The information was released by Songyou Huang, vice-president of the Chinese Supreme People's Court, on the 2004 Annual Conference of the China Law Society which was held in Guangzhou.

<sup>15</sup> "Challenges at End of Visit to China", United Nations Press Release, HR/4869, 06/09/05, [www.un.org/News/Press/docs/2005/hr4869.doc.htm](http://www.un.org/News/Press/docs/2005/hr4869.doc.htm).

human rights machinery that treaty law becomes domestic law on ratification without any further change.<sup>16</sup> Therefore, once China ratifies the ICCPR, it must implement the obligations stated therein and act realistically as required. In theory, international law in China is directly applicable. In the event of a discrepancy between the provisions of an international instrument and domestic law, the latter is to be brought into line with the former. Where subtle differences remain, international instruments took precedence over domestic law.<sup>17</sup> In practice this has proven to be true at least in cases of commercial or civil disputes. However, in other types of disputes there is no such clear reference. So far there have not been overt references to the influence of international human rights law on domestic law by courts other than rhetorically. As in the case of China's own current laws, enforcement and implementation are all too often lacking, even if backed by real political will. The state is simply not capable of delivering even the limited rights it accords its citizens.

As presented later in this thesis, China has no traditional philosophical foundation for the concept of human rights, which has its origins in the liberal democratic tradition of Western Europe. There are different cultures and different approaches towards human rights in China.<sup>18</sup> It is obvious that China cannot now accept the ICCPR into its law in the way that the HRA 1998 in United Kingdom of Great Britain and Northern Ireland (UK) accepted the ECHR. But reflection can be drawn from the reception of the ECHR into UK domestic law by the Human Right Acts 1998. Fenwick commented that it may be viewed as a public statement from the nation as a whole of the importance that they attach to human rights, has given the judges a

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<sup>16</sup> e. g. International Human Rights Instruments, Core Document Forming Part of the Reports of States Parties - China : China, HRI/CORE/1/Add.21/Rev.2, 11/06/01, paras 51-53.

<sup>17</sup> Statement as reported, from the Chinese delegation, in dialogue with the UN Committee against Torture when scrutinizing state report under the Convention against Torture, CAT/C/SR.50 and 51, 27/04/90, para. 487.

<sup>18</sup> It is beyond the scope of this paper to analyse and compare these differences in details. The representative work on the comparative study on the legal culture between the west and China see, e.g. Pitman B. Potter, *The Chinese Legal System: Globalization and Local Legal Culture*, (London & New York: Routledge, 2001); Zhiping Liang, "Explicating 'Law': A Comparative Perspective of Chinese and Western Legal Culture", (1988) 3 *Journal of Chinese Law*, p55-91; Zhongqiu Zhong, *Comparative Study of Chinese and Western Legal Culture*, (Beijing: Press of China University of Political Science & Law, 2006).

clearer mandate to develop a domestic human rights jurisprudence.<sup>19</sup> The UK experience inspires China with the hope that the ratification of the ICCPR may give further impetus to build a culture of rights and responsibilities across China. Through such influence, mutual understanding of human rights protection can be reinforced and spread, so that human rights protection for the suspects is promoted. Also, this will bring more positive changes to the criminal justice system and the overall legal system. The ratification of the ICCPR can ensure that those who are making domestic laws pay attention to the basic rights they will always have to justify interfering with. They should not ignore individual rights just because they conflict with the collective interest and should focus on the issues which involve possible infringements or limitations of rights. Furthermore, ratifying the ICCPR will make China subject to more international monitoring of its human rights situation. But through genuine improvement, China can limit the number of cases taken to the international level, and therefore limit the political embarrassment such a case can cause.

## **2.2 Obligation to Enact the ICCPR in Good faith before Ratification**

The PRC is still preparing for its ratification. Then what should China do before its ratification? Although the Chinese government has expressed a few times on various occasions that China is committed to ratifying the ICCPR when the conditions are right, it has however never given a clear timetable.<sup>20</sup> According to the Constitution of China, signing conventions with other countries and acceding to international treaties are matters that can be deliberated more than once by the Standing Committee of the NPC, for there is no restriction as to how many times nor how long the deliberation may take.<sup>21</sup> The ratification of international instruments that the Standing Committee

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<sup>19</sup> Helen Fenwick, *Civil Liberties and Human Rights*, 3<sup>rd</sup> ed, (London: Cavendish Publish, 2002), p112.

<sup>20</sup> See e.g., in his speech in France on January 27, 2004, Chinese President Hu Jintao pledged that the Chinese Government would propose the covenant to the NPC for ratification once conditions were right. During his European tour in May 2004, Chinese Premier Wen Jiabao also said that China was readying itself to ratify the ICCPR as soon as possible; This was confirmed the third time by Luo Gan, legal affairs chief of the Communist Party of China, at the 22nd Congress on the Law of the World held in September in Beijing and Shanghai in 2005.

<sup>21</sup> Constitution of People's Republic of China (2004 Amendment), 14/03/04, [hereafter Constitution], Article 67.

of the NPC has decided to join can be approved with just over half the votes of the Committee members.<sup>22</sup> In regard to important international conventions, treaties and laws, the Standing Committee usually has several deliberations so that the members may have sufficient time to understand their contents, to consult each other, as well as to study and discuss in depth the more important issues at stake. The State Council has not yet submitted the ICCPR for deliberation.

Moreover, from the perspective of domestic Law, the more reservations or declarations are resorted to, the easier it is for the State and the Covenant to be in agreement. Nevertheless, from the perspective of the International Human Rights Covenants, State Parties should make as few reservations or declarations as possible, as these would lead to more discord or divergence between Domestic Law and International Covenants. According to Article 18 of the Vienna Convention on the Law of Treaties, to which China is a party, a State party cannot take action counter to the object and purpose of the Convention, namely, it cannot make reservations violating the purpose of a treaty. Thus, although China has the right to make reservations, the basic principle of the ICCPR is not subject to reservations. Therefore like other countries, China has to consider, on the basis of its own situation and sufficient commitment to its obligations under the Covenant, what reservations to make regarding the covenants. This issue deserves separate research. Only in this way will the covenants be implemented after ratification, otherwise, they would be no more than empty words. To study the implications carefully is a responsible attitude to assume towards the covenants as well as common practice in the international community. Similar situations have occurred in other western countries. For instance, the USA signed the ICCPR in 1977, but only ratified it 15 years later in 1992.

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<sup>22</sup> *ibid.*; Organic Law of the National People's Congress, 10/12/82, Article 31.



However, before ratification of the ICCPR, China should firstly effectuate the treaty voluntarily. It seems that at this stage China may carry out any domestic legislation, in line with or not in line with the principle of human rights protection for suspects stipulated in the ICCPR, because there is no executive responsibility of a State party before ratifying a treaty. But as stated in Article 2(2) of the ICCPR, “where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”.<sup>23</sup> This article creates an affirmative duty on signatories to comply with the ICCPR provisions. It is the signatory state that bears responsibility for ensuring and promoting the ICCPR standards domestically and defining broad language within the UN’s and the Covenant’s minimum standards of human rights protection.

In addition to negative obligations preventing state authorities from interfering with or depriving individuals of civil and political rights, the provisions of the ICCPR also impose positive obligations upon states. State parties must establish procedures and mechanisms which effectively ensure protection of ICCPR rights. Also under the universal principle, a state is legally obliged to refrain from acts which would defeat the object and purpose of the treaty in the period between signature and ratification or until it has indicated that it will not be bound; and this before entry into force of the treaty, provided that the latter is not unduly delayed.<sup>24</sup> It seems that the obligation to abstain from pre-treaty acts prejudicial to the treaty is necessary if states wish to conduct their international relations with assurance and in good faith. It follows logically that if this pre-treaty obligation carries legal force, a breach of it will itself

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<sup>23</sup> ICCPR Article 2(2).

<sup>24</sup> Vienna Convention on the Law of Treaties, Article 18.

involve international responsibility.<sup>25</sup>

Therefore it is vital to introduce the international standards of criminal justice into the relevant part of domestic law. It would be more promising if China carefully revised its domestic law to increase the standard of human rights protection for suspects in preparation for the ratification of the ICCPR. But as discussion in later chapters will demonstrate, in the CCPL of 1996 there are many provisions which are inconsistent with the rules and practices in ICCPR. There is much work to be done before the Chinese government ratifies this Covenant. First of all, the knowledge of how to correctly interpret and understand the ICCPR is crucial. The rich jurisprudence with respect to the interpretations of the Covenant by the Human Rights Committee (HRC) has not been adequately taken into account in the research done in China on the ICCPR. Only after the Covenant can be comprehended in a correct way to substantially grasp and sufficiently understand it, can a useful theoretical preparatory work for the ratification and implementation of the ICCPR by China be enforced. Research on the interpretation therefore must be further strengthened. Second, there is an issue of the concordance between Chinese domestic Law and international human rights Covenants in the course of ratification and application, including modifying some domestic law progressively and establishing the social idea of the supremacy of human rights for the whole of society. Presently, there already exists a series of mechanisms for implementing the obligations of the international Covenants, consisting mainly of legislative, administrative, judicial and legal monitoring measures in China. Regarding the application of the ICCPR, though these existing domestic mechanisms cannot fully guarantee success, they will continue to play an important role in accordance with the requirements of the Covenant. It is on the basis of this prerequisite that China signed the covenants.

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<sup>25</sup> See generally, Martin Dixon, 6<sup>th</sup> ed, *Textbook on International Law*, (Oxford: Oxford University Press, 2007), [hereafter Martin Dixon, *Textbook on International Law*].

Proposing standards and norms is not difficult. What is difficult, however, is for countries to actually make improvements to their justice systems. ICCPR provides a spur to Chinese legislation. Unless specific and feasible methods and procedures are laid down, it is virtually impossible, however hard one tries, to initiate and achieve such improvements. For example, an important use of the ECHR for the UK was to successfully reveal basic flaws in UK law.<sup>26</sup> Legislation prompted by the ECHR, at least in part, includes, for example, the *Contempt of Court Act 1981*. The Strasbourg Court's judgment in *Sunday Times v UK (No.1)* was an important factor leading to the reform.<sup>27</sup> Both at the time of pending ratification and at the stage of actual implementation of the ICCPR by China, it is obviously necessary to take a look at what the ICCPR actually says in criminal justice and what impact it will have upon China's ratification. Those minimum international standards for criminal justice need to be used for reference to assess the justice of the national criminal procedure, and to be absorbed and step by step become part of national law. When suspects assert their rights in the criminal proceedings, those standards could also be their reasons for protecting their rights. China's introduction of a general human rights guarantee in its Constitution, passing new legislation or amending existing legislation would best be done prior to the ratification of the covenants. This would bring up new challenges as well as opportunities for the modernisation of the Chinese criminal procedure.

### **3. Methodology, Scope and Route Map**

#### **3.1 Methodology and Scope**

Through a comparative study, this thesis aims mainly to address the disparity between the relevant international standards and Chinese law and practice on the issue of human rights protection in criminal justice, and to see what can be done to reduce the gap in the context of China's possible ratification, so as to raise the

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<sup>26</sup> See e.g. *Thynne, Wilson and Gunnell v UK*, (1990) 13 EHRR 666; Helen Fenwick, *op.cit.*, fn 15, p90.

<sup>27</sup> *Sunday Times v UK (No.1)* (1980) 2 EHRR 245.

consciousness of human rights and accelerate the realization of criminal justice in China. The thesis has been guided by the emerging fair trial standards set by the UN, particularly under the ICCPR, and the standards in ECHR. The research method will be based on a literature review of primary and secondary sources. These include official international and regional human rights treaties, pieces of national legislation and case law. Secondary sources are books, articles from the Internet, reports, international rules and standards and local newspapers. Regarding the methodology of this research, there are some limitations because information and statistics on human rights violations of suspects in trouble with the law are very difficult to obtain in China. They happen mostly within closed doors and are perpetrated by agents of the state. Therefore, without conducting interviews with victims or field research in China, any information or statistics on the subject will be based primarily on books, government sources or sources from specific international organisations.

Understandably, a full discussion covering all the issues on human rights protection in criminal justice is wide-ranging. However, the scope of this research is limited in volume and time. So it would seem more advisable to confine it to a specific issue. Therefore this thesis does not seek to indict the entire criminal justice system in China. Instead, it will focus on the issues related to human rights protection for suspects in pre-trial procedure. Only four major issues related to human rights protection for suspects are discussed here, namely the changing guiding ideology, the pre-trial compulsory measures system, prevention of the use of illegal evidence obtained through torture and the right to legal counsel before trial. Admittedly, these are in no way the only issues limiting the full exercise of human rights protection for suspects in China, even in the pre-trial stage only. However, they are a good reflection of some of the main current issues in this area, not only from a Chinese perspective, but internationally as well. None of the four issues have received a wide analysis also due to the constraints mentioned above. However, in some ways, they

present a good link between the status of China's criminal legal system and the requirements of the ICCPR. The discussion is sufficient to afford the reader some appreciation of the significant progress made so far and the challenges that remain in China.

At the same time, Chinese scholars have already been actively conducting research on the CCPL reform, but the results and suggestions in most Chinese expert drafts for the further reform of CCPL are still not fully achieving the international requirements of the ICCPR and other international human rights instruments.<sup>28</sup> Most drafts are limited to the mere understanding of the literal meaning of the Covenant text, without comprehensively and sufficiently looking into the first-hand materials of the interpretations and development of the Covenant by the HRC in the General Comments, the Concluding Observations and the final views adopted after the consideration of individual communications. Furthermore, when discussing the understanding of the ICCPR and the differences between the provisions of the Covenant and the relevant current CCPL and practice, some research even uses domestic law as a reference to determine whether the Chinese law complies with the rule of ICCPR or not.<sup>29</sup> However, the meaning of the ICCPR must be determined by the Covenant and the HRC. If consideration of ratification is based on an inadequate understanding and interpretation in relation to the theories, rules and practices of international standards, it may well leave many difficulties and hindrances encumbrances for the future application and implementation and so jeopardize the commitment of China to the Covenant. Therefore this thesis considers the subject in several steps.

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<sup>28</sup> e.g. Guangzhong Chen, *Expert Draft for Re-amendment to the Criminal Procedure Law of the People's Republic of China and Its Annotations* (Beijing: China Legal Publishing House, 2006); Wenchang Tian and Ruihua Chen, eds. *Draft Recommendations and Considerations by the Legal Profession on the Revisions to the Criminal Procedure Law of the PRC*, (Beijing: Law Press China, 2007); Zongzhi Long, *Between Tradition and Modernization – On the Reamendment of Criminal Procedure Law of China*, (Beijing: Law Press, 2005).

<sup>29</sup> e.g., See Guangzhong Chen, Weiqiu Cheng and Vincent Cheng Yang (ed), *A study on the Issues of Ratifying and Implementing of International Covenant on Civil and Political Rights*, (Beijing: China Legal System Press, 2002), p155.

In order to consider how to conform to the standards set in the ICCPR with real commitment during the further reform of the CCPL and more effectively facilitate the ratification process of ICCPR in China, it is necessary to begin the research by providing a comprehensive, clear and correct knowledge and understanding of the international standards directly relevant to the field of human rights protection for the suspects. The correct grasp and substantive understanding of the interpretation of the ICCPR by the work of the HRC must constitute an integral and indispensable part of this thesis. Their work is very helpful and crucial to an adequate and thorough understanding of the object and purpose of the ICCPR and the exact scope and meanings of the requirements set forth in its provisions. It is not the intention here to present an exhaustive review of all the jurisprudence on these rules, but rather to give an in-depth commentary on the leading jurisprudence and latest approach to the protection of suspects' rights adopted by the judicial bodies under the covenant when considering violations of the relevant rules. The relevant ICCPR rules on fair trial in criminal justice, namely Articles 7, 9 and 14, and their definitions and interpretations by the HRC will be carefully examined and studied, thus establishing an instructive model for this discussion.

Since developments on the international level have not occurred in isolation, the contribution of the regional organisations will also be considered. The ECHR is the most developed system for the international protection of civil and political rights, not necessarily in the sense of being the best devised, or having a supervisory body with the most sophisticated reasoning, but as having the most extensive interpretative case law, covering almost 60 years.<sup>30</sup> Many issues relevant to the protection of suspects' rights have arisen before the European Commission and Court of Human Rights but have not yet even arisen in the other systems. Moreover, the opinions

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<sup>30</sup> See Iain Cameron, "The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions", 06/02/06, reported at Committee of Legal Advisers on Public International Law (CAHDI), 32<sup>nd</sup> Meeting, Athens, 13-14 September, 2006.

expressed by the European Court of Human Rights (European Court) in their cases have some link with the HRC, which usually use them as evidence to interpret a provision of the ICCPR or to deliver a General Comment thereof. Therefore, the jurisprudence of the ECHR with its rich case law mirrors, to a certain extent, the standards and norms as set out in the ICCPR from a wider point of view not only with respect to how the specific issue is understood but also how the European Court has interpreted those State Party's obligations under a human rights instrument.

As a result, although it is impossible for China to be a member state of the ECHR, some relevant rules and cases delivered by the European Court have been a valuable reference for China in its understanding of the ICCPR in depth. It is also worth noting that the European system has been able to function effectively because of the existence of the same liberal democratic tradition in Western Europe and the co-operation between governments in European countries.<sup>31</sup> However, observation of these relevant key cases in the ECHR has also been of invaluable inspiration for China to identify and estimate whether its concrete situation is compatible with international standards and so continue implementing relevant reforms. The advantages and limitations of human rights protection for suspects under ECHR are therefore considered and quoted when necessary in the thesis to understand and explain specific questions. The standards specified in the ECHR relevant to this research are mainly set out in Article 3, Article 5 and Article 6. Moreover, whilst rights in the international treaties are set out in general terms, some development of the UK common law and express statutory enactment under the UK system therefore is presented in the thesis to seek to provide a more specific and detailed example through which to study the protection of suspects' rights. The national courts contribute to the development of domestic criminal procedure law and it is their task

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<sup>31</sup> See the Preamble of the European Convention on Human Rights; A.H. Robertson and J.G. Merrills, *Human Rights in the World*, 4<sup>th</sup> ed., (Manchester & New York: Manchester University Press, 1996), [hereafter Robertson and Merrills, *Human Rights in the World*], p2, p155.

to apply the international treaties at home and in external relations.<sup>32</sup> From the analysis of relevant UK domestic case law and relevant provisions it can be observed now a member State can work continuously to improve its criminal justice system by the application of international treaties to its own national situation. It is anticipated that these concrete applications can be a useful example for Chinese criminal justice reform.

The thesis will then turn into examining the CCPL of 1996 based on the corresponding principles of the ICCPR and the ECHR. The research concentrates on suspects' rights in the pre-trial proceedings, which are composed of the investigation proceedings and an examination of prosecution proceedings in China. Several questions are considered during this discussion. To what extent has the current situation achieved the international standards for expanding the rights of individuals suspected of criminal offences? How far does the CCPL of 1996 fall short of international standards? Law interrelates with the everyday life of people in a society and that law and social situation are mutually influencing and interacting with one another. If so, how can China accommodate those internationally accepted standards or a modern legal system in its particular situation as a country? What changes would have to be made in the first place? Also, what has been the objective of the reform? Therefore, through a comparative study of several difficult but important issues in the current situation of the criminal justice system in China, progress made hitherto should be applauded. The analysis will also explore the weakness of the reform so far.

Special attention is paid to the concrete obstacles and tensions that China has been facing in any further reform to develop a modern system of criminal procedure which meets its own practical and sociological needs and at the same time fulfils the

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<sup>32</sup> See Asbjorn Aide and Gudmundur Alfredsson (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievements*, (The Hague/Boston/London: Martinus Nijhoff Publishers, 1999) p. xxv.



guidelines of international criminal justice. Should a presumption of innocence be accepted fully and its implications spelled out? Should suspects generally be granted bail during the investigation period instead of languishing in detention as at present? What protection should be enacted to reduce the likelihood that suspects will be tortured and to curb widespread protracted detention? Should all illegally-obtained evidence be excluded from trials? Should suspects have a right to keep silent and not incriminate themselves? Should defence lawyers be allowed to monitor police interrogations, conduct their own investigation prior to indictment and freely meet detained clients? What steps should be adopted to make defence lawyers available for accused person who more often than not go unrepresented? In order to solve these problems, all these observations and investigations will be guided by and compared to emerging international standards of criminal justice, in particular under the ICCPR, and the standards of the ECHR. The recommendations following the analysis aim to give guidance for future policy and legislative action for criminal justice reform.

To perceive and comprehend the challenges faced by the reform of the Chinese criminal justice system, the study must be placed in the context of a society which has traditionally valued public order and social stability above the protection of human rights. As this thesis will demonstrate, the reform of the Chinese criminal legal system is not easy and cannot be carried out in a very short time, since it will depend on many other factors, such as its unique legal history, legal culture, economic conditions and social system. These factors have hitherto continued to affect the reform of the law. A human rights culture, especially the rights of accused persons, has yet to take root. China has always gone its own way. Therefore the particular legal tradition, especially regarding the very different concept of law and human rights protection, and the salient characteristics of the Chinese criminal justice system deserve close attention and an insightful understanding before the

concrete fields of law and the substantive rules are delved into. The special Chinese characteristics always have to be taken account of in the reform process. However, at the same time, in order to establish a modern criminal justice system, a series of judicial ideologies such as human rights protection and due process has to be gradually established and updated in China. The development of this spirit of modern law in China represents a fundamental change in the concepts and ideologies of the people. In this transition stage, therefore, there must also be an awareness that the application of Chinese characteristics only serves to avoid debates and to refute evolution. The problem of how to conduct a creative transformation of these traditional judicial concepts and absorb and transplant the international guidelines into the coming reform of the CCPL demands much thought along with the discussion on the reform of specific regulations or mechanisms.

### **3.2 Route map of the Study**

The thesis is organised into four parts with eight chapters. After this introduction as Part One and Chapter One to introduce the background to the research, and the methodology and structure of the thesis, Part Two demonstrates the relevant standards of international instruments concerning human rights protection for suspects with a view to correctly understanding its scope and meaning. In doing so, Chapter Two will review the international standards of the ICCPR as a guide for the following investigation. Broadly speaking, Chapter Three looks at the relevant regulations developed in the ECHR as valuable inspiration.

Part Three then highlights four issues in the revised CCPL in four chapters. A comparative analysis of relevant provisions in the CCPL of 1996 will be undertaken in these chapters to point out the ways in which that law might be viewed as consistent or inconsistent with international standards. It also points to several key issues where the revision has signified little or no progress towards bringing the

Chinese criminal justice process into conformity with international standards. At the end of each chapter, possible suggestions for improvements specifically reflecting upon the existing problems of each issue will be duly proposed for the coming CCPL reform. This is in order to redress the inadequacies of the past and perfect the system in China's quest for compliance with international standard and to provide further safeguards for suspects.

Having dealt with the above in Part Three, Chapter Four briefly traces the change of the guiding ideologies of Chinese criminal justice throughout China's history and traditions, and through more recently developed views in government circles, academia and the civil society in general. Various aspects of the CCPL of 1996 relevant to the application of the changing guiding ideologies will be noted. Chapter Five then deals with the pre-trial compulsory system in the CCPL of 1996. It will investigate both the achievements hitherto and the numerous difficulties and problems which have arisen in the application of the compulsory measures in the CCPL. Chapter Six examines the problems of using torture and ill-treatment to obtain evidence in the CCPL of 1996. In particular, it includes a study of the complicated reasons for torture and ill-treatment for the sake of extracting confessions during the pre-trial process. The right to remain silent and the exclusionary rule prohibiting the illegally obtained evidence in the CCPL will be critically investigated. Chapter Seven seeks to examine the impact of the 1996 CCPL on the role of China's criminal defence lawyers at the pre-trial stage and to identify some key factors which have contributed to the failure or ineffectiveness of the current law.

The concluding Part Four, Chapter Eight, gives a brief summary of the thesis by reviewing the main themes and relevant arguments raised and discussed in the thesis. It also points out the main findings of the study and offers recommendations urging

the Chinese authorities to do what it can to assist in the long and difficult process of bringing China's criminal justice system into compliance with international standards.

## **Part II**

### **The Main Contents in the International Instruments for the Protection of Suspects' rights**

## **Chapter Two**

# **An Analysis of Key Rights for Suspects in the Pre-trial Proceedings Recognised in ICCPR**

### **1. Introduction**

The reform of criminal procedure to protect the human rights of suspects has always been a concern of the UN. It was pointed out the relationship between the ICCPR and the reform of the criminal procedure law in China in the Introduction chapter. As a reference point and in the context of China's possible ratification, this chapter addresses the issue of the adequately and comprehensive understanding of the ICCPR and its interpretation by HRC in order to effectively facilitate the further reform of CCPL. At the same time, this reform is playing an improving role for China in the earliest possible ratification of the Covenant with genuine commitment. In doing so, the following part of this chapter will briefly present the general characteristic of the ICCPR. Some other instruments of human rights protection for the suspects in criminal justice based on ICCPR will also be briefly introduced in this chapter. Then the relevant provisions of ICCPR and the decisions of the HRC concerning those rights for suspects in pre-trial proceedings, which are mainly in the Article 7, 9 and 14, will be carefully reviewed and analysed by referring to the actual practice and jurisprudence of the HRC, focusing on the concept of fair trial in criminal procedure law.

The idea of fair trial has been established in all concepts of modern democracy ever since modern democracy developed, during the Middle Ages. The genesis of the concept of fair trial can be traced back to Magna Carta, in which the king promised that “no free man (*nullus liber homo*) shall be taken or imprisoned or deprived of his freehold or his liberties or free customs or outlawed or exiled or in any manner destroyed, nor shall we come upon him or send against him, except by legal judgment of his peers and by the law of the land (*per legem terrae*).” The concept of fair trial is embodied in the common law traditions of England, the Constitution of the United States, and many modern

constitutions.<sup>1</sup> The protection of procedural due process is not, in itself, sufficient to protect against human rights abuses but it is the foundation stone for substantive protection against state power.<sup>2</sup> The right to fair trial has been reaffirmed and elaborated since 1948 in legally binding international and regional treaties such as the ICCPR, ECHR and ACHR.<sup>3</sup> These human rights standards were drafted to apply to all legal systems in the world and take into account the rich diversity of legal procedures, and they set out the minimum guarantees that all systems should provide.

Every government has the duty to investigate and bring to justice those responsible for crimes. It is important to bear in mind that the applicability of the right to a fair trial on a criminal charge does not start when charges are actually presented, but from the first contact between the person concerned and the State on the case.<sup>4</sup> As stated in the introduction to the Amnesty International Fair Trials Manual, “the risk of human rights abuse starts at the first moment that officials raise suspicions against a person, through the moment of arrest, in pre-trial detention, during the trial, during all appeals, right through to the imposition of any punishment.”<sup>5</sup> This allows to loosely group fair trial rights into pre-trial rights, rights during the trial, and post-trial rights. The distinction between pre-trial procedures, the actual trial and post trial procedures is sometimes blurred in fact, and the violation of rights during one stage may well have an effect on another stage. The international community has developed fair trial standards which are designed to define and protect people’s rights through all these stages. Unless human rights are upheld in the police station, the interrogation room, the detention centre, the court and the prison cell, the government has failed in its duties and betrayed its responsibilities and the justice system itself loses credibility.<sup>6</sup> The right to a fair trial is a fundamental safeguard to assure that individuals are not unjustly punished. It is a core

<sup>1</sup> See generally, P. Van Dijk, *The Right of the Accused to a Fair Trial under International Law*, (Utrecht: SIM Special, 1983); D. Weissbrodt and R. Wolfrum (eds.), *The Right to a Fair Trial*, (Berlin: Springer, 1997).

<sup>2</sup> See Richard Clayton & Hugh Tomlinson, *The Law of Human Rights*, (Oxford: Oxford University Press, 2000), p.550.

<sup>3</sup> On the origin of the right to a fair trial as articulated in the ICCPR see, e.g. David Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, (The Hague, Boston & London: Martinus Nijhoff Publishers, 2001).

<sup>4</sup> See Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel, Arlington: 1993), [hereinafter Nowak Commentary], p244.

<sup>5</sup> See Amnesty International, *Fair Trials Manual*, December 1998, <http://www.amnesty.org/en/library/asset/POL30/002/1998/en/81bf7626-d9b1-11dd-af2b-b1f6023af0c5/pol300021998en.pdf>.

<sup>6</sup> Ibid.

element in the concept of Rule of Law, as well as for the protection of human rights in general.<sup>7</sup>

## 2. General Characteristics of ICCPR

Following the adoption of the *Universal Declaration of Human Rights* the UN has developed a number of international instruments on human rights, in particular the *International covenant on Economic, social and Cultural Rights*, and the *International Covenant on civil and Political Rights* and its Optional Protocols adopted by the UN General Assembly by its resolution 2200 A (XXI) of 16 December 1966.<sup>8</sup> Most of the rights within the UDHR found their way into treaty form in these two international Covenants.<sup>9</sup> ICCPR provides for the protection of civil and political rights. So many of the rights guaranteed focus on protecting citizens from the abuse of state power. As such, it contains a list of substantive human rights guarantees in its Part III. Any country bound by it is obliged to protect its inhabitants from having their rights violated. The covenant applies to every human living in a state under the covenant regardless of age, gender or race. As of October 2009, the ICCPR had 72 signatories and 165 parties.<sup>10</sup> It made headlines in 1998 when China signed it.

As the most authoritative legal instrument in the field of civil and political rights, the ICCPR is an essential component of The *International Bill of Human Rights* which represents a milestone in the history of human rights.<sup>11</sup> Obviously this Covenant is most explicit and specific about human rights protections in the administration of criminal justice. There are three main differences between the ICCPR and the UDHR. Firstly, the rights protected in the Covenant are further described and clarified and the definitions given are frequently broader so that the covenant is more feasible and legally binding. For example, Article 14, on the rights to a fair trial, is a provision of particular

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<sup>7</sup> Martin Dixon, *Textbook on International Law*, p345.

<sup>8</sup> The instruments in the field of human rights, see *Human rights: a Compilation of International Instruments, Universal Instruments*, Vol.1-2, (New York: United Nations publication, 2002).

<sup>9</sup> A notable exclusion concerns the rights to property in art 17(1) UDHR, which would not have conformed to the socialist theorist prevailing in the Eastern Bloc while the Covenants were being drafted.

<sup>10</sup> Data from UN Treaty Collection, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en), retrieved by 20/10/09.

<sup>11</sup> Fact Sheet No.2 (Rev.1) The International Bill of Human Rights.



importance and wide scope. In addition to the usual guarantees of an independent and impartial tribunal, public hearings, the presumption of innocence and the rights of the defence, it also provides for protection against self-incrimination, the right of appeal, and compensation for miscarriage of justice, and lays down the principle that no one may be tried twice for the same offence. Secondly, the covenant is not only designed to respect various human rights, but also have to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Thirdly, the Covenant created an agency, HRC, to promote compliance with its norms. It is made up of an expert body of judges and legal specialists, supervises the implementation of the ICCPR.<sup>12</sup> The eighteen members of the HRC serve in their personal capacity as experts rather than as state representatives, which gives them some freedom to express their own perspectives as experts rather than those of their country. The Committee has the power under the first Optional Protocol to the ICCPR to consider individual petitions.<sup>13</sup> However, it is obvious that the coming into force of the Covenants, by which States parties accepted a legal as well as a moral obligation to promote and protect human rights and fundamental freedoms, did not in any way diminish the widespread influence of the UDHR. On the contrary, the very existence of the Covenants, and they contain the measures of implementation required to ensure the realization of the rights standard and norms set out in the Declaration, gives greater strength to the Declaration. Moreover, On the other hand, the Covenants, by their nature as multilateral conventions, are legally binding only on those States which have accepted them by ratification or accession. While the UDHR is truly universal in scope, as it preserves its validity for every member of the human family, everywhere, regardless of whether or not Governments have formally accepted its principles or ratified the Covenants.

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<sup>12</sup> Introduction of the Human Rights Committee see, generally, UN webpage: <http://www2.ohchr.org/english/bodies/hrc/index.htm>.

<sup>13</sup> See Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. A/6316, 19/12/66.

The purpose of the UN standards and norms is to set forth generally agreed-upon principles.<sup>14</sup> Because they represent consensus, most countries meet the standards, i.e., they are usually minimum standards. Since its establishment in 1945, the UN has initiated and elaborated a series of standards and norms that are applicable to numerous aspects of the criminal justice process and to the various State institutions responsible for responding to the crime problem. They therefore embody what can be deemed an expression of a common ideal, a vision of how the criminal justice system should be structured, how criminal policy should be developed, and how crime prevention and criminal justice should be secured. These standards and norms in criminal justice provide important agreed benchmarks for official action in ensuring respect for human rights and the proper administration of criminal justice throughout the world.<sup>15</sup> ICCPR provides basic and comprehensive principles which are to be respected in developing and implementing various international instruments in crime prevention and criminal justice. Therefore it provides the direct and concrete guidelines in the criminal justice reform for the state party.<sup>16</sup>

### **3. Some Other Instruments of Human Rights in Criminal Justice based on ICCPR**

Also the criminal justice standard for the accused in ICCPR have been refined and extended in a series of instruments that have been formulated and promoted by UN bodies, providing more and detail guidance as to how governments may comply with their international legal obligations. For example, in 1950 the General Assembly authorized the convening every five years of the UN Congress on the Prevention of Crime and the Treatment of Offenders. The First Congress unanimously adopted the *Standard Minimum Rules for the Treatment of Prisoners* (Standard Minimum Rules) in 1955, based on International Penal and Penitentiary Commission revisions of standards

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<sup>14</sup> See Robertson and Merrills, *Human Rights in the World*, p78.

<sup>15</sup> See, e.g., Human rights in the Administration of Justice, General Assembly resolution 50/181, 22/12/95; Economic and Social Council Resolution [hereafter ECOSOC resolution] 1992/22, section VII, 30/07/92; ECOSOC resolution 1993/34, section III, 27/07/93; ECOSOC resolution 1994/18, 25/07/94; ECOSOC resolution 1995/13, 24/07/95.

<sup>16</sup> See UN Commission on Crime Prevention and Criminal Justice, "Use and application of United Nations standards and norms", E/CN.15/2002/3, 26/02/02, p.4.

endorsed by the League of Nations in 1934.<sup>17</sup> It had a profound influence on the development history of the UN standards on contemporary law relating to the administration of justice and the treatment of persons deprived of liberty. Good principles and practice in the treatment of prisoners and the general management of institutions were laid out.<sup>18</sup> These Minimum Rules are applicable to all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to “security measures” or corrective measures required by the judge. They are designed to stimulate an endeavour to ensure their implementation, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the UN.<sup>19</sup> They have been used on numerous occasions by the HRC to interpret the provisions of the ICCPR that deal with torture and cruel, inhuman and degrading treatment or punishment in order to apply the Rules to conditions of detention.

In accordance with the recommendations of the congresses, other important instruments have been adopted in more recent years, such as in the Fifth Congress adopted by General Assembly on 9 December 1975, the *Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* which was to open the way to adoption of the Convention of the same name some years later;<sup>20</sup> the *Code of Conduct for law Enforcement Officials* in 1979 which has been designed to be inserted directly into the national regulations applying to law enforcement officials, particularly members of the police force and other security forces, underline that those who exercise police power are to respect and to protect human dignity and to uphold the human rights of all persons and thus is a primary means of directly incorporating the injunctions contained in Article 7 of the ICCPR;<sup>21</sup> standards were further developed by the General Assembly’s adoption of the

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<sup>17</sup> See ECOSOC resolution 663 C I (XXIV), 31/07/51.

<sup>18</sup> See R. S. Clark, *The United Nations Crime Prevention and Criminal Justice Programme: Formulation of Standards and Efforts at Their Implementation* (University of Pennsylvania Press, 1994), pp. 97-100 and 147-177.

<sup>19</sup> United Nations and Human Rights: 1945-1995, (United Nations Blue Books Series Vol. 7), (New York: United Nations, 1995), para 156.

<sup>20</sup> General Assembly resolution 3452 (XXX), 09/12/75.

<sup>21</sup> General Assembly resolution 34/169, 17/12/79.

*Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners* on 25 May 1984.<sup>22</sup>

On 10 December 1984 the General Assembly put all those principles relative to the same topic in a legally binding form by adopting the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) which is legally binding on all States party to it and established the Committee against Torture.<sup>23</sup> The Convention bans torture under all circumstances, imposes on States parties the obligation to make torture a crime and to prosecute and punish those found guilty of it. In particular, it defines torture,<sup>24</sup> requires states to take effective legal and other measure to prevent torture, and declares that no state of emergency, other external threats, nor orders from a superior officer or a public authority may be invoked to justify torture.<sup>25</sup> It requires states to assert jurisdiction when torture is committed within their jurisdiction, either investigate and prosecute themselves, or upon proper request extradite suspects to face trial before another competent court.<sup>26</sup>

Furthermore, each state is obliged to provide training to law enforcement and military on torture prevention, keep its interrogation methods under review, and promptly investigate any allegations that its officials have committed torture in the course of their official duties.<sup>27</sup> It must ensure that individuals who allege that someone has committed torture against them are permitted to make any official complaint and have it investigated, and, if the complaint is proven, receive compensation, including full medical treatment and payments to survivors if the victim dies as a result of torture.<sup>28</sup> It forbids states to admit into evidence during a trial that any confession or statement made

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<sup>22</sup> ECOSOC Resolution 1984/47, 25/05/84.

<sup>23</sup> See *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, UN General Assembly resolution 39/46, 10/1/84; [hereinafter CAT]

<sup>24</sup> Ibid., Article 1(1).

<sup>25</sup> Ibid., Article 2.

<sup>26</sup> Ibid., Article 5, 6, 7.

<sup>27</sup> Ibid., Article 10, 11, 12.

<sup>28</sup> Ibid., Article 13, 14(1).

during or as a result of torture.<sup>29</sup> It also forbids activities which do not raise to the level of torture, but which constitute cruel or degrading treatment.<sup>30</sup>

What is so revolutionary about the Convention is that it is the first international human rights treaty to embody the principle of universal jurisdiction.<sup>31</sup> The courts of any State party, no matter where the offences were committed, may try torturers. It also requires states to cooperate with any civil proceedings against accused torturers.<sup>32</sup> International monitoring of the observance of treaty obligations is incumbent upon the Committee against Torture, which is made up of 10 independent experts.<sup>33</sup> Apart from the mandatory state reporting procedure and the optional inter-state and individual complaint procedures, as a further innovation of this Convention, within the meaning of Article 20 of the Convention an international inquiry may be instituted if there is reliable information indicating that torture is being practised in the territory of a State party.

The work of the UN in this field had been expanded by the additional standards adopted by the Seventh Congress (Milan, 1985) and endorsed by the General Assembly on 29 November 1985, namely the *Basic Principles on the Independence of the Judiciary*.<sup>34</sup> The Basic Principles emphasize that the independence of the judiciary should be guaranteed by the State and enshrined in the constitution or law of the country. They point out, *inter alia*, that justice requires that everyone be entitled to a fair and public hearing by a competent, independent and impartial tribunal, in accordance with the principles proclaimed in the UDHR, ICCPR and other UN instruments. In order to secure the independence of the judiciary, the Basic Principles set forth criteria concerning the status of judges, such as their qualifications, selection, training, conditions of service and tenure, and professional secrecy and immunity. The Basic Principles also state that judges shall enjoy freedom of expression and association, and shall be free from undue disciplinary procedures. Now this Basic Principles are widely applied. Only a few countries indicated that they were still struggling to improve the

<sup>29</sup> Ibid., Article 15.

<sup>30</sup> Ibid., Article 16.

<sup>31</sup> Article 5(2) of the CAT.

<sup>32</sup> Ibid., Article 9(1).

<sup>33</sup> Ibid., Article 17.

<sup>34</sup> General Assembly Resolutions 40/32, 29/11/85; Resolutions 40/146, 13/12/85.

fundamental guarantees to ensure the independence of the judiciary in all its aspects. Further, the principle of the independence of the judiciary is of central concern to many States. A large number of States are undertaking significant efforts to ensure the use and application of the Basic Principles in their national law and practice. Differences in legal systems, however, particularly between the common law and the civil law, seem to suggest different approaches to the subject of judicial independence.

Further, in December 1988, General Assembly adopted the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Body of Principles) which set forth a set of principles to apply for the protection for the accused under any form of detention.<sup>35</sup> In 1989, the Economic and Social Council, on the recommendation of the Committee on Crime Prevention and Control, adopted the *Principles on the Effective prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*,<sup>36</sup> the *Procedures for the Effective implementation of the Basic Principles on the Independence of the judiciary* and the *Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials*.<sup>37</sup> In 1990, a considerable number of new standards, guidelines and model treaties had been adopted by the Eighth United Nations Congress and Welcomed by the General Assembly in its resolutions at 45<sup>th</sup> session in 1990 to enhance international co-operation for crime prevention and criminal justice in the context of development. These new standards, guidelines and model treaties are, such as: *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* which advocate the least possible use of deprivation of liberty, especially in prison and other closed institutions; *United Nations Standard Minimum Rules for Non-custodial Measures* (the Tokyo Rules) which emphasize that imprisonment should be considered as a last resort; *Basic Principles for the Treatment of Prisoners*; *Model Treaty on Extradition*; *Model Treaty on Mutual Assistance in Criminal Matters*; *Model Treaty on the Transfer of proceedings in Criminal Matters*; *Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released*; *Basic principles on the Role of Lawyers*; *Guidelines on the Role*

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<sup>35</sup> General Assembly Resolution 43/173, 09/12/88.

<sup>36</sup> ECOSOC Resolution 1989/65, 24/05/89.

<sup>37</sup> ECOSOC Resolution 1989/60, 24/05/89; ECOSOC Resolution 1989/61, 24/05/89.

*of Prosecutors; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; and a series measures against international terrorism.*<sup>38</sup>

The most recent standards and norms relative to the rights protection for the accused, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) is adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the UN and is available for signature, ratification and accession as from 4 February 2003.<sup>39</sup> The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.<sup>40</sup> OPCAT entered into force on 22 June 2006 after 20 States became party to the Protocol.

All these principles confirm the fundamental rights of the accused. They are extremely helpful in assessing reform needs all over the world. First, they can be used at the national level, by fostering in-depth assessments leading to the adoption of much needed and often overdue criminal justice reforms. Secondly, they can be used regionally and sub regionally, by providing a framework for the formulation of regional and/or sub regional plans of action with concrete strategies to be implemented in phases and subject to periodic evaluations. Thirdly, in the largest sense, globally or internationally, they highlight “best practices” and help States to adapt them to their specific needs so as to increase the prospects of cooperation between States.

## **4. Article 7: The Prohibition of Torture and the Right to Humane Conditions during Pre-trial Detention**

### **4.1 In General**

The aim of Article 7 is to protect both the dignity and the physical and mental integrity

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<sup>38</sup> Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, welcomed by General Assembly Resolutions 45/111, 45/118, 45/119, 45/121 and 45/166, on 14/12/90 and 18/12/90.

<sup>39</sup> General Assembly Resolution 57/199, 18/12/02.

<sup>40</sup> Article 1, OPCAT.

of the individual.<sup>41</sup> It has made clear that the prohibition in Article 7 includes acts which cause mental as well as physical suffering to the victim.<sup>42</sup> Moreover, that it covers excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.<sup>43</sup> Therefore corporal punishment,<sup>44</sup> punishment by placing in a dark cell,<sup>45</sup> and all cruel, inhuman or degrading punishments are completely prohibited as punishments for disciplinary offences.<sup>46</sup> The prohibition in Article 7 is of particular importance to people deprived of their liberty as following discussion of Article 9.

In this research, the first paragraph of Article 7 will be discussed in detail and leave the second paragraph aside, since no necessary link of this thesis to the second paragraph. The first paragraph of Article 7 provides that no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. This provision is identical to Article 5 of the UDHR. In addition to a general prohibition of torture, international standards impose a positive obligation on the states to treat all persons deprived of their liberty humanely and with respect for human dignity. The prohibition of torture has taken on a special status in the protection of human rights under international law. This right guaranteed by Article 7 is absolute and non-derogable including during a state of emergency.<sup>47</sup> It applies to all people. It may never be suspended even during times of war, threat of war, internal political instability, or states of emergency. As Pieter Kooijmans, the first Special Rapporteur on Torture for the UN Commission on Human Rights and current ICJ justice, noted, “[T]he prohibition of torture can be considered to belong to the rules of jus cogens. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture.”<sup>48</sup> He further illustrated that “if there was some disagreement [in the General Assembly] in respect to [CAT], it had to do with the methods of control

<sup>41</sup> See A. Conte et al, *Defining Civil and Political Rights* (England: Ashgate Publishing Limited, 2004), p93.

<sup>42</sup> *Annotations on the text of the draft International Covenants on Human Rights*, prepared by the Secretary-General, UN Doc. A/2929, 1/07/55, para 12.

<sup>43</sup> UN Human Rights Committee [hereafter HRC], *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, [hereafter General Comment 20], 10/03/92, para 5.

<sup>44</sup> *George Osbourne v Jamaica*, (759/1997).

<sup>45</sup> See e.g. *Deidrick v Jamaica* (619/1995); *Francis v Jamaica* (320/1988).

<sup>46</sup> See e.g. *Linton v Jamaica* (255/1987), *Bailey v Jamaica* (334/1988), *Hylton v Jamaica* (407/1990), *Polay Campos v Peru* (577/1994), *Young v Jamaica* (615/1995).

<sup>47</sup> Article 4 of ICCPR; CCPR General Comment No. 29: *Article 4 (States of Emergency)*, 31 August 2001, [hereafter General Comment 29], para 7 and 15.

<sup>48</sup> Commission on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report by Special Rapporteur, Mr. P. Kooijmans*, appointed pursuant to Commission on Human Rights resolution 1985/33, 3, UN Doc. E/CN4/1986/15, 19/02/86, para 3;



and implementation. There was no disagreement whatsoever on the fact that torture is absolutely forbidden.”<sup>49</sup>

#### 4.2 Definition of the Torture

The HRC has not issued a specific definition of torture for the purposes of Article 7 of ICCPR. Indeed, it has decided not to differentiate between the three levels of banned treatment in this provision since the distinctions depend on the nature, purpose and severity of the treatment applied.<sup>50</sup> Therefore the Committee often fails to specify which aspect of Article 7 has been breached. This may contrasted with the practice of the European Court in its interpretation of the equivalent provision for the Article 3 of ECHR as observed in Chapter 3.<sup>51</sup> However on the other hand the Committee has been able to elaborate and develop the scope of the prohibition without actually defining the terms because of the same reason.

In numerous early cases against Latin American States, the HRC found various combinations of the following acts to constitute torture. Systematic beatings, electroshocks, burns, extended hanging from hand and/or leg chains, repeated immersions in a mixture of blood, urine, vomit, and excrement, standing for great lengths, simulated executions, and amputations. In *Muteba.v. Zaire*, *Miango Muiyo.v.Zaire* and *Amd Kanana.v.Zaire*, the HRC found that various combinations of the following acts constituted torture: beatings, electric shocks to the genitals, mock executions, and deprivation of food and water, and thumb presses.<sup>52</sup> Torture entails a certain severity in pain and suffering.

The definition of protection against torture was elaborated in the CAT, which is a widely accepted definition.<sup>53</sup> The term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such

<sup>49</sup> *ibid.* para 3.

<sup>50</sup> General Comment 20, para. 4.

<sup>51</sup> See Chap3, 2.4.1, pp.100-105.

<sup>52</sup> *Muteba.v. Zaire*(124/1982); *Miango Muiyo.v.Zaire*(194/1985); *AmdKanana.v.Zaire*(366/1989).

<sup>53</sup> The definition of torture under the CAT has been the subject of detailed consideration elsewhere, see e.g. J. Herman. Burgers and Hans. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff Publishers, 1988), p 1.

purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>54</sup> This definition lists a number of example purposes, though the list is not exhaustive.<sup>55</sup> The enumerated purpose is all linked to a desire personally to persecute victims because of who they are.<sup>56</sup> In this thesis, the purpose “as obtaining from him or a third person information or a confession” is paid particularly attention, which often arises in the process of criminal justice and damages the right for the suspects.

#### **4.3 Cruel, Inhuman and Degrading Treatment or Punishment**

Article 7 prohibits three levels of bad treatment or punishment of a person. The prohibition on “treatment” is broader than the prohibition on “punishment”; the latter is inflicted for a disciplinary purpose, whilst treatment can be inflicted for numerous purposes. It has been addressed by the Committee in State reports, in its General Comment and in the Optional Protocol. However, similarly, the HRC decided not to differentiate between the three levels of banned treatment or punishment in article 7.<sup>57</sup> Therefore no specific definitions of “cruel”, “inhuman”, or “degrading” treatment have emerged under ICCPR or even CAT.

However, in one case, the HRC observed that the assessment of what constitutes inhuman and degrading treatment “depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex,

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<sup>54</sup> CAT, Article 1(1).

<sup>55</sup> The latest universal definition of torture is contained in Article 7(2)(e) of the Rome Statute of the International Criminal Court 1998 (ICC Statute). It is prohibited by the ICC Statute as a crime against humanity when committed on a widespread or systematic basis, is slightly broader in that Statute than in the CAT.

<sup>56</sup> See Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2<sup>nd</sup> ed., (New York, Oxford University Press, 2004), [hereafter Sarah Joseph, *ICCPR cases, materials, and commentary*].

<sup>57</sup> General Comment 20. para.4.

age and state of health of the victim”.<sup>58</sup> The requirements of severity, intention, and purpose are presumably applied more leniently in determining whether such treatment has occurred. For example, in case *Rojas Garcia v Colombia*, the police intended to perform the impugned acts, but did not intend to perform them on the actual victims of those acts. The Committee has rarely undertaken a close examination of the intent of a perpetrator of Article 7 abuse and considered that ordinarily Article 7 requires intent on the part of an actor as to possible effect of his act, and the lack of such intent works to eliminate or extenuate unlawfulness of the act.<sup>59</sup>

Article 7 is complemented in ICCPR by Article 10, which prohibits less serious forms of treatment than that prohibited by Article 7. Article 10 of the ICCPR provides in paragraph 1 that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.<sup>60</sup> In general, it may be said that inhuman treatment as referred to in Article 10 pertains to a “lower intensity of disregard for human dignity than that within the meaning of Article 7”.<sup>61</sup> But the line between Articles 7 and 10 is, admittedly, sometimes hard to draw, as evidenced by the case law of the Committee. For instance, the combined consideration of issues under Articles 7 and 10 related to the burden of proof in respect of allegations of torture and ill-treatment in the cases of *Teran Jijon v Ecuador* and *Jelaya Blanco v Nicaragua* led to the conclusion that both provisions were violated.<sup>62</sup> Beatings by policemen after arrest and deplorable pretrial detention conditions led to a finding of violations of Articles 7 and 10 in the case of *Silbert Daley v Jamaica*.<sup>63</sup> In the relatively recent case of *Sandy Sextus v Trinidad and Tobago*, the Committee clarified its approach of dealing jointly with Article 7 and 10 by reasoning as follows: “in the light of this finding in respect of Article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out

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<sup>58</sup> *A. Vuolanne v. Finland* (265/1987), para 9.2.

<sup>59</sup> *Rojas Garcia v Colombia* (687/1996), para 2.1.

<sup>60</sup> See also American Convention on Human Rights [hereafter American Convention], Article 5; African Charter on Human and Peoples' Rights, [African Charter], Articles 4-5; Basic Principles for the Treatment of Prisoners, Principle 1; and *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* [hereafter Body of Principle], Principle 1.

<sup>61</sup> Manfred Nowak, *op.cit.*, fn 4, p186.

<sup>62</sup> *Teran Jijon v Ecuador* (277/1988); *Jelaya Blanco v Nicaragua* (328/1988).

<sup>63</sup> *Silbert Daley v Jamaica*, (750/1997).

generally in Article 7, it is not necessary to separately consider the claims arising under article 7”.<sup>64</sup> However, an important distinction between Article 7 and 10 is that the latter is a derogable right.

While the prohibition in Article 7 covers specific attacks on personal integrity and applies to all persons, whether in any form of detention or not, Article 10 relates more to the general state of a detention facility and/or the conditions of detention and is meant to encompass only the treatment of persons actually deprived of liberty.<sup>65</sup> The HRC has stated that the duty to treat detainees with respect for their inherent dignity is a basic standard of universal application. States cannot claim a lack of material resources or financial difficulties as a justification for inhumane treatment. States are obliged to provide all detainees and prisoners with services that will satisfy their essential needs.<sup>66</sup> For instance, detainees have a right to food, to clothing,<sup>67</sup> to adequate medical attention,<sup>68</sup> and to communicate with their families. In *Quinteros v Uruguay*, a mother submitted the communication, alleging that she and her daughter were both the victims of the violations of the Covenant by Uruguay. The Committee found that the State was responsible for the disappearance of the daughter and the breaches of Article 7, 9 and 10(1). In addition, the Committee noted that the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the rights to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of Article 7.<sup>69</sup>

In its General Comment on Article 10, the HRC observed; “thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to Article 7, including medical or scientific experimentation, but neither may they be subjected to any

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<sup>64</sup> *Sandy Sextus v Trinidad and Tobago* (818/1998), para 10.

<sup>65</sup> General Comment 20, paras 5 and 6.

<sup>66</sup> *Kelly v Jamaica*, (253/1987), para 5.7; see also *Párkányi v Hungary* (410/1990).

<sup>67</sup> Standard Minimum Rules for the Treatment of Prisoners, [hereafter Standard Minimum Rules], Rules 17, 18, 20, 87 and 88; Body of Principles, Principles 15-16.

<sup>68</sup> Standard Minimum Rules, Rules 22-25, 91; Body of Principles, Principle 24; Code of Conduct for Law Enforcement Officials, Article 6.

<sup>69</sup> *Quinteros v Uruguay*, (107/1981), para 14; see also *S. Jegatheeswara Sarma v Sri Lanka*, (950/2000), para 9.5.; *Bondarenko v Belarus*, (886/1999), para 10.2; *Khalilov v Tajikistan*, (973/2001), para 7.7.

hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons”.<sup>70</sup> For example, Article 10(2) and (3) are related to the segregation of different groups of detainees and to the requirement of rehabilitation being the essential aim of penitentiary systems. The Committee emphasises the right of accused persons to be segregated from convicted ones, also due to their right to be presumed innocent.<sup>71</sup> Through a reference to Article 6(5), the Committee draws a presumption that persons under 18 years of age are to be considered juveniles in the meaning of Article 10.<sup>72</sup> A violation of Article 10(2) was established in *Dieter Wolf v Panama* because the author, as an accused person, had not been segregated from convicted persons.<sup>73</sup> In *Damian Thomas v Jamaica*, a violation of Article 10(2) and (3) was found when a person was segregated from adults neither when arrested for a crime at the age of 14 nor when serving his prison sentence from the age of 15.<sup>74</sup>

#### 4.4 State Obligation

States Parties are obliged to take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under their jurisdiction.<sup>75</sup> The most fundamental of the specific measures is the requirement that states parties must criminalise torture and prosecute perpetrators under its domestic laws. The HRC does not distinguish between public and private torture. It is clear that those perpetrators of torture stipulated by the Article 7 of ICCPR should be a public official or other person acting in an official capacity, outside their official capacity, or in a private capacity, instead of the specific State organs or the persons who perform public service in the said specific State organs.<sup>76</sup> State parties should indicate when presenting their reports the provisions of their criminal law which penalise torture and specifying the penalties applicable to such acts.<sup>77</sup> Those who violate article 7, whether by encouraging, ordering,

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<sup>70</sup> CCPR General Comment No. 21: Article 10 (Replaces general comment 9 concerning humane treatment of persons deprived of liberty), [hereafter General Comment 21], 10 April 1992, para 3.

<sup>71</sup> Ibid., para 9.

<sup>72</sup> Ibid., para 13.

<sup>73</sup> *Dieter Wolf v Panama*, (289/1988).

<sup>74</sup> *Damian Thomas v Jamaica*, (800/1998).

<sup>75</sup> General Comment 20, para 2.

<sup>76</sup> Ibid., para 2; see also Article 1, CAT.

<sup>77</sup> Ibid., para,13.

tolerating or perpetrating prohibited acts, must be held responsible.<sup>78</sup> The fact that they were ordered to do so by their superiors may not be used as a justification; in fact, they are bound by international standards to disobey such orders and to report them.<sup>79</sup> The fact that a person is also considered dangerous does not justify torture. The most recent and typical example is the use of torture on detainees in Guantanamo Bay.<sup>80</sup> The ICC Statute definition of torture includes acts committed independently of any public official, for example, by private individuals with private motives.<sup>81</sup> The International Criminal Tribunal for the Former Yugoslavia, in *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, has ruled that the characteristic of the offence of torture was to be found in the nature of the act committed, rather than in the status of the person who committed it.<sup>82</sup>

In its General Comments 20 on Article 7 of the ICCPR, which corresponded in part to those set forth in the 1984 UN Convention against Torture and the 1992 UN Declaration on Enforced Disappearance, the HRC has stressed that in implementing this right, it is not sufficient to prohibit torture or to make it a crime. When read together with Article 2, there arises a duty on States parties to ensure effective protection through some machinery of control. The right to lodge complaints against maltreatment prohibited by Article 7 must be recognized in the domestic law. Also, the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.<sup>83</sup> In particular, the HRC emphasizes the obligation of states to investigate, as expeditiously, impartially and thoroughly as possible, well-founded allegations of torture and other gross violations of human rights, and to bring the perpetrators to justice in its case law on individual complaints.<sup>84</sup> The reports of States parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and

<sup>78</sup> Ibid., para.13.

<sup>79</sup> General Comment 20, para 3.

<sup>80</sup> See generally, Christoph Burchard, "Torture in the jurisprudence of the ad hoc tribunals: a critical assessment", J.I.C.J. 2008, 6(2), pp.159-182; Barbara Hudson, "Justice in a time of terror" Brit. J. Criminol. 2009, 49(5), pp.702-717.

<sup>81</sup> See Article 7(2)(e), Rome Statute of the International Criminal Court 1998.

<sup>82</sup> See ICTY, 22 February 2001, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case no. IT-96-23-T, para 495.

<sup>83</sup> General Comment 20, para.14.

<sup>84</sup> Ibid., para.14; see also CAT, Article 12 and 13.

how they have been dealt with. In case of *Herrera Rubio v Colombia*, the HRC regarded that it is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it.<sup>85</sup> In *Zelaya Blanco v. Nicaragua*, the HRC noted that violations of Article 7 and 10(1) are extremely serious and require prompt and impartial investigation by competent authorities of the States parties so as to make remedy effective.<sup>86</sup>

The HRC has listed a number of *preventive duties* for the States to prevent torture: the prohibition of *incommunicado* detention, routine visits by physicians, attorneys and family members, centralized registration and information regarding all imprisoned persons, prohibition of the use of evidence obtained through torture, as well as corresponding training of law enforcement officials and medical personnel.<sup>87</sup> For example, the HRC has instructed states to ensure that all places of detention are free from any equipment liable to be used for inflicting torture or ill-treatment.<sup>88</sup> In one of the HRC's first merits decision, *Massera v Uruguay*, the Committee found that detention in conditions detrimental to health constituted a breach of Article 7.<sup>89</sup> Also the Committee states that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7.<sup>90</sup> Moreover, in *Shaw v Jamaica*, 8 months' detention *incommunicado* in overcrowded, damp conditions constituted inhuman and degrading treatment. It concerned the shortest period for which a period of detention *incommunicado* has been found to breach Article 7.<sup>91</sup>

Other state obligations to fulfil arise from the special obligation of States parties towards detainees, a group of particularly vulnerable human beings, who are not in a position to satisfy their most basic needs by themselves, and who are subject to a high degree of violence, ill-treatment and humiliation by prison wardens and fellow inmates alike. For

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<sup>85</sup> *Herrera Rubio v Colombia* (161/1983), para.10.5.

<sup>86</sup> *Zelaya Blanco v. Nicaragua*, (328/1988), para 10.6.

<sup>87</sup> Manfred Nowak, *op.cit.*, fn 4, p179-180.

<sup>88</sup> General Comment 20, para.11.

<sup>89</sup> *Massera v Uruguay* (5/1977).

<sup>90</sup> General Comment 20, para.11.

<sup>91</sup> *Shaw v Jamaica* (704/1996), para 7.1.

example, the Committee has dealt with most cases regarding poor general conditions of detention under Article 10(1), indicating that it has retreated from its *Massera* position.<sup>92</sup> It should be stressed that, the right to humane treatment in Article 10 imposes a positive obligation on states. This obligation is intended to ensure the observance of minimum standards with regard to conditions of detention and the exercise of a detainee's rights while deprived of liberty.

#### **4.5 The Prohibition on the Use of the Evidence Obtained through Unlawful Means**

In the determination of any criminal charge against him, everyone is entitled “not to be compelled to testify against himself or to confess guilt” in Article 14(3)(g) of ICCPR.<sup>93</sup> The prohibition against compelling an accused to testify or confess guilt is broad. This privilege protects the accused's communications and testimony. The burden is on the State to prove that a confession has been obtained without duress.<sup>94</sup> Rooted in English common law, the right against self-incrimination is considered “one of the great landmarks in men's struggle to make himself civilized”.<sup>95</sup> This provision aims to prohibit the authorities from engaging any form of coercion, whether direct or indirect, physical or mental, and whether before or during the trial, that could be used to force the accused to testify against himself or to confess guilt. It is unacceptable to treat an accused person in a manner contrary to Article 7 of the Covenant in order to extract a confession. Therefore it prohibits torture and cruel, inhuman or degrading treatment. It prohibits treatment which violates the right of detainees to be treated with respect for the inherent dignity of the human person. It also prohibits the imposition of judicial sanctions to compel the accused to testify.<sup>96</sup>

Although the exclusion of evidence obtained through torture and unlawful means or treatment is not expressly covered by Article 14 (3)(g), it is a well-established interpretation that such evidence should be strictly excluded at trial to protect the right

<sup>92</sup> See P.R. Gandhi, “The Human Rights Committee and Articles 7 and 10(1) of the International Covenant on Civil and Political Rights, 1966”, (1990) 13 Dalhousie Law Journal 758, pp.762-766.

<sup>93</sup> See also American Convention, Articles 8(2)(g) and 8(3); ICC Statute, Articles 55(1)(a) (pre-trial) and 67(1)(g).

<sup>94</sup> See Concluding Observations of the Human Right Committee: Romania, [hereafter Concluding Observations on Romania] UN doc. CCPR/C/79/Add.111, 28/07/99.

<sup>95</sup> See Erwin N. Griswold, *The 5th Amendment Today: Three Speeches by Erwin N. Griswold*, (Cambridge, Harvard University Press, 1955), p.7.

<sup>96</sup> See e.g. *Kelly v. Jamaica*, (253/1987); *Conteris v. Uruguay*, (139/1983); *Estrella v. Uruguay*, (74/1980).



against self-incrimination.<sup>97</sup> The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.<sup>98</sup> The judge must have the authority to consider an allegation of coercion or torture at any stage of the proceedings.<sup>99</sup> Furthermore, the HRC reaffirm recently that it is important for the discouragement of violations under Article 7 that the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.<sup>100</sup> Article 7 in this respect complements Article 14 (3)(g) of ICCPR. In Concluding Observations on Romania, the Committee is also concerned at the lack of legislation invalidating statements of accused persons obtained in violation of Article 7 of the Covenant. The State party should adopt appropriate legislation that places the burden on the State to prove that statements made by accused persons in a criminal case have been given of their own free will, and that statements obtained in violation of article 7 of the Covenant are excluded from the evidence.<sup>101</sup>

The right to silence has been deemed to be implicit in the European Convention which will be discussed in next chapter.<sup>102</sup> More recent international documents have explicitly set it out as a right in the jurisprudence from the *Draft Body of Principles on the Right to a Fair Trial*, the recent *Rules of Procedure and Evidence* adopted by the criminal tribunals established for the Former Yugoslavia and Rwanda and, and the *Rome Statute of the International Criminal Court*.<sup>103</sup> The most recent articulation of the right to silence in the *Rome Statute of the International Criminal Court* provides for a broad interpretation in that “silence may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent”.<sup>104</sup> The HRC’s comments on the UK with concerned on the provisions of the Criminal Justice

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<sup>97</sup> See the prohibition on the use of evidence in Article 15 of the CAT. See also CCPR General Comment No. 13: Article 14 (Equality before the courts and the right to a fair and public hearing by an independent court established by law), [hereafter General Comment 13], 13 April 1984, para 14.

<sup>98</sup> Ibid., para 14.

<sup>99</sup> Ibid., para 15.

<sup>100</sup> General Comment 20, para. 12.

<sup>101</sup> Concluding Observations on Romania (1999), para 13.

<sup>102</sup> Chap3, 4.4.3, pp.176-185.

<sup>103</sup> See Eileen Skinnider and Frances Gordon, “The Right to Silence – International Norms and Domestic Realities”, paper presented in Sino Canadian international Conference on the Ratification and Implementation of Human Rights Covenants Beijing, 25-16 October 2001, <http://www.icclr.law.ubc.ca/Publications/Reports/Silence-BeijingfinalOct15.PDF>.

<sup>104</sup> ICC Statute (UN Doc A/CONF.183/9), Article 67.

and Public Order Act of 1994 indicate that a crucial aspect of one's right to silence is the right to be free from adverse inferences drawn from one's silence.<sup>105</sup> The right to silence during police questioning and at trial is incorporated into many national legal systems. It has been also deemed to be implicit in other protected rights, such as the right to be presumed innocent, which will be discussed below.<sup>106</sup> Thus, the burden is on the State to prove that a confession has been obtained without duress. Implementation of certain procedures, such as the audio or video recording of police interviews, assists in alleviating such a burden.<sup>107</sup> According to Guideline 16 on the Role of Prosecutors, prosecutors shall refuse to use evidence which they "know or believe on reasonable grounds" to have been "obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's rights", in particular when such methods have involved recourse to torture or other human rights abuses.<sup>108</sup>

## **5. Article 9: The prohibition on arbitrary arrest and detention**

### **5.1 In General**

There is nothing novel about rights to liberty.<sup>109</sup> Deprivation of personal liberty in the form of imprisonment or as a preventive measure for further offences occurring, flight or interference with material facts or witnesses has long represented the most common means used by the state to fight crime, preserve the rights of others and therefore maintain internal security. There is a tendency under human rights law to require that such detention is only used when necessary, accused persons should normally be released on condition of appearance at a specified court of law and specified time. Any deprivation of liberty will invariably put the person affected into an extremely vulnerable position, exposing him or her to the risk of being subjected to torture and inhuman and degrading treatment. The provisions of the Statute of the International Criminal Court deal with this issue – Article 60 provides for the possibility of conditional release pending trial.

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<sup>105</sup> See HRC, Concluding Observations: *United Kingdom of Great Britain and Northern Ireland*, UN doc. CCPR/C/79/Add.55, 27/07/95; see also, UN doc. CCPR/CO/73/UK, 06/12/01, para 17.

<sup>106</sup> *Murray v. UK*, (1996) 22 EHRR 29, para. 45.

<sup>107</sup> Sarah Joseph, *ICCPR cases, materials, and commentary*, p.450.

<sup>108</sup> Guideline 16 on the Role of Prosecutors.

<sup>109</sup> See Rhona K M Smith, *Text book on Human Rights* (Oxford: Oxford University Press, 2003), p.239.

Article 9(1) firstly provides that “everyone has the right to liberty and security of person”.<sup>110</sup> The term “liberty of person” is quite narrow and must not be confused with that of liberty in general. It relates only to a very specific aspect of human liberty: the freedom of bodily movement in the narrowest sense.<sup>111</sup> An interference with personal liberty result only the forceful detention of a person at a certain, narrowly bounded location, such as a prison or some other detention facility, a psychiatric facility, a re-education, concentration or work camp, or a detoxification facility for alcoholics or drug addicts, as well as an order of house arrest.<sup>112</sup> Only in these cases are the procedural guarantees under Article 9 applicable. All less grievous restrictions on freedom of bodily movement, such as limitations on domicile or residency, exile, confinement to an island or expulsion from State territory, do not fall within the scope of the right to personal liberty but instead under freedom of movement pursuant to Article 12 and 13.<sup>113</sup> Restrictions on other rights of liberty, such as freedom of religion, association or assembly, come still less within the scope of personal liberty. Security has been taken to mean the right to be free from interference with personal integrity by private persons. A breach of this Article occurs, *inter alia*, when an individual is physically confined in a prison or detention facility.

Although Article 9(1) is applicable to all deprivations of liberty, most cases have concerned detention for the purposes of criminal justice.<sup>114</sup> Article 9(2) to (5) of the Covenant, which will be discussed below, provide appropriate guarantees for persons under arrest or detention. Although largely designated to terminate, prevent, or discourage unlawful or arbitrary detention, the guarantees apply to all persons arrested or detained, whether or not the arrest or detention is lawful and warranted. The HRC further held that Article 9(1) protects the right to security of person also outside the

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<sup>110</sup> Article 9(1), ICCPR; also see Article 5(1), ECHR.

<sup>111</sup> See section on “Use of Terms” in the Body of Principles; also see generally, J. L. Murdoch (ed.), *Article 5 of the European Convention on Human Rights: The Protection of Liberty And Security of Person*, (Strasbourg: Council of Europe, 2002), pp16-18.

<sup>112</sup> *Torres v Finland* (291/1988); also see 3.2.1, pp.111-113.

<sup>113</sup> *Celepli v. Sweden*, (456/1991), para 5.2., 6.1. see ICCPR, Article 12 and Article 13.

<sup>114</sup> See General Comment No. 08: Right to liberty and security of persons (Article. 9), [hereafter General Comment No.8], 30/06/82, para 1.

context of formal deprivation of liberty.<sup>115</sup> As the case *W. Delgado Páez v. Colombia* suggested, that States cannot be passive in the face of the threats to the personal security of non-detained persons, but are under a legal obligation to take reasonable and appropriate measures to protect them.<sup>116</sup>

In general, in contrast to such absolute rights as the prohibitions of slavery and torture which discussed above, international instruments do not completely abolish of state measures about deprivation of liberty, rather, they merely restrict to establishing procedural guarantees and minimum standards for those deprived of their liberty. It is not the deprivation of liberty in and of itself that is disapproved of but rather which is arbitrary and unlawful. All countries are confronted by the practice of arbitrary detention.<sup>117</sup> To comply with Article 9, no one shall be “deprived of his liberty except on such grounds and procedures as are established by law”. In the case of *Clifford McLawrence v. Jamaica*, the HRC held that the principle of legality is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation.<sup>118</sup> It means there are two permissible limitations to one’s right to liberty under Article 9. The references to “grounds” and “procedures” will mean that deprivation of liberty must be in accordance with domestic substantive and procedural law.<sup>119</sup> Furthermore, such laws must be applicable and accessible to all. It obligates a state’s legislature to define precisely the grounds on which deprivation of liberty is permissible and the procedures to be applied and to make it possible for the independent judiciary to take quick action in the event of arbitrary or unlawful deprivation of liberty by administrative authorities or executive officials. An example of an “unlawful” arrest occurred in *Domukovsky et al v Georgia*.<sup>120</sup> This case appears to confirm that an arrest must be lawful in the law of both the arresting state and the law of the state where the arrest takes place.

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<sup>115</sup> *Dias v. Angola* (711/1996), para 8.3.

<sup>116</sup> *W. Delgado Páez v. Colombia*, (195/1985), para 5.5.

<sup>117</sup> Fact Sheet No.26, The Working Group on Arbitrary Detention, <http://www.ohchr.org/english/about/publications/docs/fs26.htm#IV>.

<sup>118</sup> *McLawrence v. Jamaica*, (702/1996), para. 5.5.

<sup>119</sup> See Chap3, 3.2.2, p.113.

<sup>120</sup> *Domukovsky et al v Georgia* (623-624/95, 626-627/95).

Also Article 5 of the ECHR to help understand what is meant by “established by law” which will be discussed in Chapter 3.<sup>121</sup> Applying the same reason, “established by law” in Article 9 does not just mean that the detention is in compliance with the relevant domestic law of a State party but the detention must be in compliance with the standard of lawfulness set by the ICCPR.<sup>122</sup> Also the HRC in *A v Australia* held that by stipulating that the court must have the power to order release if the detention is not lawful, Article 9(4), requires that the court be empowered to order release, if the detention is incompatible with the requirements in Article 9 (1), or in other provisions of the Covenant. This conclusion is supported by Article 9(5), which obviously governs the granting of compensation for detention that is unlawful either under the terms of domestic law or within the meaning of the Covenant.<sup>123</sup> As such “lawful” in Article 9(4) and (5) means that it must also be in accordance with the standard of lawfulness set out in the ICCPR. Based on this, it is submitted that established by law in Article 9(1) has the same meaning as lawful in Article 9(4) and (5). Any detention carried out by a State party of the ICCPR should be in compliance with the standards of lawfulness set out in the ICCPR.

Although the right of liberty of person may be restricted in the case of a public emergency within the meaning of Article 4, the HRC has taken the view that the requirement of court review over the lawfulness of detention forms a “non – derogable” element in Article 9.<sup>124</sup> The right to personal liberty is not forfeitable pursuant to Article 5(1).<sup>125</sup> The Commission on Human Rights established the Working Group in 1991 to investigate allegations of arbitrary deprivation of liberty.<sup>126</sup> To enable it to carry out its tasks using sufficiently precise criteria, the Working Group adopted criteria applicable in the consideration of cases submitted to it, drawing on the relative provisions of the UDHR and ICCPR as well as the Body of Principles. Resolution 1997/50 considers that deprivation of liberty is not arbitrary if it results from a final decision taken by a

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<sup>121</sup> See Chap3, 3.2.2, pp114-115.

<sup>122</sup> See *Baranowski v Poland* Chap3, 3.2.2, pp114.

<sup>123</sup> *A v. Australia*, (560/1993), para 9.5.

<sup>124</sup> ICCPR, Article 4.

<sup>125</sup> ICCPR, Article 5(1).

<sup>126</sup> See Commission on Human Rights, Resolution 1991/42; see also the latest report by the working group, downloaded on Jan. 2005 <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.6.pdf>.

domestic judicial instance and which is (a) in accordance with domestic law; and (b) in accordance with other relevant international standards set forth in the UDHR and the relevant international instruments accepted by the States concerned. The HRC has further specified “the prohibitions against unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.”<sup>127</sup>

Article 9(1) states that no one shall be subjected to “arbitrary arrest or detention”. The prohibition on arbitrariness means that the deprivation of liberty, even if provided for by law, must still be proportional to the reasons for arrest, as well as predictable. The meaning of arbitrariness in the context of article 9(1) was considered in *Van Alphen v the Netherlands*.<sup>128</sup> The HRC made the comments that arbitrariness is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.<sup>129</sup> This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable and necessary in all the circumstances.<sup>130</sup> Any deprivation of liberty provided for by law will be “arbitrary” when it is manifestly discriminatory, inappropriate, disproportionate, unjust or unpredictable in view of the circumstances of the case.<sup>131</sup> Thus, deprivations of liberty that fall short of “illegal” conduct nevertheless qualify as breaches of Article 9(1). The HRC stated clearly that this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.<sup>132</sup>

A useful example of a state violation of rights contained in Article 9 and the HRC’s analysis is provided by the case of *Albert Womah Mukong v. Cameroon*.<sup>133</sup> The author alleged that he had been arbitrarily arrested and detained for several months. The State

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<sup>127</sup> General Comment No. 29, para 13(b).

<sup>128</sup> *Van Alphen v The Netherlands*, (Comm.305/1988).

<sup>129</sup> *Ibid.*, para 5.8; See also *A v Australia* (Comm.560/1993) para. 9.2.

<sup>130</sup> *Van Alphen v The Netherlands*, para 5.8.

<sup>131</sup> *Albert Womah Mukong v. Cameroon*, (458/1991), para. 9.8.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Albert Womah Mukong v. Cameroon*, (458/1991).

party rejected the allegation on the basis that the arrest and detention had been carried out in accordance with the domestic law. In 1988 the author was arrested and detained after a BBC broadcast in which he had criticised the Cameroonian government. The reason given for his arrest was that he had made subversive comments contrary to a State Ordinance. He was subsequently charged with offences under the Ordinance. The Committee concluded that article 9(1) had been violated, since the author's detention "was neither reasonable nor necessary in the circumstances of the case". The Committee considered that national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights, and that the author's right to freedom of expression had therefore been violated. Consequently, the Committee also concluded that the author's arrest and detention were contrary to article 9(1) of the Covenant.<sup>134</sup>

A further element of arbitrariness arises in that the shift from judicial to police and prosecutorial discretion means, in effect, that whether or not an offender is subject to a period of imprisonment is determined outside of court proceedings. In relation to such decision-making, there is no regulation, transparency or public scrutiny. Mandatory minimum sentences remove a check on the power of the prosecution, and concentrate discretion with respect to sentencing in the hands of the executive.<sup>135</sup> The UN Working Group on Arbitrary Detention has stated that the use of "administrative detention" under public security legislation resulting in a deprivation of liberty for unlimited time or for very long periods without effective judicial oversight, as a means to detain persons suspected of involvement in terrorism or other crimes, is not compatible with international human rights law.<sup>136</sup>

For more recent, as it can be noticed that by flouting international law in its treatment of detainees, the Bush administration has drawn worldwide criticism and undermined

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<sup>134</sup> Ibid., para. 9.8.

<sup>135</sup> See Dato' Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and the Judiciary, keynote delivered to the Symposium "Mandatory Sentencing – Rights and Wrongs", University of New South Wales, 28 October 2000, para 11. Also see Dato' Param Cumaraswamy, "Mandatory Sentencing: The Individual and Social Cost", [2001] Australian Journal of Human Rights 14, <http://www.austlii.edu.au/au/journals/AJHR/2001/14.html#Heading30>.

<sup>136</sup> Report of the Working Group on Arbitrary Detention: Mission to China,, E/CN.4/2005/6, para. 77.

support for U.S. counterterrorism efforts.<sup>137</sup> Three years after it was created, the U.S. government continues to detain people in the prison camp at Guantanamo indefinitely without charge or trial or without applying the Geneva Conventions. The fate of the military commissions created to try them is also uncertain. Only four of the some 550 detainees at Guantanamo currently face charges, either for war crimes or other crimes. After a federal court in November 2004 ruled that the commissions did not meet the requirements of the Geneva Conventions or basic guarantees for fair trials, the Pentagon suspended proceedings in all of the cases. Human Rights Watch has consistently criticised the military commissions as fundamentally flawed, lacking the rules and structure necessary to ensure fair trials.<sup>138</sup>

One of the four cases, *United States v. David M. Hicks*, Mr. Hicks was seized and concurrently detained in Afghanistan in or around November 2001. The armed conflict in Afghanistan concluded at the latest 1 May 2003.<sup>139</sup> On 3 July 2003, Mr. Hicks was designated as eligible for trial by military commission. Charges were instituted against Mr. Hicks on 10 June 2003. Mr. Hicks appeared before the commission for the first time 25 August 2004. However, it is obvious that Mr. Hicks was arbitrarily and improperly detained by U.S. forces in Afghanistan. Although the United States Government has claimed the right to detain individuals such as Mr. Hicks until the “war on terrorism” is over, even if such individuals are tried by a military commission and found not guilty, his ongoing detention at Guantanamo Naval Base is no longer appropriate.<sup>140</sup> Mr. Hicks was detained indefinitely, solely on the basis that he allegedly participated in the hostilities in Afghanistan. This is completely disproportionate and unjust, and therefore arbitrary. Mr. Hicks’s arrest and detention do not comply with U.S. domestic or international substantive law. In Conclusion Observations on Ireland, the HRC

<sup>137</sup> See e.g. Tim Otty, “Honour bound to defend freedom? The Guantanamo Bay litigation and the fight for fundamental values in the War on Terror”, EHRLR 2008, 4, pp.433-453; Jordan J. Paust, *Beyond the Law: The Bush Administration's Unlawful Responses in the 'War' on Terror*, (New York:Cambridge University Press, 2007).

<sup>138</sup> See the reports from Human Rights watch, e.g. “US: New Legislation on Military Commissions Doesn’t Fix Fundamental Flaws” <http://www.hrw.org/en/news/2009/10/08/us-new-legislation-military-commissions-doesn-t-fix-fundamental-flaws>, 8/10/09; “US: Hamdan Trial Exposes Flaws in Military Commissions”, <http://www.hrw.org/en/news/2008/08/06/us-hamdan-trial-exposes-flaws-military-commissions>, 6 /08/08.

<sup>139</sup> Background knowledge of the case see Lex Lasry QC, “The United States v David Matthew Hicks: Final Report of the Independent Observer for the Law Council of Australia”, Guantanamo Bay, Cuba, [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=CDF9FC6F-1E4F-17FA-D252-457B6909B05A&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=CDF9FC6F-1E4F-17FA-D252-457B6909B05A&siteName=lca).

<sup>140</sup> U.S. Department of Defense News Briefing, 21/03/02, transcript published by M2 PressWIREe, 22/03/02.



expressed concern over laws that permitted the arrest of someone “on suspicion of being about to commit an offence”.<sup>141</sup> Again, punitive protective detention is not recognised by either U.S. or international law, such as Article 9 of ICCPR. In the *habeas corpus* petition of Salim Ahmed Hamdan, the Federal District Court for the District of Columbia faulted the Department of Defense for not properly determining the legal status of the detainees and for imposing rules of evidence that violate fair trial standards and military commission proceedings for Guantanamo detainees was properly halted until the Bush administration complies with the Geneva Conventions in November 2004.<sup>142</sup>

## **5.2 The Right to Know the Reasons for Arrest**

Article 9(2) of the ICCPR provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.<sup>143</sup> The right to know the reasons for arrest is another essential guarantee which means that anyone who is arrested or detained must be immediately informed of the reasons why he is deprived of his liberty, and subsequent information, containing accusations in the legal sense, must be furnished “promptly.” The rights contained in Article 9(2) of the ICCPR relate only to the stage of arrest. One violation concerned the fact in *Kelly v Jamaica* was not informed of his charge for 26 days.<sup>144</sup> The State party has not denied that the author was not apprised in any detail of the reasons for his arrest for the several weeks following his apprehension and that he was not informed about the facts of the crime in connection with which he was detained or about the identity of the victim. The committee considered the relationship between Article 9(2) and Article 14(3)(a). The comments held that those remanded in custody pending the result of police investigations is covered by Article 9(2) while the requirement of prompt information in Article 14(3)(a) only applies once the individual has been formally charged with a criminal offence.<sup>145</sup> The Body of Principles further reinforces the principle that anyone

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<sup>141</sup> HRC, *Concluding observations: Ireland*, 24/07/2000, UN Doc. A/55/40, paras 422-451, para 15.

<sup>142</sup> *Salim Ahmed Hamdan v Donald H. Rumsfeld*, Civil Action No. 04-1519 (JR), [http://www.humanrightsfirst.org/us\\_law/inthecourts/supreme\\_court\\_hamdan.htm](http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_hamdan.htm).

<sup>143</sup> See also ECHR, Article 5(2).

<sup>144</sup> *Kelly v Jamaica*, (Comm.253/1987).

<sup>145</sup> *Ibid.*, para 5.8.

who is arrested should be informed at the time of his arrest of the reason for his arrest and should be promptly informed of any charges against him.<sup>146</sup>

Also the provisions have been interpreted to mean that anyone who is arrested must be informed of the general reasons for the arrest “at the time of arrest”, while subsequent information, to be furnished “promptly”, must contain accusations in the legal sense. It was doubted that “as soon as is reasonably practicable” satisfied this requirement.<sup>147</sup> The Committee has found a violation of this right in several cases in which no information at all or with a delay of several weeks had been provided. The shortest delay, which has been found actually to breach Article 9(2), remains the 7 days delay in *Grant v Jamaica*.<sup>148</sup> In *Hill and Hill v Spain* the Hill brothers had contended that 8 hours had passed before they were informed of the reason for their arrest.<sup>149</sup> While the committee chose to accept the State’s evidence that this period of time was only 3 hours, as well as the evidence that the interpreter was sufficiently competent. It is therefore uncertain whether 8 hours’ delay would have constituted a breach of Article 9(2). A written arrest warrant is not unconditionally required, but the lack of a warrant may, in some cases, give rise to a claim of arbitrary arrest.<sup>150</sup>

In addition, one must be reasonably aware of the precise reasons for one’s arrest. Initial information must be provided at the time of arrest, which may merely be a limited description of the reasons for arrest. It is not sufficient for the purposes of the Article 9(2) to arrest and detain a person on grounds of a presumed connection with subversive activities; the arrested and detained person must be given explanations as to the scope and meaning of “subversive activities”, which constitute a criminal offence under the relevant legislation.<sup>151</sup> There must be sufficient information to permit the accused to challenge the legality of his or her detention. The right to be informed in Article 9(2) serves the legal interests of arrested persons concerned. As the HRC has explained in

<sup>146</sup> Body of Principles, Article 10

<sup>147</sup> Report of HRC, 33, GAOR Supp. (No. 40), UN Doc. A/33/40, 1978, para. 474.

<sup>148</sup> *Grant v Jamaica*, (Comm.597/1994).

<sup>149</sup> *Hill and Hill v Spain*, (Comm.526/1993).

<sup>150</sup> In two cases against Zaire and Uruguay, the Human Rights Committee indicated that the lack of a written arrest warrant might be an indication of an arbitrary arrest. (Comms.90/1981, 139/1983); However, the authors in both cases had not been informed at all of the grounds for their arrest.

<sup>151</sup> *L. B. Carballal v. Uruguay*, (Comm.R.8/33), paras. 12-13.

*Campbell v Jamaica*, one of the most important reasons for the requirement of “prompt” information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority.<sup>152</sup>

For example, in case *Drescher Caldas v Uruguay*, it is not sufficient to be informed that one is being arrested “under prompt security measures without any indication of the substance” of the reasons for the arrest.<sup>153</sup> Similarly, the HRC expressed concern about detentions in Sudan on grounds of “national security”. The Committee recommended that the concept of national security be defined by law and that police and security officials be required to provide written reasons for a person’s arrest, which should be made public and subject to review by the courts.<sup>154</sup> While in *Stephens v Jamaica*, the committee rejected an allegation of a violation of article 9(2) on the basis that the author was fully aware of the reasons for his detention as he had surrendered himself to the police and a detective had cautioned the author whilst he was in custody.<sup>155</sup> The reasons for arrest and the explanation of any other rights must be given in a language that the person arrested understands. This right extends to all pre-trial proceedings.<sup>156</sup> Accordingly, the accused has a right to a competent interpreter in the event that he or she does not understand the local language.<sup>157</sup>

In contrast, the Committee finds no violation of Article 9(2) in *Griffin v Spain* with regard to the author’s claim that he was not informed of the reasons for his arrest and of the charges against him as there was no interpreter present at the time of his arrest.<sup>158</sup> But the committee observed that although no interpreter was present during the arrest, it is wholly unreasonable to argue that the author was unaware of the reasons for his arrest because in any event he was promptly informed of the charges held against him in his own language. Similarly, in *D. McTaggart v. Jamaica*, where the author alleged that he was not promptly informed of the charges against him but where there was evidence that

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<sup>152</sup> *G. Campbell v. Jamaica*, (Comm. 248/1987), para. 6.3.

<sup>153</sup> *Drescher Caldas v Uruguay*, (Comm. 43/1979), para 15.

<sup>154</sup> Concluding Observations of the HRC: Sudan, UN Doc. CCPR/C/79/Add.85, 19 November 1997, para.13.

<sup>155</sup> *Stephens v Jamaica*, (Comm.373/1989).

<sup>156</sup> Body of Principles, Principle 14.

<sup>157</sup> *ibid.*; ICC Statute, Article 67(1)(f), guarantees the right to a ‘competent’ interpreter.

<sup>158</sup> *Griffin v Spain*, (Comm. 493/1992).

he had seen a lawyer during the first week of his detention, the Committee concluded that it was “highly unlikely that neither the author nor his counsel were aware of the reasons for his arrest”.<sup>159</sup>

### 5.3 The Right to a Prompt Appearance before a Judge

Article 9(3) refers specifically to the rights of a person arrested or detained on a criminal charge, who “shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”.<sup>160</sup> One of the keys to the interpretation of Article 9(3) is the meaning of the word “promptly”. “Promptly” is not defined but the practice of enlightened states helps determine its meaning. The time limit within which a person held in custody on arrest must be brought before the competent judicial officer varies: in many countries it is 48 hours, in others, even to 24 hours.<sup>161</sup> The UN Special Rapporteur on Torture has stated that “those legally arrested should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, should not exceed a period of 48 hours”.<sup>162</sup> Where periods of custody on arrest maybe extended at the request of the police or public prosecutor, the period of extension is usually limited to the same length as the initial period. Ordinarily, then, delay for longer periods would violate the Covenant. It has been interpreted by the HRC to mean that the period of custody, before an individual is brought before a judge or other officer, may not exceed “a few days”.<sup>163</sup> This comment is quite vague indeed.<sup>164</sup> In *McLawrence v. Jamaica*, the Committee held that the term “promptly” in Article 9(3) must be determined on a case-by-case basis. It explicitly referred to its “few days” rule in General Comment 8/16 and concluded that a delay of 1 week in a capital case cannot be deemed compatible with Article 9(3).<sup>165</sup> The HRC has specified that this right applies at all times, including

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<sup>159</sup> *D. McTaggart v. Jamaica*, (Comm. 749/1997), para. 8.1.

<sup>160</sup> General Comment 8; Article 7(5), American Convention; Paragraph 2(C), African Commission Resolution; Article 59(2)-(3), ICC Statute; see further, Body of Principles, Principles 11, 38 and 39; Declaration on the Protection of all Persons from Enforced Disappearance, UN General Assembly resolution 47/133, 18/12/92, Article 10(1).

<sup>161</sup> See Manfred Nowak, *op.cit.*, fn 4, p.176; also see *Jecius v Lithuania*, Chap3, 3.5.5.1, p138.

<sup>162</sup> See Report of the UN Special Rapporteur on Torture, E/CN.4/2003/68, para. 26(g), 17/12/02.

<sup>163</sup> General Comment No. 8, para 2. See further Body of Principles, Article 37.

<sup>164</sup> See Chap3, 3.5.3, pp138-140.

<sup>165</sup> *McLawrence v. Jamaica*, (Comm. 702/1996), para 5.6.

during states of emergency.<sup>166</sup>

In *Portorreal v Dominican Republic* the Committee found that there was no breach of Article 9(3) even though the author was held for 50 hours before being brought before a judge.<sup>167</sup> Also in *Ban der Houwen v The Netherlands*, 73 hours of detention without being brought before a judge was held not to be a violation of Article 9(3).<sup>168</sup> However, in the later case of *Borisenko v Hungary*, the author's unexplained detention for 3 days prior to presentation before a judicial officer constituted a breach of Article 9(3).<sup>169</sup> Furthermore in *Freemantle v Jamaica* and *Jijon v Ecuador*, the committee found a delay of 4 and 5 days before the accused was brought a judge constituted a violation of Article 9(3).<sup>170</sup> Therefore, it is indicates that the limit of "promptness" for the purposes of this Article guarantee of judicial review lies somewhere around 3 days. But in recent 2000 Concluding Observations on Gabon, the Committee has taken a stricter view that the state should take action to ensure that detention a police custody never lasts longer than 48 hours and ensure full de facto compliance with the provisions of Article 9(3).<sup>171</sup>

Another term need to be noticed is the meaning of "other officer authorized by law". The UN Working Group on Arbitrary Detention has suggested that the decision to deprive someone of personal liberty must be made by an impartial and independent judicial body.<sup>172</sup> According to principle 11(1) of the Body of Principles, the detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.<sup>173</sup> The requirement that a person be brought before a judge or "other officer authorised by law to exercise judicial power" is precisely the same as Article 5(3) of the ECHR. Thus the interpretation developed by the European Court in the *Schiesser v Switzerland* case would be useful for the interpretation of this provision: a judicial assistant must be independent of the executive, personally hear the person concerned and be empowered

<sup>166</sup> General Comment No. 29, para 16.

<sup>167</sup> *Portorreal v Dominican Republic* (Comm. 188/1984), para. 10.2.

<sup>168</sup> *Ban der Houwen v The Netherlands* (Comm. 583/1994), para. 4.3.

<sup>169</sup> *Borisenko v Hungary*, (Comm. 852/1999).

<sup>170</sup> *Freemantle v Jamaica*, (Comm.625/1995); *Jijon v Ecuador*, (Comm. 277/1988).

<sup>171</sup> UN doc. CCPR/CO/70/GAB; see also Concluding Observations on Mali, UN doc. CCPR/CO/77/MLI, para 19, 16/0403; Concluding Observations on the Czech Republic, UN doc. CCPR/CO/72/CZE, para 17, 27/08/01; Concluding Observations on Kuwait, UN doc. CCPR/CO/69/KWT, para 21, 27/07/00.

<sup>172</sup> Report on the Visit to the PRC, UN Doc.E/CN.4/1998/44/Add.2, 22/12/1997, p.96.

<sup>173</sup> Body of Principles, Article 11.

to direct pre-trial detention or to release the person arrested. Thus, custody must end within a few days with either release or remittal by a judge to pre-trial detention.<sup>174</sup>

For example, *Kulomin v Hungary* concerned the authorization and renewal of pre-trial detention by the public prosecutor.<sup>175</sup> The author of the communication was detained more than 9 months before he was brought before a judge. The decision was based on the decisions of the prosecutors. As regards the compatibility of the procedure with the requirements of Article 9, paragraph 3, the State party interprets the term “other officers authorized by law” as meaning officers with the same independence towards the executive as the Courts. In this connection, the State party notes that the law in force in Hungary in 1988 provided that the Chief Public Prosecutor was elected by and responsible to Parliament. All other public prosecutors were subordinate to the Chief Public Prosecutor. The State party concludes that the prosecutor’s organization at the time had no link whatsoever with the executive and was independent from it. The State party therefore argues that the prosecutors who decided on the continued detention of Mr. Kulomin can be regarded as other officers authorized by law to exercise judicial power within the meaning of Article 9, paragraph 3, and that no violation of the Covenant has occurred.

However, the committee observes that Article 9(3) is intended to bring the detention of a person charged with a criminal offence under judicial control and considered that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.<sup>176</sup> The Committee rejected the state party’s arguments in relation to Article 9(3) and think the public prosecutor could not be regarded as having the institutional objectivity and impartiality necessary to be considered an “officer authorized by law to exercise judicial Power” within the meaning of Article 9(3) of the Covenant.<sup>177</sup> The HRC further stated that vesting the authority to decide upon the continuation of pre-trial detention with the

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<sup>174</sup> See *Schiesser v Switzerland*, Chap3, 3.5.4, p135.

<sup>175</sup> *Kulomin v Hungary*, (Comm. 521/1992), 22/03/96, para 11.3.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

Procurator and not with a judge is incompatible with Article 9(3) of the ICCPR.<sup>178</sup> However, it is still vague as to how the public prosecutor lacked sufficient “institutional objectivity and impartiality”.<sup>179</sup> While no blending function, it means, for example, a prosecutor did not perform investigation and prosecution functions in the same case and in respect of the same defendant, it cannot say it will violate the impartiality. Especially, when arrest power and prosecution power are divided into different apartment even if charged by the same prosecutor office. However, if showing the blending function, namely, a prosecutor performed investigation and prosecution functions in the same case and in respect of the same defendant, the impartiality will be doubted. Under this circumstance, division and balance should be considered.

#### **5.4 The Right to trial within a Reasonable Time**

Another right guaranteed in Article 9(3) as well is that a person arrested or detained “shall be entitled to trial within a reasonable time or to release”.<sup>180</sup> Some questions arise. First, what grounds are adequate for continued detention pending trial? It is thus to be limited to essential reasons, such as danger of suppression of evidence, repetition of the offence and absconding. In reviewing the grounds given by the national authorities for detaining an individual pending trial, one must first consider whether the grounds relied on to prolong detention can be justified by the terms of Article 9(3), and second, whether continued detention is warranted by the facts of the case. Initially, as discussed above, a person may be arrested or detained for the purpose of bringing him before a competent legal authority merely on the basis of reasonable suspicion that he has committed an offense. Article 6 of *The Tokyo Rules*, sets down that pre-trial detention should only be used “as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim”, and should be no longer than is necessary. Applying similar provision in the ECHR, the European Court observed in the *Neumeister* case, *Stögmüller* case and the *Matznetter*

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<sup>178</sup> HRC, Concluding Observations: Belarus, UN Doc. CCPR/C/79/Add.86, 19/11/97, para.10.

<sup>179</sup> See *Kulomin v Hungary*, (Comm.521/1992), the individual opinion of Nisuke Ando.

<sup>180</sup> *Sextus v. Trinidad and Tobago*, (Comm. 818/1998), para. 7.2.

Case that the persistence of suspicion is not sufficient to warrant continued detention after the lapse of a reasonable time for investigation.<sup>181</sup>

The only basis for continuing detention, as for the original arrest, is the reasonable belief that the person has committed a crime and will be brought to trial. Article 9(3) implies that if he cannot be brought to trial within a reasonable time, he must be released; in fact failure to bring the person to trial within a reasonable time precludes trial thereafter, and he must be released. Another ground for continued detention pending trial is the risk that the accused will commit a further offense. As examined in detail in next Chapter, the European court held that in the special circumstances of the case the risk of further offense was sufficient to justify continued detention pending trial.<sup>182</sup> On the other hand, there was no such risk and that continued detention was unwarranted.<sup>183</sup> Other grounds which have been found to justify continued detention pending trial are the risks of suppression of evidence and of collusion.<sup>184</sup> The same considerations should govern the application of the ICCPR.

Secondly, what constitutes “trial within a reasonable time”? Pre-trial detention should be an exception and as short as possible.<sup>185</sup> Article 9(3) refers to “a reasonable time”. This time limit is considered to be shorter than the time limit provided for in Article 14(3)(c) without undue delay, within which prosecution is to be initiated, but longer than the time taken to impose a judgement against a juvenile pre-trial detainee, which must be made “as speedily as possible”.<sup>186</sup> In *Koné v. Senegal*, the reasonableness of a period of pre-trial detention has been assessed on a case-by-case basis by the HRC.<sup>187</sup> Factors considered in examining the reasonableness of a period of pre-trial detention include: the seriousness of the offence alleged to have been committed; the nature and severity of the possible penalties; and the danger that the accused will abscond if released. Also examined are whether the national authorities have displayed “special diligence” in the

<sup>181</sup> See *Neumeister v Austria*, (1979-80) 1 EHRR 91, Chap3, 3.5.1, pp.122-123; *Stögmüller v. Austria*, (1969) 1 EHRR 155, Chap3, 3.5.1.1 p125.

<sup>182</sup> See e.g. *Matznetter v Austria*, (1979-80) 1 EHRR 198, Chap3, 3.5.1.2, p127.

<sup>183</sup> See, e.g. *Assenov v Bulgarian*, (1999) 28 EHRR 652, Chap3, 3.5.1.2, p127-128.

<sup>184</sup> See e.g. *W v Switzerland* (1993) 17 EHRR 60, Chap3, 3.5.1.2, pp.126-127.

<sup>185</sup> General Comment 8, para.3.

<sup>186</sup> Article 10(2)(b) of ICCPR.

<sup>187</sup> *Kone v Senegal* (Comm. 386/1989), para 8.6.



conduct of the proceedings, considering the complexity and special characteristics of the investigation, and whether continued delays are due to the conduct of the accused such as refusing to cooperate with the authorities or the prosecution, as detail discussion shown in the case law in ECHR on Article 5(3).<sup>188</sup>

Even if a person is bound over for trial, detention pending trial may not be justified. The practical observation of this guarantee requires particular attention against the backdrop of an enormous backlog of cases pending trial as well as where there is over reliance on pre-trial detention as a means to secure the defendant's appearance. The HRC has inquired about safeguards existing and measures taken against unreasonably prolonged detention.<sup>189</sup> For example, in the case of *Fillastre v Bolivia* 1988 the Committee held that the lack of adequate budgetary appropriations for the administration of criminal justice does not justify a period of 4 years until adjudication at first instance.<sup>190</sup> In *Kone v Senegal* the HRC also held that detention of over 4 years was not compatible with Article 9(3) of the ICCPR, unless special circumstances existed where the delay was attributable to the actions of the accused or the accused's representative.<sup>191</sup>

It must be doubted whether pre-trial detention of years could ever be justified. Long periods of pre-trial detention may be permitted when the detainee is charged with a very serious offence. There is a risk that such people will escape or pose a danger to society if released pending trial. Thus, for example, Pre-trial detention for 12 and 14 months, for a trial for capital murder, did not breach article 9(3) in case *Mctaggart v Jamaica* and *Thomas v Jamaica*.<sup>192</sup> Also even a 4-year delay in bringing someone to trial so long as they have not been detained the whole time maybe justified by the complexities of the case or by obstruction on the part of the accused.<sup>193</sup> However, in the case of a murder suspect in Panama, held without bail for more than 3 and a half years before his acquittal, the HRC stated that "in cases involving serious charges such as homicide or murder, where the accused is denied bail by the court, the accused must be tried in as expeditious

<sup>188</sup> See Chap3, 3.5.3, pp.130-134.

<sup>189</sup> General Comment 8, para 3.

<sup>190</sup> Manfred Nowak, *op.cit.*, fn 4, p177.

<sup>191</sup> *Famara Kone v Senegal* (Comm. 386/1989), paras 8.6-8.7.

<sup>192</sup> *Mctaggart v Jamaica* (Comm. 749/1997), para 8.2; *Thomas v Jamaica*, (Comm. 614/1995) para 9.6.

<sup>193</sup> *Wolf v Panama*, (Comm. 289/1988), para 6.4.

a manner as possible”.<sup>194</sup> The twenty-month period permitted by one penal code was considered an “extremely long period”.<sup>195</sup> The HRC also concluded in *McLawrence v. Jamaica* that holding a person charged with capital murder for 16 months before trial, in the absence of satisfactory explanations from the state or other justification discernible from the file, was a violation of his right to be tried within a reasonable time or released.<sup>196</sup>

In contrast, it is worthy noting that in a case from Uruguay, where a detainee was held *incommunicado* for 4 to 6 months, and his trial by military court on charges of subversive association and conspiracy to violate the constitution began after 5 to 8 months, the HRC held that Article 9(3) of the ICCPR had been violated because he was not brought promptly before a judge or other officer authorized by law to exercise judicial power and because he was not tried within a reasonable time.<sup>197</sup> In 1992, there is a limit on pre-trial detention under the United Nations Transitional Authority in Cambodia Penal Code of 4 months, which may be extended by a judge to 6 months.<sup>198</sup> Therefore whether a time limit is appropriate can be evaluated only in light of all the circumstance of a given case in HRC jurisprudence. It can be noted therefore the HRC has adopted a flexible approach in determining what constitutes a violation of the right to be tried within a reasonable time. The prosecution however has a continuing obligation to ensure that suspects get their day in court as reasonably fast as possible.

## 5.5 The Right to Release Pending Trial

Article 9(3) also provides that “it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement”. It makes clear that pre-trial detention “shall not be the general rule” and implicitly provides a detainee with a legitimate claim to release in exchange for bail or

<sup>194</sup> *del Cid Gómez v. Panama*, (Comm. 473/1991), para 46.

<sup>195</sup> UN Doc. A/33/40, para. 269; see also S. Grosz, McNutty, and Duffy, “Pre-trial Detention in Western Europe”, 23 ICJ Rev. 35 (1979), pp.35-39.

<sup>196</sup> *McLawrence v. Jamaica*, (Comm.702/1996), para. 5.6.

<sup>197</sup> *Alba Pietraroia Alba Pietraroia v. Uruguay*, (Comm. 44/1979), paras 13.2 and 17; also see Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), Vol. I, para. 47.

<sup>198</sup> Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the transitional Period, commonly known as the UNTAC Penal Code, 1992, Article 14.

some other guarantee of appearance at the trial.<sup>199</sup> Detention for the sole purpose of further interrogation is not justifiable. For instance, the Ugandan constitution provides that suspects charged with a capital offense, which includes treason and terrorism, may be held in pre-trial detention for up to 360 days.<sup>200</sup> As noticed from the report by Human Rights Watch, this lengthy period of 360 days allows for and encourages police and prosecutorial inefficiency in the gathering of evidence.<sup>201</sup> Although the prosecutor is required to appear at the magistrates' court every two weeks or so with the prisoner, "investigation still pending" or "the investigation is still continuing, a further remand is needed" are the routine excuses by the prosecutor. The court routinely grants another adjournment and remands the prisoner to prison. The wait for trial may be the longest period of all, and there is no time limit set by legislation on this stage, regardless of whether or not the defendant has been able to post bail. The indefiniteness of the time the defendant must wait for trial, usually in jail because of unavailability of bail, can be converted to pressure on the defendant to abandon his right to fair trial and to sign a request for amnesty, thereby admitting guilt. Thus there are few cases of treason or terrorism that actually are tried. The charges are used instead to justify prolonged arbitrary detention, sometimes for years.

Under the Covenant, in cases where the danger of absconding can be avoided by bail or other guarantees, it is the duty of the national authorities to see that the accused is released pending trial.<sup>202</sup> However, the Article 9(3) allows pre-trial detention as an exception under some circumstance. In the case of *Van Alphen v The Netherlands*, the HRC stated that "remand in custody must not only be lawful but necessary in all the circumstances...for example, to prevent flight, interference with evidence or the recurrence of crime".<sup>203</sup> Also since the author's detention was based on considerations that there was a serious risk that he might interfere with the evidence against him if released, the Committee found in case *W.B.E. v The Netherlands* that "pre-trial detention

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<sup>199</sup> General Comment 8, para 3.

<sup>200</sup> Uganda Constitution, Article 23 (6) (c): "in the case of an offence triable only by the High Court the person shall be released on bail on such conditions as the Court considers reasonable, if the person has been remanded in custody for three hundred and sixty days before the case is committed to the High Court."

<sup>201</sup> Jemera Rone, "State of Pain", at Chapter VI, <http://www.hrw.org/en/node/12159/section/1>, 28/03/04.

<sup>202</sup> See *Neumeister v Austria* Chap3, 3.5.2, p.129.

<sup>203</sup> *Van Alphen v. the Netherlands*, (Comm. 305/1988), para 115.

maybe necessary to ensure the presence of the accused at the trial, avert interference with witnesses and other evidence, or the commission of other offences”.<sup>204</sup>

The guarantee does not have to be of a financial nature. Bail is a procedure by which a Judge or a Magistrate sets at liberty one who has been arrested or imprisoned, upon receipt of security to ensure the released prisoner’s later appearance in court for further proceedings. Release from custody is ordinarily effected by posting a sum of money, or a bond, although originally bail included the delivery of other forms of property, such as title to real estate. The principal use of bail in modern legal systems is to secure the freedom, pending trial, of one arrested and charged with a criminal offense. The purposes of bail pending trial in criminal cases are to avoid inflicting punishment upon an innocent person who may be acquitted at trial and to encourage the unhampered preparation of his defence. The committee, in its Concluding Observations on Argentina, reiterated the requirement that bail be reasonably available as an alternative to pretrial detention.

It must not be overlooked that in this regard States parties have been provided with broad discretion on this issue and a violation of this right to release on bail has only been found by the Committee in rare cases. For example, in *Michael and Brian Hill v Spain*, the applicants were foreigners in Spain who were arrested on suspicion of firebombing a bar.<sup>205</sup> The complainants stated that they were refused bail in violation of Article 9(3) of the ICCPR. The State Party argued that it had a well-founded concern that the applicants would leave Spain if they were to be released on bail, but did not provide sufficient evidence to sustain the claim. The Committee reaffirmed the principle that: pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State Party. It held further that “the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial.” The Committee thereby found that the rights of the

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<sup>204</sup> *W. B. E. v The Netherlands*, (Comm. 432/1990), para. 6.3.

<sup>205</sup> *Michael and Brian Hill v Spain* (526/1993), paras 2.1, 12.3.

applicants under Article 9(3) had been violated.<sup>206</sup>

### **5.6 The Right to Challenge the Lawfulness of the Detention before a Court**

All persons who have been deprived of their liberty of person are - regardless of the reasons - entitled to a right to have the detention reviewed in court without delay. Without expressly mentioning it, Article 9(4) provides for the right to *habeas corpus*, that is, the right of anyone deprived of liberty by arrest or detention to “take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.<sup>207</sup> This provision lays down the principle of judicial control over every arrest or detention. In this context it should be noted that the term “court” signifies not only a regular court, but a special court, including an administrative, constitutional or military court as well; it should be noticed that review by a superior military officer, government official or advisory panel would be insufficient. For example, in *Vuolanne v Finland* stating that review of detention of a soldier by a superior military officer does not satisfy Article 9(4).<sup>208</sup> In *Torres v Finland*, where the author had been detained under the Finnish Aliens Act under orders of the police, the lawfulness of the detention could not be reviewed by a court until, after 7 days, the detention order had been confirmed by the Minister of the Interior. The HRC has made clear that the body reviewing the lawfulness of detention must be a court, in order to ensure a high degree of objectivity and independence. Therefore the Ministry of the Interior does not satisfy Article 9(4) of the ICCPR.<sup>209</sup>

Unlike Article 9(3), there is no obligation on the part of the state to bring the detainee to court. The proceedings must be initiated by the detainee. In the case of *Stephens v Jamaica*, the HRC found no violation of Article 9(4) when the detainee could have but did not do so. However, the state is obliged to make the right to challenge the lawfulness of one’s deprivation of liberty effectively available to the person detained. The Committee held that there had been a violation of article 9(4) where the person deprived

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<sup>206</sup> *Ibid.*

<sup>207</sup> See also European Convention, Article 5(4); African Charter, Article 7(1)(a); American Convention, Article 7(6); and Body of Principles, Principle 32.

<sup>208</sup> *Vuolanne v Finland*, (Comm. 265/1987), para 9.6.

<sup>209</sup> *M. I. Torres v. Finland*, (Comm. 291/1988), para.7.2.

of liberty had been held *incommunicado* and thereby been “effectively barred from challenging his arrest and detention”.<sup>210</sup> In case *E. D. Santullo Valcada v. Uruguay*, during his detention the applicant did not have access to legal counsel. He had no possibility to apply for *habeas corpus*. Nor was there any decision against him which could be the subject of an appeal. The Committee has found a violation of article 9(4) since *habeas corpus* being inapplicable in this case, the applicant was denied an effective remedy to challenge their arrest and detention.<sup>211</sup> Likewise, in *Carballal v Uruguay*, Carballal was arrested on 4 January 1976 and held *incommunicado* for more than 5 months.<sup>212</sup> During his detention, for long periods he was tied and blindfolded and kept in secret places. Attempts to have recourse to *habeas corpus* proved unsuccessful. He was brought before a military judge on 5 May 1976 and again on 28 June but was detained for over a year. The Committee found *inter alia* violations of Article 9(1), (2), (3) and (4).<sup>213</sup>

The UN Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities called on all states “to establish a procedure such as *habeas corpus* by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful”.<sup>214</sup> Such procedures must be simple, speedy and free of charge if the detainee cannot afford to pay.<sup>215</sup> For example, in *Berry v Jamaica*, where the author could, in principle, have applied to the courts for a writ of *habeas corpus*, but where the author had no access to legal representation throughout his detention for 2 and a half month, the Committee clearly links access to legal representation with enjoyment of the right in Article 9(4) and therefore concluded that article 9(4) of the Covenant had been violated.<sup>216</sup> On the other hand, in *L. Stephens v. Jamaica*, where there was no evidence that either the author or his legal representative

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<sup>210</sup> *H. G. Dermitt on behalf of G. I. and H. H. Dermitt Barbato* (Comm. 84/1981), para. 10.

<sup>211</sup> See, e.g., *E. D. Santullo Valcada v. Uruguay*, (Comm.R.2/9), para. 12.

<sup>212</sup> *Carballal v Uruguay* (Comm. 33/1978).

<sup>213</sup> *Ibid.*, para 7 and 13.

<sup>214</sup> *Habeas corpus*, E/CN.4/RES/1992/35, 28/02/92 and Sub-Commission Resolution 1991/15, 28/08/91.

<sup>215</sup> Body of Principles, Principle 32(2).

<sup>216</sup> *A. Berry v. Jamaica*, (Comm. 330/1988), para. 11.1.

applied for such a writ, the Committee was unable to conclude that the former “was denied the opportunity to have the lawfulness of his detention reviewed in court without delay”.<sup>217</sup>

If such a proceeding is initiated, the detaining authorities must produce the detainee before the relevant court without unreasonable delay. The requirement that a decision must be made speedily or “without delay” applies to the initial decision on whether a detention is lawful and to any appeals against that decision provided for by national law or procedure. Courts examining the lawfulness of detention must order the release of the detainee if their detention is not lawful. For example, in the Committee’s view in *M. I. Torres v. Finland* the 7 days delay violated Article 9(4), according to which a detained person must be able “to take proceedings before a court, in order that that court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful”. It should be noted that the lawfulness of administrative detention must be directly reviewed by a court, not only by a higher administrative authority.<sup>218</sup>

The detainee also has the right to continuing review of the lawfulness of detention at reasonable intervals.<sup>219</sup> For example, in the case the Committee was satisfied that the review of the author’s detention under the Extradition Act by the Helsinki City Court at two-week intervals satisfied the requirements of article 9(4) of the Covenant.<sup>220</sup> Further, the court must be one which not only has the jurisdiction to decide on the lawfulness of the detention, the court must also be empowered to order the release of the detainee if it finds the detention to be unlawful.<sup>221</sup> As already discussed above, the standard of “lawfulness” in this provision is the standard of lawfulness under the Convention, and not only the domestic law.

## 5.7 The Right to Legal Counsel during Pre-trial Detention

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<sup>217</sup> *L. Stephens v. Jamaica*, (Comm. 373/1989), para. 9.7.

<sup>218</sup> *M. I. Torres v. Finland*, (Comm. 291/1988), para. 7.2.

<sup>219</sup> Basic Principles, Principles 11(3), 32 and 39; see 3.6.3 Chapter3, pp.58-60.

<sup>220</sup> *M. I. Torres v. Finland*, (Comm. 291/1988), para. 7.4.

<sup>221</sup> See 5.5. pp.61-64.

A person's right to the help of a lawyer in pre-trial proceedings is not expressly set out in the ICCPR. However, the HRC has all recognised that the right to a fair trial requires access to a lawyer during detention, interrogation and preliminary investigations. It has stated that "all persons arrested must have immediate access to counsel".<sup>222</sup> Also Principle 1 of the Basic Principles on the Role of Lawyers establishes the right to assistance at all stages of criminal proceedings, including interrogations.<sup>223</sup> It is an important and central safeguard to a fair trial which ensures necessary legal advice and assistance on the detained individual's rights at the pre-trial stage.<sup>224</sup> The right to legal counsel remains relevant throughout all stages of criminal proceedings which are also an important element of the right to adequate facilities for the preparation of a defence and the right to a defence which will be discussed below.<sup>225</sup> For example, where the complainant had not had access to legal representation from December 1984 to March 1985 in *Campbell v Jamaica*, the HRC concluded that there was a violation of article 9(4) of the Covenant "since he was not in due time afforded the opportunity to obtain, on his own initiative, a decision by a court on the lawfulness of his detention".<sup>226</sup> In Concluding Observations on Ireland, the Committee made clear that pre-charge detainees are also permitted access to legal aid if they are unable to afford their own legal counsel.<sup>227</sup> The lack of access to a lawyer, whether counsel of his own choice or a public defender, was also an element in the Committee's decision to conclude that there had been a violation of article 9(3) in the case of *D. Wolf v. Panama*, since the author had not been brought promptly before a judge or other judicial officer authorized by law to exercise judicial power.<sup>228</sup>

## 5.8 The Prohibition on *Incommunicado* Detention

People held lawfully in detention or imprisonment forfeit for a time the right to liberty, and face restrictions on other rights such as the right to privacy, freedom of movement and freedom of assembly. Although detainees are to be presumed innocent until they

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<sup>222</sup> HRC, Concluding Observations: Georgia, UN Doc. CCPR/C/79/Add.74, 09/04/97, para. 28.

<sup>223</sup> Also see e.g. Body of Principles, Principles 11(1), 15, 17, 18; General Comment No. 20, at para 11.

<sup>224</sup> Op.cit., fn 222, para. 28.

<sup>225</sup> See 6.3 pp.74-81.

<sup>226</sup> *G. Campbell v. Jamaica*, (Comm. 248/1987), para 6.4.

<sup>227</sup> HRC, Concluding Observations on Ireland, para 17-18, 25/07/00.

<sup>228</sup> *D. Wolf v. Panama*, (Comm. 289/1988), para. 6.2; also see *Berry v Jamaica*, (Comm. 330/1988), para 11.1.



have been convicted, detainees are inherently vulnerable because they are under the control of the state. ICCPR recognises this and places special responsibility on the state to protect detainees. When the state deprives a person of liberty, it assumes a duty of care for that person. The duty of care is to maintain the safety and safeguard the welfare of people deprived of their liberty. Detainees are not to be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.<sup>229</sup>

*Incommunicado* detention means the practice of holding detainees *incommunicado*, that is to say, keeping them totally isolated from the outside world without even allowing them access to their family and lawyer. ICCPR do not expressly prohibit *incommunicado* detention in all circumstances. However, international standards and expert bodies provide that restrictions and delays in granting detainees access to the outside world are permitted only in very exceptional circumstances for very short periods of time. The HRC has found that prolonged *incommunicado* detention may violate Article 7 of the ICCPR which prohibits torture, inhuman, cruel and degrading treatment, because it facilitates the perpetration of torture, ill-treatment and “disappearances” and can in itself constitute a form of cruel, inhuman or degrading treatment.<sup>230</sup> The HRC has stated in its General Comment No. 20, on article 7 of the Covenant, that provisions should be made against *incommunicado* detention.<sup>231</sup>

The prohibition of torture during detention pending trial is an essential pre-trial guarantee. The U.N. Committee against Torture said in 2002 that it was “deeply concerned” over the (then) five-day *incommunicado* detention period in Spain and stated that regardless of the legal safeguards for its application, it facilitates the commission of acts of torture and ill-treatment.<sup>232</sup> Again, the U.N. Special Rapporteur on Torture, Theo van Boven, issued a report on Spain in February 2004 in which he emphasised that prolonged *incommunicado* detention may facilitate the perpetration of torture and could

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<sup>229</sup> General Comment 21, para. 3.

<sup>230</sup> Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/RES/1997/38, 11/04/97, para 20; see also *Albert Womah Mukong v. Cameroon*, (Comm. 458/1991); *El-Megreisi v. Libyan Arab Jamahiriya*, (Comm. 440/1990).

<sup>231</sup> See General Comments 20, para 11.

<sup>232</sup> U.N. Committee against Torture, Conclusions and recommendations of the Committee against Torture: Spain, 23/12/2002, CAT/C/CR/29/3, para 10.

in itself amount to a form of cruel, inhuman or degrading treatment.<sup>233</sup> In *Conteris v Uruguay* case, the author was held *incommunicado* for 3 months and subjected to various forms of physical torture, including hanging by the wrists and burning. After having been forced to sign a confession he was sentenced by a military court to 15 years' imprisonment. The Committee found violations of several Article 7, Article 9(1), 9(3), 9(4), 10(1), 14(1) and 14(3) of ICCPR.<sup>234</sup> Therefore the HRC has stated that provisions should also be made against *incommunicado* detention as a safeguard against torture and ill-treatment.<sup>235</sup> For example, the Committee has also stated that “*incommunicado* detention is conducive to torture and ... consequently this practice should be avoided, and that urgent measures should be taken to strictly limit *incommunicado* detention, in relation to the Committee's examination of Peruvian laws allowing up to 15 days' *incommunicado* detention at the discretion of the police to interrogate detainees suspected of terrorism-related offences.”<sup>236</sup> Prolonged *incommunicado* detention can be in itself a form of cruel, inhuman or degrading treatment.

Principle 16 of the Body of Principles requires that the family of any arrested or detained person must be notified promptly of the arrest and the location of their family member. If the detainee is moved to another facility the family must be notified of that change. A detainee cannot be denied the right to communicate with his family and counsel “for more than a matter of days”.<sup>237</sup> Principle 19 of the Body of Principles states that a “detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations”.<sup>238</sup> At a minimum, the right to communicate with the “the outside world” includes the right to communicate with a detainee's family, a lawyer and a doctor. Therefore people held in custody by law enforcement officials have

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<sup>233</sup> Report of the Special Rapporteur on the Question of Torture, Theo van Boven. Addendum: Visit to Spain. E/CN.4/2004/56/Add.2, 06/02/04, para. 34.

<sup>234</sup> *Conteris v Uruguay*, (Comm.139/83).

<sup>235</sup> General Comment 20, para.11.

<sup>236</sup> Preliminary Observations of the HRC: Peru, UN Doc. CCPR/C/79/Add.67, paras 18 and 24, 25/07/96.

<sup>237</sup> Body of Principles, Principle 15.

<sup>238</sup> *Ibid.*, Principle 19.

the right to be examined by a doctor and, when necessary, to receive medical treatment as well. This right is viewed as a safeguard against torture and ill-treatment, among other things, as well as an integral part of the duty of the authorities to ensure respect for the inherent dignity of the human person. The HRC has stated that the protection of detainees requires that each person detained be afforded prompt and regular access to doctors.<sup>239</sup>

Furthermore, where the detainee is in pre-trial detention he or she is entitled to visits by family and friends, subject only to restrictions “necessary in the interests of the administration of justice and of the security and good order of the institution”.<sup>240</sup> Regarding access to lawyers, see above which discusses access to legal counsel. With respect to doctors, the General Comment 20, the Body of Principles and the Standard Minimum Rules all state that detainees must be provided prompt and regular access to medical care. Finally, if the detainee is a foreign national, he or she must be permitted to communicate with, and receive visits from, representatives of their government.<sup>241</sup> In a case from Uruguay, where a detainee was held *incommunicado* for 4 to 6 months, though the precise dates being disputed, and his trial by military court on charges of subversive association and conspiracy to violate the constitution began after five to eight months, the HRC held that Article 9(3) of the ICCPR had been violated “because he was not brought promptly before a judge or other officer authorized by law to exercise judicial power and because he was not tried within a reasonable time”.<sup>242</sup>

## 5.9 The Right to Compensation

Last but not least, Article 9(5) provides that “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”<sup>243</sup> The HRC stated in the General Comment that states parties have in accordance with Article 2(3) also to ensure that an effective remedy is provided in other cases in which an

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<sup>239</sup> General Comment 20, para. 11.

<sup>240</sup> Standard Minimum Rules, Rule 92.

<sup>241</sup> Vienna Convention on Consular Relations, 24/04/63, Article 36; Body of Principles, Rule 16(2); Standard Minimum Rules, Rule 38.

<sup>242</sup> *Pietraroia v. Uruguay*, (Comm.44/1979), paras 13.2 and 17.

<sup>243</sup> See also European Convention, Article 5(5).

individual claims to be deprived of his liberty in violation of the Covenant.<sup>244</sup> Such a claim arises when the arrest or detention has contravened the provisions of Article 9(1) to (4) and/or a provision of domestic law. For example, in *Bolanos v Ecuador* compensation was held payable for violations of article 9(1) and (3).<sup>245</sup> However, the way in which a claim for compensation is to be implemented is not explicitly spelled out, but is generally considered to refer to an individual's right to bring a civil law suit either against the state or the particular body or person responsible for the wrongful conduct.<sup>246</sup> The plausible interpretation is that the state must ensure that the victim's remedy is effective, and regardless of whether there is a remedy against the state in the first instance, the state must assure compensation if the individual official cannot pay it.<sup>247</sup> The provision requires a remedy even if the unlawful arrest or detention was innocently motivated.<sup>248</sup> In the HRC, there was approval for countries that recognized that victim of unlawful arrest or detention was entitled to compensation for moral as well as actual damages.<sup>249</sup>

## **6. Article 14: Rights of the Suspect to a Fair Trial**

### **6.1 In General**

The protection of the right to a fair trial in civil and criminal proceedings is vital in any democratic society. In this thesis, however, only are the criminal trials discussed. The fairness of the legal process has a particular significance in criminal cases. Article 14 of the ICCPR therefore is undoubtedly a necessary and pertinent to this review. Article 14 sets out a series of rights which are required in both civil and criminal proceedings. The aim of the provisions is to ensure the proper administration of justice.<sup>250</sup> Also inherent in these procedural guarantees is a far-reaching potential for a step-by-step adaptation of the differing national legal systems to a common minimum standard of the "rule of law" in civil and criminal trials. The fundamental importance of this right is illustrated not

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<sup>244</sup> General Comment No.8, para 1.

<sup>245</sup> *Bolanos v Ecuador*, (Comm. 238/1987).

<sup>246</sup> Op.cit., fn 42, para 36 (1955).

<sup>247</sup> See Article 2(1) of ICCPR.

<sup>248</sup> Also see Chap3, 3.7, p.155.

<sup>249</sup> Report of Human Right Committees, 34 GAOR Supp. 40, UN Doc. A/34/40, 15/08/1979, para. 430.

<sup>250</sup> See CCPR General Comment 32: Article 14 (Right to equality before courts and tribunals and to fair trial), U.N. Doc. CCPR/C/GC/32, 23 August 2007, [hereafter General Comment 32], para 2.

only by the extensive body of interpretation it has generated but by a proposal to include it in the non-derogable rights provided for in Article 4(2) of the ICCPR.<sup>251</sup> While international law permits the derogation of certain rights in a state of emergency, any such derogation is permitted only to the extent strictly required by the exigencies of the actual situation. The guarantees of fair trial and of the rights to be presumed innocence may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.<sup>252</sup>

Article 14(1) outlines the general guarantee. Elements of fair trial specifically mentioned in Article 14(1) are the publicity and fairness of the trial, the requirement that the competence of the court or tribunal is established by law, and that is independent and impartial. Whereas article 14(2) to (7) sets out specific guarantees in relation to criminal trials and criminal appeals. In *Gerardus Strik v Netherlands*, the Committee confirmed that the provisions of Article 14(2) to (7), as well as Article (15), apply only to criminal charges.<sup>253</sup> The guarantees outlined in Article 14(1) apply to all stages of the proceedings in all courts. They also supplement the Article 14(3) requirements by acting as a residual guarantee.<sup>254</sup> In case *Maleki v Italy*, the committee found a breach of Article 14(1) even though a reservation had been entered to the relevant guarantee in Article 14(3).<sup>255</sup> The following section elaborates the meaning of the rights set out in Article 14 in the order in which they arise.

## 6.2 The Right to the Presumption of Innocence

According to Article 14(2) of the ICCPR, everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.<sup>256</sup> As a basic component of the right to a fair trial, the presumption of innocence, *inter alia*,  
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<sup>251</sup> See Draft Third Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I, in: “The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening,” Final Report by Stanislav Chernichenko and William Treat, Special Rapporteurs, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, [hereafter Final Report 1994], 46th Session, E/CN.4/Sub.2/1994/24, 3/06/94, pp.59-62.

<sup>252</sup> ICCPR, Article 4, para 11; See General Comment 32, para 6; General Comment 29, para 16.

<sup>253</sup> *Gerardus Strik v Netherlands*, (Comm.1001/01), para 7.3.

<sup>254</sup> D. McGoldrick, *The Human Rights Committee*, (Oxford: Clarendon Press, 1994), p.417.

<sup>255</sup> *Maleki v Italy*, (Comm. 699/96), para 14.99; General Comment 32 para 19.

<sup>256</sup> See also European Convention, Article 6(2); American Convention, Article 8(2); African Charter, Article 7(1)(b); ICC Statute, Article 66(1).

means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of the doubt.<sup>257</sup> The judge must permit the latter to produce evidence in rebuttal. Despite the fact that Article 14(2) does not specify the standard of proof required, it is generally accepted that guilt must be proved to the intimate conviction of the trier of fact or beyond a reasonable doubt, whichever standard of proof provides the greatest protection for the presumption of innocence under national law.<sup>258</sup> Being treated as innocent is fundamental to a fair trial and intrinsically related to the protection of human dignity. Above all, it guarantees against abuse of power by those in authority and ensures the preservation of the basic concepts of justice and fairness.

The presumption of innocence must, in addition, be maintained not only during a criminal trial with regards to the defendant, but also in relation to a suspect or accused throughout the pre-trial phase.<sup>259</sup> The obligations deriving from the presumption of innocence go beyond the conduct of the judges during the criminal trial itself. As the committee referred to its General Comment No 32 on Article 14, it is the duty of both the officials involved in a case as well as all public authorities to maintain the presumption of innocence by refraining from prejudging the outcome of a trial.<sup>260</sup> In particular, in the case of excessive “media justice” or the danger of impermissible influencing of lay or professional judges by other powerful social groups, the states is under a corresponding positive obligation to ensure the presumption of innocence.<sup>261</sup> Ministers or other influential officials may, in this respect, commit a violation of Article 14(2). For instance, in case *Gridin v Russian Federation*, with regard to the allegation of a violation of the presumption of innocence, including public statements made by high ranking law enforcement officials portraying the author as guilty which were given wide media coverage. Furthermore, the investigator had called upon the public to send social prosecutors, and during the trial the courtroom had been crowded with people who were screaming that Mr. Gridin should be sentenced to death, which is what actually happened to the applicant shortly thereafter. The Committee notes that the Supreme

<sup>257</sup> General Comment 32, para 30; see also F. G. Jacobs, *The European Convention on Human Rights* (Oxford: Clarendon Press, 1975), p113.

<sup>258</sup> The Final Report 1994, at 76; See also General Comment 32, para 30; ICC Statute, Article 66.

<sup>259</sup> General Comment 32, para 30.

<sup>260</sup> *ibid.*

<sup>261</sup> See Chap3, 4.4.2, pp173-176.

Court referred to the issue, but failed to specifically deal with it when it heard the author's appeal and therefore the authorities failed to exercise the restraint that article 14(2) requires of them.<sup>262</sup>

During the pretrial stage, the presumption is important because it limits the use of detention on remand and, in cases where a person is detained, governs the conditions of detention. The detainee should be treated as an innocent person who is only suspected of a crime and not as a convicted person. For that reason, among others, the Covenant requires that "accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons"<sup>263</sup> Denial of bail to a pre-trial detainee, in principle, does not affect the presumption of innocence. In *Cagas, Butin and Astillero. v. The Philippines*, the HRC concluded, nevertheless, the excessive period of preventive detention, exceeding nine years, does affect the right to be presumed innocent and therefore reveals a violation of Article 14(2).<sup>264</sup>

### 6.3 Equality of Arms

Article 14(3) provides that everyone charged with a criminal offense shall be entitled to a series of "minimum guarantees, in full equality".<sup>265</sup> These guarantees also constitute essential elements of the concept of "fair trial" in criminal proceedings. The words "minimum guarantees" clearly show that the rights expressly enumerated are not exhaustive, are necessary but not always sufficient, and that a trial may not conform to the general standard of "fair trial" required by Article 14(1) even where the minimum rights have all been respected. These minimum rights apply to all stages of the criminal proceedings, from the time when the accused is charged until his final conviction or acquittal. The main idea is that the prosecution and the defence should be on equal footing.<sup>266</sup> Procurators should not be afforded special privileges or preferential treatment. Thus judges must remain impartial and may not assume procurator functions during trial.

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<sup>262</sup> *Gridin v Russian Federation* (Comm. 770/1997), para 3.5 and 8.3; also see *Polay Campos v Peru*, (Comm. 577/1994).

<sup>263</sup> ICCPR, Article 10(2)(a).

<sup>264</sup> *Cagas, Butin and Astillero. v. The Philippines*, (Comm. 788/1997), para 7.3.

<sup>265</sup> ICCPR, Article 14(3)

<sup>266</sup> *Neumeister v Austria*, Chap3, 4.3, p.161.

### **6.3.1 The Right to Adequate Time and Facilities for the Preparation of a Defence**

Article 14(3)(b) of the ICCPR provides that in the determination of any criminal charge against him everyone is entitled to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.<sup>267</sup> It is an important element of the guarantee of a fair trial and an important aspect of the principle of equality of arms.<sup>268</sup> The term “adequate facilities” has been interpreted to include access to documents and other evidence. Further, the defence must be able to conduct its own investigation and have its experts treated equally to state experts. Although the ICCPR does not expressly impose an obligation on the prosecution to disclose material in its possession which is favourable to the accused, to be on equal footing, the accused and defence counsel must be granted access to all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence.<sup>269</sup> In any event, the right to disclosure of the prosecution case including documentary evidence is an important implication drawn from the right to a fair trial protected by Article 14(1).

However the provision does not contain an explicit right of an accused to have direct access to all documents used in the preparation of the trial against him in a language he can understand. In case *Harward v Norway*, the question before the Committee is whether the failure of the State party to provide written translations of all the documents used in the preparation of the trial has violated the author’s right to have adequate facilities to prepare his defence under Article 14(3)(b). The Committee noted that it is important for the guarantee of fair trial that the defence has the opportunity to familiarise itself with the documentary evidence against an accused. However, this does not entail that an accused who does not understand the language used in court, has the right to be furnished with translations of all relevant documents in a criminal investigation,

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<sup>267</sup> Also see Chap 3, 4.6, pp.194-206.

<sup>268</sup> See *Kelly v Jamaica*, (Comm. 253/1987), para 5.9.

<sup>269</sup> General Comment 32, para 33; and also see HRC, Concluding Observations: Canada, UN doc. CCPR/C/CAN/CO/5, 20/04/05, para. 13.



provided that the relevant documents are made available to his counsel.<sup>270</sup> It may be sufficient that the relevant documents in the case file are made available to counsel if the accused is represented by counsel who is familiar with the language.

Moreover, an individual's right to communicate with counsel of his or her own choosing, is the most important element of the right to adequate facilities for the preparation of a defence.<sup>271</sup> It includes the opportunity and means for identifying and engaging counsel. If the state deprives the accused of access to defence counsel during crucial aspects of the investigative phase, it impedes his right to prepare for and ultimately receive a fair trial. In case *Gridin v Russian Federation* The author claimed that he did not have a lawyer available to him for the first 5 days after he was arrested, the Committee notes that the State party has responded that the author was represented in accordance with the law. The State party has not, however, refuted the author's claim that he requested a lawyer soon after his detention and that his request was ignored. Neither has it refuted the author's claim that he was interrogated without the benefit of consulting a lawyer after he repeatedly requested such a consultation. The committee finds that denying the author access to legal counsel after he had requested such access and interrogation him during that time constitutes a violation of the author's right under Article 14(3)(b).<sup>272</sup> Furthermore, the Committee considers that counsel should be able to advise and to communicate with the accused in conditions that fully respect the confidentiality of their communications.<sup>273</sup> Article 14(3)(b) was also violated in the case of *Wright v Madagascar*, who was kept *incommunicado* without access to legal counsel during a ten-month period while criminal charges against him were being investigated and determined.<sup>274</sup> This right overlaps substantially with the rights contained in Article 7 and Article 9(4) discussed above and Article 14(3)(d) which will be further considered

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<sup>270</sup> *Harward v Norway* (Comm. 451/1991), para 9.4 and 9.5.

<sup>271</sup> See HRC, Concluding observations: Spain, UN Doc. CCPR/C/79/Add.61), 03/04/96, at par. 12.

<sup>272</sup> *Gridin v Russian Federation*, (Comm. 770/1997), CCPR/C/69/D/770/1997, 20/07/00, para 8.5; also see Kelly v Jamaica, Communication No 537/1993, 17 July, 1996, CCPR/C/57/D/537/1993, para 9.2.

<sup>273</sup> *Gridin v Russian Federation*, (770/1997), para 8.5; Noor Muhammad, H, "Due Process of Law for the Persons Accused of Crime" in Henkin, L (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights*, (New York: Columbia University Press, 1981), p.152; General Comment 13, para.9; Basic Principles on Lawyers, Principle 21.

<sup>274</sup> *J. Wight v. Madagascar*, (Comm. 115/1982), para. 17;

below.<sup>275</sup> The Committee has confirmed on numerous occasions that detention *incommunicado* breaches Article 14(3)(b) as it renders access to legal assistance impossible.

What constitutes “adequate time” will depend on the nature of the proceedings and the factual circumstances of a case.<sup>276</sup> Factors to be taken into account include the complexity of a case, the defendant’s access to evidence, the time limits provided for in domestic law for certain actions in the proceedings, etc. For instance, a violation of Article 14(3) (b) was found by HRC in the fact that “the author did not have more than half an hour for consultation with counsel prior to the trial”; that was all the more unacceptable as it happened in a capital punishment case.<sup>277</sup> One state reported to the Committee that it was its practice to limit a defendant to 6 days to prepare his defence. In response, one committee member suggested that this limitation violated the right to “adequate time”.<sup>278</sup> However in case the Committee denied a breach of Article 14(3)(b) where the accused had not asked for an adjournment.<sup>279</sup> In the case *Wright v Jamaica*, the committee held it was equally uncontested that no adjournment of the trial was requested by the author’s counsel though there was considerable pressure to start the trial as scheduled. However, if counsel reasonably feels that the time for the preparation of the defence is insufficient, it was incumbent upon them to request the adjournment of the trial. Therefore the Committee did not consider that the inadequate preparation of the defence may be attributed to the judicial authorities of the State Party.<sup>280</sup> No violation can be found when the restrictions on the defence in the pre-trial phase entirely depend on the fault of the accused, or his lawyer, or when a remedy would have been available during the trial, but the accused did not resort to it.<sup>281</sup>

The right to adequate time and facilities for the preparation of a defence applies not only

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<sup>275</sup> See 4.4 pp.41-42; 5.8, pp.67-70.

<sup>276</sup> General Comment 32, para 32; *Smith v Jamaica*, (Comm. 282/1988), para 10.4; *Sawyers, McLean and McLean v Jamaica*, (Comms.226/1987, 256/1987), para 13.6.

<sup>277</sup> *Little v. Jamaica*, (Comm. 283/1988), 1/11/ 1991, paras. 8.3 and 8.4.

<sup>278</sup> UN Doc. A/34/40, para.33.

<sup>279</sup> *M. Steadman v. Jamaica* (Comm. 528/1993), para. 10.2.

<sup>280</sup> *C. Wright v. Jamaica*, (Comm. 349/1989), para. 8.4; see also *Morais v. Angola*, (Comm. 1128/2002), para. 5.6.

<sup>281</sup> See also *Sawyers, McLean and McLean v. Jamaica*, (Comms. 226/1987 and 256/1987), paras. 13.6 and 13.7; *Semey v. Spain*, (Comm. 986/2001), at par. 8.8.

to the defendant but to his defence counsel as well and is to be observed in all stages of the proceedings.<sup>282</sup> In case *Phillip v Trinidad and Tobago*, the Committee recalls that while Article 14(3)(d), does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the trial by the lawyer is not incompatible with the interests of justice.<sup>283</sup> The Committee considers that in a capital case, when counsel for the accused who was not experienced in such cases requests an adjournment because he is unprepared to proceed the Court must ensure that the accused is given an opportunity to prepare his defence. The Committee found that the author was not effectively represented on trial because his counsel should have been granted an adjournment, in violation of Article 14(3)(b).<sup>284</sup> But the State party is not to be held responsible for the conduct of a defence lawyer.

### 6.3.2 The Right to Defend Oneself in Person or Through Legal Counsel

The right to counsel in the pre-trial stages of a criminal trial, as discussed earlier in this chapter, is clearly linked to the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing and to be informed of this right as set out in Article 14(3)(d) of the ICCPR in all stage of criminal proceedings, including the preliminary investigation and pre-trial detention.<sup>285</sup> “Legal assistance” includes counsel as well as representation in court. Article 14(3)(d) overlaps to a large extent with the Article 14(3)(b) guarantee, particularly regarding one’s right to legal representation. Hence, simultaneous breaches of the two sub-paragraphs are often found. Assignment of counsel by the court contravenes the principle of fair trial if a qualified lawyer of the accused’s own choice is available and willing to represent him. For example, in the case of *Estrella v Uruguay*, the HRC held that a military court had violated the defendant’s right to choose counsel by limiting him to a choice between two appointed attorneys.<sup>286</sup> In *Lopez Burgos v Uruguay* the Committee found a violation of Article 14(3)(d) when the author was forced to accept a certain person as his legal

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<sup>282</sup> Basic Principles on the Role of Lawyers, Principle 21.

<sup>283</sup> *Phillip v Trinidad and Tobago*, (Comm. 594/92); see also *Hussain v. Mauritius*, (Comm. 980/2001), para. 6.3.

<sup>284</sup> *Phillip v Trinidad and Tobago*, para 7.2; *Chan v. Guyana*, (Comm. 913/2000), para. 6.3; *L. Smith v. Jamaica*, (Comm. 282/1988), 31/03/93, para.10.4.

<sup>285</sup> See 5.7, p.67; See Manfred Nowak, *op.cit.*, fn 4, at 256 and Final Report 1994, para 71; See also *Henry and Douglas v Jamaica* (Comm. 571/1994), para 9.2.

<sup>286</sup> *Estrella v Uruguay* (Comm. 74/1980), p.9.5.

counsel even though this lawyer was connected with the government.<sup>287</sup> In *Pinto v Trinidad and Tobago*, the author should not have been forced to accept a court-appointed lawyer, who had performed poorly in the trial at first instance, when “he had made the necessary arrangements to have another lawyer represent him before the court of Appeal”.<sup>288</sup>

Article 14(3)(d) guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it. For instance, in *Aliboeva v. Tajikistan*, HRC has held it is axiomatic that the accused involving capital punishment must be effectively assisted by a lawyer at all stages of the proceedings.<sup>289</sup> The right to counsel may also imply the right to competent counsel, but this is not expressly stated in the international instruments as well. However, General Comment 32 clearly stated that all states must ensure that assigned counsel provide effective representation for suspects and accused.<sup>290</sup> However, in *OF v Norway* a person accused of speeding would not necessarily be entitled to have counsel appointed at the expense of the state.<sup>291</sup> Principle 6 of the Basic Principles on the Role of Lawyers established that any person arrested, detained or charged with a criminal offence is entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance.<sup>292</sup> Therefore the gravity of the offence is important in deciding whether counsel should be assigned “in the interest of justice” as is the existence of some objective chance of success at the appeals stage.<sup>293</sup> But Article 14(3)(d) does not entitle the accused to a choice of counsel if the author is being provided with a legal aid lawyer, and is otherwise unable to afford legal representation.<sup>294</sup>

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<sup>287</sup> *Lopez Burgos v Uruguay*, (Comm. 52/1979).

<sup>288</sup> *Pinto v Trinidad and Tobago*, (Comm. 232/1987), para 12.5;

<sup>289</sup> *Aliboeva v. Tajikistan*, (Comm. 985/2001), para. 6.4; *Saidova v. Tajikistan*, (Comm. 964/2001), para. 6.8; *Aliev v. Ukraine*, (Comm. 781/1997), para. 7.3; *LaVende v. Trinidad and Tobago*, (Comm. 554/1993), para. 58. *Henry and Douglas v Jamaica* (Comm. 571/1994), 26/07/96, para 9.2.

<sup>290</sup> See General Comment 32, para 38.

<sup>291</sup> See *OF v Norway* (Comm. 158/1983).

<sup>292</sup> Basic Principles on the Role of Lawyers, Principle 6.

<sup>293</sup> *Lindon v. Australia*, (Comm. 646/1995), para. 6.5.; *Z.P. v. Canada*, (Comm. 341/1988), para. 5.4.

<sup>294</sup> *Pratt and Morgan v Jamaica* (Comms. 210/1987, 225/1987), para 13.2; *Teesdale v Trinidad and Tobago* (Comm. 677/1996), para 9.6.

However, court appointed counsel must be able to fulfil their task effectively and actually advocate in favour of the accused.<sup>295</sup> For example, in case *Brown v. Jamaica*, the Committee is of the opinion that the magistrate, when aware of the absence of the author's defence counsel, should not have proceeded with the deposition of the witnesses without allowing the author an opportunity to ensure the presence of his counsel. The fact entails the responsibility of the State concerned for a violation of Article 14(3) (d).<sup>296</sup> Also in case *Chan v. Guyana*, the HRC noted that it should have been manifest to the judge in a capital case that counsel's request for an adjournment of the trial for only two week days, during which he was engaged in another case, was not compatible with the interests of justice, since it did not provide the author with adequate time and facilities to prepare his defence.<sup>297</sup> Therefore the Committee concludes that the author was not effectively represented at trial, in violation of article 14, paragraph 3 (b) and (d), of the Covenant.<sup>298</sup> On the other hand, the State must not impair the adequacy of the defence, the equality of arms, or other aspects of a fair trial.<sup>299</sup> For example, in case *Arutyunyan v. Uzbekistan* there is also a violation of this provision because once counsel was allowed to represent the author's brother, the counsel was prevented from seeing him confidentially; counsel was allowed to examine the court's records only shortly before the hearing in the Supreme Court.<sup>300</sup>

At the same time, the wording of the Covenant is clear in all official languages, providing the possibility for the accused to reject being assisted by any counsel. Presumably if he insists on defending himself the state cannot compel him to accept counsel. This right to defend oneself without a lawyer is not absolute, however.<sup>301</sup> In case *Correia de Matos v. Portugal*, the committee pointed out that notwithstanding the importance of the relationship of trust between accused and lawyer, the interests of justice may require the assignment of a lawyer against the wishes of the accused,

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<sup>295</sup> Basic Principles on the Role of Lawyers, Principle 6, which refers to the right to "effective legal assistance".

<sup>296</sup> *Brown v. Jamaica*, (Comm. 775/1997), para. 6.6.

<sup>297</sup> *Chan v. Guyana*, (Comm. 913/2000), para. 6.2; see also *Hussain v. Mauritius*, (Comm. 980/2001), para. 6.3.

<sup>298</sup> *Ibid.*;

<sup>299</sup> General Comment 32, para 38.

<sup>300</sup> *Arutyunyan v. Uzbekistan*, (Comm. 917/2000), para. 6.3.

<sup>301</sup> General Comment 32, para 37.

particularly in cases of a person substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in his own interests, or where it is necessary to protect vulnerable witnesses from further distress if the accused were to question them himself.<sup>302</sup> But the committee concludes that the right to defend oneself in person, guaranteed under article 14(3)(d) of the Covenant has not been respected. Because in the present case, the legislation of the State party and the case law of its Supreme Court provide that the accused can never be released from the requirement to be represented by counsel in criminal proceedings, even if he is a lawyer himself, and that the law takes no account of the seriousness of the charges or the behaviour of the accused. Any restriction of the wish of accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. But the state party has not provided any reasons. Therefore, domestic law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel.<sup>303</sup>

## **7. Conclusion**

From the previously given description and analyses, it can be noticed that developments in international rights protection for the suspects have proceeded at a rapid pace and will likely continue to do so whilst the international community is struggling with the increasing crime and terrorism. When dealing with universal treaties, there is greater danger that national legal systems and their practical application may be inconsistent with the international obligations of these states. By their very nature, procedural guarantees are not directed at requiring states parties to refrain from doing something but rather require them to undertake extensive positive measures to ensure these guarantees. Without being exhaustive, this chapter has first introduced some of the essential human rights that must be guaranteed during pre-trial investigation into criminal activities in ICCPR. It has extensively explained the interpretation of these principal rights by the HRC that must be effectively ensured to suspects in the determination of any criminal

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<sup>302</sup> *Correia de Matos v. Portugal*, (Comm. 1123/2002), para 7.4.

<sup>303</sup> *Ibid.*, para. 7.5.

charges against them, rights which must be protected from the beginning of the trial proceedings until conviction or acquittal.

The rights dealt with in this chapter are manifold and it is impossible to single out some as being more important than others. All these international standards of guaranteeing the rights of suspects in ICCPR, which China has signed already, are the minimum request and basic guideline wherein criminal justice to ensure basic human rights. Although some of these rights need to be shaped more clear and enforceable, they indeed form a whole and constitute the foundation on which a society respectful of human rights in general, including the rule of law, is built. Therefore with the continuing development of constructing the rule of law, China should carry out all these basic rules in criminal procedural activities. Those abovementioned international guidelines need to be transformed into domestic laws. China's legal system faces the challenge on how to obey these international rules of criminal justice under the present situation of China. The challenge resolves in the forthcoming modification of CCPL. The HRC has used various mechanisms and rules in interpreting the ICCPR to meet the specific object and purpose of the Covenant. The study on the rules and interpretation of the ICCPR which directly relevant to the field of human rights protection for the suspects in the pre-trial criminal proceedings in this chapter is crucial and necessary for the following research as a basic reference.

## Chapter Three

# An Analysis of Key Rights for Suspects in the Pre-trial Proceedings Recognized in the ECHR

### 1. Introduction

This section is going to review some advanced experiences under ECHR. The rights guaranteed by the ECHR are based on those outlined in the UDHR and was primarily intended to protect civil and political rights.<sup>1</sup> As with the UN instruments, most rights in ECHR guarantees are reserved for those accused with a criminal offence. While the previous chapter has established the benchmarks for this research, the issues discussing in this chapter are also important to Chinese law reforms. As the “most developed and effective international system for protecting human rights in the world”, the standards maintained under the ECHR are examined largely for comparative purposes to provide a broader perspective and deeper understanding of UN standards regarding to the human rights protection for suspects, though they are not on the basis that they are actually likely to be adopted in China.<sup>2</sup> This brief indication of some latest approach is intended to provide a valuable insight into the considerably more specific nature, purposes, contents and interpretations of the international standards on the human rights protection for the suspects in Europe countries. The purpose of this chapter is to further comprehend the importance to guarantee the rights of the suspects that should not be violated by the activities of national authorities in their efforts to strike at crime. How to establish and implement proper legislation in China in order to strengthen the control of the course of investigation and achieve the balance between criminal control and human rights protection in modern criminal proceedings can be reflected in the discussions of later chapters through the observation of this section.

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<sup>1</sup> The history of ECHR see, generally, J. G. Merrills & A.H. Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights*, 4<sup>th</sup> ed, (Manchester, New York: Manchester University Press: Juris Publishing, 2001), [hereafter Merrills *Human Rights in Europe*].

<sup>2</sup> See Robertson and Merrills, *Human Rights in the World*, p.155; also see Andrew Z. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study*, (New York, Oxford University Press, 1983), p.17.



But it would not be possible or desirable, within the scope of this research, to give a comprehensive account of all the case law of ECHR as to the right to a fair trial in criminal cases. Aiming at the discussion in Part Three, this chapter includes: Article 3 to prohibit torture, and “inhuman or degrading treatment or punishment”, Article 5 to provide the right to liberty, subject only to lawful arrest or detention under certain other circumstances, such as arrest on suspicion of a crime or imprisonment in fulfilment of a sentence, and Article 6 to provide a detailed right to a fair trial, including the presumption of innocence. These rights, which are highlighted for everyone at all times indeed and has been ratified by all the Member States of ECHR, are served as the starting point for defining a minimum common standard for procedural safeguards. The examples to be given in subsequent parts will show that the development of the ECHR human rights standards in step with the new human needs that continue to emerge in society.

As mentioned in introduction, in the following discussion it is especially useful to explore some UK case law in this field as well for the purpose of comparison more concretely. There is no doubt that incorporation of the ECHR in UK has opened the eyes of English lawyers and judges to the creative ways in which international legal obligations interact with domestic laws.<sup>3</sup> The approach of the UK domestic courts has been largely consistent with that of the European Court thus far, although in recent years laws have been passed to give the police more powers in situations involving terror suspects.<sup>4</sup> But the UK law covers the pre-trial rights for the suspects in many detailed aspects such as during police powers to stop and search, search premises, arrest, and detain suspects by a set of Codes of Practice under the Police and Criminal Evidence Act 1984 (PACE) and by the development of the case law. The UK’s new Human Rights Act with its duty to give domestic effect to the ECHR and the jurisprudence of the Strasbourg Court will have a significant effect on many aspects of the Article 3, 5 and 6 application in the criminal and regulatory process. The briefly case study of under the UK system of law can be a crucial reflection for China on understanding and observing how these universal human rights standards

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<sup>3</sup> See Lord Bingham of Cornhill “Incorporation Of The European Convention On Human Rights: The Opportunity And The Challenge”, address delivered to members of the Royal Court and of the States of Jersey on 10th July 1998, in the Royal Court House, (1998) 2 St Helier, Jersey and Guernsey Law Review, Issue.3.

<sup>4</sup> See David Pollard, Neil Parpworth, David Hughes, *Constitutional and Administrative law: Text with Materials*, (New York, Oxford University Press, 2007),p.803.

effectively influence the domestic law and provide a guidance to the domestic legal professions in their work to protect individuals according to different social situations, when the country commit itself to incorporating the international instrument.

## **2. Article 3: Prohibition of Torture and Inhuman or Degrading Treatment or Punishment**

### **2.1 Introduction**

Article 3 of ECHR provides that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”.<sup>5</sup> That is the extent of the Article. It is identical to Article 5 of the UDHR, except that the word “cruel” in the UN text has been omitted.<sup>6</sup> Merrills and Robertson regarded that “the omission has no importance”, since the sense of “cruel” is equally covered by “inhuman”.<sup>7</sup> In other words, this absolute right is imprecise in nature. The simple statement of the Article 3 that hides their complexity has been given a broad interpretation by the European Court. Such that the treatment of detainees and prisoners, its most obvious field of application, is now only one of the potential uses to which it may be put. Most cases under Article 3, as one would expect, involve physical maltreatment of some kind. In some cases, however, which it shall be examined separately, conduct may be alleged to infringe Article 3 even without any physical element. Article 3, like Article 2, is one of the most fundamental provisions of the Convention.<sup>8</sup> The notion of absolute right, what kind of prohibited acts and then the state obligation are going to discuss in this section on the Article 3 of ECHR under the topic of this thesis. The discussions try to deeper recognizing and reinforcing of the prohibition of torture and ill-treatment, and also helping to look for the obvious step for combating and preventing torture under national legal reform in China which will be discussed in Chapter Six.

### **2.2 Does Article 3 Provide an Absolute Right?**

The idea that Article 3 contains absolute rights is generally accepted. Nevertheless, not surprisingly, a significant number of complaints involving Article 3 are still made

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<sup>5</sup> See ECHR, Article 3; also see discussion about Article 7, Chap2, 4, pp.34-45.

<sup>6</sup> See UDHR, Article 5.

<sup>7</sup> See J. G. Merrills & A.H. Robertson, *op.cit.*, fn 1, p.35.

<sup>8</sup> See *Soering v UK* (1989) 11 EHRR 439 para 88; *McCann and Others v UK*, (1995) 21 EHRR 97, para.147.

against the police and concern the alleged ill-treatments of individuals who are in custodies. In the circumstance in this kind of case, such as *Tomasi v France* concerning mistreatment during police interrogation, the Court normally has to consider two issues, which are whether the alleged ill-treatment can be proved and, if it can, whether it is sufficiently serious to transgress the Convention.<sup>9</sup> However, before discuss these issues it is necessary to explore the ambit of absolute rights in Article 3 which could basically affect the application of the Article. In the light of Strasbourg case law the notion of absolute rights looks indistinct because it involves an assessment of subjective factors.<sup>10</sup> But as mentioned above, “fundamental”, that is how the European Court regarded the right under Article 3. The importance of the Article 3 is reflected in its absolute and non-derogable status. In common with Article 2, 4(1), and 7, Article 3 cannot be the subject of a public emergency derogation under Article 15 even in time of war or public emergency.<sup>11</sup> That is why the rights embodied by this article may not be infringed by a state, no matter what the justification, and no matter what threat the state may be acting against. Unlike the other substantive rights laid down by the Convention, Article 3 appears without express exception or qualification, and the European Court has refused to find any implied exceptions.<sup>12</sup> Thus, on the fact of it, once a State has been found to fall within its terms, no justification is possible.<sup>13</sup> This principle has been reiterated time and time again by the European Court, for example, recently in *Ramirez Sanchez v France*, and *Labita v Italy* and many others.<sup>14</sup>

Article 3 does not expressly provide that its terms are absolute. Nor does the Convention employ terms such as “absolute right”. The characterisation of the prohibitions in Article 3 as absolute has emerged from general human rights discourse and litigations before the Strasbourg supervisory organs. In the interstate case *Denmark, France, Norway, Sweden and the Netherlands v. Greece* (the *Greek case* (1969), by using the phrase “in the particular situation is unjustifiable” the Commission appeared to leave the door for it to be argued that there are

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<sup>9</sup> (1992) 15 EHRR 1 para.107.

<sup>10</sup> Detail discussion see, Michael K. Addo and Nicholas Grief, “Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?”, EJIL 1998 9(3), pp.510-524.

<sup>11</sup> ECHR, Article 15(2); also see e.g. *Aksoy v Turkey* (1996) 23 EHRR 533, para.62.

<sup>12</sup> See Chap2, 4.1, p.35.

<sup>13</sup> *Ireland v UK* (1978) 2 EHRR 25.

<sup>14</sup> See *Ramirez Sanchez v France* (2007) 45 EHRR 49, para 96, and *Labita v Italy* (2008) 46 EHRR 50, para.119.

circumstances within which ill-treatment could be justified.<sup>15</sup> However, in *Ireland v UK*, the European Court closed the loophole left open by the earlier decision.<sup>16</sup> Furthermore, in case *Tomasi v France*, the French Government argued that the behavior of the police could be excused in the light of the circumstances of the fight against terrorism in Corsica.<sup>17</sup> The European Court, however, refused to accept any limitations on the protection to be afforded to the physical integrity of individuals. The decision has made it clear that the use of forms of Article 3 treatment in order to extract information, even in order to combat terrorism, is unjustifiable.<sup>18</sup> This absolute nature of the prohibition is well illustrated by the case *Chahal v UK* and some recent cases again.<sup>19</sup> The European Court emphasised that “Article 3 enshrines one of the most fundamental values of democratic society”. The European Court is “well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence”. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. However, even in these circumstances, the Convention “prohibits in absolute terms torture or inhuman or degrading treatment or punishment, the activities of the individual in question in the past or possibly in the future, however undesirable or dangerous, cannot be a material consideration”.<sup>20</sup>

It should be noticed that the European Court is guided in its decision-making by such principles as “effective protection” and “margin of appreciation” through which relativity is injected into its thinking.<sup>21</sup> The Commission and the European Court have always operated on the basis that assessment of the specific conduct under consideration can only be subjective, whilst the prohibitions in Article 3 are absolute and in principle not negotiable. A good indication of the flexible nature of the processes for assessing compliance with Article 3 can be found in the Commission’s opinion in the *Greek Case*.<sup>22</sup> The European Court has found that such factors include the nature and context of the treatment, its duration, its mental and physical effects

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<sup>15</sup> (1969), Yearbook XII 186-510.

<sup>16</sup> (1978) 2 EHRR 25, para.163.

<sup>17</sup> (1993) 15 EHRR 1.

<sup>18</sup> *Ibid.*, para.56; *Assenov and others v Bulgaria* (1999) 28 EHRR 652, para.93.

<sup>19</sup> (1997) 23 EHRR 413; *Saadi v Italy*, (2009) 49 EHRR 30, para.141; *N. v Finland*, (2005) 43 EHRR 12 para.159

<sup>20</sup> *Chahal v UK*, para 80; also see, e.g. *Egmez v Cyprus* (2002) 34 EHRR 753, para.77.

<sup>21</sup> See Oren Gross & Fionnuala Ni Aolain, “From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights”, (2001) 23 Human Rights Quarterly, No.3, pp.625.

<sup>22</sup> Yearbook XII 186 -510.

and, in some instances, the sex, age and state of health of the victim.<sup>23</sup> Inevitably, it is a process which does not lend itself to objective analysis. The subjective nature of the determining factors to be assessed in Article 3 cases, for instance, severity, has already been mentioned in the context of the case *Ireland v UK*.<sup>24</sup> The case is especially important for its contribution to the case law on the definition of the terms used in Article 3 as shown below, but it contains many mixed signals.<sup>25</sup> While the majority limited the finding to inhuman and degrading treatment, several judges in the minority concluded that the five techniques amounted to torture. In particular, the British judge, Sir Gerald Fitzmaurice, in his noticeable dissenting opinion concluded that they did not amount even to inhuman and degrading treatment. His opinion provides a good illustration of the subjectivity of the process involved in determining whether a particular act or series of acts is in breach of the guarantees enshrined in Article 3.

In Addo and Grief's analysis, there is a serious risk of inconsistency in Article 3 decisions, at least at first sight, since the practice under Article 3 based on the effects of various subjective factors on the particular facts of each case.<sup>26</sup> Noticeably, in the case *Soering v UK*, the European Court endorsed the absolute nature of Article 3.<sup>27</sup> However, under the consideration on searching "a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights", the European Court also indicated that it might be necessary to take account of factors such as "the manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution".<sup>28</sup> The European Court concluded that the circumstances to which the applicant would be exposed to the "death row phenomenon" constituted a real risk of treatment that his extradition would be contrary to Article 3.<sup>29</sup> In European Court's view, Article 3 should therefore be construed in harmony with the provisions of Article 2 and Article 3 is no exceptions

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<sup>23</sup> Ibid., p.186.

<sup>24</sup> (1978) 2 EHRR 25.

<sup>25</sup> See M. O'Boyle, "Torture and Emergency Powers under the European Convention on Human Rights" (1977) 71 AJIL, pp 674-706.

<sup>26</sup> See Michael K. Addo and Nicholas Grief, *op.cit.*, fn 10.

<sup>27</sup> (1989) 11 EHRR 439 para.83.

<sup>28</sup> Ibid., paras.89 and 104.

<sup>29</sup> *Soering v UK* (1989) 11 EHRR 439, para.111.

or derogations.<sup>30</sup>

Accordingly national interests could not override the interests of the individual, even if they are a notorious terrorist, drug trafficker or mafioso, by virtue of Article 3 the State is prohibited from ill-treating them or from expelling them to another country where they are likely to be ill-treated. The decision of the European Court in *Soering v UK* raised an important point concerning a government may be confronted by a dilemma in respect of persons who are suspected of being international terrorists but who cannot be placed on trial due to the sensitivity of the evidence and the high standard of proof and cannot be extradited, or deported to their country of origin. This is because there are grounds to think that these terrorists would there be subject to a substantial risk of torture or inhuman and degrading treatment, and to do so would violate Article 3 of the Convention.<sup>31</sup> In UK, the Joint Committee on Human Rights appeared to take the view that the government could have escaped from the demands of Article 3 by denouncing the whole Convention and then re-entering it, at the same time entering a reservation to Article 3. However, Fenwick argued that it is probable that such a reservation would have been viewed as invalid since as a matter of general international law it is accepted that reservations are not permitted to non-derogable Articles.<sup>32</sup> Had the UK sought to take this immensely controversial course, it would almost certainly have been found to be in breach of Article 3 and would also have breached the ICCPR which does not allow for derogation from Article 7, which covers Article 3 treatment.<sup>33</sup> Thus, on one view, the government was caught between the provisions of Articles 3 and 5, in relation to a number of suspected international terrorists, and therefore had to find a compromise which would allow for their detention.<sup>34</sup>

In view of the object and purpose of the ICCPR and the ECHR, as an instrument for the protection of individual human beings, provision about preventing torture must, “like any other provision thereof, be interpreted and applied so as to make its

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<sup>30</sup> *Ibid.*, para 103.

<sup>31</sup> See Helen Fenwick, “The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?”, 65 [2002] MLR 724, pp.731 and 755.

<sup>32</sup> *Ibid.*, p731.

<sup>33</sup> See Chap2, 4.1, p.34.

<sup>34</sup> This issue related to Article 5 will be discussed again in 3.5.5.2, pp.140-145.

safeguards practical and effective”.<sup>35</sup> Therefore, in a dynamic human rights regime, the ambit of the “absolute right” and the various issues which can arise under Article 3 should be continually considered and evaluated with reference to the facts of each case. However, being guided by the practical circumstances of each case coupled with the principle of effectiveness and the aim of upholding European public order, Merrills regarded that it would be unfair to conclude that Strasbourg’s supervisory organs do not respect the absolute character of the guarantees in Article 3.<sup>36</sup> Freedom from torture is not only valuable in itself but also is instrumental in making possible the enjoyment of all other rights such as rights to liberties and securities, rights to a fair trial. From this angle, the supervisory organs of the Convention happen to have the same view as HRC.

### **2.3 The State’s Obligation**

As recent developments in the jurisprudence relating to violations of Article 3 have focused upon the ambit of the application of Article 3, consequentially the extent of States’ obligations has also been a central issue in many cases.<sup>37</sup> Strasbourg bodies have ruled that the responsibility of the State extends beyond prohibiting the use of Article 3 treatments by its agents. It includes a duty to ensure that individuals within their jurisdiction are not subjected to ill-treatments by other individuals. The State also has a positive obligation to carry out an effective investigation into allegations of breaches of Article 3 while the provisions are in the form of prohibitions.

#### **2.3.1 The Negative Obligation**

States have an obligation to refrain from acts of torture and other forms of ill-treatment foreseen in Article 3. They are responsible for the acts of all public officials such as police and security forces. States cannot escape responsibility for acts contrary to Article 3 by claiming that they were unaware of such acts. For example, in *Ireland v UK*, the European Court held that “it is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to

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<sup>35</sup> *Soering v UK*, (1989) 11 EHRR 439, para.87.

<sup>36</sup> J. G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester University Press, 1995), at Chapter 5.; *Soering v. the UK*, para.88.

<sup>37</sup> The same requirement as that in Article 7 of ICCPR, see Chap2, 4.4, pp.40-43.

impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected”.<sup>38</sup> In *Hurtado v Switzerland*, the Commission confirmed that the State has a specific positive obligation to protect the physical well-being of persons deprived of their liberty.<sup>39</sup>

A State may avoid liabilities for Article 3 treatments where there appears to be individual acts of ill discipline in respect of which the State takes appropriate actions. But the State must take rigorous steps to discipline those responsible and adopt measures to ensure there is no repetition of such actions. For example, in *Cyprus v Turkey (No.2)*, the Commission found there was evidence that soldiers had engaged in “wholesale and repeated acts of rape” against women and children in their custody.<sup>40</sup> The Commission stated that “the evidence shows that rapes were committed by Turkish soldiers and at least in two cases even by Turkish officers, and this not only in some isolated cases of indiscipline. It has not been shown that the Turkish authorities took adequate measures to prevent this happening or that they generally took any disciplinary measures following such incidents. The Commission therefore considers that the non-prevention of the said acts is imputable to Turkey under the Convention.”<sup>41</sup> The European Court has clearly stated that States are under an obligation to set up a framework that enables both public officials and private parties to be punished for, or discouraged from, treatment in violation of Article 3.<sup>42</sup>

The exact nature of a State’s obligation to protect individuals from violations has been examined extensively in respect of expulsion and extradition cases particularly. The leading case on this issue is *Soering v UK* as well.<sup>43</sup> As regards the duty to protect individuals, the finding of a violation attaches not to the receiving State because of what it might do, but to the returning State for exposing the individual to ill-treatment.<sup>44</sup> For the purposes of the present discussion, this approach emphasizes that, where there is a threat of serious physical harm risked a violation of Article 3, a state owes individuals a duty to provide effective protections for the potential victims

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<sup>38</sup> *Ireland v UK*, (1978) 2 EHRR 25, para.159.

<sup>39</sup> (1994) ECHR 1 paras.68, 79-80.

<sup>40</sup> (1982) 4 EHRR 482, paras.371 – 372.

<sup>41</sup> *Ibid.*, paras.373 – 374.

<sup>42</sup> *A v UK* (1999) 27 EHRR 611, and *Z v UK* (2002) 34 EHRR 3.

<sup>43</sup> (1989) 11 EHRR 439; also see *Cruz Varas v Sweden* (1991) 14 EHRR 1, *Vilvarajah v UK* (1991) 14 EHRR 248.

<sup>44</sup> See *Soering v UK*, 2.2, pp.87-88.



to prevent the harm according to the Convention. One particular UK case provides a good example of this situation. The case is *Thompson and Venables v News Group Newspapers*.<sup>45</sup> The two applicants, both young men aged 18, claimed that they could suffer death or serious injury if they were identified. They had been convicted of a particularly shocking murder, that of the 2-year-old James Bulger. The judge made an order forbidding publication of material which might identify them, and the newspapers sought to have this removed; Thompson and Venables claimed that the order was necessary for their protection. The European Court heard evidence of serious threats made against them and found that there was a real and serious risk of death or serious injury to the two young men, and therefore was a risk of violations of Article 3, as well as Article 2. The judgment does not distinguish between the threats under each Article, but it is clear that, if the threats were carried out, if death did not result, very serious harm qualifying as torture, or inhuman or degrading treatment might well do. Thus, the order restraining publication was continued, even though that would interfere with the rights of expression of the newspapers under Article 10. The risk must be a real one and not a mere possibility.<sup>46</sup>

### 2.3.2 Violation due to a Lack of Investigation

Following the decision in *Ribitsch v Austria*, there are a number of cases which hold that a State's responsibility under Article 3 can be engaged by its failure to provide methods by which protection against torture, and inhuman and degrading treatment or punishment can be ensured, and under which incidents of those ill treatment can be verified.<sup>47</sup> The failure to conduct a thorough and effective official investigation may constitute a violation of Article 13.<sup>48</sup> Whereas the term "thorough" generally relates to the scope and nature of the steps taken in carrying out an investigation, "effective" relates to the quality of the investigation.<sup>49</sup> In more detail, as REDRESS observed, "the European Court has analysed what steps authorities must take when gathering evidence, and has made reference in its jurisprudence to offers of assistance; objectivity; attitude of the authorities towards victims and alleged perpetrators; timely questioning of witnesses; seeking evidence at the scene, e.g. by

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<sup>45</sup> [2001] 2 WLR 1038, p.100.

<sup>46</sup> See also *Bader and Others v Sweden*, (2008) 46 EHRR 13, paras.43-47.

<sup>47</sup> (1996) 21 EHRR 573.

<sup>48</sup> See, e.g. *Aydin v. Turkey*, (1998) 25 EHRR 251, para.103; *Ilhan v Turkey* (2002) 34 EHRR 36.

<sup>49</sup> See Chap2, 4.4, p.41.

searching detention areas, checking custody records, carrying out objective medical examinations by qualified doctors; use of medical reports, and, in death in custody cases, obtaining forensic evidence and carrying out an autopsy.”<sup>50</sup>

For example, the authorities failed, without good explanation, to interview key witnesses, in particular the doctor who examined the applicant after his arrest.<sup>51</sup> In *Kmetty v Hungary*, the applicant complained that he was ill-treated by the police, and that the investigations into his related complaints had been inadequate, in breach of Article 3 of the Convention.<sup>52</sup> He claimed that he had been assaulted by police officers while being arrested and again subsequently in police custody. The European Court found that the injuries the applicant was proven to have suffered fell within the scope of Article 3. However, the European Court also found “it impossible to establish on the basis of the evidence presented whether or not the applicant’s injuries were caused by the police exceeding the force necessary to overcome his resistance to a lawful police measure, either while immobilising and taking him to the police station or during his custody”.<sup>53</sup> The European Court did, however, consider that, taken together, the medical evidence, the applicant’s testimony and the fact that “he was detained for more than three hours at the Police Department give rise to a reasonable suspicion that he may have been subjected to ill-treatment by the police”.<sup>54</sup> This “arguable claim” of ill-treatment ought to have been investigated properly by the authorities.<sup>55</sup> In this case, the European Court was not persuaded that this investigation was sufficiently thorough and effective to meet the requirements of Article 3.<sup>56</sup> Those shortcomings in the proceedings deprived the applicant of any opportunity to challenge the alleged perpetrators’ version of the events.

If the injuries occurred after arrest, the burden would have fallen on the State to explain how the applicant sustained his injuries. For example, in *Assenov v Bulgaria*, the European Court notes that the authorities was prepared to conclude that Mr

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<sup>50</sup> See Report by REDRESS, “Taking Complaints of Torture Seriously: *Rights of Victims and Responsibilities of Authorities*”, 09/04, <http://www.redress.org/publications/PoliceComplaints.pdf>; e.g. *Salman v. Turkey* (2002) 34 EHRR 17 para.106; *Tanrikulu v Turkey*, (2000) 30 EHRR 950 para.109; *Gül v Turkey* (2002) 34 EHRR 28, para.89.

<sup>51</sup> *Kmetty v Hungary*, (2005) 40 EHRR 6, para.40;

<sup>52</sup> *Ibid.*; see also *Vezenadaroglu v Turkey* (2001) 33 EHRR 59.

<sup>53</sup> *Kmetty v Hungary*, para.36.

<sup>54</sup> *Ibid.*, para.37.

<sup>55</sup> *Ibid.*, para.38.

<sup>56</sup> *Ibid.*, para.43;

Assenov's injuries had been caused by his father, despite the lack of any evidence that the latter had beaten his son with the force which would have been required to cause the bruising described in the medical certificate.<sup>57</sup> Also there is no attempt by the authorities have been made to ascertain the truth through contacting and questioning these witnesses in the immediate aftermath of the incident. Assumption without any explanation was made to conclude that the reason of the blow on the body is because Mr Assenov had not been compliant.<sup>58</sup> In view of the lack of a thorough and effective investigation into the applicant's arguable claim that he had been beaten by police officers, the European Court finds that there has been a violation of Article 3 of the Convention. Therefore authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions.<sup>59</sup>

The European Court has also established that any investigation, as with that under Article 2, should be thorough and capable of leading to the identification and punishment of those responsible, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.<sup>60</sup> This principle has also been applied in a number of other cases. The application of this approach can be seen in the case *Martinez Sala and Others v Spain* as well.<sup>61</sup> The European Court could but note that the domestic judicial authorities had dismissed all the applicants' requests for evidence to be obtained, thereby denying them a reasonable opportunity to establish the matters of which they complained. Consequently, the European Court found that there had been a violation of Article 3 on account of the absence of a thorough and effective investigation into the applicants' allegations.

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<sup>57</sup> (1999) 28 EHRR 651.

<sup>58</sup> *Ibid.*, para.104;

<sup>59</sup> *Ibid.*, paras.103-105; also see *Timurtas v. Turkey* (2001) 33 E.H.R.R. 6 ECHR, para.88.

<sup>60</sup> See e.g. *Assenov and Others v. Bulgaria*, para.102; *Askoy v. Turkey*, (1997) 23 EHRR 553,para.95; *Aydin v. Turkey*, (1998) 25 EHRR 251,para. 103; also see a recent case *Sunal v. Turkey* (App. 43918/98), 25/01/05.

<sup>61</sup> (App. 58438/00), 2/11/04.

For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.<sup>62</sup> For example, in *Ognyanova and Choban v Bulgaria*, the applicants alleged that Mr Stefanov had died as a result of his ill-treatment by the police while in custody and that the authorities had failed to conduct an effective investigation into the circumstances surrounding his death.<sup>63</sup> The European Court observed that the authorities have never asked lieutenant I.C.'s to clarify the inconsistencies in his accounts of the version of events. The credibility of the witness statements had been reserved, because some of whom might have been under pressure to corroborate the police's version of events.<sup>64</sup>

Moreover, similar as the ruling established by the HRC, in *Aksoy v Turkey*, the European Court believed that a prompt and impartial investigation is implicit in the notion of an effective remedy, although there is no express provision existing in the ECHR to impose such a duty as that in CAT.<sup>65</sup> When examining whether an investigation is effective, the European Court has applied the test of whether the authorities reacted effectively to the complaints at the relevant time.<sup>66</sup> The European Court regarded that investigation should be of reasonable scope and duration in relation to the allegations.<sup>67</sup> Therefore the obligation to conduct a timely, thorough and impartial investigation in EHCR is well established. This obligation is later described as a "procedural obligation" which devolves on the State under Article 3.<sup>68</sup> Therefore, although the absence of a proper and timely investigation is likely to make it difficult to support the applicants' evidence, a failure to conduct such an investigation may itself constitute a violation of the Convention.<sup>69</sup>

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<sup>62</sup> *Ognyanova and Choban v Bulgaria*, (App. 46317/99), 23/02/06, para.104.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, paras.108-110.

<sup>65</sup> (1997) 23 EHRR 553, para 98; also see Chap2, 4.4, pp.41-42.

<sup>66</sup> *Labita v Italy*, (2008) 46 EHRR 50, para.131.

<sup>67</sup> *Akkoç v. Turkey*, (2002) 34 EHRR 51 para.99.

<sup>68</sup> see Clare Ovey & Robin C.A.White, Jacobs and White, *The European Convention on Human Rights*, 4<sup>th</sup> ed., (Oxford: Oxford University Press, 2006), p.67; *Sevtap Veznedarodlu v Turkey*, (2001) 33 EHRR 1412 para.35.

<sup>69</sup> see *Al-Adsani v UK* (2002) 34 EHRR 11; Recalling the decisions in *A v UK*, *Assenov and others v Bulgaria* and *Aksoy v Turkey*, the Court in case *Al-Adsani v UK* held that the positive obligation only applies in relation to ill-treatment allegedly committed within the jurisdiction of the violator State.

### 2.3.3 Evidential Issue

The starting point is that any allegations of ill-treatment must be supported by appropriate and sufficient evidence. In other words, the applicant bears the responsibility of providing evidence of treatment or punishment contrary to Article 3. As mentioned above, in respect of the impact of the failure to investigate upon victims's access to a remedy and reparations, European jurisprudence suggests that States will have violated victims' rights when they have failed to investigate despite the existence of an "arguable claim".<sup>70</sup> In *Veznedaroglu v. Turkey*, the European Court implied that a complaint needs to be "arguable" in order to trigger the State's obligation to carry out an effective investigation.<sup>71</sup> In the *Boyle and Rice v UK*, the European Court did not think that "it should give an abstract definition of the notion of arguability. Rather it must be determined, in the light of the particular facts and the nature of the legal issue or issues raised".<sup>72</sup> However, a rather high standard of proof required by the European Court in assessing allegations of ill-treatment is "beyond reasonable doubt", although this has rightly been the subject of criticism in cases of ill-treatment of detainees where the only available evidence may be in the hands of the authorities.<sup>73</sup> The European Court made similar statements in later cases, such as the recent decisions in *Farbtuhs v Latvia* and in *Nachova and Others v Bulgaria* in regard to Article 14.<sup>74</sup> But the European Court is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention.<sup>75</sup>

Evidence may take the form of medical reports of injuries, but also witness statements, photographs etc. Such evidence must be able to provide concrete strongholds in order to allow the European Court to assess whether the injuries indeed existed and whether they were sufficiently serious to reach the threshold of severity under Article 3. For instance, there was found to be insufficient evidence in *Martinez Sala and Others v Spain* to confirm that the applicant had been ill-treated

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<sup>70</sup> *Kmetty v Hungary*, (2005) 40 EHRR 6.

<sup>71</sup> (2001) 33 EHRR 59, para.32.

<sup>72</sup> (1988) 10 EHRR 425, para 55. See also Françoise J. Hampson, "The Concept of an "Arguable Claim" Under Article 13 of the European Convention on Human Rights", ICLQ (1990) 39, pp.891-899.

<sup>73</sup> See *Ireland v UK*, (1979-80) 2 EHRR 25 para.161.

<sup>74</sup> See *Farbtuhs v Latvia*, (App.4672/02), 2/12/04, para.54; *Nachova and Others v Bulgaria* (2006) 42 EHRR 43, para.166.

<sup>75</sup> *Mathew v the Netherlands*, (App. 24919/03), 29/09/05.

in police custody.<sup>76</sup> Apart from marks made by the handcuffs and a few minor bruises and haematoma, the reports drawn up by the forensic doctors did not mention any significant signs or traces of ill-treatment. As to the allegations of some of the applicants that they had been subjected to serious ill-treatment, the European Court was unable to make any finding in the absence of medical or other evidence. Nor did the results of the medical examinations carried out by private practitioners offer any assistance on that point either.<sup>77</sup> In addition, the investigation by the domestic authorities had not been sufficiently complete to establish which version of events was the more credible. Therefore the European Court found that the applicants' allegations were not sufficiently supported by the evidence they had adduced and held that there had been no violation of Article 3.

As regards the issue of proof, it obviously presents that the victim could well not be in as strong a position as the State in relation to the collection and presentation of evidence.<sup>78</sup> The result induced by this risk was unfortunate, to say the least, not only because of its impact on the burden of proof but also because it undermined the spirit of "absolute guarantee" in Article 3. In *Aksoy v Turkey*, while in detention the applicant allegedly was subjected by the police to torture. No sufficient explanation is offered by the authorities as to how these injuries might have occurred other than through ill-treatment by state agents.<sup>79</sup> The European Court therefore considers that "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury".<sup>80</sup> Consequently, although there is no general principle that the burden of proof should fall upon the authorities to establish that the applicant's suffering was not caused by their actions, however, the European Court has shown itself very willing to draw inferences from the State's failure to provide evidence in cases where the applicant has suffered ill-treatment while in police custody and the onus is on the authorities to produce evidence to show that the State was not responsible.<sup>81</sup> In *Rehbock, v Slovenia*, the European Court held that the

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<sup>76</sup> (App. 58438/00), 2/11/04; also see *Assenov and others v Bulgaria* (1999) 28 EHRR 652.

<sup>77</sup> *Martinez Sala and Others v Spain*, (App. 58438/00), 2/11/04, para 121; Also see *Indelicato v Italy* (2002) 35 EHRR 40 para.37.

<sup>78</sup> *Klaas v Germany*, (1994) 18 EHRR 305.

<sup>79</sup> (1997) 23 EHRR 553, para.23; see also *Tomasi v France*, (1993) 15 EHRR 1, para.27; *Sunal v. Turkey* (App. 43918/98), 25/01/05.

<sup>80</sup> *Aksoy v Turkey*, para.61.

<sup>81</sup> See *Tomasi v France* paras.108-111; *Ribitsch v Austria* (1995) 21 EHRR 573, para.34.

burden of proof also shifts to the State in respect of persons who are injured during an arrest.<sup>82</sup> Where a person is injured in such circumstances, the burden rests with the State to show that the use of force applied during the arrest was not excessive.<sup>83</sup>

The European Court is increasingly mindful of this problem. For instance, in case *Khudoyorov v Russia*, the European Court has recognised that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation) because in certain instances the respondent Government alone have access to information capable of corroborating or refuting these allegations.<sup>84</sup> On the other hand, the European Court also recognising that there must be compelling proof of a State's failure before condemning the State under the Article.<sup>85</sup> Indeed, the European Court has emphasised on many occasions that proof sufficient to reach the standard of proof of "beyond all reasonable doubt may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact." For example, in *Salman v Turkey*, the European Court stated that where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention.<sup>86</sup> Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.<sup>87</sup> Moreover, the actions of the victim may also be taken into account in assessing the degree of burden on the State to prove that the use of force was not excessive.<sup>88</sup>

### 2.3.4 Finding a Violation in Respect of Property Damage

Also, though the ill-treatments of detainees is the commonest way in which the forces of law and order are likely to violate Article 3, it is not the only way. In the *Selcuk and Asker* case, for example, the security forces in Turkey deliberately destroyed the applicants' homes and most of their property, depriving them of their

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<sup>82</sup> (App. 29462/95), 28/11/00.

<sup>83</sup> *Ibid.*, paras.68-78.

<sup>84</sup> (2007) 45 EHRR 5, paras.112-113.

<sup>85</sup> See general, Ugur. Erdal, "Burden and standard of proof in proceedings under the European Convention" (2001) 26 E. L. Rev. HR 68, pp.72-78.

<sup>86</sup> (2002) 34 EHRR 17.

<sup>87</sup> *Ibid.*, para.100; Also see *Mathew v the Netherlands*, (2006) 43 EHRR 23 para.154.

<sup>88</sup> See *Berlinski v Poland*, (Apps. 27715/95 and 30209/96), 20/06/02, para.62.

livelihoods and forcing them to leave their village.<sup>89</sup> In particular, the European Court considered that the reason that the acts in question were carried out without any intention of punishing the applicants but instead to prevent their homes being used by terrorists or as a discouragement to others would not provide a justification for the ill-treatment.<sup>90</sup> The European Court had no hesitation in concluding that the suffering caused by these callous and premeditated actions qualified as inhuman treatment for the purposes of Article 3.<sup>91</sup> Again in its consideration of the case of *Bilgin v Turkey*, the European Court took note of the fact that the destruction of the applicant's home and possessions deprived him of his livelihood and shelter.<sup>92</sup> Even assuming that the acts in question were carried out without any intention of punishing the applicant, the European Court considered that the material losses had deeply affected the applicant and had caused suffering sufficiently severe so as to amount to ill-treatment. This decision was recently upheld in several cases such as *Dulas v Turkey*, where the European Court also found that there had been violation of Article 3 in respect of property damage.<sup>93</sup>

## 2.4 Distinguishing the Prohibited Acts

The issue as to what acts or omissions can be defined as such abuses should be considered for the suspects' rights protection under Article 3, as mentioned above, after the issue as to what is the extent of States' obligations to prohibit and prevent such violation being specified. It is clear that, in order to determine this issue, present views must be considered rather than the views at the time when the Convention was drawn up. The infringement of Article 3 can involve a wide range of acts, from those which humiliate the victim to acts of extreme brutality. As to the notions of torture and cruel, inhuman or degrading treatment or punishment which affect the scope and the practice of the provision, the ICCPR and the ECHR choose two attitudes. As mentioned in above chapter, Article 7 of the ICCPR contains no definition of the notions covered thereby, nor did the HRC "consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment", since "the distinctions depend on the nature, purpose and

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<sup>89</sup> (1998) 26 EHRR 477, para.77.

<sup>90</sup> *Ibid.*, para.79.

<sup>91</sup> *Ibid.*, paras.78 and 80.

<sup>92</sup> (2003) 36 EHRR 879.

<sup>93</sup> (App: 25801/94), 30/01/01; also see e.g. *Matyar v Turkey* (App. 23423/94). 21/02/02; *Menteşe and others v. Turkey* (2007) 44 EHRR 6; *Hasan Ilhan v Turkey* (App. 22494/93), 9/11/04.



severity of the treatment applied”.<sup>94</sup> However, the European Court has developed a standard approach, whereby the three prohibited acts are distinguished from each other. The distinction between the three categories of infringement identified in Article 3 is useful for the purpose of applying the appropriate label to a particular form of abuse. It may also affect the amount of compensation awarded under Article 50 and to a state’s reputation. Nevertheless, all forms of ill-treatments which fall within the scope of Article 3 are prohibited with equal force no matter at which end of the spectrum they fall, and there is a close inter-relationship between inhuman and degrading treatment and punishment. It covers physical as well as mental ill-treatment in both official and private contexts.<sup>95</sup>

#### **2.4.1 Entry Threshold Requirements for Article 3**

As Addo and Grief regarded, in the exercise of their supervisory jurisdictions involving Article 3, the European Court and the Commission of Human Rights have dealt with a variety of matters which could not have been predicted by the architects of the Convention.<sup>96</sup> Definitional characteristics of torture, inhuman or degrading treatment or punishment have emerged from the jurisprudence of the European judicial bodies.<sup>97</sup> The first case which defined these concepts was the Greek case.<sup>98</sup> In this case Commission defined torture as inhuman treatment which has a purpose, such as the obtaining of information or concessions, or the infliction of punishment.<sup>99</sup> Nearly 10 years after the Greek case, in order to determine under what category classify the five techniques that the UK authority interrogated people accused of being the activists of IRA, the European Court regards that ill-treatment must, primarily, attain a minimum level of severity in order to trigger the provision’s application in case *Ireland v. UK*.<sup>100</sup> According to the *Ireland v. UK* judgment, the torture is a deliberate inhuman treatment causing very serious and cruel suffering.

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<sup>94</sup> See Chap2, 4.2 and 4.3, pp.36-40.

<sup>95</sup> D. J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), p.61.

<sup>96</sup> See further Addo and Grief, ‘Is There a Policy behind the Decisions and Judgments Relating to Article 3 of the European Convention on Human Rights?’, (1995) 20 ELRev. pp.178-193.

<sup>97</sup> More detail see, e.g. Clare Ovey & Robin White, *op.cit.*, fn 68, pp.75-84; Malcolm D. Evans, “Getting to grips with torture”, I&CLQ (2002), 51, pp.369-375.

<sup>98</sup> The Greek Case Yearbook, 12, (1969).

<sup>99</sup> Ibid.

<sup>100</sup> (1979-80) 2 EHRR 25 para.161.

Those three forms of treatments mentioned basically represent three different levels of seriousness rather than purpose.<sup>101</sup>

This sliding scale places torture at the apex of the severity scale, followed by inhuman and then degrading treatment or punishment.<sup>102</sup> In the case of *Aydin v Turkey* the European Court restated the defining characteristics of torture established in the ruling of *Ireland v UK*, and held that in certain circumstances rape causes physical and mental suffering sufficiently severe so as to amount to torture.<sup>103</sup> Recently the European Court has further broadened the scope situations which amount to torture. In *Nevmerzhitsky v Ukraine* it considered that whilst the authorities had complied with the manner of force-feeding prescribed by the relevant decree, the restraints applied – handcuffs, mouth-widener, a special tube inserted into the food channel – with the use of force, and despite the applicants resistance, had constituted treatment of such a severe character warranting its characterisation as torture.<sup>104</sup> *Selmouni v France* is also a significant case concerning the issue of scope of Article 3, as it made an unprecedented reference to the definition contained in Article 1 of the UN CAT in order to establish whether the acts complained of were sufficiently severe so as to amount to torture.<sup>105</sup> The limitation upon the scope of Article 3 in this context no longer only concerns the gravity of the injuries sustained but is related to their cause. The European Court has taken an equally robust line with the perspective of the “severity of suffering” and held in *Keenan v. The UK* that “while it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many of the cases decided, under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor”.<sup>106</sup> For example, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.<sup>107</sup>

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<sup>101</sup> See 2.2, pp.86-86.

<sup>102</sup> See Evans and Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, (Oxford: Clarendon Press, 1998), p.82.

<sup>103</sup> (1997) 25 EHRR 251.

<sup>104</sup> (App. 54825/00), 05/04/05.

<sup>105</sup> (2000) 29 EHRR 403, para.10; also see Chap2, 4.2, pp.36-37.

<sup>106</sup> (2001) 33 EHRR 913, para.112.

<sup>107</sup> *Ibid.*; also see *Ribitsch v Austria* (1996) 21 EHRR 573, para.38; *Tomasi v France*, (1993) 15 EHRR 1, para.105.

Moreover, in *Ilhan v Turkey*, the purposive element of torture was highlighted in very strong terms.<sup>108</sup> This approach has been followed in some subsequent decisions such as *Bati and Others v Turkey*.<sup>109</sup> The European Court found that all the thirteen applicants had lived throughout their time in police custody in a permanent state of physical pain and anxiety owing to uncertainty about their fate and the intensity of the violence to which they had been subjected. In the European Court's opinion, such treatment had been "intentionally meted out by agents of the State in the performance of their duties, with the aim of extracting confessions or information. The violence inflicted on them, taken as a whole and having regard to its purpose and duration, had been particularly serious and cruel, had been capable of causing 'severe' pain and suffering and had amounted to 'torture'." <sup>110</sup> Clearly, torture can be distinguished due to the level severity of suffering caused and the purpose for which the suffering was inflicted. This is in keeping with the definition of torture as set out in UN CAT. This formula, which has been endorsed on numerous occasions, now forms the basis of the Commission's and European Court's approach in cases concerning allegations of ill-treatment of detainees.

Clearly, treatments which could not come within the restricted definition of torture could still fall within one of the other two heads, especially the broad head "degrading treatment". However, it must be remembered that acts of inhuman and degrading treatment are no less of a violation of Article 3 than acts of torture. Clearly Article 3 will cover only the grossest instances of ill treatments.<sup>111</sup> Treatments may be both inhuman and degrading, but degrading treatment may not also amount to inhuman treatments.<sup>112</sup> In order to characterise a treatment as inhuman, it must reach a minimum level of severity.<sup>113</sup> In the Greek case, inhuman treatment or punishment was defined as "treatment deliberately causing severe suffering, mental or physical, which, in the particular situation, is unjustifiable".<sup>114</sup> The Commission placed inhuman treatment at the middle of a consideration of a violation of Article 3 by

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<sup>108</sup> (2002) 34 EHRR 36, para.85; also see *Salman v Turkey* (2002) 34 EHRR 17; *Aksoy v Turkey* (1996) 23 EHRR 553.

<sup>109</sup> (2006) 42 EHRR 37; also see *Elci and Others v Turkey*, (Apps. 23145/93 and 25091/94), 13/11/03, para.646.

<sup>110</sup> *Ibid.*, para.118; *Mikheyev v Russia*, (App. 77617/01), 26/01/06, para.135.

<sup>111</sup> See Helen Fenwick, *Civil Liberties and Human Rights*, 3<sup>rd</sup> ed, (London: Cavendish Ltd, 2002), p.730.

<sup>112</sup> See *Tyrer v UK*, (1978) 2 EHRR 1, paras.29-30.

<sup>113</sup> *Ibid.*, para.29; *Ramirez Sanchez v France* (2007) 45 EHRR 49, and *A v UK* (1999) 27 EHRR 611.

<sup>114</sup> See *The Greek case* (1969), 12 Yearbook XII 186 and 501.

developing more complex definitions for torture and degrading treatment with specific characteristics. In *Ireland v the UK*, intense physical assaults and interrogation techniques causing psychological disorientation have been found to amount to inhuman treatments.<sup>115</sup> A threat of a treatment which violates Article 3 would also itself amount to a breach of that provision, provided the threat is sufficiently real and immediate.<sup>116</sup>

Unlike inhuman treatment, degrading treatment has been the subject of more substantial definitional considerations, possibly because it can be considered the baseline for acts to be categorised as a violation of Article 3. The commission considered degrading treatment as “a treatment that grossly humiliates an individual vis-à-vis other persons, or forces him to act against his will or consciousness” in the Greek case.<sup>117</sup> It is sufficient if the victim is humiliated in his own eyes. In *Ireland v the UK* the European Court held that a treatment can be classified as degrading where “it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of debasing them and possibly breaking their physical or moral resistance”.<sup>118</sup> The level of humiliation required for a breach of Article 3 to occur must be other than that usual element of humiliation. The assessment is, in the nature of things, relative as well: “it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution”.<sup>119</sup> Although it may be a factor to be taken into account in the consideration of the quantum of damages, a lack of sufficient intent to be prohibited as torture will not bar the finding of a violation of those ill-treatments that reach the minimum level of severity contemplated by Article 3.<sup>120</sup> A string of cases as to conduct not reaching the severity threshold for Article 3 may, nonetheless, breach Article 8 which protects physical and moral integrity as part of an individual’s fear of privacy during the course of arrest and detention.<sup>121</sup>

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<sup>115</sup> (1978) 2 EHRR 25.

<sup>116</sup> See *Thompson and Venables v News Group Newspapers* [2001] 2 WLR 1038, p100; *Campbell and Cosans v UK* (1982) 4 EHRR 293, para.26.

<sup>117</sup> the Greek case (1969) 12 YearBook XII 186;

<sup>118</sup> (1978) 2 EHRR 25, para.167; also see recent case *Bekos and Koutropoulos v Greece*, (2006) 43 EHRR 2

<sup>119</sup> *Ireland v UK*, para 162.

<sup>120</sup> *Ibid.*

<sup>121</sup> See e.g. *Costello-Roberts v UK* (1993) 19 EHRR 112; *Am v Italy*, June 8 1999; *Saunders v UK* (1997) EHRR 313; *Wainwright v UK*, (2007) 44 EHRR 40; *Mubanzila Mayeka and Kaniki Mitunga v Belgium* (2008) 46 EHRR 23, paras.48, 53 and 60.

Therefore the European Court has always allowed itself a degree of flexibility when considering the prohibited acts. In a recent case *Wainwright v. the UK*, the European Court has reiterated that the assessment of a minimum level of severity “depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim”.<sup>122</sup> Inevitably, the threshold is relative. However, following the decisions in *Selmouni v France* and *Ilhan v Turkey*, it is unclear whether one of these defining characteristics is more influential than the other when categorising an act as “torture”. Evans and Morgan regarded that this approach of jurisprudence reinforces the tendency to consider what amounts to torture, or inhuman or degrading treatment in a rather impressionistic fashion.<sup>123</sup> Whilst the European Court have stated that the three prohibited acts can and should be distinguished, nevertheless it can be difficult to pinpoint the distinguishing elements of such a categorisation.

But the European Court is clear that the individual circumstances of the case, and especially factors pertaining to the victims, and sometimes his or her near relatives, must be taken into account. Two questions need to be considered with these factors: whether the nature of the allegations is sufficient to amount to inhuman or degrading treatment or punishment and whether the suffering can be distinguished from ill treatment or other inhumane acts and be regarded as torture. The discussion above has shown how wide a range of situations can potentially fall within the prohibitions in Article 3. As society continues to evolve, the scope of these provisions will continue to expand beyond strict literal definitions: new forms of treatment may be brought within the ambit of the law deemed threats to the dignity and worth of the human person.<sup>124</sup> In recent case *Elci v Turkey*, the European Court restated that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.<sup>125</sup> This is a key restatement of the degree of flexibility which the European Court affords itself when considering allegations of Article 3 in order to try and afford the

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<sup>122</sup> (2007) 44 EHRR 40, para 41; also see *Ireland v. UK*, (1978) 2 EHRR 25, para.162;

<sup>123</sup> Evans and Morgan, *op.cit.*, fn102, p.97.

<sup>124</sup> See Rhona K M Smith, *Textbook on Human Right*, 3<sup>rd</sup> ed, (Oxford: Oxford University, 2007), p.231.

<sup>125</sup> (Apps. 23145/93 and 25091/94), 13/11/03, para.634; also see *Selmouni v France* (2000) 29 EHRR 403, para.101.

greatest possible protection to individual. It can be noted that, by taking this approach, the European Court and Commissions have been able to and can continue to respond to the challenges faced by new as well as traditional forms of ill-treatment and abuse. From this point modernity does not always bring progress and the ECHR and the ICCPR reach the same goal by different routes.<sup>126</sup>

As the European Court has recognised that the boundaries may shift. In a general rule, it is the national courts to make its own assessment as to whether a convention right has been breached in its particular circumstances.<sup>127</sup> A domestic court is bound to take all relevant factors into account, and engage in a delicate balancing act, in considering whether a person has been subjected to torture or one of the other prohibited forms of ill-treatment. It opens up the possibility of domestic law perfectly entitled to apply a higher standard than that operating on the international level. For instance, in UK it would seem that the domestic court was adopting a broader concept of “inhuman and degrading treatment” than that so far used by the European Court. The Scottish court has even held that in regard to Article 3 “it was not founded merely on the conditions which prevailed in the place where the petitioner had been detained, but upon the whole circumstances as they had affected the petitioner, including the physical and mental effects and the state of his health”.<sup>128</sup> However, in recent case *Wainwright v Home Office*, the House of Lords held that a strip-search of people visiting a relative who was on remand did not involve a breach of Article 3, despite the fact that it had not followed the approved procedure under the Prison Rules. Lord Hoffmann, giving the leading speech, held that “the conduct of the searches came nowhere near the degree of humiliation which has been held by the European Court to be degrading in similar situations”.<sup>129</sup> As a result, it may be that the approach has in *Wainwright* did not take sufficient account of the broadening of the scope of Article 3 which seems to be taking place in the European Court case law.

#### **2.4.2 Assessment of Conditions of Detention**

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<sup>126</sup> See Chap2, 4.3, pp.37-38.

<sup>127</sup> See *Klaas v Germany*, (1994) 18 EHRR 305, para.29.

<sup>128</sup> See *Napier v The Scottish Ministers*, [2005] ScotCS CSIH\_16 (10/02/05), para.2.

<sup>129</sup> [2003] UKHL 53; [2003] 4 ALL ER 969, para.49.

When assessing conditions of detention, the European Court has to take account of the cumulative effects of the conditions which are compatible with respect for human dignity, that “the manner and method of the execution of the measure do not subject the individual to distress or hardship exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, the person’s health and well-being are adequately secured, with the provision of the requisite medical assistance and treatment, as well as the specific allegations made by the applicant”.<sup>130</sup> Overcrowding and failure to provide sleeping facilities in itself could amount to treatment contrary to Article 3, even in the absence of aggravating factors such as the lack of light or ventilation.<sup>131</sup> In *Poltoratskiy v Ukraine*, the European Court held that “serious economic difficulties experienced by Ukraine” could not explain or excuse the unacceptable conditions of the applicant’s detention.<sup>132</sup> Furthermore, inadequate heating, sanitation, food, recreation and contacts with the outside world can also amount to inhuman treatment and degrading treatment.<sup>133</sup>

The availability or non-availability of such services in society at large is not the touchstone by which is to be judged. Again the result is that the thresholds of ill-treatment must be worked out from within that context and the special circumstances relating to it. For example, in *Becciev v Moldova*, the applicant spent relatively short time in detention, 37 days, having regard to the harsh conditions in the cell, the lack of outdoor exercise, the inadequate provision of food and the fact that the applicant was detained in these conditions for 37 days, the European Court considers that the hardship he endured went beyond the unavoidable level inherent in detention and reached the threshold of severity contrary to Article 3 of the Convention.<sup>134</sup> However, in case *Ramirez Sanchez v France*, the applicant was detained in solitary confinement for 8 years and 2 months.<sup>135</sup> He was kept in a single cell, had no contact with other prisoners or the prison warders, was not allowed outside his cell apart from a two-hour daily walk, and had very restricted visiting rights. He was, however,

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<sup>130</sup> *Kudla v Poland*, (2002) 35 EHRR 11 para 92-94; and also *Aerts v Belgium* (1998) 29 EHRR 50, para 64.

<sup>131</sup> *Khudoyorov v Russia*, para 106; *Kalashnikov v Russia* (2003) 36 EHRR 34, para 96-97; *Peers v. Greece*, (2001) 31 EHRR 51, 70-72.

<sup>132</sup> (2004) 39 EHRR 43, para 148; see also *Khokhlich v Ukraine* (App. 41707/98), 29/04/03; *Kuznetsov v Ukraine* (App. 39042/97), 29/04/03.

<sup>133</sup> Also see Article 8(1).

<sup>134</sup> (2007) 45 EHRR 11, para 47; also see *Mathew v the Netherlands*, (2006) 43 EHRR 23

<sup>135</sup> (2007) 45 EHRR 49; also see *Georgiev v Bulgaria*, (Application No. 47823/99), 15/12/05.

allowed to read newspapers and watch television.<sup>136</sup> The European Court noted that he was not suffering from complete sensory isolation – in addition to TV and newspapers, his lawyer visited him 57 times, his family are not subject to any restrictions on visiting rights but never ask for permission to visit, and he received regular visits by doctors.<sup>137</sup> The European Court concluded that the general and very particular conditions in which the applicant had been detained, and the length of that detention, did not reach the minimum level of severity necessary to constitute inhuman treatment, particularly in view of the applicant's personality and the exceptional level of danger that he posed.<sup>138</sup>

As shown above, a number of cases present at European Court have questioned the practice of using solitary confinement.<sup>139</sup> The Commission has accepted that the use of solitary confinement may breach Article 3.<sup>140</sup> *Incommunicado* detention is a particularly serious form of solitary confinement and should be declared illegal. Prolonged isolation constitutes *per se* torture and cruel and inhuman treatment. It is unlawful to prevent people held *incommunicado* from challenging the legality of their detention or from effectively preparing their defence. Solitary confinement cases fall into two categories: those in which the detainee is subjected to total social and sensory isolation and those in which a detainee is removed from association with other prisoners for reasons of the administration of justice, security, protection or discipline.<sup>141</sup> In order to determine whether breach of Article 3 has occurred, as the European Commission expressed in *Ramirez Sanchez v France*, it is necessary to have “regard for the surrounding circumstances, including the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned. Complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality; this constitutes a form of inhuman treatment which cannot be justified by the requirements of security”.<sup>142</sup> As instructed by UN, solitary confinement should only be used when the security or the

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<sup>136</sup> *Ramirez Sanchez v France* (2007) 45 EHRR 49, para.128.

<sup>137</sup> *Ibid.*, 131.

<sup>138</sup> *Ibid.*, para 150.

<sup>139</sup> See *Aksoy v Turkey*, (1997) 23 EHRR 553, para 83.

<sup>140</sup> *Ensslin, Baader and Raspe v Federal Republic of Germany*, (1979) 14 DR 64, p109; *Treholt v Norway*, App. 14610/89, (1991) 71 DR 168.

<sup>141</sup> Richard Clayton & Hugh Tomlinson, *The Law of Human Rights*, (Oxford: Oxford University Press, 2000), p401. also see *Ensslin, Baader and Raspe v Germany*, para 109.

<sup>142</sup> (2007) 45 EHRR 49, para 120.



well-being of persons or property are in danger and should be subject to regular judicial supervision. Solitary confinement should not be used as a punishment.<sup>143</sup> Prompt judicial intervention to examine the lawfulness of a deprivation of liberty is instrumental in ensuring respect for a detained person's physical and mental integrity as will discuss below.<sup>144</sup>

Thus, in determining whether a particular treatment to the accused, such as solitary confinement, physical mistreatment in the course of arrest amounts to a violation of article 3, a number of factors must be taken into account, though the fact that they relate to, or have occurred in, places of detention is a critical factor.<sup>145</sup> For instance, where degrading conditions of detention are self-imposed there will be no breach of Article 3.<sup>146</sup> It also established that account must be taken of the cumulative effect of conditions and not simply specific allegations.<sup>147</sup> In order to assess these conditions, the European Court and Commission would rely not only on witness testimony but could also conduct an on-site visit. Recently they have been assisted by and have made increasing use of the reports prepared by European Committee for the Prevention of Torture, the regional visiting body established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>148</sup>

### 2.4.3 Acts in the Course of Interrogation

Interrogation techniques which include beatings, threats and other abuse will tend to violate Article 3.<sup>149</sup> In addition to physical assaults, the interrogation of persons in detention in connection with acts of terrorism in *Ireland v UK* involved “five techniques” causing intense psychological suffering and illegal acts of violence need not necessarily attain the threshold of seriousness necessary to engage responsibility

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<sup>143</sup> UN, Office of the High Commissioner for Human Rights in Corporation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, (New York and Geneva, 2003), p355, [www.ohchr.org/Documents/Publications/training9Titleen.pdf](http://www.ohchr.org/Documents/Publications/training9Titleen.pdf).

<sup>144</sup> See 3.5.5, pp.137-145.

<sup>145</sup> e.g. *Cyprus v Turkey* (1976) 4 EHRR 482, para 302-311; *The Greek case* (1969) 12 YB 1; *Ireland v UK*, (1979-80) 2 EHRR 25; and *Tekin v Turkey* RJD 1998-IV 53.

<sup>146</sup> See *McFeeley v UK* (1980) 20 DR 44.

<sup>147</sup> *Ibid.*, p83.

<sup>148</sup> See e.g. *Aydin v Turkey* (1997) 25 EHRR 251; A useful account of the visits of the Committee on the Protection of Torture to places of detention in the UK is contained in Mark Kelly, “Preventing Ill-treatment: the Work of the European Committee for the Prevention of Torture” (1996) EHRLR 3, p287-303; For more information please see the CPT website [www.cpt.coe.fr](http://www.cpt.coe.fr).

<sup>149</sup> See e.g. *Mikheyev v Russia*, (App. 77617/01), 26/01/06; *Rivas v France*, (App. 59584/00), 01/04/04.

under Article 3. The European Court considered the judicial corporal punishment is institutionalised violence and thus although the applicant did not suffer any severe or long lasting physical effects, his punishment constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity.<sup>150</sup> If institutionalised physical violence is degrading treatment, unauthorised physical violence meted out by those in authority must also fall within the bounds of Article 3.

In UK, for example, the custody officer is responsible for ascertaining and safeguarding a detained person's right under police powers according to PACE. Examples of serious physical mistreatments in the obtaining of confessions are comparatively rare. Questioning is regulated by s. 76 to 78 of the PACE and Code of Practice C under s. 66 of the Act and evidence that is unlawfully obtained is excluded as well. If an accused is beaten or threatened and humiliated by police officers in order to obtain a confession, this may be sufficiently severe to breach of Article 3. In relation to the Human Rights Act 1998, a particular issue related to Article 3 is the extent to which the police have the power to take fingerprints, or samples, from a suspect to aid their inquiries. The powers of the police in this area are covered by ss55 and 61-65 of PACE para. 4 and Annex A of Code of Practice C; and paras 3 and 5 of Code D. A general power to take photographs of detainees, without consent if necessary, was added to PACE by the Anti-Terrorism Crime and Security Act 2001, and now appears as s64A.

### **3. Article 5: The Right to Liberty and Security**

#### **3.1 Introduction**

As mentioned in chapter one, Abuse of compulsory measures can easily happen in Chinese criminal justice nowadays.<sup>151</sup> Issues concerning arrest and detention also arise frequently and account for a large proportion of the jurisprudence in the ECHR.<sup>152</sup> The ECHR deals with liberty and security of persons in Article 5. Deprivation of liberty is only permissible if the grounds of a detention are lawful and the procedures followed upon detentions are also in accordance with the law. Article

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<sup>150</sup> *Ireland v UK* (1978) 2 EHRR 25 para. 167; see also *Tyrer v UK*, (1978), 2 EHRR 1 para 33.

<sup>151</sup> See detail discussion on the arbitrary compulsory measures system in China in Chapter 5.

<sup>152</sup> S Trechsel, "the Right to Liberty and Security of the Person – Article 5 of the European Convention on Human Rights in the Strasbourg Case law", (1980) 1 HRLJ 88, p.88.

5 enshrines the fundamental human right of protecting the individual against arbitrary interferences by the state with the right of liberty: as the Court emphasised in *Brogan v UK* judicial control of such interferences is implied by the rule of law and is one of the fundamental principles of a democratic society.<sup>153</sup> The right to physical liberty is not absolute. It must give way where vital community interests are at stake. That applied in assessing whether the application of the arbitrariness prohibition to an Article 5 deprivation of liberty is “necessary in a democratic society”.<sup>154</sup> Article 5 can be derogated from under Article 15 and this issue is discussed further below.

Article 5 is a vital means of protection for some of the least popular groups in society, including the accused suspects in the criminal procedure. The Fourth Protocol to the ECHR adds a number of rights to the Article 5 guarantee. The contrast here between the ECHR and the ICCPR furnishes a clear illustration of different approaches to the drafting of human rights treaties. The general principle of the Article 9 in the ICCPR is expanded to nearly a page by using the method of detailed and precise definition in Article 5 of ECHR.<sup>155</sup> Article 5 proclaims the right of individual liberty, specifically enumerates the range of situations in which the right might be lawfully justified in the Contracting States, and lays down the essential conditions which must be observed if that power is to be controlled by law. It will be noted that Article 5 deals with two distinct questions within the context of the accused rights. It requires that every arrest or detention is lawful both procedurally and substantively and that it has in fact been carried out for one of the six specified reasons in sub-paragraphs 5(1) (a) to (f), which amounts to an exhaustive list of circumstances.<sup>156</sup> There are also a number of procedural rights which are detailed in paragraphs (2) to (5). The aim of the Convention is to secure real rights to liberty for individuals, which means that the rights should be one with a substantive content and not simply affording a mere formal guarantee. In seeking to grasp the requirements of Article 5, the interpretation of the text by the European Court is vital. As with all the articles of the Convention, the European Court has interpreted every provision of Article 5 in a purposeful and

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<sup>153</sup> (1988) 11 EHRR 117, para 58.

<sup>154</sup> J Murdoch, “Safeguarding the Liberty of the Person: Recent Strasbourg Jurisprudence” (1993) 42 ICLQ 494, p499.

<sup>155</sup> See discussion about Article 9(1) of ICCPR in Chap2, 5.1, pp.45-52.

<sup>156</sup> See *Engel and others v Netherlands* 1 (1976) EHRR 647, para 57; *Riera Blume and others v Spain* (2000) 30 EHRR 632.

dynamic manner, inevitably taking one beyond the literal terms of the text of the Convention in determining what particular provisions entail. In practice the application of the Convention has shown Article 5 to be an extremely important provision and one which produces a regular stream of case law.

### 3.2 The Scope for Article 5

Article 5 opens by stating the general principle that “everyone has the right to liberty and security of person”.<sup>157</sup> This is a combined right, with the right to security of person having no separate meaning from the right to liberty.<sup>158</sup> The specific concern of the right is to ensure that no one is deprived of his or her liberty in an “arbitrary fashion”.<sup>159</sup> In 1970, in the case of *De Wilde, Ooms and Versyp v Belgium*, the European Court said that the right to liberty is too important for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to go into custody.<sup>160</sup> Hoffman regarded that “that is remarkable”, because even when a man volunteers to be detained, his liberty is protected by the Convention.<sup>161</sup> The European Court there emphasised the importance of liberty itself, and how it should be kept safe by the law. The justifications for restricting liberty under Article 5 are given a narrow construction although the instances included are potentially wide.<sup>162</sup>

#### 3.2.1 The Notion of Deprivation of Liberty

To decide whether someone has been deprived of his rights under Article 5(1) it is necessary to begin by establishing that he has been “deprived of his liberty”. “Personal liberty” under the Convention means simply the freedom of physical movement of persons from one place to another.<sup>163</sup> In most cases, demonstrating its applicability is quite straightforward. A person has obviously suffered a deprivation of liberty when detained at a police station, thrown into prison or locked up in a mental hospital and so the only question in such cases will be whether the detention

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<sup>157</sup> ECHR, Article 5; also see Chap2, 5.1, pp.46.

<sup>158</sup> See *Bozano v France*, (1987) 9 EHRR 297, para 54; and *Kamma v Netherlands* (1974) 18 YB 300; also see Helen Fenwick, *op.cit.*, fn 111, p50.

<sup>159</sup> *Engel v Netherlands* (1976) 1 EHRR 647, para 58.

<sup>160</sup> (1978-80) 1 EHRR 373.

<sup>161</sup> David Hoffman and John Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998*, 2<sup>nd</sup> ed, (Harlow : Pearson Education, 2006), p.158.

<sup>162</sup> See e.g. *Winterwerp v Netherlands* (1979) 2 EHRR 387 paras 37; *Guzzardi v Italy* (1980) 3 EHRR 333 paras 98 and 100; *Quinn v France* (1995) 21 EHRR 529 para 42.

<sup>163</sup> S Trechsel, *op.cit.*, fn 152, p88; See Chap2, 5.1, pp.46-47.

can be justified. However, Article 5 is not engaged by every restriction on an individual's liberty. The provision is concerned with actual deprivation of liberty rather than with mere restrictions on liberty or movement.<sup>164</sup> The difference between a deprivation of and a restriction on liberty is more of degree or intensity rather than of nature or substance.<sup>165</sup> In UK, the Court of Appeal had to consider more extensive forms of control order in case *Secretary of State for the Home Department v JJ* in 2006.<sup>166</sup> This is a case raising the question at what precise point a control order amounts to a deprivation of liberty for the purposes of the Convention in any particular case in UK. Each of the subjects of the control orders in this case had to live in his own one-bedroom flat for 18 hours a day and in the remaining hours they could only visit specific areas. The flats were subject to spot searches. The Court of Appeal agreed with the judge Sullivan J that the restrictions imposed by the order were so extensive that they violated Article 5 of the Convention and as there was no derogation order in place, the orders had to be quashed.<sup>167</sup>

As Merrills observed, when deciding whether there has been a deprivation of liberty the Strasbourg institutions are guided by the individual's actual and concrete circumstances rather than by formal or theoretical considerations.<sup>168</sup> In *Guzzardi v Italy*, the European Court regarded that factors such as the type, duration, effects, and manner of implementation of the impugned conduct are the starting point to determine the existence of a deprivation of liberty within the meaning of Article 5.<sup>169</sup> This approach, which is a general feature of their interpretation of the Convention, is well illustrated in case *H.L v UK* case.<sup>170</sup> Also, Pannick and Lester noted that whether or not an individual is detained may depend on the intention of the state.<sup>171</sup> As a result, stopping someone for a short time with the purpose of searching them may not be sufficient to trigger Article 5 protection. For example, in *X v Germany*, the Commission decided that the object of police action was not clearly to deprive those

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<sup>164</sup> *Engel v Netherlands* (1976) 1 EHRR 647, para 58; The European Court noted in *H.M. v Switzerland*, (2002) 38 EHRR 314, restrictions on freedom of movement are the concern of Article 2 of Protocol 4 to the Convention.; The discussion concerning the line between deprivations of liberty of Article 5 and restrictions on freedom of movement of Article 2 of Protocol No.4 see Chapter 18 in Clare Ovey & Robin White, op.cit., fn 68.

<sup>165</sup> *Guzzardi v Italy* (1980) 3 EHRR 333, para 92; *Ashingdane v UK* (1985) 7 EHRR 528, para 41;

<sup>166</sup> [2006] H.R.L.R. 38; [2006] EWCA Civ 1141

<sup>167</sup> *ibid.* para 1 and 11;

<sup>168</sup> J. G. Merrills & A.H. Robertson, op.cit., fn 1, p56.

<sup>169</sup> *Guzzardi v Italy*, para 92.

<sup>170</sup> (2005) 40 EHRR 761, para 93.

<sup>171</sup> See Antony Lester and David Pannick, *Human Rights Law and Practice*, (London: Butterworths, 1999), p.164.

involved of their liberty. The police action was simply to obtain information from them about how they obtained possession of the objects found on them and about thefts which had occurred in the school previously. The Commission therefore held that a 10 year-old girl who was questioned at a police station for two hours without being arrested, locked into a cell or formally detained was not deprived of her liberty for the purposes of Article 5.<sup>172</sup> However, very short periods of detention are deprivations of liberty where there has been close confinement or arrest by the police or other authorities. For example, in case *X v Austria*, where the police took X to an institution so that a blood test could be carried out in relation to ongoing affiliation proceedings, the Commission found that the intention was to deprive X of his liberty, notwithstanding that the underlying court proceedings were civil in nature.<sup>173</sup>

### 3.2.2 Lawful Arrest and Detention

The deprivation of liberty must be “lawful” and carried out “in accordance with a procedure prescribed by law”. The phrases “lawful”, and “in accordance with a procedure prescribed by law” mean two requirements.<sup>174</sup> On one hand, the arrest and detention must have been carried out according to the procedural and substantive rules of national law.<sup>175</sup> Where, for example, a warrant is required for arrest and detention, the warrant must be in the correct form and time-limit or the arrest or detention will not be lawful under Article 5. In the case *Voskuil v. the Netherlands*, the applicant complained that, contrary to domestic law, he had not been provided with a copy of the order for his detention in writing within 24 hours.<sup>176</sup> He also complained that the written copy, when he eventually received it, contained no reasoning. The European Court observes that, although the decision ordering the applicant detained on the ground of refusing to give evidence was not required to be reasoned as the applicant suggested, domestic law did provide for notification in writing of the detention order within 24 hours.<sup>177</sup> The Government did not deny that the applicant was only provided with a written copy of the order some three days later. The European Court therefore finds that the procedure prescribed by law has

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<sup>172</sup> *X v Germany* (1981) 24 DR 158 at para 161.

<sup>173</sup> *X v Austria* (1979) 18 DR 154.

<sup>174</sup> See *Amuur v France* (1996) 22 EHRR 533.

<sup>175</sup> See *Öcalan v. Turkey* [GC], no. 46221/99, (2005) 41 EHRR 985 para 83.

<sup>176</sup> (2010) 50 EHRR 9.

<sup>177</sup> *Ibid.*, para 83.

not been followed.<sup>178</sup> There has accordingly been a violation of Article 5(1) of the Convention.<sup>179</sup> Similarly, where force is used in order to effect an arrest, the degree of force used must not exceed that authorised in the circumstances by domestic law.

On the other hand, any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness.<sup>180</sup> It seems that European Court want to allow state to take reasonable measures to control crime, therefore reviewing compliance with domestic law tends to be left to the national courts in accordance with the principle of subsidiarity.<sup>181</sup> However, in *Steel and others v UK*, the European Court regarded that the domestic laws and their application must be sufficiently precise to allow their citizen to foresee, to a degree that is reasonable in all circumstances, the consequences which a given action may entail.<sup>182</sup> Therefore, it must contain clear and accessible rules governing the circumstances in which it is permissible for the State to deprive an individual of his liberty and the procedure which must be followed.<sup>183</sup> Where someone is arrested for doing something which they should have realised was criminal, it is quite another for them where they could not have know that what they were doing was against the law. This may be because the words of a statute are not precise or because the court's own order is unintelligible. For example, in *Baranowski v Poland* the European Court found deficiencies in the Polish law on pre-trial detention.<sup>184</sup> It was the practice in Poland in 1993 to 1994 that the accused could continue to be detained on remand until trial without the need for a court order once a bill of indictment had been lodged.<sup>185</sup> The European Court found that this practice of maintaining detention on the basis of the indictment was not founded on any specific legislative provision or case law but stemmed from the absence of clear rules.<sup>186</sup> It did not satisfy the test of foreseeability.<sup>187</sup> Therefore, even where the national law is clear and has been complied with, the deprivation of liberty will not be lawful if domestic law allows for

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<sup>178</sup> *Voskuil v. the Netherlands* (2010) 50 EHRR 9, para 82.

<sup>179</sup> *Ibid.*, para 83.

<sup>180</sup> See *Bozano v France* (1987) 9 EHRR 297, para 54.

<sup>181</sup> See *Z and others v UK* (2002) 34 EHRR para 103.

<sup>182</sup> (1998) EHRR 603, para 54.

<sup>183</sup> *Ibid.*, para 55.

<sup>184</sup> (App.28358/95), 28/03/00; *Hashman and Harrup v UK* (2000) 30 EHRR 241.

<sup>185</sup> *Baranowski v Poland*, para. 54.

<sup>186</sup> *Ibid.*, para. 55-57.

<sup>187</sup> *Ibid.*, para 55.

arbitrary or excessive detention.<sup>188</sup>

The European Court further stressed that the unacknowledged detention of an individual is a complete negation of the guarantees contained in Article 5 and discloses a most grave violation of it.<sup>189</sup> In the recent case *Menesheva v Russia*, the European Court observes that no documents pertaining specifically to the applicant's initial arrest and her overnight stay at the police station could subsequently be found.<sup>190</sup> It follows that for some 20 hours after the applicant's arrest there existed no records such as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it. Even assuming that the police intended to press charges for the administrative offence, this did not absolve them from complying with such basic formalities before locking her up. That fact in itself must be considered a most serious failing with the requirement of lawfulness and with the very purpose of Article 5 of the Convention. The unacknowledged detention could easily continue for an unlimited and unpredictable period was contrary to the principle of legal certainty and open to arbitrariness and abuse. However, the practice of the European Courts exercising supervisory jurisdiction is not to rehear evidence supporting detention and in most cases they will refuse to hear applications from persons convicted of criminal offences who complain that their convictions or sentences were based on errors of fact or law.<sup>191</sup>

### 3.3 Reasonable Suspicion: Article 5(1)(c)

Article 5(1)(c) authorises the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.<sup>192</sup> This is the longest paragraph of Article 5(1) and contemplates pretrial detention or "detention on remand". It permits the lawful arrest or detention of a person for the purpose of bringing him before the competent legal authority in three sets of circumstances.<sup>193</sup>

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<sup>188</sup> see also *Erkalo v Netherlands* (1999) 28 EHRR 509.

<sup>189</sup> See *Çakici v. Turkey*, (2001) 31 EHRR 5, para 104.

<sup>190</sup> (2007) 44 EHRR 56, para 87.

<sup>191</sup> See *Bozano v. France*, (1986) 9 EHRR 297; *Benham v. UK*, (1996) 22 EHRR 293.

<sup>192</sup> See 3.5.1 pp.122-129; also see Chap2, 5.5, pp.61-64.

<sup>193</sup> J. G. Merrills & A.H. Robertson, *op.cit.*, fn 1, p63.



The first situation is arrest or detention on reasonable suspicion and in practice is the most important. The second situation is preventive detention, which clearly requires careful monitoring, and the third is detention to prevent flight after an offence has been committed. This provision, read in conjunction with Article 5(3) and Article 6, is part of an overall scheme for the investigation and prosecution of a person for a criminal offence, and is clearly limited to the arrest or detention of persons for the purpose of enforcing the criminal law.<sup>194</sup> The interpretation of these Articles is difficult both because of unclear wording of Article 5(1)(c) and (3) and because of the differences between the systems of criminal procedure in common law and civil law jurisdictions in Europe, as Clayton noted, the European Court has to balance the need for a common European standard of procedure against respect for national approaches.<sup>195</sup>

However, the European Court reiterates that the requirement of reasonable suspicion is an essential safeguard against arbitrary arrest and detention.<sup>196</sup> This requirement applies to all the three alternative circumstances in which an arrest may be lawful under Article 5(1)(c).<sup>197</sup> Clayton and Tomlinson even regard that the overlap of the three grounds for detention means that only the first ground arrest or detention on reasonable suspicion has been considered in detail.<sup>198</sup> In the case of *Fox, Campbell and Hartley* the interpretation of the concept of reasonable suspicion divided the European Court and the case is a good illustration of the type of problem which can arise in practice.<sup>199</sup> The three applicants in this case were arrested and detained under section 11(1) of the Northern Ireland (Emergency Provisions) Act 1978 which provided that “any constable may arrest without warrant any person whom he suspects of being a terrorist”.<sup>200</sup> As interpreted by the House of Lords in the UK this section imposed a subjective test of honest belief, rather than an objective requirement of reasonable suspicion.<sup>201</sup> The applicants, who had been questioned and

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<sup>194</sup> See *Ciulla v Italy* (1989) 13 EHRR 346.

<sup>195</sup> Richard Clayton & Hugh Tomlinson, *The Law of Human Rights*, (Oxford: Oxford University Press, 2000), p400;

<sup>196</sup> See e.g. *Stepuleac v. Moldova*, (App. 8207/06), 06/11/07, para 68; *Fox, Campbell and Hartley v UK* (1990) 13 EHRR 157, para 32.

<sup>197</sup> *Lawless v Ireland* (1961) 1 EHRR 15 para 14.

<sup>198</sup> Richard Clayton and Hugh Tomlinson, *The Law of Human Rights*, (Oxford: Oxford University Press, 2000), p490.

<sup>199</sup> (1990) 13 EHRR 157.

<sup>200</sup> See section 11(1) of the Northern Ireland (Emergency Provisions) Act 1978.

<sup>201</sup> *McKee v Chief Constable for Northern Ireland* [1984] 1 W.L.R. 1358; see further *Fox, Campbell and Hartley v UK*, para 20

released without being charged, argued that the Act itself was in conflict with Article 5(1)(c) and, furthermore, that on the facts their arrests had not been shown to have been based on reasonable suspicion. The European Court found a violation of Article 5(1)(c) on the basis that “genuine and honest” suspicion was a lower standard than reasonable suspicion and was, therefore, not acceptable under the Convention. The mere fact that a person has committed some offence in the past will not be a sufficient basis for a reasonable suspicion. In the European Court’s view, “reasonable suspicion supposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence”.<sup>202</sup> It is not enough that the arresting officer believes it to be reasonable.

The European Court held that what might be regarded as “reasonable” must depend on all the circumstances.<sup>203</sup> For example, in connection with arrests and detention under criminal legislation enacted to deal with acts of terrorism, the European Court has explained that in view of the difficulties inherent in the investigation and prosecution of terrorist-type offences, the “reasonableness” of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime.<sup>204</sup> In order to illustrate this special situation, it is worth to compare the European Court’s conclusion in the *Fox* case with its subsequent decisions in the *Murray v UK* case and later the *Erdagöz v. Turkey* case in both of which the level of suspicion required by Article 5(1)(c) was again in issue.<sup>205</sup> In *Murray* case, another terrorist case which the applicant was arrested under similarly worded legislation as the *Fox*, the European Court was less robust in its defence of Article 5(1)(c), but the principles in the case are specific and may not apply in non-terrorist cases.<sup>206</sup> The European Court decided by fourteen votes to four that the applicant’s arrest on suspicion of collecting money to buy arms in the US had not violated Article 5(1), since two of her brothers had been convicted of buying arms and the applicant had visited them there.<sup>207</sup> On the contrary, in the *Erdagöz v Turkey*, the European Court decided by seven votes to two that Turkey had violated Article 5(1) by detaining a man on suspicion of fabricating evidence, but

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<sup>202</sup> *Fox, Campbell and Hartley v UK*, (1991) 13 EHRR 157, para 32.

<sup>203</sup> *Ibid.*; *Murray v. UK* (1995) 19 EHRR 193, para 51.

<sup>204</sup> *Fox, Campbell and Hartley v UK*, para 32.

<sup>205</sup> See *Murray v UK*, para 51; *Erdagöz v Turkey* (2001) 32 EHRR 19, para 112.

<sup>206</sup> (1995) 19 EHRR 193, para 51.

<sup>207</sup> *Ibid.*, para 62.

emphasized that since the object of questioning during detention under paragraph (c) is to confirm or dispel the suspicion, less evidence is needed to justify an arrest than to bring a charge.<sup>208</sup>

However, the European Court stressed all the time that the exigencies of dealing with terrorism could not justify stretching the notion of “reasonableness” to the point where the essence of the safeguard was impaired.<sup>209</sup> Therefore even though the Contracting States cannot be asked to establish “the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources of their identity”, the European Court must nevertheless be enabled to ascertain whether “the essence of the safeguard afforded by Article 5(1)(c) has been secured”.<sup>210</sup> This means that where the domestic law did not require ‘reasonable suspicion’ as such but only “honest suspicion”, the respondent Government have to furnish at least some facts or information capable of satisfying the European Court that the arrested person was reasonably suspected of having committed the alleged offence.<sup>211</sup> It will not be enough that the suspicion is of some vaguely described conduct. The European Court has recognised that there can be instances where there is some uncertainty as to whether known facts could reasonably be considered as falling within a particular prohibition on behaviour by the criminal law. But there is a need to be able to demonstrate not only a link between the person deprived of liberty and the events supposed to constitute an offence but also a sufficient basis for concluding that those events fall within the scope of the offence alleged.<sup>212</sup> The absence of a criminal prohibition was relatively clear-cut. For example, in *Lukanov v Bulgaria*, the main problem was that most of the accusations brought against the applicant did not amount to any criminal offence under Bulgarian law.<sup>213</sup>

But an arrest on reasonable suspicion of having committed an offence will not necessarily violate Article 5 if the detainee is not subsequently charged or taken

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<sup>208</sup> (2001) 32 EHRR 443, para 52.

<sup>209</sup> *Murray v UK* (1995) 19 EHRR 193, para 51.

<sup>210</sup> *Fox, Campbell and Hartley v UK* (1991) 13 EHRR 157, para 32;

<sup>211</sup> *Ibid.*, para 34; *Tuncer and Durmuş v. Turkey*, (App. 30494/96), 02/02/05, para 48.

<sup>212</sup> Monica Macovei, A guide to the implementation of Article 5 of the European Convention on Human Rights, (2002) Human Right Handbook No.5, p.28.

<sup>213</sup> (1997) 24 EHRR 121; see also *Nikolov v Bulgaria* (38884/97) (2003).

before the court, provided that the arrest had been made for that purpose.<sup>214</sup> For example, in both *Brogan v UK* and *Murray v UK* the domestic authorities in these two cases had concluded that after questioning the persons concerned it was impossible to pursue their suspicions against them and that in these circumstances charges could not be brought.<sup>215</sup> The European Court regarded that Article 5(1)(c) does not presuppose that the investigating authorities should have obtained sufficient evidence to bring charges, either at the point of arrest or while the arrested person is in custody.<sup>216</sup> The object of questioning during detention under Article 5(1)(c) is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation.<sup>217</sup> Therefore the European Court declined to find a violation of Article 5(1)(c) in these two cases. These cases shows that there is no requirement that the police should have obtained sufficient evidence to bring charges, either at the point of arrest, or while a person is in custody.<sup>218</sup> But the legality of continued detention depends upon the reasonable suspicion of the detainee persisting.<sup>219</sup> Arrests for the purpose other than ultimately to bring a prosecution, for example merely gathering information, are not permitted in UK.<sup>220</sup>

### 3.4 Prompt Reasons for Arrest: Article 5(2)

Now it should move on to consider the requirements which Article 5 imposes following an arrest. The elementary safeguard that any person arrested should be promptly given adequate information in simple, non-technical language that he can understand, to discern both the essential legal and factual grounds for his deprivation of liberty.<sup>221</sup> Hoffman and Rowe regarded that it is an additional safeguard against arbitrary arrest: if the person making the arrest cannot say why they are doing so immediately after the arrest has been made, they are unlikely to be able to

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<sup>214</sup> See *Brogan and others v UK* (1989) 11 EHRR 117, para 53.

<sup>215</sup> See *Murray v UK* (1995) 19 EHRR 193; *Brogan and others v UK* (1989) 11 EHRR 117.

<sup>216</sup> *Brogan and others v UK*, para 53.

<sup>217</sup> *Murray v UK*, para 55.

<sup>218</sup> *Ibid.*; *Tuncer and Durmuş v. Turkey*, (App. 30494/96), 02/02/05, para 47.

<sup>219</sup> See *Stogmuller v Austria* (1979-80) 1 EHRR 155, para 4; *Murray v. UK*, para 56.

<sup>220</sup> See e.g. *Cf Mohammed-Holgate v Duke* [1984] AC 437, pp.444-445.

<sup>221</sup> Article 5(2) of ECHR; *Fox, Campbell and Hartley v UK*, (1991) 13 EHRR 157, para 40; also see Chap2, 5.2, pp.52-55.

demonstrate that it is not arbitrary.<sup>222</sup> An explanation may have the beneficial effect of making it clear that resistance is not appropriate and thereby facilitate the task of the officials involved. In addition, the need to explain why such a measure is being taken is likely to encourage public officials to consider whether they are acting within the limits of their powers and to avoid taking action for which no adequate justification can be given. The person arrested is able, if he sees fit, to apply to a court to challenge the deprivation in accordance with Article 5(4).<sup>223</sup>

It seems that the requirements of Article 5(2) have been applied very loosely by the European Court. Article 5(2) does not require that any particular form of communication be used, such as a warrant or other documentation. For example, the case *Fox, Campbell and Hartley v UK* appears to indicate that Article 5(2) does not require the detainee to be expressly informed of the reasons for his arrest, as long as they can be inferred from the circumstances.<sup>224</sup> The person arrested must consequently be interrogated in sufficient detail about their suspected involvement in specific criminal acts and their suspected membership of proscribed organizations.<sup>225</sup> Such lack of rigour might be acceptable if there was a real connection between a failure to give information to suspects and an advantage to be gained in an emergency situation, since the principle of proportionality would then be satisfied. Clayton and Tomlinson commented that this finding was an unacceptable dilution of a basic guarantee.<sup>226</sup> In *Ireland v UK*, the European Court held that it was not enough to tell an arrested person that he or she was being held pursuant to the provisions of emergency legislation.<sup>227</sup> In cases arising under Article 5(1)(c), it is unnecessary to indicate all of the charges that might later be brought against an arrested person, so long as the information provided justifies the detention.<sup>228</sup> The explanation is perhaps best given by a direct statement to the person affected by the official depriving of liberty.

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<sup>222</sup> David Hoffman & John Rowe Q.C., *Human Rights in the UK: An Introduction to the Human Rights Act 1998*, (Harlow: Pearson Longman, 2003), p.143.

<sup>223</sup> *Fox, Campbell and Hartley v UK*, (1991) 13 EHRR 157, para 40.

<sup>224</sup> Contrast the position under UK law, s 28 of PACE.

<sup>225</sup> *Fox, Campbell and Hartley v UK*, para 41.

<sup>226</sup> Richard Clayton & Hugh Tomlinson, *The Law of Human Rights*, (Oxford: Oxford University Press, 2000), p.498.

<sup>227</sup> *Ireland v UK* (1979-80) 2 E.H.R.R. 25, para 198.

<sup>228</sup> *X v UK* (1971) 14 YB 250; Article 6(3a) which requires that the information be more specific and detailed than that called for under Article 5(2) as a result of the nature of its purpose: *Nielsen v Denmark* (1959) 2 YB 412.

What is sufficient information is matter for determination on special features of each case.<sup>229</sup> In the *Kerr* case the applicant was informed at the time of his arrest of the provision of domestic law under which he was detained (the Prevention of Terrorism Act 1996).<sup>230</sup> The European Court held that a bare indication of the legal basis for an arrest could not, on its own, be sufficient for the purposes of Article 5(2).<sup>231</sup> However, in this case, the reasons for the applicant's detention must have been sufficiently clear to him for the purposes of Article 5(2) because the applicant was questioned about his suspected involvement in a recent bomb explosion at a military barracks, his membership of a proscribed organization, and about the use he had made of items seized by the police from his house, in particular computer equipment and the information stored on the computer immediately after his arrest.<sup>232</sup> The ruling in this case underlined that a degree of specificity is required in order to satisfy Article 5(2). Where the capacity of the individual to appreciate the notification is impaired as, for example, in cases of minors or the mentally handicapped, the information must nevertheless be communicated to his representative, legal agent or guardian.<sup>233</sup>

Whether the promptness of the information conveyed was sufficient is to be assessed in each case according to its special features as well.<sup>234</sup> The obligation to give information about the arrest or charge "promptly" does not mean that the information must be given in its entirety immediately upon arrest.<sup>235</sup> This is different from Article 9(2) of ICCPR.<sup>236</sup> The detained person must be informed of the legal and factual grounds for his arrest whether at one time or over an interval within a sufficient period following the arrest in order that Article 5(2) is complied with.<sup>237</sup> This is obviously relevant if the arrested person is drunk or otherwise incapacitated, but can also be important in other situations. All the facts of the particular case must be taken into account; and periods of 6 to 8 hours, 24 hours and even 2 days between arrest and information were acceptable.<sup>238</sup> The question of the timing of notification was

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<sup>229</sup> *Murray v UK*, (1995) 19 EHRR 193; *Kerr v UK* (App.40451/98), 07/12/99.

<sup>230</sup> *Kerr v UK*, Third Section, Partial Decision; see also *Fox, Campbell and Hartley v UK*.

<sup>231</sup> *Kerr v UK*, p8; See also *Fox, Campbell and Hartley v UK*, para 41.

<sup>232</sup> *Kerr v UK*, p8.

<sup>233</sup> Richard Clayton & Hugh Tomlinson, *The Law of Human Rights*, (Oxford: Oxford University Press, 2000), p498.

<sup>234</sup> *Fox, Campbell and Hartley v UK* (1991) 13 EHRR 157, para 40.

<sup>235</sup> Richard Clayton & Hugh Tomlinson, *op.cit.*, fn 233.

<sup>236</sup> See Chap2, 5.2, p.53.

<sup>237</sup> *Fox, Campbell and Hartley v UK*, para 41.

<sup>238</sup> *O'Hara v UK* (2002) 34 EHRR 32; *Fox, Campbell and Hartley v UK*; *X v Denmark* (1975) 1 Digest 457; *Skoogström v Sweden* (1982) 5 EHRR 278.

raised in the *Murray* case as well. Soldiers had occupied the applicant's house, thus clearly taking her into detention, but she was not informed of the fact of arrest for half an hour. The question arose whether she was falsely imprisoned during that half hour. The European Court found that no breach of Article 5(2) had occurred in those circumstances. Mrs Murray was interval of a few hours had elapsed between the arrest and informing her of the reason for it, this could still be termed prompt.<sup>239</sup> As Fenwick regarded, these decisions of European Court provide examples of the European Court's tenderness to claims of a threat to national security made by governments of Member States.<sup>240</sup>

### 3.5 Prompt Appearance before a Court: Article 5(3)

Article 5(3) is specifically concerned with the rights of those who are arrested or detained in accordance with Article 5(1)(c).<sup>241</sup> Its purpose is to "minimise the risk of arbitrariness" by providing judicial control over the executive's interference with the right to liberty in the criminal process.<sup>242</sup> A literal reading of Article 5(3) would suggest that the authorities have a free choice either to release a person pending trial or else to try him within a reasonable time. This restrictive interpretation has been rejected by the European Court. The European Court has found in *Wemhoff v Germany* that these are not alternatives: there is a right to be released pending trial unless detention can be justified.<sup>243</sup> Although Article 5(3) does not guarantee an absolute right to bail, the presumption is in favour of release.<sup>244</sup> No violation of Article 5(3) can arise if the arrested person is released "promptly" pending trial before any judicial control of his detention would have been feasible.<sup>245</sup> And there is no need for release to receive judicial approval.

#### 3.5.1 Justifying Pre-trial Detention

The European Court has repeatedly asserted that the existence of a reasonable suspicion is essential for the initial detention but not sufficient for any prolongation of detention after a certain lapse of time.<sup>246</sup> As established in *Neumeister v. Austria*

<sup>239</sup> See *Murray v UK*, (1995) 19 EHRR 193, para. 78.

<sup>240</sup> Helen Fenwick, *op.cit.*, fn 111, p54.

<sup>241</sup> See Article 5(3) of ECHR; also see Chap2, 5.3, pp.55-58; *Schiesser v Switzerland* (1979) 2 EHRR 417 para 29.

<sup>242</sup> *Brogan v UK* (1989) 11 EHRR 117, para58.

<sup>243</sup> (1968) 1 EHRR 55 para 7.

<sup>244</sup> *Castravet v. Moldova*, (App. 23393/05), 13/03/07, para 30.

<sup>245</sup> See *Brogan and Others v. the UK*, (1989) 11 EHRR 117 para 58.

<sup>246</sup> See e.g. *Assenov and Others v. Bulgaria*, (1998) 28 EHRR 652 para 54; *Clooth v Belgium* (1992) 14 EHRR

(*No.1*), until conviction, the accused must be presumed innocent, and the purpose of the second limb of Article 5(3) is essentially to require his provisional release once his continuing detention ceases to be reasonable.<sup>247</sup> Therefore, a continuing obligation on the detaining authorities is required throughout the detention to consider whether its continuation is really justified at the first place and whether it is still appropriate. The European Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty.<sup>248</sup> The factors that are relevant in assessing whether a period is “reasonable” include the complexity of the case, the difficulty of obtaining evidence, the volume of the evidence, the length and nature of the charge, whether the accused has contributed towards the lengthening of proceedings and, in particular, whether there have been any unjustified delays on the part of the judicial authorities. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.<sup>249</sup>

Consequently, although reasonable suspicion must continue in order to justify detention under Article 5(1)(c), Article 5(3) requires in addition that there be specific indications of “relevant and sufficient” and “genuine” public interest reasons to justify interfering with the liberty of a person presumed to be innocent.<sup>250</sup> As summary by the P Van Dijk and G J H Van Hoof, it is obvious that for each individual case and at each moment the interests of the accused will have to be weighed against the interests of the protection of society and the interest of effective prosecution.<sup>251</sup> As the European Court stated in the *Neumeister* judgment that it is for the national judicial authorities to seek all the facts arguing for or against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty.<sup>252</sup> It is essential that applications for release be examined with an open mind.

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<sup>247</sup> (1979-80) 1 EHRR 91, para 4.

<sup>248</sup> See *Letellier v France* (1992) 14 EHRR 83, para 35.

<sup>249</sup> *W v Switzerland*, (1993) 17 EHRR 60, para 30.

<sup>250</sup> *Letellier v France* (1991) 14 EHRR 83, para 35.

<sup>251</sup> P Van Dijk & G J H Van Hoof, *Theory and Practice of the European Convention on Human Rights*, (Deventer and Boston: Kluwer. 1990) at p. 277.

<sup>252</sup> (1979-80) 1 EHRR 91, para 5; see also *Kudla v. Poland*, (2002) 35 EHRR 11, paras 110.



### 3.5.1.1 Risk of Flight

The ground most frequently relied upon by national courts is the risk of flight. Most of the cases regarding bail concern the fear that the accused will abscond. However, the European Court has emphasized that the risk must be substantiated in each case and assessed by reference to a number of factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial.<sup>253</sup> Also since the risk decreases as time passes, the European Court will be correspondingly more exacting in its scrutiny the longer pre-trial detention lasts.<sup>254</sup> There must be an overall evaluation of the risk of flight with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial.<sup>255</sup> Other factors include the accused's clear distaste of detention;<sup>256</sup> the probable civil liability of the accused if convicted and the threat of further proceedings;<sup>257</sup> the character of the accused, his morals,<sup>258</sup> his home, his occupation, his assets, his family ties,<sup>259</sup> all kinds of links with the country in which he is being prosecuted;<sup>260</sup> the likelihood of absconding itself and indications that he has links with another country<sup>261</sup> or that he is planning to escape.<sup>262</sup> However, it is not sufficient to invoke any of these factors pointing to the risk of flight as a justification in itself for continuing to deprive someone of liberty.

Even when the accused is charged with a particularly serious crime and the evidence against him is strong, for example, in case *Chraidi v. Germany*, the European Court nonetheless emphasized again that the existence of a strong suspicion of the involvement of the person concerned in serious offences, while constituting a relevant factor, cannot be gauged solely on the basis of the severity of the sentence.<sup>263</sup> The European Court accepts that the reasonable suspicion that the applicant

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<sup>253</sup> *Castravet v. Moldova*, (App. 23393/05), 13/03/07, para 32; *Yağcı and Sargin v. Turkey*, (1995) 20 EHRR 505, para. 52.

<sup>254</sup> *Letellier v. France*, (1991) 14 EHRR 83, para 35.

<sup>255</sup> *Ibid.*, para 43.

<sup>256</sup> *Stögmüller v. Austria* (1969) 1 EHRR 155.

<sup>257</sup> *X v. Switzerland* (1980) 21 DR 241.

<sup>258</sup> *Letellier v. France; Matznetter v. Austria* (1969) 1 EHRR 198.

<sup>259</sup> *Ibid.*

<sup>260</sup> *Neumeister v. Austria* (No 1) (1968) 1 EHRR 91.

<sup>261</sup> *W v. Switzerland*, (1993) 17 EHRR 60; *Punzelt v. the Czech Republic* (2001) 33 EHRR 1159; *Barfuss v. the Czech Republic* (2002) 34 EHRR 948.

<sup>262</sup> *Matznetter v. Austria* (1969) 1 EHRR 198.

<sup>263</sup> (2008) 47 EHRR 2 para 36; see also *Muller v. France* (21802/93), (1997), para 43; *Vander Tang v. Spain* (1993) 22 EHRR 363.

committed the offences with which he had been charged, being based on cogent evidence, persisted throughout the trial leading to his conviction. It also agrees that the alleged offences were of a serious nature.<sup>264</sup> As regards the danger of the absconding, the European Court was satisfied that a substantial risk of the applicant's absconding persisted throughout his detention since there is the fact that "the applicant had been extradited from Lebanon to Germany for the purposes of criminal proceedings in the context of international terrorism. He had neither a fixed dwelling nor social ties in Germany which might have prevented him from absconding if released".<sup>265</sup> Therefore, the European Court also accepted the domestic courts' finding that no other measures to secure his presence detention and would have been appropriate. There is a need to assess how significant such factors are in the particular circumstances of the case and to weigh them against any of the factors present which might point against the person concerned being likely to flee. For instance, in *Stögmüller v Austria*, the applicant had flown abroad several times during a period of provisional release and had always returned, a slight delay in doing so on one occasion had also been satisfactorily explained.<sup>266</sup> Similarly, in *Letellier v France* there had been no attempt to abscond when the applicant had previously been released for a 4 week period.<sup>267</sup>

Certainly a ruling which is based on a stereotyped form of words without any explanation as to why the risk of absconding exists will never be considered acceptable by the European Court.<sup>268</sup> For example, in *Sarban v. Moldova*, the domestic courts limited themselves to paraphrasing the reasons for detention provided for by the Code of Criminal Procedure, without explaining how they applied in the applicant's case.<sup>269</sup> The only exception was that they referred to the applicant's Romanian passport, which could have enabled him to abscond abroad, and his lack of a permanent job. However, the domestic courts did not react in any way to the applicant's argument that both his Romanian and Moldovan passports could have been seized by the authorities if they had decided that this was necessary to prevent his absconding and that alternative preventive measures existed, some of

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<sup>264</sup> *Chruidi v. Germany*, (2008) 47 EHRR 2, para 39.

<sup>265</sup> *Ibid.*, para 40.

<sup>266</sup> (1969) 1 EHRR 155.

<sup>267</sup> (1991) 14 EHRR 83.

<sup>268</sup> See *Yağcı and Sargın v. Turkey* (1995) 20 EHRR 505.

<sup>269</sup> (App. 3456/05), 04/10/05; also see *Stici v Moldova*, (App. 35324/04), 23/10/07.

which provided virtually the same guarantees against absconding as pre-trial detention, for house arrest.<sup>270</sup> Neither were any other factors in favour of the applicant's release examined, such as his appearance before the investigator at the latter's first request, despite an express requirement to do so under Article 176 (3) of the Code of Criminal Procedure and the applicant's reference to several prima facie relevant reasons against detention.<sup>271</sup> The European Court also takes into account that the applicant was held for over two years in detention pending trial, even though no new reasons were advanced for the continued need for such detention.<sup>272</sup>

### **3.5.1.2 The risk of Interference with the Course of Justice and Preventing Crime**

Another common ground invoked to justify pre-trial detention is the risk of interference with the course of justice prior to trial. Furthermore in most cases this is a ground for continued deprivation of liberty which will become less and less compelling as the various stages of an investigation are completed, such as the taking statements and the carrying out verifications. It will not generally be an admissible justification once the whole process has been completed as held in *Muller v France*.<sup>273</sup> Bail may be refused where there is evidence that release of the accused will use the opportunity to undermine the preparation of a case against him by his destruction of documents, collusion with other possible suspects or interference with witnesses.<sup>274</sup> Obviously there must be some concrete factual circumstances supporting these possibilities in respect of the person deprived of his liberty. However, the European Court will always make its assessment by reference to the facts of the particular case and these can sometimes be so exceptional as to justify deprivation of liberty until trial.

For instance, a substantial risk of collusion until trial was considered to exist in *W v Switzerland* because of the exceptional extent of the case, the extraordinary quantity of the documents seized and their intentionally confused state, the large number of witnesses to be questioned, the behaviour of the applicant before and after release reflecting an intention of systematically deleting all evidence of liability, and the fear

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<sup>270</sup> *Sarban v. Moldova*, (App. 3456/05), 04/10/05, para 100.

<sup>271</sup> *Ibid.* para 101-103; see also *Ambruszkiewicz v. Poland*, (App. 38797/03), 04/05/06, para 33.

<sup>272</sup> *Sarban v. Moldova*, para 101-102.

<sup>273</sup> (Application No. 21802/93), 17/03/97, paras 39 and 40.

<sup>274</sup> See e.g. *Clooth v Belgium* (1991) 14 EHRR 717 para 44; *Wemhoff v Germany* (1968) 1 EHRR 55 para 25; *Letellier v France* (1991) 14 EHRR 83.

of the applicant's being able to eliminate items of evidence still hidden, to manufacture false evidence and to connive with witnesses, as well as the extension of the investigation to offences in Germany.<sup>275</sup> It was undoubtedly significant in this regard that the case indicated that other proceedings the applicant had manufactured exonerating evidence, antedated documents and manipulated witnesses. However, it should be noted that this was not the sole justification for continued deprivation as there was also a risk of the applicant's fleeing.

As to the need to prevent crime, again, the domestic court judgments must show that this risk was substantiated: all the circumstances of the case must be taken into account and reference to past crimes may not be sufficient.<sup>276</sup> But the European Court also suggested that in "special circumstances" a person presumed innocent may still be detained in the belief that, if released, the accused will commit another serious offence of the kind with which he is already charged. For example, in *Matznetter v Austria*, the applicant was an accountant charged with committing a number of serious company frauds.<sup>277</sup> The European Court held that it was compatible with Article 5(3) for the national court to rely on the risk of re-offending as a ground for refusing bail, since Matznetter had the skill and experience, such as to make it easy for him to resume his unlawful activities.<sup>278</sup> Similarly, in the *Assenov v Bulgarian* case the Bulgarian authorities were entitled to rely on this ground since the applicant was charged with a long series of thefts, some of which had allegedly been committed subsequent to his initial arrest and questioning by the police.<sup>279</sup> The fact that the person concerned had previous convictions for the same or similar offences to the one under investigation would thus be significant, as would other offences apparently being committed between the beginning of the investigation and the person being charged with the one for which his or her detention is sought. However, the continued detention of the person in such cases is likely to be inappropriate where the offences concerned were not comparable in either their nature or degree of seriousness.<sup>280</sup> Moreover, argument that financial difficulties would be a temptation to commit further offences is unlikely to be convincing.<sup>281</sup>

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<sup>275</sup> (1993) 17 EHRR 60, para 36.

<sup>276</sup> *Ringelsen v Austria*, (1979-80), 1 EHRR 455, para 109.

<sup>277</sup> (1979-80) 1 EHRR 198.

<sup>278</sup> *Ibid.*, para 9.

<sup>279</sup> (1999) 28 EHRR 652.

<sup>280</sup> See *Clooth v Belgium* (1991) 14 EHRR 717, para 40, *Muller v France*, (Application No. 21802/93), 17/03/97

### 3.5.1.3 The Need to Maintain Public Order and Protection of Defendant

The test raised in *Letellier v France* is whether municipal law recognises the ground to justify fears of disturbance and there is evidence that the accused's release "will actually disturb public order".<sup>282</sup> The European Court acknowledged that, in exceptional circumstances, by reason of their particular gravity and public reaction to them, certain offences, such as murder, may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time.<sup>283</sup> However, the European Court explained that this ground can be regarded as relevant and sufficient only provided that it is based on facts capable showing that the accused's release would actually prejudice public order.<sup>284</sup> In this case, the European Court noted that no concrete manifestations of disorder had been cited and indeed the mother and sister of the deceased had not opposed the applicant's release. Therefore, the contested detention had ceased to be based on relevant and sufficient grounds. In addition, as concluded in *Tomasi v France*, detention will continue to be legitimate only if public order remains actually threatened, since it might have disappeared after a certain time.<sup>285</sup>

A defendant may also be detained before trial if such detention is necessary for his own protection, at least for a time.<sup>286</sup> However, the European Court underlined that there can only be detention on this ground "in exceptional circumstances having to do with the nature of the offences concerned, the conditions in which they were committed and the context in which they took place".<sup>287</sup> It could not be relied upon simply because of the nature of the offence involved. For example, in *I.A. v France*, the invocation of concern about reprisals by a murder victim's relatives was ineffective because they were vague but also implausible.<sup>288</sup>

### 3.5.2 The right to Release on Bail

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para 44.

<sup>281</sup> See *Stögmüller v Austria* (1969) 1 EHRR 155.

<sup>282</sup> (1991) 14 EHRR 83, para 51.

<sup>283</sup> *ibid.*; See also *Tomasi v France* (1992) 15 EHRR 1 para 91.

<sup>284</sup> *ibid.*

<sup>285</sup> (1992) 15 EHRR 1 para 91.

<sup>286</sup> *I.A. v France*, (App.28213/95), 23/09/98, para 108.

<sup>287</sup> *Ibid.*

<sup>288</sup> *ibid.*

As held in *Wemhoff v Germany*, where such grounds to justify the continued detention do not exist or the circumstances as discussed above can be avoided by bail or other guarantees, whether initially or at a later stage, there is an obligation on the national authorities to consider such alternatives to detention.<sup>289</sup> In any of these situations, the reason advanced must be justified by the facts in the particular case. But if there is still reasonable suspicion regarding the commission of an offence, the person concerned should be released on bail but this may be subject to guarantees designed to ensure that he appears for trial. In those countries which have the system of bail on financial sureties, the amount of the sureties must not be excessive, and must be fixed by reference to the purpose for which they are imposed, namely to ensure that this particular defendant appears for trial.<sup>290</sup> The sum must never be set exclusively by reference to the seriousness of the charge without considering the accused's financial circumstances. For example, in *Neumeister v Austria*, where the domestic authorities calculated the amount of bail solely in relation to the loss imputed to the applicant, the European Court found this contrary to Article 5(3), since the bail is designed to ensure the presence of the person accused to the hearing and is not the reparation of the loss caused by the accused.<sup>291</sup> The amount of the bail must also correspond to this aim and thus must be calculated by reference to the accused, his assets and the relationship with the person providing the security.<sup>292</sup> The accused must make available information related to his assets while the domestic authorities are under a duty to carefully assess this information for a proper assessment of the security to be calculated. Even if such guarantees as monetary cannot be obtained or are not considered reliable, consideration ought to be given in all cases to the suitability of other measures than deprivation of liberty for ensuring those dangers discussed above do not occur. For example, in order to the same end of ensuring the accused's presence at the trial, it can also require that the person concerned reside in a particular place, give up his travel documents or frequently report to the police.<sup>293</sup>

### 3.5.3 The Length of Pre-trial Detention

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<sup>289</sup> (1968) 1 EHRR 55, para 15; *Jablonski v Poland* (2003) 36 EHRR 27.

<sup>290</sup> *Neumeister v Austria*, (1979-80) 1 EHRR 91, para 13-14; *Punzelt v Czech Republic* (2001) 33 EHRR 1159.

<sup>291</sup> *Neumeister v Austria*, para 14.

<sup>292</sup> *Wemhoff v Germany* (1968) 1 EHRR 55, para 15.

<sup>293</sup> See e.g. *Stögmüller v. Austria* (1969) 1 EHRR 155, para 15; see also *Wemhoff v Germany*; *Schmid v Austria* (1985) 44 DR 195.

However, even if the reasons justifying continued deprivation of liberty can still be demonstrated to be applicable to a particular individual, there is also a need to ensure that he is brought to trial within a reasonable time if he is held in custody and not release pending trial and this necessarily sets limits to the overall period for which such a deprivation can be allowed to endure.<sup>294</sup> Article 5 (3), for its part, refers only to persons charged and detained.<sup>295</sup> Once the accused has been released on bail, Article 5(3) does not apply.<sup>296</sup> Also, the European Court has held that the end of the period with which this provision is concerned is the day on which the charge is determined, even if only by a court of first instance. It follows that it is not the day on which the judgement becomes final.<sup>297</sup> In the case of *B v Austria*, where the European Court confirmed its *Wemhoff* judgment to hold that, despite the rule of Austrian law that sentence becomes final only with the determination of any appeal, but the important guarantees of Article 5(3) of the Convention are not dependent on national legislation.<sup>298</sup> So the applicant's detention on remand came to an end for the purposes of the Convention with the finding of guilt and sentencing at first instance.<sup>299</sup>

However, if the accused is released and later taken back into custody, the relevant period is the aggregate period of detention.<sup>300</sup> Where an accused person is detained for two or more separate periods pending trial, the European Court declared those complaints regarding these periods inadmissible if an application was lodged more than 6 months after the end of initial periods of detention.<sup>301</sup> However, the European Court has reinstated in recent cases such as *Solmaz v Turkey* and *Baltaci v Turkey* that the "reasonable time" guarantee of Article 5(3) requires a global assessment of the accumulated periods.<sup>302</sup> The European Court notes that, in the absence of

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<sup>294</sup> Article 5(3) of ECHR; *Stogmüller v Austria*, para 5 of "the law"; also see Chap2, 5.4, pp.59-61.

<sup>295</sup> *Stögmüller v. Austria* (1969) 1 EHRR 155, para 5 of "the law".

<sup>296</sup> *ibid*; this right in Article 5(3) is parallel to that contained in Article 6(1) which guarantees a hearing to determine criminal charges within a reasonable time, and applies where an accused has been released from custody. also see Jason Coppel, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts*, (Chichester: John Wiley & Sons Ltd, 1999) p.225; J.G. Merrills & A. H. Robertson, *op.cit.*, fn 1, p78.

<sup>297</sup> See *Solmaz v. Turkey*, (App.27561/02), 16/01/07, para 24; *Wemhoff Case v. Germany*, (1968) 1 EHRR 55, para 9.

<sup>298</sup> (1991) 13 EHRR 20

<sup>299</sup> *Ibid.*, para 39.

<sup>300</sup> See *Neumeister v. Austria*, (1979-80) 1 EHRR 91, para 6; see also *Kemmache v France* (1992) 14 EHRR 520.

<sup>301</sup> See e.g. *Solmaz v. Turkey*, para 30; *Kalay v. Turkey*, (App. 16779/02), 22/09/05, para 34.

<sup>302</sup> *Solmaz v. Turkey*, para 31; *Baltaci v. Turkey*, (App. 495/02), 13/07/06, para. 44-46.

domestic remedies, the 6-month time limit starts to run from the act being complained of.<sup>303</sup>

There is no maximum length of pre-trial detention as long as there remain “relevant and sufficient circumstances” to show that detention was not unreasonably prolonged and contrary to Article 5(3) of the Convention as discussed above.<sup>304</sup> The European Court reiterates that the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*.<sup>305</sup> The reasonableness of an accused person’s continued detention must be assessed in each case according to its special features and the factors which may be taken into consideration are extremely diverse.<sup>306</sup> For example, in a recent case *Khudobin v Russia*, the European Court recalled that “the gravity of the charge cannot by itself serve to justify long periods of detention pending trial. Nor can it be used to anticipate a custodial sentence”.<sup>307</sup> Also, the reasons for the applicant’s detention in this case, referred to by the Government as the danger of absconding and the applicant’s “character”, were not mentioned in the domestic courts’ decisions, and the European Court cannot accept that those reasons transpire from the circumstances of the case.<sup>308</sup> On the other hand, such factors as the applicant’s young age, health problems, the absence of a criminal record, the fact that he had a permanent place of residence and stable family relations called for a careful scrutiny of his applications for release and for their analysis in the judicial decisions. The European Court regarded that “it appears that the lack of reasoning was not an accidental or short-term omission, but rather a customary way of dealing with applications for release in Russia”. Against this background the European Court concludes that the applicant’s detention pending investigation and trial 1 year and 23 days was not justified by “relevant and sufficient” reasons.<sup>309</sup>

The complexity and special characteristics of the investigations are factors to be considered by European Court justify a long period of pre-trial detention.<sup>310</sup> In

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<sup>303</sup> *Solmaz v. Turkey*, (App.27561/02), 16/01/07, para 35.

<sup>304</sup> See *W v Switzerland* (1993) 17 EHRR 60, para 30.

<sup>305</sup> See e.g. *Stögmüller v. Austria* (1969) 1 EHRR 155, para 4; *Chraidi v. Germany*, (2008) 47 EHRR 2, para 35; also see Chap2, 5.4 pp.59.

<sup>306</sup> See *Wemhoff v. Germany*, (1979-1980) 1 EHRR 55, para 10.

<sup>307</sup> (2009) 48 EHRR 22, para 107.

<sup>308</sup> *Ibid.*, para 108.

<sup>309</sup> *Ibid.*

<sup>310</sup> *Scott v. Spain*, (1997) 24 EHRR 391, para 78, also see *I.A. v France*, (App.28213/95), 23/09/98, para 102.



*Wemhoff v Germany* the pre-trial period was 3 years, the need to obtain further expert evidence was held by the European Court in this case as a justifiable reason for delay in prosecution of a case.<sup>311</sup> This approach is still the position can be seen from the decisions in the coming cases. For example, in *Contrada v Italy* the European Court held that detention for a period of 2 years and 7 months to enable complex investigations to be carried out did not breach Article 5(3).<sup>312</sup> The right of an accused person to have his case considered with particular expedition should not hinder the efforts of the domestic courts to carry out their tasks with proper care.<sup>313</sup> In *W v Switzerland*, which bore some resemblance to *Wemhoff*, Judge Pettiti dissented and suggested that there ought to be an absolute limit to the length of proceedings and that strong evidence should be necessary to justify both refusing bail and extending proceedings for more than 4 years.<sup>314</sup> However, the European Court finally held that a total of 4 years and 6 months pre-trial detention was considered acceptable because there were good grounds for refusing bail and the complexity of the case, rather than any delays attributable to the authorities, was the cause of the extended proceedings.<sup>315</sup>

At the same time the European Court regarded that the complexity of a case does not per se absolve the prosecution from its responsibility to promptly bring an accused to trial.<sup>316</sup> For example, in case *Solmaz v. Turkey*, the European Court observes that the Istanbul State Security Court examined the applicant's continued detention at the end of every hearing, either of its own motion or upon the applicant's request.<sup>317</sup> However, it also noted that, from the material in the case file, that the court ordered the applicant's continued detention using identical, stereotyped terms, such as "having regard to the nature of the offence, the state of the evidence and the content of the file" at the end of most of the hearings. Although, in general, the expression "the state of evidence" may be a relevant factor for the existence and persistence of serious indications of guilt, in the present case it nevertheless, alone, cannot justify 7 years and 2 months of the pre-trial detention.<sup>318</sup>

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<sup>311</sup> *Wemhoff v Germany*, (1979-1980) 1 EHRR 55, para 14.

<sup>312</sup> *Contrada v Italy* (App.27143/95), 24/08/98.

<sup>313</sup> *Ibid.*, para 65-67;

<sup>314</sup> (1993) 17 EHRR 60, see Dissenting Opinion of Judge Pettiti.

<sup>315</sup> *Ibid.*, paras. 41-42.

<sup>316</sup> See *Tomasi v. France*, para 89; *Labita v. Italy*, (2008) 46 EHRR 50, para 152.

<sup>317</sup> (App.27561/02), 16/01/07

<sup>318</sup> *Ibid.* para 41.

Where such grounds to justify the continued detention are “relevant” and “sufficient”, the European Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings.<sup>319</sup> The need for special diligence does not, however, imply any upper limit on time in custody, or preclude very long periods of detention in an appropriate case.<sup>320</sup> Periods of inactivity by the national authorities lasting more than a few months are usually taken by the European Court as a sign of lack of diligence, particularly if the overall duration of the detention was long. An example of a successful claim under Article 5(3) is *Scott v Spain*, where the applicant had been detained for 2 years and 4 months pending trial on rape charges of which he was acquitted.<sup>321</sup> The European Court rejected the argument of the Spanish Government that the difficulties of liaising with the alleged victim, who lived in Finland, could justify the delay.<sup>322</sup> In contrast, in recent case *Chraidi v. Germany*, the applicant’s detention on remand thus lasted 5 years and almost 6 months.<sup>323</sup> When the European Court ascertained whether the judicial authorities displayed “special diligence” in the conduct of the proceedings, the European Court takes the view that the applicant’s case involved many witnesses and plaintiffs with a terrorist and international background was extremely complex.<sup>324</sup> The European Court noted that hearings took place on 281 separate days with on average two hearings per week until the Regional Court’s decision of 13 November 2001. The hearings were regularly attended by five defendants, their fifteen lawyers, 106 joint plaintiffs and their 29 lawyers. Therefore the European Court held that having regard to the difficulties intrinsic to the prosecution of offences committed in the context of international terrorism, the competent judicial authorities cannot be said to have displayed a lack of special diligence in handling the applicant’s case.<sup>325</sup>

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<sup>319</sup> See e.g., *Stögmüller v Austria* (1969) 1 EHRR 155, para 5; *Castravet v. Moldova*, 23393/05, (2007), para 31; *Assenov v. Bulgaria*, (1998) 28 EHRR 652, para 54.

<sup>320</sup> Jason Coppel, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts*, (Chichester: John Wiley & Sons Ltd, 1999) p.225.

<sup>321</sup> (1997) 24 EHRR 391.

<sup>322</sup> *Ibid.*, para 83.

<sup>323</sup> (2008) 47 EHRR 2.

<sup>324</sup> *Ibid.*, para 43.

<sup>325</sup> *Ibid.*, para 44.

A suspect is not considered by the European Court to be under any obligation to co-operate but his conduct in not doing so will be recognised as factor in slowing the overall progress of an investigation. For example, in case *W v Switzerland*, lack of co-operation of the accused, as well as actual obstruction that as a result of the state of their accounts there had been great difficulties in reconstructing the financial situation of his companies will thus also be considered in assessing whether or not the total period of pre-trial detention is excessive.<sup>326</sup> But in case *Stögmüller v Austria*, even though the European Court accepted the delays caused by certain of the applicant's applications and appeals and, in particular, his challenges to judges, it unanimously held that there has been in this case a breach of Article 5 (3) because "at that time the length of his detention had already ceased to be reasonable".<sup>327</sup> In *Jablonski v Poland*, the domestic courts extended the applicant's detention beyond the statutory time-limit because he had previously inflicted injuries on himself and had thus obstructed the progress of the trial.<sup>328</sup> However, the European Court found a violation of Article 5(3), arguing that the national courts failed to consider any alternative "preventive measure" such as bail or police supervision when they decided that the applicant should be kept in detention in order to ensure the proper conduct of the trial.<sup>329</sup>

### 3.5.4 The character of the Competent Legal Authority

If the accused is not released pending trial promptly before any judicial control of his detention would have been feasible, he is entitled to a prompt appearance before a judge or judicial officer.<sup>330</sup> The importance of the right to be brought promptly before a judge under Article 5(3) arises from the objective and purpose of Article 5 itself: to protect the individual against arbitrary interferences by the state with his right to liberty.<sup>331</sup> So Article 5(3) emphasises the state's duty to have the accused's arrest and detention approved by a judge at an early stage and differs from Article 5(4) and Article 6. The "officer" must hear the individual brought before him in person and review whether or not the detention is justified. If it is not justified, the

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<sup>326</sup> (1993) 17 EHRR 60, para 42.

<sup>327</sup> (1969) 1 EHRR 155, para 16.

<sup>328</sup> (2003) 36 EHRR 455.

<sup>329</sup> *Ibid.*, para 83-84; *Lelievre v. Belgium*, 11287/03, (2007).

<sup>330</sup> See Article 5(3) of ECHR; and also see discussion on Chap2, 5.3, pp55-56.

<sup>331</sup> See *Bozano v France* (1986) 9 EHRR 297 para 54; *Brogan v UK* (1988) 14 EHRR 117 para 58; *Assenov v Bulgaria* (1999) 28 EHRR 652 para 146; Chap2, 5.1, p.49.

“officer” must have the power to make a binding order for the detainee’s release.<sup>332</sup> The European Court note the word “officer authorised by law to exercise judicial power” using in Article 5(3) is quite vague but tries to emphasis the limits of the distinction which it establishes.<sup>333</sup> A number of cases have considered the character of the “other officer authorized by law to exercise judicial power”.

The important concern on the independence and impartiality is whether or not there is a possibility of the officer may intervene in subsequent criminal proceedings on behalf of the prosecution.<sup>334</sup> This aspect of Article 5(3) was examined in detail in the *Schiesser v Switzerland* case.<sup>335</sup> The “officer” need not be a judge but must display judicial attributes sufficient to protect the rights of the detained person. Judge or other judicial officer authorised by law has the same meaning as “competent legal authority” in Article 5(1)(c), in other words that it is independent of the executive and is impartial in relation to the parties.<sup>336</sup> In addition, the European Court explained under Article 5(3), there are both a procedural and a substantive requirement.<sup>337</sup> The procedural requirement places the “officer” under the obligation of hearing himself the individual brought before him; the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons.

Therefore in the *Schiesser* case it was decided that a Swiss District Attorney satisfied the requirements of Article 5(3) because, although he could act as a prosecuting as well as an investigating authority, in the present case he had acted solely as an investigating authority and, in accordance with the usual practice, had taken his decision to detain the applicant in complete independence and in conformity with the procedural and substantive requirements of the Convention. On the contrary, in case *Assenov v Bulgaria* the European Court therefore held that the prosecutor who authorised the applicant’s continued detention on remand could not provide sufficient guarantees of independence since he could in theory have taken over the

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<sup>332</sup> *Schiesser v Switzerland* (1979) 2 EHRR 417, para 31; also see *Ireland v. UK*, para 199.

<sup>333</sup> *Schiesser v Switzerland*, para 29,

<sup>334</sup> *Hood v. UK*, (2000) 29 EHRR 365, para 57.

<sup>335</sup> (1979) 2 EHRR 417.

<sup>336</sup> *Schiesser v Switzerland*, para 29.

<sup>337</sup> *Ibid.*, para 31; *Assenov v Bulgaria* (1998) 28 EHRR 652, para 146.

prosecution of the subsequent criminal proceedings.<sup>338</sup> As Macovei concluded, from a number of cases, the problem of objective impartiality is likely to be much more acute given the structure of prosecution systems.<sup>339</sup> The basic problem is that the prosecutor is a party to the proceedings and the person taking that role could not therefore be expected to be impartial when performing a judicial function in the same case. The officer needs to display judicial attributes sufficient to protect the rights of the accused. The European Court does not rule out the possibility of the judicial officer who orders the detention carrying out other duties, but reiterates the independence or impartiality of the officer for the purposes of Article 5(3) all the time.

It is hard to guarantee in advance that a person taking a detention decision will not subsequently be involved in the prosecution. Also there will be a need to ensure that the “officer” is truly independent and that means not only from political pressures but also from superiors. In *Schiesser v Switzerland*, this does not mean that the “officer” may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence.<sup>340</sup> In some circumstances, subordinates may be expected to follow their superior’s instructions regarding an individual case and they will not therefore have the requisite independence. This problem were extensively examined and discussed by the European Court in the case of *Niedbala v Poland*.<sup>341</sup> The European Court firstly observed that under Polish law at the material time, the tasks of the prosecution during criminal proceedings were carried out by prosecutors. The latter were subordinated to the Prosecutor General who at the same time carried out the function of the Minister of Justice. The Polish constitutional law provides for the separation of legislative, executive and judicial powers. The judicial power is entrusted solely to the independent courts. This made it indisputable that prosecutors, in the exercise of their functions, are subject to supervision of an authority belonging to the executive branch of the government. The European Court also held that their role as guardians of the public interest cannot be regarded as conferring on them a judicial status. Since the prosecutors performed investigative

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<sup>338</sup> (1998) 28 EHRR 652, para 146; also see *Nikolova v Bulgaria* (2001) 31 EHRR 64; *Bojilov v. Bulgaria*, (App. 45114/98), 22/12/04.

<sup>339</sup> Monica Macovei, *op.cit.*, fn 212, 2004, p.51.

<sup>340</sup> (1979) 2 EHRR 417 para 31.

<sup>341</sup> (2001) 33 EHRR 48.

and prosecuting functions, they must be seen as a party to the criminal proceedings.<sup>342</sup> Consequently, the European Court found that the prosecutor in the Polish legal system was not an “officer authorized by law to exercise judicial power”.

The case *Salov v Ukraine* is one of the latest applications of this approach.<sup>343</sup> The applicant in this case complained that he was not brought promptly before a judge or other judicial authority to have his arrest reviewed. The Government maintained that the applicant had been detained in accordance with the decision of the prosecutor. They stressed that the prosecutor, pursuant to the reservation made by Ukraine in respect of Article 5 of the Convention, could be considered another officer authorised by law to exercise judicial power. However, the European Court observes that “under Ukrainian legislation, a prosecutor cannot be regarded as an officer exercising ‘judicial power’ within the meaning of Article 5(3)”. Moreover, his status cannot offer guarantees against any arbitrary or unjustified deprivation of liberty as he is not endowed with the attributes of “independence” and “impartiality” required by Article 5(3). Furthermore, the prosecution authorities not only belong to the executive branch of the State, but they also “concurrently perform investigative and prosecution functions in criminal proceedings and are party to those proceedings”.<sup>344</sup> The European Court therefore reiterates its position as to the status of the prosecutor, who cannot be regarded as “an officer authorised by law to exercise judicial power” and rejects the Government’s arguments in this respect.<sup>345</sup>

### **3.5.5 The time-frame for supervision**

#### **3.5.5.1 The Notion of Promptness**

It follows also that, if this safeguard, the right to be brought promptly before a judge, is to be effective, the interpretation of the word “promptly” assumes a crucial importance and much of the case law on Article 5(3) has concerned this question. The European Court reiterates that such judicial control cannot be made to depend on an application by the detained person, which might defeat the purpose of Article 5(3), but must be automatic.<sup>346</sup> For example, in recent case *Salov v. Ukraine*, the

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<sup>342</sup> *Niedbala v Poland* (2001) 33 EHRR 48, paras 52-54.

<sup>343</sup> (2007) 45 EHRR 51.

<sup>344</sup> *Salov v. Ukraine*, (2007) 45 EHRR 51, para 58; See also *Merit v. Ukraine*, (App. 66561/01), 30/03/04, paras 62-63.

<sup>345</sup> See also *Schiesser v Switzerland*, (1979) 2 EHRR 417, para 27-41.

<sup>346</sup> *Niedbala v Poland*, para 50; *T W v Malta* (1999) 29 EHRR 185, para 43; *De Jong, Baljet and Van den Brink v.*

applicant was apprehended by the police but that his detention was not reviewed by a court 16 days after his arrest. The European Court considers that the Government's explanations as to the delay in reviewing the applicant's arrest are immaterial as they presuppose that there was no automatic judicial review of detention and that such a review depends only on whether the detainee has complained to the court about the lawfulness of his or her detention.<sup>347</sup>

As to the assessment of the notion "promptness", there is no concrete limit on the acceptable length since it considers that this must depend on an assessment of the "special features" of each case as under Article 5(2).<sup>348</sup> There have been some cases where the detention concerned lasted far longer than could ever reasonably be regarded as acceptable. Thus the lapse of 3 months before judicial supervision in *Assenov and Others v Bulgaria* and in *Jecius v Lithuania* were thus unanimously held to violate the promptness requirement.<sup>349</sup> The European Court considers that "the wording 'brought promptly' in Article 5(3) implies that the right to be brought before an appropriate officer relates to the time when a person is first deprived of his liberty under Article 5(1)(c)."<sup>350</sup> However violations of the obligation will also arise where the intervals are not quite so extreme. Although the European Court has never put a finite limit on the acceptable length of preliminary detention, the degree of flexibility attaching to the assessment of the notion "promptness" is limited.<sup>351</sup> Some guidance is provided by the *Brogan and Others v the UK* judgment, which concerned the arrest and detention by virtue of powers granted under special legislation of persons suspected of involvement in terrorism in Northern Ireland.<sup>352</sup>

In *Brogan and Others v the UK*, the shortest length of detention after arrest was 4 days and 6 hours and the longest was 6 days and 16 hours. Here the issue to be decided by the European Court was whether, having regard to the special features relied on by the Government, each applicant's release can be considered as "prompt" for the purposes of article 5(3). All the applicants were questioned about specific

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*the Netherlands* (1986) 8 EHRR 20, paras 51 and 57.

<sup>347</sup> *Salov v. Ukraine*, (2007) 45 EHRR 51, para 59.

<sup>348</sup> *Wemhoff v. Germany*, (1979-1980) 1 EHRR 55, para 10; *De Jong, Baljet and Van Den Brink v Netherlands* para 52.

<sup>349</sup> *Assenov v Bulgaria* (1998) 28 EHRR 652, para 147; *Jecius v Lithuania* (2002) 35 EHRR 16, para 83-86.

<sup>350</sup> *Jecius v Lithuania*, para 84.

<sup>351</sup> *Brogan and Others v. UK*, (1989) 11 EHRR 117, para 62.

<sup>352</sup> *Ibid.*

terrorist incidents, it is clear that none of the applicants had been brought before a judge or judicial officer during his time in custody before his release.<sup>353</sup> Turning to the particular facts, the European Court recognised that the investigation of terrorist offences in Northern Ireland presents the authorities with special problems. Account was also taken of the safeguards of ministerial control, the constant monitoring of the need for the legislation by Parliament and the regular review of its operation. The European Court agreed subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5(3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.<sup>354</sup> Therefore the European Court held that it is for the European Court to determine and balance the significance to be attached to different background circumstances.

However, the European Court still regarded that the special features of this case can never be taken to the point of impairing the very essence of the right guaranteed by Article 5(3).<sup>355</sup> So the promptness has to be made in the light of the overall object and purpose of Article 5.<sup>356</sup> The undoubted fact that arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5(3).<sup>357</sup> In this case, even the shortest of the four periods of detention, namely the 4 days and 6 hours spent in police custody by one applicant in this case fell outside the strict constraints as to time permitted by the first part of Article 5. The case *Brogan v UK* recognised that the word “promptly” in Article 5(3) should be interpreted strictly and with only a limited degree of flexibility to cater for special circumstances. Later cases have fully endorsed this approach.<sup>358</sup> For example, in case *Salov v Ukraine*, there was no hesitation on the part of the European Court in finding a violation of Article 5(3) even if the Government’s argument that the applicant had contributed to the delay by not applying for release were accepted, where his detention for 7 days without any judicial control fell

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<sup>353</sup> *Brogan and Others v. UK*, (1989) 11 EHRR 117, para 60.

<sup>354</sup> *Ibid.*, para 61.

<sup>355</sup> *Ibid.*, paras 48 and 59.

<sup>356</sup> *Ibid.*, para 58.

<sup>357</sup> *Ibid.*, para 62.

<sup>358</sup> *Ibid.*, para 59; See also *Koster v the Netherlands* (1992) 14 EHRR 396, para 24.



outside the strict constraints of time laid down by the Convention.<sup>359</sup> Either it has been impossible to persuade the European Court that delay of 5 or 6 days could be acceptable.<sup>360</sup>

### 3.5.5.2 State of Emergency

The most frequent emergency measure resorted to by states in emergency situations, such as organised terrorism or threats to national security, is the detention without trial. Especially after 11 September, the general perception was that further attacks could well occur, and that they might happen anywhere in the world. Thus the UN Security Council required states in Resolution 1373 to take measures to prevent terrorist attacks, which include denying a safe haven to those who plan, support or commit such acts.<sup>361</sup> The European Court has given the broad definition of a public emergency as an exceptional situation of crisis or emergency which effects the whole population and constitutes a threat to the organised life of the community of which the State is composed.<sup>362</sup> Faced with such a situation Article 5 about the right to liberty and security of persons is one article therefore that may be derogated from its convention obligations in so far as it is permitted to do by the State in such an emergency.

Due to the nature and extent of the terrorist threat and the resulting problems in obtaining evidence sufficient to bring charges, member states have invoked the need to keep terrorist suspects in custody before bringing him before a judge or other judicial officer for some time following arrest. For example, the UK government's response to the *Brogan and others v UK* judgment was to file a derogation of Article 5 under Article 15 of the Convention after the European Court found a violation of Article 5(3) in the case, although later the derogation has been withdrawn with effect from 2001.<sup>363</sup> Interestingly, the Government did not seek to derogate from the equivalent right to liberty contained in Article 9 of ICCPR. In UK, the period of detention without charge has been extended from 48 hours to 7 days by the

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<sup>359</sup> (2007) 45 EHRR 51, para 59.

<sup>360</sup> See *Koster v the Netherlands*, para 25; *Sakik v Turkey* (1998) 26 EHRR 662; *De Jong, Baljet and Van den Brink v the Netherlands* (1986) 8 EHRR 20 para 52.

<sup>361</sup> UN Security Council Resolution 1371 (2001), S/RES/1373, 28/09/01.

<sup>362</sup> *Lawless v Ireland* (No.3), (1961) 1 EHRR 15, para 28.

<sup>363</sup> The Human Rights Act (Amendment) Order 2001, 26/02/01.

Terrorism Act 2000.<sup>364</sup> In the case *Brannigan and McBride v UK*, the European Court gives a considerable “margin of appreciation” to the State on the question whether resort to emergency measures were justified.<sup>365</sup> The UK has not overstepped the margin of appreciation by derogating from their obligations under Article 5 of the Convention to the extent that the individuals suspected of terrorist offences were allowed to be held for up to 7 days without judicial control.<sup>366</sup>

The UK has had lengthy experience in indefinitely detaining those suspected to be terrorists without trial.<sup>367</sup> Since 9/11, the government in the UK has faced the difficult task of balancing the rights of individuals with the security of the state.<sup>368</sup> There has been intense legislative activity in UK. The issue was tackled and controversial during the drafting of all the Terrorism Act, especially on the detention of suspected terrorists without trial.<sup>369</sup> After 7 July bomb attacks in London the UK Parliament has passed the *Terrorism Act 2006 (UK)*.<sup>370</sup> Under this Act, the detention for an initial period of 48 hours, is then reviewed by a judicial authority sitting in private rather than in an open court, and is then renewable for every 7 day periods up to a maximum of 28 days, with a senior judge considering applications for detainment for the final 14 days.<sup>371</sup> This was a considerable increase over the existing term permitted by the Criminal Justice Act 2003, which allowed for a maximum 14 days detention before charges were laid and contrast also to the maximum of 4 days detention without charge allowed in cases of murder, rape and complex fraud under ordinary legislation, with further 36 hours and 24 hours extensions being granted by a judicial authority after the initial 36 hours.<sup>372</sup> The

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<sup>364</sup> Terrorism Act 2000, C 26.

<sup>365</sup> (1993) 17 EHRR 539.

<sup>366</sup> *Ibid.*, para 57; for a detailed analysis about this topic see Susan Marks, “Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights”, (1995) 15 Oxford Journal of Legal Studies, No.1, pp.69-95.

<sup>367</sup> *Brannigan and McBride v UK*, para 50.

<sup>368</sup> The Government Reply to the Nineteenth Report from the Joint Committee on Human Rights Session 2006-07 HL Paper 157, HC 394, Counter-terrorism Policy and Human Rights: 28 Day, Intercept and Post-charge Questioning, 2007-08, Cm 7215, para 1, <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>.

<sup>369</sup> See BBC News, “Head to Head: New Terrorism Act”, 11/02/01, [http://news.bbc.co.uk/1/hi/uk\\_politics/talking\\_politics/1178705.stm](http://news.bbc.co.uk/1/hi/uk_politics/talking_politics/1178705.stm); The overview on legislation on counter-terrorism See Clive Walker “Clamping down on terrorism in the United Kingdom”, J.I.C.J. 2006, 4(5), pp.1137-1151; Ben Brandon, “Terrorism, human rights and the rule of law: 120 years of the UK’s legal response to terrorism”, P.L. 2010, Jan, 110-139.

<sup>370</sup> Terrorism Act 2006. The period of detention under the Terrorism Act 2006 is subject to a sunset provision, requiring that Parliament approve the extension of detention from 14 to 28 days annually by an affirmative resolution debate in both Houses of Parliament. It was recently renewed by Terrorism Act 2006 (Disapplication of Section 25) Order 2009, 25/07/09.

<sup>371</sup> Terrorism Act 2006, para 24.

<sup>372</sup> Criminal Justice Act 2003, C 306; Police and Criminal Evidence Act 1984, S.42(1).

parliament has warned that the growing number of cases and the increases in suspects monitored by the police and security forces make it entirely possible that compelling evidence for a longer detention period will become available.<sup>373</sup>

It can of course be argued that the government has a responsibility to protect the public from the threat of terrorism. The reasons for extension of detention have included difficulties relating to resources, such as interpreters, time and logistical difficulties, and technological or forensic difficulties, such as breaking encryption. Also the UK government have reviewed whether the powers of extended detention could be conferred on the normal courts, but have concluded that it would not be appropriate to involve courts in such decisions.<sup>374</sup> The reasons held by the government is that the sensitive nature of the information not presented to the detainee or his legal adviser might have to be only disclosed in any judicial supervision of the detention in the essentially adversarial common law system, and therefore, the risk that judicial involvement in any decisions of the extension might “undermine public confidence in the independence of the judiciary”, not least “because it was small in numbers and vulnerable to terrorist attack.”<sup>375</sup> Conversely, the questions are raised as to whether special laws are required to deal with terrorists, and whether it is justified for these laws to interfere with human rights if necessary to tackle this threat.<sup>376</sup>

For example, despite lots of criticism the period of detention permitted under the *Terrorism Act 2000*, on 14 December 2001, the *Anti-Terrorism, Crime and Security Act* was introduced in UK in the wake of the attacks.<sup>377</sup> This legislation enables non-UK nationals, who are suspected to be international terrorists, to be detained without

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<sup>373</sup> See House of Commons, Home Affairs Committee, “Terrorism Detention Powers”, Fourth Report of Session 2005-06, 03/07/06, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/91002.htm>; On June 11, 2008 the House of Commons, by a narrow majority of nine, passed a *Counter-Terrorism Bill*, to further increase the pre-charge detention period from 28 to 42 days, [http://www.opsi.gov.uk/acts/acts2008/ukpga\\_20080028\\_en\\_1](http://www.opsi.gov.uk/acts/acts2008/ukpga_20080028_en_1); However, On 13 October 2008 this measure was dropped from the Bill by a vote in the House of Lords, <http://www.publicwhip.org.uk/division.php?date=2008-10-13&number=1&house=lords>.

<sup>374</sup> Official Report, Mr David Waddington on 14 November 1989 col. 210 in *Brannigan and McBride v. UK*, (1993) 17 EHRR 539 para 32.

<sup>375</sup> *Brannigan and McBride v. UK*, para 55-60 and the Commission’s Observation para 29, 33, 55 and 61.

<sup>376</sup> The terrorism legislation is worth considering as a special topic. This topic is discussed detailed by many specialists and scholars, see such as Helen Fenwick, op.cit., fn 31; David Hoffman & John Rowe, *Human Rights in the UK: An Introduction to the Human Right Act 1998*, (Harlow: Pearson Longman, 2003), Chapter 21, p283; Mary Arden, “Meeting the Challenge of Terrorism: The Experience of English and other Courts”, (2006) 80 ALJ 818-838.

<sup>377</sup> *Anti-Terrorism, Crime and Security Act 2001*.

charge or trial in circumstances where they cannot be removed from the UK. In December 2004, the case, *A(FC) and others v Secretary of State for the Home Department*, relates to the indefinite detention of a number of foreign nationals on the grounds that the Secretary of State has a reasonable suspicion that they are international terrorists.<sup>378</sup> The court was posed with the problem of whether indefinite detention was a proportionate response to the terrorism emergency and whether there was indeed a public emergency threatening the life of the nation that justified the making of the derogation from Article 5. A majority of the judges accepted that the UK government was within its powers to find that the UK was in a state of public emergency after 11 September 2001 but found that the measures taken were not “strictly requires by the exigencies of the situation”.<sup>379</sup> The House of Lords quashed the derogation order from ECHR Article 5 and declared that s23 of the *Anti-terrorism Crime and Security Act 2001* providing indefinite detention without trial was a disproportionate response to the threat of terrorism and incompatible with Article 5 of the ECHR.

Lord, Hoffmann, however, even goes further and does not agree and considers that the Government cannot justify in law its claim that there is a threat to the life of the nation. He added that the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.<sup>380</sup> That is the true measure of what terrorism may achieve. The judgment of this case is the most dramatic and landmark decision in favour of liberty and freedom of the individual where legislation about terrorism has been used to maintain a particular regime in power.<sup>381</sup> Accordingly, in UK, a person may be deprived of his liberty, but only if the exercise of powers of arrest and detention by state authorities is governed by due process of law and consistent with recognised standards. It reminded that no threat, however real, can justify abandoning basic principles of liberty and justice.<sup>382</sup>

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<sup>378</sup> [2005] 2 AC 68.

<sup>379</sup> *A(FC) and others v Secretary of State for the Home Department* [2005] 2 AC 68. p 69.

<sup>380</sup> *Ibid.*, para 97 of the speech of Lord Hoffman.

<sup>381</sup> The detailed discussion about this case see, Arden M, “Human Rights in the Age of Terrorism” 2005 121 LQR, p604-627. Sangeeta Shah, “The UK’s Anti-terror Legislation and the House of Lords: the Battle Continues”, H.R.L. Rev. 2006, 6(2), 416-434; Mark Elliott, “Detention without Trial and the “War on Terror”, I.J.C.L. 2006, 4(3), pp.553-566.

<sup>382</sup> See “U.K.: Law Lords Rule Indefinite Detention Breaches Human Rights”, 14/12/04, <http://hrw.org/english/docs/2004/12/16/uk9890.htm>.

Moreover, *Prevention of Terrorism Act 2005* which allows for control orders restricting the freedom of terrorism suspects was rushed through UK parliament in response to the judgment of the above leading A case.<sup>383</sup> The Act gives the government the power to impose control orders amounting to house arrest, provided that it first “derogates” from Article 5 of ECHR.<sup>384</sup> House arrest is a gross interference with liberty which impacts not only the person subject to the order, but any family members with whom he resides. So-called “derogating” control orders can only be made by the court, upon application by the Secretary of State. The evidence presented by the government must establish “reasonable grounds” for suspecting involvement in terrorism-related activities, in a preliminary hearing from which the individual and his or her lawyer can be excluded, as *Murray v UK*.<sup>385</sup> The court must then conduct a narrow judicial review of the order in a subsequent full hearing, with all parties present, applying the civil standard of proof. The court would be entitled to consider secret evidence in closed sessions from which the controlled person and his or her lawyer would be excluded. While house arrest can be ordered for an absolute maximum of 12 months, there is no limit on the number of times that other control orders may be renewed. The Act will remain in force for 1 year, but may be renewed for another year.<sup>386</sup> It is still severely criticized. “First we had indefinite detention, now we have curfews and tagging – but still without trial. That hardly counts as progress, the government refuses to acknowledge a basic truth: punishment without trial is unacceptable, no matter what”, said Ben Ward, special counsel in the Europe and Central Asia division of Human Rights Watch.<sup>387</sup>

However, the government has a corresponding duty to ensure that counter-terrorism measures are fully compatible with its obligations under human rights law. Though the *Brannigan and McBride v UK* judgment demonstrates that there are circumstances in which automatic judicial supervision of detention can be deferred for such a significant period. The exceptional nature of such a step is underlined by the need to demonstrate that there was a genuine emergency and the importance

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<sup>383</sup> The Prevention of Terrorism Act 2005. Also see Adam Sandell, “Liberty, fairness and the UK control order cases: two steps forward, two steps back”, (2008) 1 EHRLR, 1, pp.120-131.

<sup>384</sup> The Prevention of Terrorism Act 2005, Article 1(2) (b) and (10).

<sup>385</sup> see 3.3, pp116.

<sup>386</sup> In any event, sections 1-9 of the Act are subject to annual renewal by affirmative resolution of both Houses of Parliament. As of March 2007 the measures were last renewed following votes of the Commons on 22 Feb 2007 and the Lords on 5 March 2007.

<sup>387</sup> Human Rights Watch, “UK: New Terrorism Law Fundamentally Flawed”, March 14, 2005, <http://www.hrw.org/en/news/2005/03/14/uk-new-terrorism-law-fundamentally-flawed>.

attached to the existence of other safeguards against potential abuse of the vulnerability of those who are detained.<sup>388</sup> In the same case the European Court also insisted that the State do not enjoy an unlimited power of appreciation. Even where a Government has derogated from its Article 5(3) obligations, it is for the European Court to rule on whether inter alia the States have gone beyond the extent strictly required by the exigencies of the crisis.<sup>389</sup> So ultimately the resort to derogation is subject to a European supervision. As Ovey and White regarded, judicial safeguards are of particular importance in connection with emotive crimes of this nature, when the police and prosecution are likely to be under pressure to secure convictions and may be tempted to use unorthodox means to force confessions.<sup>390</sup> This term comes from the overarching prohibition of any arbitrariness with respect to a person's detention.

This approach later confirmed in the European Court judgment *Aksoy v Turkey*.<sup>391</sup> The applicant was arrested on suspicion of involvement with the terrorist organization and detained *incommunicado* for 14 days under emergency provisions in force in South-east Turkey, which allows a person detained in connection with a collective offence to be held for up to 30 days in the state of emergency region. Although the European Court accepted that the investigation of terrorist offences “undoubtedly presents the authorities with special problems” and even taking into account the difficulty of investigating terrorist offences, an *incommunicado* detention power of up to 14 days was excessive too long to hold a suspect without judicial supervision and without access to a lawyer, doctor or friend.<sup>392</sup> Also as discussed in previous section about Article 3 of ECHR, the decision was expressly linked to the protection of detainees from torture and in the context of the finding that the applicant in this case, held for over 12 days had been tortured and denied access to prompt medical treatment.<sup>393</sup> Therefore the period was not only to arbitrary interference with the applicant's right to liberty but also to torture. Therefore the European Court held that there was a violation of Article 5 of the Convention even though Turkey has made a derogation from Article 5.

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<sup>388</sup> (1993) 17 EHRR 539, para 47.

<sup>389</sup> *Ibid.*, paras 49-50.

<sup>390</sup> Clare Ovey & Robin White, *op.cit.*, fn 68, p.132.

<sup>391</sup> (1997) 23 EHRR 553;

<sup>392</sup> *Aksoy v Turkey* para 83-84; also see 2.3.3, p97 and 2.4.2, pp104-108.

<sup>393</sup> *Ibid.*, para 56.

### 3.6 Speedy Review of Detention: Article 5(4)

#### 3.6.1 The Nature of the Review

Article 5(4) provides that when a person is deprived of his liberty by arrest or detention he “shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.<sup>394</sup> It is the *habeas corpus* provision of the Convention.<sup>395</sup> It applies whatever the basis of the detention and whether or not it is justified under Article 5(1). The question as to whether a person’s right under Article 5(4) has been respected has to be determined in the light of the circumstances of each case.<sup>396</sup> The European Court regards that the notion of “lawfulness” in Article 5(4) has the same meaning as Article 5(1), and entitles an arrested or detained person to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the lawfulness of their deprivation of liberty.<sup>397</sup> This means that the review must moreover be conducted in conformity with the aim of Article 5 to protect the individual against arbitrariness, in particular with regard to the time taken to give a decision, as held in *Keus v the Netherlands*.<sup>398</sup>

Specifically on the topic of this thesis, if a person is detained under Article 5(1)(c) of the Convention, the “court” must be empowered to examine whether or not there is sufficient evidence to give rise to a reasonable suspicion that he or she has committed an offence, because the existence of such a suspicion is essential if detention on remand is to be “lawful” under the Convention.<sup>399</sup> But, as Clayton regarded, Article 5(4) requires the right to challenge the lawfulness of the deprivation of liberty must be available even though a detention is “lawful” under the Convention.<sup>400</sup> For example, in *De Wilde, Ooms and Versyp v Belgium* Article 5(4) was found to be infringed because the applicants had no right of appeal to a court against administrative decisions ordering their detention while Article 5(1) was

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<sup>394</sup> Article 5(4) of ECHR; also see Chap2, 5.6, pp64-66.

<sup>395</sup> Jason Coppel, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts*, (Chichester: John Wiley & Sons Ltd, 1999), p.226.

<sup>396</sup> *RMD v Switzerland* (1997) 28 EHRR 224, para 42.

<sup>397</sup> *Assenov v. Bulgaria*, (1998) 28 EHRR 652, para 162; *Brogan v. UK*, (1989) 11 EHRR 117, para 65; See also *Reinprecht v. Austria*, (App. 67175/01), 15/11/05, para 31.

<sup>398</sup> (1991) 13 EHRR 700, para. 24.

<sup>399</sup> See *Nikolova v Bulgaria*, (2001) 31 EHRR 3, para 58; *Grauslys v Lithuania* (2002) 34 ERHH 46.

<sup>400</sup> Richard Clayton & Hugh Tomlinson, *The Law of Human Rights*, (Oxford: Oxford University Press, 2000), p504.

not.<sup>401</sup> However, the European Court held that once an infringement of one of the provisions in Article 5 has been found, it will not necessarily rule on compliance with Article 5(4).<sup>402</sup> The European Court has recognised that the need to examine the whole range of remedies available to a detainee, as apparent shortcomings in one procedure may be remedied by safeguards available in other procedures.<sup>403</sup>

### 3.6.2 The Principle of Equality of Arms during the Review

The European Court considered that Article 5(4) necessarily implies various procedural requirements which in general will be similar to the obligations imposed by Article 6, but they may not always be the same and they will vary according to the deprivation of liberty in question.<sup>404</sup> The requirements of Article 5(4) in this aspect therefore are more exacting than those of Article 5(3). In particular, the European Court has stated in many times the proceedings examining an appeal against detention must be adversarial and must always ensure “equality of arms” between the parties, the prosecutor and the detained person, which allows the detained person to challenge the evidence put forward in support of his detention.<sup>405</sup> In addition, as the European Court emphasised in *Benjamin and Wilson v UK*, the competent judicial body must “have the ability to decide the lawfulness of the detention and to order release if detention is found to be unlawful. A mere power of recommendation is insufficient”.<sup>406</sup> The domestic remedy must of course be available sufficiently certain, not just in theory but also in practice.<sup>407</sup> The European Court has even tended to acknowledge the need for a hearing before a judicial authority only in cases under Article 5(1)(c) and (e).<sup>408</sup> In the more recent decision of *Schöps v. Germany*, the European Court stated that proceedings under Article 5(4) should, to the largest extent possible in the context of an ongoing investigation, meet the basic requirements of a fair trial.<sup>409</sup>

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<sup>401</sup> (1971) 1 EHRR 373 para 73.

<sup>402</sup> See *Van der Leer v Netherlands* (1990) 12 EHRR 567, para 34; *Koendjibiharie v Netherlands* (1990) 13 EHRR 820, para 31.

<sup>403</sup> See *Weeks v UK*, (1988) 10 EHRR 293, para 69.

<sup>404</sup> See *Niedbala v Poland* (2001) 33 EHRR 48, para 66; *Winterwerp v Netherlands*, (1979) 2 EHRR 387, para 60.

<sup>405</sup> *Schops v Germany* (application no. 25116/94), 2001, para 44; *Lamy v Belgium* (1989) 11 EHRR 529, para 29.

<sup>406</sup> (2002) 36 EHRR 1, para 34; *Singh v UK* (1996) 22 EHRR 1, para 65.

<sup>407</sup> See *Kadem v. Malta*, (2003) 37 EHRR 18 para 41;

<sup>408</sup> See e.g. *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71 para 51; *Niedbala v Poland*, para 66; *Kampanis v. Greece*, (1996) 21 EHRR 43 para 47.

<sup>409</sup> (App. 25116/94), 13/02/01, para 44.



Firstly, regard to the characteristics of a “court” in Article 5(4), in the *Weeks v UK* case the European Court summarised from an organisational point of view that the “court” does not necessarily have to be a classic court of law, which is formally part of the state’s judicial machinery.<sup>410</sup> However, this term implies only that the authority called upon to decide thereon must exhibit the necessary judicial procedures and safeguards appropriate to the kind of deprivation of liberty in question, including most importantly independence of the executive and of the parties.<sup>411</sup> The impartiality requirement will be doubtful if the “court” has in some way had a previous involvement with the case. For example, in *Vodenicarov v Slovakia* the European Court held that the possibility open to the applicant to seek redress before the public prosecutor does not meet the requirements of Article 5(4) as the procedure followed by a prosecutor lacks judicial character.<sup>412</sup> Also in *Varbanov v Bulgaria*, the applicant’s detention was ordered by a district prosecutor, who then became a party to the proceedings against him seeking the applicant’s psychiatric internment.<sup>413</sup> The district prosecutor’s order was subject to appeal to higher prosecutors only.<sup>414</sup> Here the European Court found that the applicant was deprived of his right to have the lawfulness of his detention reviewed by a court, contrary to Article 5(4).

Secondly, a detained person must be given time and facilities to prepare his case.<sup>415</sup> It has been held that “equality of arms” means that the court should give the applicant the opportunity to appear at the same time as the prosecutor.<sup>416</sup> For example, in the case *Fodale v. Italy*, the applicant complained that he had been unable to participate in the hearing before the Court of Cassation to review the lawfulness of detention.<sup>417</sup> No summons to appear was served on the applicant or his counsel. The respondent was thus unable to file written pleadings or to present oral argument at the hearing, in response to the submissions of the public prosecutor’s office. By contrast, a representative of that office was able to do so before the Court

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<sup>410</sup> (1988) 10 EHRR 293, para 61.

<sup>411</sup> See e.g. *De Wilde, Ooms and Versyp v Belgium*, (1979-80) 1 EHRR 438, para 78; *Benjamin and Wilson v UK* (2003) 36 EHRR 1, para 33; *Neumeister v Austria* (1979-80) 1 EHRR 91, para 24.

<sup>412</sup> (1992) 15 EHRR 584, para 37; see also *Huber v Switzerland*, (1990) 18 EHRR 188.

<sup>413</sup> *Varbanov v Bulgaria* (App.31365/96), 05/10/00.

<sup>414</sup> *Ibid.*, para 60.

<sup>415</sup> The issue related to the right to defence see 4.6, pp.194-206.

<sup>416</sup> *Kampanis v Greece* (1995) 21 EHRR 43 para 58.

<sup>417</sup> (2008) 47 EHRR 43.

of Cassation. The European Court is unable to find that the requirements of adversarial proceedings and equality of arms were met.<sup>418</sup> The European Court insisted that the burden of proof lies on the state to show that detention is lawful.<sup>419</sup> A violation was established in *Weeks* since the prisoner was not allowed access to all of the documents which were used by the Parole Board in assessing his case.<sup>420</sup> Moreover, most detainees are unlikely to be in a position to prepare all the necessary arguments and then to have effective recourse to the remedy. Therefore the European Court regarded that the guarantees provided in Article 6 concerning access to legal assistance have been found for the purpose of mounting a challenge under Article 5(4).<sup>421</sup> Where the detainee cannot afford a lawyer the expense will have to be borne by the State.<sup>422</sup>

There are some special circumstances of the case made it impossible for the applicant to be able to consult with and be assisted by his lawyer in connection with the proceedings taken to test the legality of his detention, such as *incommunicado* detention. For example, in *Öçalan v. Turkey*, the applicant complained that contrary to Article 5(4), he had not had an opportunity to take proceedings by which the lawfulness of his detention in police custody could be decided.<sup>423</sup> During the first ten days of his detention he had been held *incommunicado*. The European Court noticed the applicant was kept in total isolation prevented his using the remedy personally.<sup>424</sup> Also as regards the suggestion that the lawyers instructed by the applicant or by his close relatives could have challenged his detention without consulting him, the European Court observes that the movements of the sole member of the applicant's legal team to possess an authority to represent him were obstructed by the police. The other lawyers, who had been retained by the applicant's family, found it impossible to contact him while he was in police custody. Moreover, in view of the unusual circumstances of his arrest, the applicant was the principal source of direct information on events in Nairobi that would have been relevant, at that point in the proceedings, for the purposes of challenging the lawfulness of his arrest. The

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<sup>418</sup> *Fodale v. Italy* (2008) 47 EHRR 43, para 43.

<sup>419</sup> See *Zamir v UK* (1983) 40 DR 42 para 58.

<sup>420</sup> (1988) 10 EHRR 293, paras 64-68; also see *Lamy v Belgium*, (1989) 11 EHRR 529.

<sup>421</sup> *Modarca v. Moldova*, (2009) 48 EHRR 39, para 85; *Niedbala v Poland* (2001) 33 EHRR 48, para 67; also see Chap2, 5.7, pp.67; 4.6, pp.194-206.

<sup>422</sup> See 4.6.3, pp.204-205.

<sup>423</sup> (2005) 41 EHRR 985.

<sup>424</sup> *Ibid.*, para 70.

European Court holds that there has been a violation of Article 5(4) as absence of possibility of obtaining review of lawfulness of detention.<sup>425</sup>

One of the key elements in a lawyer's effective representation of a client's interests is the principle that the confidentiality of information exchanged between them must be protected.<sup>426</sup> In case *Modarca v. Moldova*, the European Court considered that an interference with the lawyer-client privilege does not necessarily require an actual interception or eavesdropping to have taken place.<sup>427</sup> The applicant complained that he had not been allowed to meet in private with his lawyer and had been separated from him by a glass partition, preventing normal discussion or work with documents. As a result they had had to shout to hear each other and had both refused on several occasions to meet in such conditions, informing the court that they were unable to prepare for hearings. It also made it impossible to read texts together or pass documents between them. In the Court's view, "a genuine belief held on reasonable grounds that their discussion was being listened to might be sufficient to limit the effectiveness of the assistance which the lawyer could provide. Such a belief would inevitably inhibit a free discussion between lawyer and client and hamper the detained person's right effectively to challenge the lawfulness of his detention."<sup>428</sup>

In this case the European Court noted that the glass partition was a general measure affecting indiscriminately everyone in the remand centre, regardless of the personal circumstances of the accused. The lack of confidentiality of lawyer-client communications in the detention centre was a matter of serious concern for the entire community of lawyers in Moldova for a long time and that it had even been the cause of strike organised by the Bar Association in Moldova.<sup>429</sup> Also, the demands of the Bar Association to provide lawyers with rooms for confidential meetings with their clients and take down the glass partition in the detention centre in order to check that there were no listening devices were refused.<sup>430</sup> Accordingly, the European Court's conclusion is that the applicant and his lawyer could reasonably have had grounds to

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<sup>425</sup> *Öçalan v. Turkey* (2005) 41 EHRR 985, para 70.

<sup>426</sup> See *Campbell v UK*, (1989) 11 EHRR CD97, para 46-47; *Modarca v. Moldova*, (2009) 48 EHRR 39, para 87; also see 4.6.2.2, pp199-203.

<sup>427</sup> (2009) 48 EHRR 39, para. 89.

<sup>428</sup> *Ibid.*; *Castravet v. Moldova*, 23393/05 (2007), para 51.

<sup>429</sup> *Modarca v. Moldova*, para 91.

<sup>430</sup> *Ibid.*, para 33 and 34.

believe that his conversations in the lawyer-client meeting room were not confidential.<sup>431</sup> The Convention is intended to guarantee the right to access lawyer that are practical and effective.<sup>432</sup> Noticeably, in *Kröcher and Möller v. Switzerland* in which the fact that the lawyer and his client were separated by a glass partition was found not to violate the right to confidential communications since the applicant were accused of extremely violent acts and were considered very dangerous.<sup>433</sup> In case *Modarca v. Moldova*, the security reasons invoked by the Government had been rejected, as “there is nothing in the file to confirm the existence of a security risk”.<sup>434</sup> The European Court further regarded that in exceptional circumstances where supervision of lawyer–client meetings would be justified, visual supervision of those meetings would be sufficient for such purposes.

The European Court reiterates that equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness, in the sense of the Convention, of his client’s detention.<sup>435</sup> In *Nikolov v Bulgaria*, as confirmed by the Government, at the relevant time access to the case files in pending investigation proceedings was refused as a matter of established practice. The European Court held that this approach was incompatible with Article 5(4).<sup>436</sup> Particularly in the *Lamy v. Belgium* case, the European Court consider that the failure to make documents available promptly to the applicant’s lawyer precluded the possibility of an effective challenge to statements which formed the basis of the decision to detain, giving rise to a violation of Article 5(4).<sup>437</sup>

Thirdly, the remedy under the domestic law should satisfy the requirement of Article 5(4).<sup>438</sup> For example, in case *Öçalan v. Turkey*, as to the Government’s assertion before the Grand Chamber that the applicant could have claimed compensation under the domestic law, the Grand Chamber also considers that such a claim cannot constitute proceedings of the type required by Article 5(4) since the court’s lack of

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<sup>431</sup> *Modarca v. Moldova*, (2009) 48 EHRR 39, para 93.

<sup>432</sup> Also see 4.6.3, p.205.

<sup>433</sup> (1983) D& R 34 (1983);

<sup>434</sup> *Modarca v. Moldova*, paras 97-98.

<sup>435</sup> *Nikolov v Bulgaria*, (2001) 31 EHRR 3, para 97; *Garcia Alva v Germany* (2001) 37 EHRR 335, para 39;

<sup>436</sup> *Nikolov v Bulgaria*, para 98;

<sup>437</sup> (1989) 11 EHRR 529;

<sup>438</sup> Also see 3.7, pp.155-157.

jurisdiction to order release if the detention is unlawful.<sup>439</sup> Also the domestic law merely provides the prisoners who have been detained unlawfully or without due cause with an action in damages against the State. The domestic law therefore cannot award reparation for a breach of the Convention if the detention complies with domestic law.<sup>440</sup> The European Court considered that those proceedings to claim for compensation under the domestic law were not the type required by the Article 5(4).

### 3.6.3 Continuing Review

The justification for a prolonged period of detention is liable to vary over time. It is important to appreciate that the review required by Article 5(4) is not necessarily a once and for all affair but may need to be repeated.<sup>441</sup> This does not mean that the detainee must be able to bring proceedings at any and every moment. That could obviously lead to paralysis in the criminal justice system. In *De Jong, Baljet and van der Brink v Netherlands*, the European Court held that fulfilment of the procedure prescribed in Article 5(3), first part, may affect compliance with Article 5(4). Thus in case where initial detention is ordered or confirmed promptly by a “court”, the judicial control of lawfulness required by Article 5(4) is incorporated in this initial decision.<sup>442</sup> However, the guarantee assured by Article 5(4) is of a different order from, and additional to, that provided by Article 5(3). The European Court itself has on several previous occasions examined whether the same set of facts gave rise to a breach of both paragraphs 3 and 4 of Article 5, without ever suggesting that the safeguards provided might not apply concurrently.<sup>443</sup> This is because circumstances change so does the possibility that a previous legal justification for a detention is increasingly likely no longer applicable as time pass by. A person in detention therefore is likely to have grounds for arguing that the detention is improper prior to conviction. Thus the detained person is entitled under Article 5(4) to apply for judicial review of the detention’s continued legality at reasonable intervals or there must be arrangements for periodic review to ensure that the detention is still justified.<sup>444</sup> This proposition was first enunciated in case of indefinite detention

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<sup>439</sup> (2005) 41 EHRR 985 para 71.

<sup>440</sup> *Öçalan v. Turkey*, (2003) 37 EHRR 10 para 75;

<sup>441</sup> J. G. Merrills & A.H. Robertson, *op.cit.*, fn 1, p81.

<sup>442</sup> (1986) 8 EHRR 20, para 57; also see *De Wilde, Ooms and Versyp v Belgium*, (1979-80) 1 EHRR 438, para. 76.

<sup>443</sup> *De Jong, Baljet and van der Brink v Netherlands*, para 57.

<sup>444</sup> See *X v UK*, (1981) 4 EHRR 188, para 58-61; *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, para 47 and 56; *E v Norway* (1990) 17 EHRR 30.

under mental health legislation, but has been extended to cases where continuing detention is conditioned upon a view that the person is dangerous in a broader sense, and even to cases of detention on remand.<sup>445</sup> What is of importance in this context, as the European Court regarded, is the nature and purpose of the detention in question, viewed in the light of the objectives of the sentencing court, and not the category to which it belongs under Article 5(1).<sup>446</sup>

The case law points to much shorter intervals being appropriate in the situation of someone being detained pending trial. In the case *Bezicheri v Italy*, the applicant was arrested pursuant to an arrest warrant and was remanded in custody on suspicion inter alia of having been an accessory to an aggravated murder.<sup>447</sup> His lawyer submitted a further application for his release from detention or placing under house arrest. The applicant lodged his second application a month after the dismissal of the first. Accordingly, new issue could arise for the European Court on whether at a later stage the applicant was subsequently entitled, after a reasonable interval, to take proceedings by which the lawfulness of his continued detention was decided speedily by a court.<sup>448</sup> Regard to the reasonable interval, in the European Court's opinion, the nature of detention on remand calls for short intervals. There is an assumption in the Convention by Article 5(3) that detention on remand is to be of strictly limited duration, because its justification is essentially related to the requirements of an investigation which is to be conducted with expedition.<sup>449</sup> Therefore the European Court held that in the present case an interval of 1 month is not unreasonable.

### 3.6.4 The Notions of “Speedily”

The aim of Article 5(4) is to limit the length of a person's detention and not to promote a speedy trial.<sup>450</sup> Therefore, the final requirement of Article 5(4) is that the remedy to challenge detention must be available “speedily”. For purposes of determining the length of the proceedings, it starts to run when Article 5(4) proceedings are instituted, and ends, not when the person is released, but when the

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<sup>445</sup> Also see e.g. *Bezicheri v Italy*, (1990) 12 EHRR 210.

<sup>446</sup> *Van Droogenbroeck v Belgium*, para 47.

<sup>447</sup> (1990) 12 EHRR 210.

<sup>448</sup> *Bezicheri v Italy* (1990) 12 EHRR 210, para 20.

<sup>449</sup> *Ibid.*, para 21.

<sup>450</sup> *Haase v. Federal Republic of Germany* (App.7412 /76), 12 July 1977, 11 DR 78;

final decision is made as to the legality of the detention.<sup>451</sup> In the case *Kolev v Bulgaria*, the applicant submitted that the “speediness” requirement had been breached in the proceedings instituted by the prosecutor against the Sofia City Court’s decision of 11 November 1998 to release the applicant on bail as it took several months for the Sofia Appellate Court to issue a decision.<sup>452</sup> The European Court notes that on a number of occasions the examination of the applicant’s appeals against his detention was delayed. In particular, on 8 October 1999 his appeal was not examined. The applicant’s appeal of 20 December 1999 was examined by the Sofia City Court more than a month later, on 21 January 2000. The applicant’s ensuing appeal to the Sofia Appellate Court was decided on 25 February 2000, another month later. Those appeals were not, therefore, examined “speedily”, as required by Article 5(4) of the Convention.<sup>453</sup>

The issue of “speedily” cannot be assessed in the abstract but has to be determined in the light of the particular circumstances of each case; and any delays caused by both the detainee and the authorities should be taken into account.<sup>454</sup> For example, when the European Court considers that the applicant was released before an issue under Article 5(4) could arise, in a recent case *Harkmann v. Estonia*, the European Court found the complain of the fact that the lawfulness of his detention had not been decided on speedily is manifestly ill-founded.<sup>455</sup> Also, where there is an administrative decision prior to access to a court under Article 5(4), the length of the proceedings is calculated from the time when the administrative tribunal is seized of the case.<sup>456</sup> There are two aspects of this “speedy” requirement. Firstly, the opportunity for the initial legal review should take place particularly quickly, normally it must be provided soon after the person is taken into detention, and thereafter at reasonable intervals if necessary as discussed above. In the case *De Jong, Baljet and van der Brink v Netherlands*, Mr. de Jong was 7 days, Mr. Baljet 11 days and Mr. van den Brink 6 days in custody before being referred for trial and hence without a remedy.<sup>457</sup> In the European Court’s view, even having regard to the

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<sup>451</sup> *Luberti v Italy* (1984) 6 EHRR 440, para 33 and 37; *Van der Leer v Netherlands* (1990) 12 EHRR 567, para 35.

<sup>452</sup> *Kolev v Bulgaria*, (App.50326/99), 28/04/05.

<sup>453</sup> *Ibid.*, para 80.

<sup>454</sup> *Navarra v France* (1993) 17 EHRR 594, para 28; *Mitev v. Bulgaria*, (2006) 43 EHRR 18 para 123.

<sup>455</sup> (App.2192/03), 11/07/06, para 44.

<sup>456</sup> See *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71, para 54;

<sup>457</sup> (1986) 8 EHRR 20.

exigencies of military life and military justice, the length of absence of access to a court was in each case such as to deprive the applicant of his entitlement to bring proceedings to obtain a “speedy” review of the lawfulness of his detention.<sup>458</sup> The European Court concluded that there was a breach of Article 5(4) in each case.

Secondly, the court must act speedily. A delay must not be unreasonable and a lack of resources or vacation periods is not acceptable justifications for delay. Where it appears, *prima facie*, that there has been a delay, the onus is on the state to show that the proceedings have in fact been conducted speedily.<sup>459</sup> The review proceedings must be conducted with “due diligence”. If an application for release from detention is under review for a period of several months then, unless there are special factors, the decision will be that the Convention has been violated. In a case of a straightforward bail application by a man detained on suspicion of drug-trafficking, for example, the European Court held that 3 weeks was too long.<sup>460</sup> Longer periods might be acceptable in more complex cases, but given the importance of the right to liberty, there is still a pressing obligation on the authorities to deal quickly with such applications for release.<sup>461</sup> In the *Baranowski v Poland* case, for example, the fact that it took a court deciding a bail application 6 weeks to obtain a report from a cardiologist and a further month to obtain evidence from a neurologist and a psychiatrist was evidence of lack of due diligence and gave rise to a violation of Article 5(4).<sup>462</sup> In this context, the European Court also recalled that the accused should benefit fully from the principle of the presumption of innocence in case *Ilowiecki v Poland*.<sup>463</sup> There is no violation to the Article 5(4) if delays attributable to the detained person.<sup>464</sup>

It is the obligation of the state to organise its court system efficiently. In case *Bezicheri v Italy*, the fact that the judge allegedly had a heavy work-load at the time was not considered as relevant, since the European Court emphasized that “the Convention requires the Contracting States to organize their legal systems so as to

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<sup>458</sup> *De Jong, Baljet and van der Brink v Netherlands* (1986) 8 EHRR 20, para 58.

<sup>459</sup> *Mitev v. Bulgaria*, (2006) 43 EHRR 18 para 124.

<sup>460</sup> See *G. B. v Switzerland*, (2002) 34 EHRR 265.

<sup>461</sup> *Ilowiecki v Poland* (2003) 37 EHRR 24, para 75.

<sup>462</sup> (App. 28358/95), 28/03/00, para 73.

<sup>463</sup> (2003) 37 EHRR 24, para 76.

<sup>464</sup> See e.g. *Navarra v France* (1994) 17 EHRR 594; *Luberti v Italy* (1984) 6 EHRR 440.



enable the courts to comply with its various requirements”.<sup>465</sup> So that neither judges’ holidays is a justifiable excuse of delay where the right to liberty is at stake. For example, in the case *E v Norway*, approximately 2 months elapsed between the institution of proceedings and the delivery of the judgement.<sup>466</sup> Part of this delay was caused by administrative problems due to the vacation period. However, the European Court emphasized that “it is incumbent on the judicial authorities to make the necessary administrative arrangements, even during a vacation period, to ensure that urgent matters are dealt with speedily and this is particularly necessary when the individual’s personal liberty is at stake. Appropriate provisions for this purpose do not appear to have been made in the circumstances of the present case.”<sup>467</sup> Therefore the 5 weeks that elapsed between the filing of the application for judicial review and the additional three weeks that were required to write the judgement did not comply with the notion of “speedily” in article 5(4) which, consequently, had been violated.<sup>468</sup>

### **3.7 Compensation for Wrongful Detention: Article 5(5)**

The European Court reiterates that Article 5(5) provides for compensation if the arrest or detention contravenes the other provisions of Article 5, whether or not the detention was unlawful under national law.<sup>469</sup> Therefore for the European Court to find a violation of Article 5(5), most often, there will be a finding of a violation of one or more elements of Article 5.<sup>470</sup> Even if a person is found to have been unlawfully arrested under domestic law in the domestic court, but no compensation is available, he or she can apply to the European Court on the basis of the lack of compensation under Article 5 of ECHR.<sup>471</sup> Therefore it will be noted Article 5(5) is unique in the Convention system that Article 5(5) exists as an independent and specific right and so it differs from the general remedies provision of Article 13.

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<sup>465</sup> (1990) 12 EHRR 210, para 25.

<sup>466</sup> (1990) 17 EHRR 30.

<sup>467</sup> *Ibid.*, para 66.

<sup>468</sup> *Ibid.*, para 67.

<sup>469</sup> Article 5(5) of ECHR; *Brogan v UK* (1988) 11 EHRR 117, para 66-67; also see Chap2, 5.9, pp.70-71.

<sup>470</sup> See e.g. *Brogan v UK* (1988) 11 EHRR 117; *Ciulla v Italy* (1989) 13 EHRR 346.

<sup>471</sup> See e.g. *Huber v Switzerland* (App.12794/87), 23/10/90; *Harkmann v. Estonia*, (App.2192/03), 11/07/06, para 50.

Article 5(5) requires a remedy “before a court” leading to a legally binding award of compensation that can be enforced by the courts.<sup>472</sup> Noticeably, the European Court will not require the victims to exhaust the local remedies in order to find out whether they could obtain a remedy before the national authorities.<sup>473</sup> For example, in the *Fox, Campbell and Hartley* and *Brogan* cases, for example, the European Court found Article 5(5) have been breached since there was no rule of Northern Irish law which would have provided compensation for the arrest and prolonged initial detention of the applicants under the prevention of terrorism legislation.<sup>474</sup> More recently, the European Court came to the same conclusion in the case *Harkmann v. Estonia*, where the applicant complained of the violation of his right to compensation for unlawful detention.<sup>475</sup> The Government submitted that, although the applicant could not rely on the Unjust Deprivation of Liberty (Compensation) Act before the termination of the criminal proceedings, there had been other remedies available to him whose rights were violated by unlawful activities of a public authority. The Government pointed out that he could claim damage to seek remedies under the State Liability Act. However, the European Court has no doubt the lawfulness of the applicant’s detention under Estonian law. Therefore the European Court considered “in these circumstances it does not appear that a claim for compensation made by the applicant under any of the relevant provisions of the Estonian law would have had any reasonable prospect of success. Nor did Estonian law provide for a distinct right to compensation for detention in violation of Article 5 of the Convention.”<sup>476</sup>

However, if a state can show with “a sufficient degree of certainty” that a remedy of the type required by Article 5(5) is available to the victim, the European Court will find no violation of this provision.<sup>477</sup> For instance, in case *Ciulla v Italy*, the Italian Government maintained that the Convention has been incorporated into its domestic legal order and the status of constitutional law prevailed over all ordinary laws, regardless of date.<sup>478</sup> However, the European Court considered this argument does not “accord with the preponderance of the case-law of Italian first-instance and

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<sup>472</sup> *Harkmann v. Estonia*, para 51; *Brogan v UK* (1988) 11 EHRR 117, para 67.

<sup>473</sup> *Harkmann v. Estonia*, para 52.

<sup>474</sup> *Fox, Campbell and Hartley v UK* (1991) 13 EHRR 157, para 46; *Brogan v UK*, para 67.

<sup>475</sup> (App.2192/03), 11/07/06; also see *Mitev v Bulgaria*, (2006) 43 EHRR 18

<sup>476</sup> *Harkmann v. Estonia*, para 52.

<sup>477</sup> (1991) 13 EHRR 346, para 44.

<sup>478</sup> *Ibid.*

appellate courts, since none of the decisions brought to the European Court's notice expressly recognises that the Convention prevails over later statutes." Therefore the European Court held that "effective enjoyment of the right guaranteed in Article 5(5) is not ensured with a sufficient degree of certainty".<sup>479</sup>

The requirement of Article 5(5) as to the quantum of compensation for unlawful arrest or detention is a live issue. In practice, it is likely to be financial compensation. The European Court held that although a person may be a victim of an Article 5 breach, damage giving rise to compensation may be no pecuniary or non-pecuniary, including moral damage such as pain and emotional distress.<sup>480</sup> For example, in case *Sakik and others v Turkey*, the applicants claimed compensation for the non-pecuniary damage resulting from the deprivation of their liberty, which, they asserted, had been aggravated by the damage to their "reputations as members of parliament".<sup>481</sup> The European Court notes that the applicants were detained in police custody for 12 days or 14 days without judicial intervention. It is in no doubt that the circumstances in which they were deprived of their liberty must have caused them non-pecuniary damage for which the domestic courts have not awarded them any compensation.<sup>482</sup> In respect to the cost and expense, the European Court observed that "the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Commission and later by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and that they are reasonable as to *quantum*."<sup>483</sup> Prior to deciding the compensation, the national authorities may require evidence of the damages which had resulted from the breach of Article 5.

## **4. Article 6: The Right to a Fair trial in Criminal Cases**

### **4.1 Introduction**

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<sup>479</sup> *Harkmann v. Estonia*, (App.2192/03), 11/07/06, para 44; see also *Rehbock v Slovenia* [2000] ECHR 636, para 91;

<sup>480</sup> *Tsirilis and Kouloumpas v Greece* (1997) 25 EHRR 198, para 80.

<sup>481</sup> (1998) 26 EHRR 662.

<sup>482</sup> *Sakik v Turkey*, (1998) 26 EHRR 662, para 66.

<sup>483</sup> *Ibid.*, para 70; *Nideröst-Huber v. Switzerland*, (1998) 25 EHRR 709, para 40.

As Stavros regarded, Article 6 of ECHR is full of difficult clauses.<sup>484</sup> Almost each part of every sentence raises a range of legal questions. The method of definition employed in the Convention made it necessary to elaborate Article 6 in much greater detail. Many provisions in the Article 6 of ECHR have been extensively interpreted. Also, as Fenwick observed, due to its machinery for enforcement the Article 6 of ECHR has had far more effect on the Member States law than any other human rights treaty.<sup>485</sup> The provisions and those case-laws constitute an important source of information and guidance for judges and lawyers in different countries, especially in Europe. References to related Convention case law are to be found in the decisions of the United Nations treaty bodies, including the decisions of the HRC on individual applications under the ICCPR. Therefore the greater specificity of Article 6 of ECHR provides a clearer framework of protection. Without purporting to be exhaustive, this section examines some key factors to guarantee the human rights at the pre-trial stage under the criminal limb of Article 6 and shows the ongoing process of the development and applications of the Article 6 of ECHR with a few illustrative examples of the voluminous case laws.

## 4.2 General Characters of Article 6 of ECHR

The importance and fundament of the right to a fair trial hardly needs any explanation in this paper.<sup>486</sup> Set forth by the UDHR in 1948, the right to a fair trial has since then been further elaborated and is recognized by several international and regional human rights standards, including the ICCPR and ECHR.<sup>487</sup> The main statement of the right is rather similar in the Article 6 of ECHR and Article 14 of ICCPR. It guarantees the right to a fair and public hearing in the determination of an individual's civil rights and obligations or of any criminal charge against him. In criminal cases, it may be necessary to balance the rights of the individual defendant against the general public interest.<sup>488</sup> When considering the fair trial provisions, the courts are repeatedly faced with decisions as to the extent to which the rights of the

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<sup>484</sup> Stephanos Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments*, (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993), at Preface.

<sup>485</sup> See Helen Fenwick, *op.cit.*, fn 111, p.17.

<sup>486</sup> See e.g. *Salabiaku v France*, (1991) 13 EHRR 379, para 28.

<sup>487</sup> See J. G. Merrills & A.H. Robertson, *op.cit.*, fn 1, p87-88.

<sup>488</sup> The problem of balancing the interests between individual suspect and society see Stefan Trechsel, "Why Must Trials be Fair", (1997) ILR, 31 (1-3), 94; Stefan Trechsel, *Human Rights in Criminal Proceedings*, (Oxford: Oxford University Press, 2004), p7.

suspects should be modified or restricted in the public interest. In the case of *Delcourt v Belgium*, the European Court stated that in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and the purpose of that provision.<sup>489</sup> Any restriction on the rights of the defence is to be scrutinized with special care and strictly restricted.<sup>490</sup> If a less restrictive measure can suffice then that measure should be applied.<sup>491</sup> Therefore it is particularly important that the place of right to a fair trial be well defined and moderately applied.

The relationship between the right to a fair trial in Article 6(1) and the specific rights set out in Article 6(2) and (3) has been described as “that of the general to the particular”.<sup>492</sup> As the demonstration below, this approach has enabled the European Court to imply into Article 6 that the prosecution authorities disclose to the defence all material evidence for or against the accused.<sup>493</sup> Also, the right to a fair trial in Article 6 has been given a particularly open-textured interpretation due to its prominent place in a democratic society, allowing scope for a range of rights to be read into its text by implication.<sup>494</sup> Therefore it has enabled the European Court to imply into Article 6 the right to consult with a solicitor privately and free from state supervision, the right to remain silent and not to contribute to incriminating himself.<sup>495</sup> The extent of these limitations is not subject to any general formula and depends very much upon the context of each case and especially upon the nature of the right in question.<sup>496</sup> The European Court will frequently find no violation of Article 6 because it considers that the proceedings “taken as a whole” were fair, as a higher court was able to rectify the errors of the lower court.<sup>497</sup>

As discussed in the above parts, Ill-treatment or torture by the police, long preventive

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<sup>489</sup> (1979-80) 1 EHRR 355, para 25; *Moreira de Azevedo v Portugal* (1990) 13 EHRR, para 66.

<sup>490</sup> *Van Mechelin v Netherlands* (1998) 25 EHRR 647, para 59;

<sup>491</sup> *Ibid.*, para 59.

<sup>492</sup> *Jespers v Belgium* (1981) 27 DR 61 at para 54-56.

<sup>493</sup> *Edwards v UK* (1993) 15 EHRR 417 at para 36.

<sup>494</sup> *Moreira de Azevedo v Portugal*, (1991) 13 EHRR 721, para 66.

<sup>495</sup> *S v Switzerland* (1992) 14 EHRR 670, para 48; *Funke v France* (1993) 16 EHRR 297, para 44; *Saunders v UK* (1997) 23 EHRR 313, para 68.

<sup>496</sup> See the discussion below: the right to disclosure of unused material in *Rowe and Davis v UK*, p.161; right to remain silent under police questioning in *Murray v UK*, p.178; the right to defend in *Öcalan v. Turkey*, pp.194-197.

<sup>497</sup> *Colozza v Italy* (1985) 7 EHRR 516, para 27.

detention, damage to reputation and personal property are some examples of the legitimate or illegitimate, usual or extreme consequences that pre-trial procedures may produce on the individual. Pre-trial procedures may severely affect the rights and interests of the suspect and it may even determine the issue of the trial, as it happens when the judgment is based on evidence taken before trial. Therefore, while the European Court would point to the difference in the nature of the interests protected by different Articles,<sup>498</sup> there is an enormous amount of overlap between Article 6 and other Articles in ECHR, such as Article 2, 3, 5 and 8, while the applicant appears to be unfairly treated during pre-trial procedures.<sup>499</sup> For example, as Article 6 has been described as “a pithy epitome of what constitutes a fair administration of justice”, the emphasis in Article 5 on due process of law in relation to the liberty overlaps with the more general and comprehensive protection for procedural due process granted by Article 6.<sup>500</sup> Therefore, the pre-trial procedures play a crucial role in an evaluation of the “fairness” of the trial.<sup>501</sup>

### 4.3 Disclosure of Evidence

There is no express reference to the equality of arms in Article 6 of the ECHR.<sup>502</sup> Nevertheless, the concept of “equality of arms” was first mentioned in the *Neumeister v Austria* and has been a feature of Article 6(1) ever since.<sup>503</sup> The European Court regards that a fair trial implies procedural equality in both criminal and civil cases.<sup>504</sup> Every party to the proceedings must have a “reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage vis-à-vis his opponent”.<sup>505</sup> In the criminal sphere, the criminal defendant’s opponent is the State. In a recent case, *Dowsett v. UK*, the European Court recalled that the fundamental aspect of the right to a fair trial provided for in Article 6 is that criminal proceedings should be adversarial and that

<sup>498</sup> e.g. see *McMichael v UK*, (1995) 20 EHRR 205, para 91.

<sup>499</sup> See e.g. *Öçalan v. Turkey* (2005) 41 EHRR 985; *Mayzit v. Russia* (2006) 43 EHRR 38.

<sup>500</sup> J. Cremona, “The public character of trial and judgment in the jurisprudence of the European Court of Human Rights” in F. Matscher and H. Petzold, *Protecting Human Rights: The European Dimension: Studies in Honour of Gerard J. Wiarda* (Koln, 1990), at 107.

<sup>501</sup> *Barbéra, Messegué and Jabardo v Spain*, (1989) 11 EHRR 360, para 68; also see J. G. Merrills & A. H. Robertson, *op.cit.*, fn 1, p88.

<sup>502</sup> See Chap2, 6.3, p.74; The complexity of the Equality in the context of human rights is discussed thorough in e.g. S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), p.97.

<sup>503</sup> (1979-80) 1 EHRR 91, para 22.

<sup>504</sup> *Ibid.* para 23.

<sup>505</sup> See *De Haes and Gijssels v Belgium* (1997) 25 EHRR 1 para 53; *Dombo Beheer BV v Netherlands* (1993) 18 EHRR 213, para 33; *Delcourt v Belgium* (1970) 1 EHRR 355 para 28.

there should be equality of arms between the defence and the prosecution.<sup>506</sup> As previously interpreted by the European Court, this means that “both parties must be given the opportunity to have knowledge of, and command on, the observations filed and the evidence adduced by the other opponent at the time when it can most effectively serve to protect the rights of the defence”.<sup>507</sup> Therefore the general principle of equality of arms in Article 6(1) requires “the prosecution should normally disclose to the defence all material evidence in their possession for or against the defence”, and overlaps, in this respect, with the right of an accused under Article 6(3) (b) to have adequate facilities for the preparation of his defence.<sup>508</sup> The European Court has formulated this fundamental rule in a number of relevant cases and that the failure to do so gave rise to a defect in the trial proceedings.<sup>509</sup>

Noticeably, a failure to disclose of the original trial may be remedied by consideration of the relevant evidence on appeal as in case *Edwards v UK* since the European Court considered the proceedings as a whole was fair.<sup>510</sup> As to the domestic law, for example in the UK, the English Court of Appeal further stated in *R v Makin* that, “the duty of disclosure continues as long as proceedings remain whether at first instance or on appeal”.<sup>511</sup> This means that there is a continuing duty on the prosecution to disclose throughout the proceedings, including at appeal. The defence had the opportunity, to some extent, to comment on the issue, the undisclosed material was not put to the jury or the trial judge assessed at all times the need for disclosure.<sup>512</sup> On the contrary, in *Rowe and Davis v UK*, during the applicants’ trial at first instance it was the prosecution without the knowledge or approval of the trial judge, who decided to withhold certain relevant evidence on grounds of public interest.<sup>513</sup> The European Court finds that such unilateral decision-making on the part of the prosecution is clearly incompatible with Article 6, despite the fact that the Court of Appeal had subsequently considered the withheld material

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<sup>506</sup> (2004) 38 EHRR 41, para 41; *Brandstetter v. Austria*, (1991) 15 EHRR 378, para 67.

<sup>507</sup> *Dowsett v UK*, para 41; also see issue on the right to have adequate facilities in 4.6.2, pp.198-203.

<sup>508</sup> *Dowsett v UK*, para 40-41.

<sup>509</sup> See e.g. *Jasper v UK*, (2000) 30 EHRR 441, para 51; *Rowe and Davis v UK* (2000) 30 EHRR 1, para 60; *Edwards v UK* (1992) 15 EHRR 417, para 33 and 36; *Fitt v UK* (2000) 30 EHRR 480 para 44; *IJJ, GMR and AKP v UK* (2001) 33 EHRR 11 para 112.

<sup>510</sup> (1993) 15 EHRR 417, para 34-39.

<sup>511</sup> [2004] EWCA CRIM 1607, para 36.

<sup>512</sup> *Jasper v UK*, para 55-56; *PG v UK*, (2008) 46 EHRR 51, para 70-73.

<sup>513</sup> (2000) 30 EHRR 1.

and found the conviction to be safe.<sup>514</sup> The European Court distinguished *Edwards* on the ground that there had been no opportunity for adversarial argument before the Court of Appeal.<sup>515</sup>

The European Court has reiterated that “in criminal proceeding there may be competing factors, such as national security, or the need to protect witnesses at risk of reprisals, or to keep secret police methods of investigation of crime, which must be weighed against the rights of the accused”.<sup>516</sup> This is also a general problem which comes up in several different contexts in the case-law in particular with regard to Article 6(3)(b), (c) and (d) as discussed below. Thus any disclosure regime must reconcile and balance the obligation of disclosure to ensure a fair trial with duties of confidentiality and privacy. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest, provided that such measures are permissible under Article 6(1).<sup>517</sup> Especially there are situations brought about by the terrorism legislation where the defendant will not be allowed to know who is giving evidence against him, or what that evidence is.

As said in Lord Goldsmith’s speech, “terrorism is a huge international challenge. But terrorism is a particular challenge for democracies who must strive to protect individual liberties while at the same time ensuring collective security.”<sup>518</sup> The need to reconcile these competing demands is the theme of recent heated debates in UK. It is not impossible to explain here how the UK has sought to achieve the right balance in enacting its domestic legislation on terrorism. But the UK government is constantly being criticized for striking the wrong balance. For example, in UK under the Prevention Terrorism Act 2005 “Control orders” can be based on secret intelligence not disclosed to the people concerned or to their legal counsel of

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<sup>514</sup> *Rowe and Davis v UK* (2000) 30 EHRR 1, para 62-65; see also *Atlan v UK* (2002) 34 EHRR 833 paras 42-46.

<sup>515</sup> *Rowe and Davis v UK*, para 66.

<sup>516</sup> See e.g. *Rowe and Davis v UK*, para 61; *Dowsett v UK* (2004) 38 EHRR 41, para 42; *Jasper v UK*, (2000) 30 EHRR 441, para 52; also see 4.6.2.2, pp.201-203.

<sup>517</sup> See e.g. *Van Mechelen and Others v. the Netherlands* (1998) 25 EHRR 647; *Doorson v the Netherlands*, (1996) 22 EHRR 330.

<sup>518</sup> Attorney general Lord Goldsmith’s speech “UK Terrorism Legislation in an International Context” on terrorism and human rights, delivered to a Royal United Services Institute conference, 09/05/06, [http://www.epolitix.com/latestnews/article-detail/newsarticle/lord-goldsmith-human-rights-speech-in-full/?no\\_cache=1](http://www.epolitix.com/latestnews/article-detail/newsarticle/lord-goldsmith-human-rights-speech-in-full/?no_cache=1).



choice.<sup>519</sup> The Secretary of State may withhold evidence that information he relies on to impose an “order” had been obtained under torture. If the domestic court agrees with the Home Secretary that in the interest of “national security” the “evidence” should not be disclosed to the person concerned or to their legal counsel of choice, then a Special Advocate is appointed who is able to participate in the secret closed proceedings.<sup>520</sup> However, in the same way as with the controversial Anti-terrorism, Crime and Security Act 2001 proceedings, the Special Advocate is not allowed to tell the person concerned what the secret intelligence is, nor receive instructions from them.<sup>521</sup> The cumulative effect of this restricts those subjected to “control orders” the right to a defence and the possibility of clearing their name. In April 2006, in his judgment in the case of *Re MB*, Mr Justice Sullivan issued a declaration under section 4 of the Human Rights Act 1998 that section 3 of the Prevention of Terrorism Act 2005 was incompatible with the right to fair proceedings under Article 6 of the ECHR.<sup>522</sup>

Obviously, the *ex parte* procedure of the UK cases whereby the prosecution can obtain permission not to disclose on grounds of public interests without informing the defence is always under challenge in Strasbourg.<sup>523</sup> The international and national tests of fairness of the trial and soundness of the conviction might lead to different conclusions. The European Court reiterates in many cases that it will not itself examine whether or not an order permitting non-disclosure was justified in any particular case. It will only review the decision-making procedure to ensure that it complied, as far as possible, with the requirements of a fair trial.<sup>524</sup> Both in *Fitt v UK* and *Jasper v UK*, the English law had been changed compared with the case *Rowe and Davis v UK*, the prosecution were required to make an application to the trial judge for authority not to disclose the evidence in question.<sup>525</sup> The defences were kept informed and permitted to make submissions and participate in the earlier decision-making process as far as was possible without revealing to them the

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<sup>519</sup> Prevention Terrorism Act 2005, C.4(3)(a), C.5(3) and Section 11.4.2 (b) and Section 11.4.2 (d) .

<sup>520</sup> *Ibid.*, Section 11, para 2, 4(1) and 7.

<sup>521</sup> Anti-terrorism, Crime and Security Act 2001, Section 70 para 6.2 (c).

<sup>522</sup> *re MB* [2006] EWHC 1000, <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2006/1000.html>.

<sup>523</sup> See e.g. *Edwards and Lewis v UK* (2005) 40 EHRR 593; *Rowe and Davis v UK* (2000) 30 EHRR 1.

<sup>524</sup> *Jasper v UK* (2000) 30 EHRR 441, para 53; also see *Rowe and Davis v UK*, para 62; *Edwards and Lewis v UK*, para 54.

<sup>525</sup> *Jasper v UK*, para 46; also see *Fitt v UK* (2000) 30 EHRR 480, para 40.

material which the prosecution sought to keep secret on public interest grounds.<sup>526</sup> Furthermore the non-disclosed material played no further role in the case.<sup>527</sup> Emphasis was placed on the role of the trial judge in monitoring the propriety of withholding the material, especially since he was fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial.<sup>528</sup> The European Court, albeit on a narrow majority of 9-8, held that the procedures were compatible with Article 6(1).<sup>529</sup> It had left avenues open for further argument where the judge who heard the *ex parte* hearing was also the judge of factual issues in the case.

In *Edwards and Lewis v UK*, again, the decision related to the *ex parte* procedures used to determine applications not to disclose material on the grounds of public interest immunity.<sup>530</sup> Both applicants had been arrested by undercover police officers and faced separate criminal trials during which the prosecution successfully applied at *ex parte* hearings to withhold material evidence on the basis of public interest immunity. The applicants unsuccessfully applied under section 78 of the Police and Criminal Evidence Act 1984 to have the prosecution evidence excluded on the basis that they had been entrapped by undercover officers into committing the offences in question. The applicant Edward was convicted and that conviction was upheld on appeal. The applicant Lewis pleaded guilty. Both complained to European Court that their right to a fair trial under Article 6 had been infringed because it had been impossible, on the evidence that had been made available to them, for them to establish whether or not the involvement of *agents provocateurs* rendered proceedings against them unfair.

In this case the problem arose under Article 6 because in the absence of any representative of the defence, the same trial judge had already seen the prosecution's evidence which likely have been of assistance to the defence case. The European Court emphasised again that there should be an equality of arms between the prosecution and defence and that the prosecution authorities should disclose all

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<sup>526</sup> *Jasper v UK*, (2000) 30 EHRR 441, para 54-55; *Fitt v UK*, (2000) 30 EHRR 480, para 47-48;

<sup>527</sup> *Jasper v UK*, para 55; *Fitt v UK*, para 48.

<sup>528</sup> *Jasper v UK* para 56; *Fitt v UK*, para 49.

<sup>529</sup> Also see the minority in these two cases considered that in the absence of "special counsel" the *ex parte* procedure had to be considered fundamentally unfair.

<sup>530</sup> (2005) 40 EHRR 593.

material evidence in their possession for or against the accused.<sup>531</sup> As a matter of English procedural law, the trial judge must determine, as a question of fact and taking into account such matters as the accused's past criminal record and any evidence concerning his dealings with the police, whether or not it is established on the balance of probabilities that the police improperly incited the offence. In order to conclude whether or not the accused had indeed been the victim of improper incitement by the police, in both cases the trial judge had examined the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police.<sup>532</sup>

The European Court distinguished the material from the earlier one in *Jasper and Fitt v UK* which related to disclosure of unused material, and held that the undisclosed evidence related, or may have related, to an issue of fact decided by the trial judge.<sup>533</sup> If the defence had been able to persuade the judge that the police had acted improperly, "the prosecution would, in effect, have had to be discontinued". Therefore, the applications in question were of determinative importance to the applicants' trials, and the public interest immunity evidence may have related to facts connected with those applications.<sup>534</sup> Despite this, the applicants were denied access to the evidence because of the secret nature of this procedure. The defence parties were unable to know whether or not the undisclosed evidence was in fact harmful to the accused's allegations of entrapment, and, if so, whether the evidence was accurate or could have been rebutted in the course of the *ex parte* hearings. Therefore it was not possible for the defence representatives to argue the case on entrapment in full before the judge.<sup>535</sup> In the case of Mr Edwards it was subsequently shown that that material was damaging to his application. In Mr Lewis' case, although the nature of the material which the judge had seen had not been disclosed, it was possible that the material was damaging to the applicant's submissions on entrapment. Under English law where material for which public interest immunity was claimed was unlikely to assist the accused, but would in fact assist the prosecution, the trial judge was unlikely to order disclosure.<sup>536</sup>

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<sup>531</sup> *Edwards and Lewis v UK* (2005) 40 EHRR 593, para 52.

<sup>532</sup> *Ibid.*, para 57.

<sup>533</sup> *Ibid.*, para 51 and 57.

<sup>534</sup> *Ibid.*, para 57;

<sup>535</sup> *Ibid.*, para 58;

<sup>536</sup> *Ibid.*, para 58;

For these reasons the European Court concluded that a procedure that denies the defence that opportunity fails to comply “with the requirements to provide adversarial proceedings and equality of arms” and fails to incorporate “adequate safeguards to protect the interests of the accused”.<sup>537</sup> The European Court recognised the importance of “the public interest in the fight against crime” but held that the requirements of a fair trial are paramount, and that police incitement amounting to entrapment would render it unfair to try a defendant.<sup>538</sup> It here saw its task as determining whether the procedure for determining the issues of disclosure and entrapment was fair. Ashworth and Strange regard that the *Edwards and Lewis* judgment is significant in the area as to disclosure of evidence.<sup>539</sup> Some changes will no doubt need to be made in member States as a result of this judgment: for example in UK, new Attorney-General’s Guidelines on the use of special counsel in public interest immunity hearings will be required.<sup>540</sup>

#### 4.4 The Presumption of Innocence

The European Court has examined a number of alleged violations of the presumption of innocence and consequently established standards for the practical application of this presumption under Article 6(2). It has there been repeatedly recognised that the presumption of innocence, enshrined in Article 6(2), is a fundamental principle of the fair criminal trial as required by Article 6(1).<sup>541</sup> It is a right which, like other rights contained in the Convention, must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory.<sup>542</sup> Matters such as the ability of an accused’s previous convictions, the admissibility of confession evidence and the right to silence are closely linked to the presumption of innocence.<sup>543</sup> Also there is a certain amount of overlap between the presumption of innocence, the requirement of a fair hearing under Article 6(1) and the specific

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<sup>537</sup> *Edwards and Lewis v UK* (2005) 40 EHRR 593, para 59.

<sup>538</sup> See *Edwards and Lewis v UK* [2003] Crim.L.R. 891, para 49-52.

<sup>539</sup> Andrew Ashworth & Michelle Strange, “Criminal Law and Human Rights”, EHRLR, 2004, 2, p132; at the same time, Ashworth and Strange regard that there may be limits on the breadth of the application In spite of the finding that there had been a violation, the Court declined to say that the defendants were wrongly convicted, or to award any damages, saying instead that the finding of a violation constituted just satisfaction in itself.

<sup>540</sup> See Attorney General’s Guidelines on the disclosure of information; The principles and ambit of use of special counsel can be found in the case of *R v H* [2004] 2 A.C. 134.

<sup>541</sup> see, e.g., *Bernard v France* (1998) 30 EHRR 808, para 37; also see Chap2, 6.2, p.73.

<sup>542</sup> *Allenet de Ribemont v. France*, (1995) 20 EHRR 557, para 35.

<sup>543</sup> *Saunders v UK* (1997) 23 EHRR 313, para 68; *Heaney and McGuinness v Ireland*, (2001) 33 EHRR 12, para 40. *Quinn v Ireland*, [2000] ECHR 690 para 40;

guarantees listed in Article 6(3). The presumption of innocence, together with the high standard of proof required, is generally regarded as a necessary right, safeguarding the citizen against an all-powerful state.

The presumption of innocence applies throughout criminal proceedings, regardless of their stage. Article 6(2) might be violated if, without any finding of guilt, there is a judicial decision reflecting that an accused is guilty, such as the refusal to pay costs to an acquitted defendant. For instance, in an important case *Minelli v. Switzerland*, the European Court found a violation of the presumption of innocence when a defendant was ordered by the Swiss courts to pay part of court costs and compensation of the expenses even though the case had been discontinued on account of time limitations.<sup>544</sup> Also, the decision of the Swiss court concluded that in the absence of statutory limitations the case would very probably have led to the conviction of the applicant.<sup>545</sup> The European Court deemed that the presumption of innocence would be violated if a judicial decision concerning the accused reflects an opinion that he is guilty without his having previously been proved guilty according to law and notably without his having had the opportunity of exercising his rights of defence. It suffices that there is some reasoning suggesting that the court regards the accused as guilty.<sup>546</sup> Also, the award to Minelli made by the European Court was not confined to reimbursement.<sup>547</sup>

By stressing the crucial role of the presumption of innocence within the right to a fair trial, the European Court has clearly spelled out that the presumption of innocence “requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused”.<sup>548</sup> However, it seems that these formulations are not of great use in predicting whether the operation of a particular presumption is in breach of Article 6(2). The below account has illustrated however that it is also accepted that there may be compromises to this principle. This section will focus on some issues of

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<sup>544</sup> (1983) 5 EHRR 554.

<sup>545</sup> *Ibid.*, para 37-38; also see the *Leutscher v The Netherlands* (1997) 24 EHRR 181, para 29; *Geerings v. Netherlands*, (2008) 46 EHRR 49, para 42.

<sup>546</sup> *Minelli v Switzerland*, para 37.

<sup>547</sup> *Ibid.*, para 48.

<sup>548</sup> *Barberà, Messegué and Jabardo v. Spain*, (1988) 11 EHRR 360, para. 77.

particular importance in the criminal law, the use of presumptions, the effect of prejudicial publicity, and the right to silence.

#### 4.4.1 The Use of Presumptions

Article 6(2) guarantees the presumption of innocence in criminal proceedings which is crucial for the evidence-taking process, in that it places the burden of proof on the prosecution and allows the accused to rebut evidence against him and get the benefit of the doubt.<sup>549</sup> It may be in issue where the burden of proof is transferred to the accused to establish a defence or where a presumption of law or fact is applied against the accused. Modern statutes in many countries have been created offences and imposed burdens on a defendant with words such as “unless he proves the contrary”.<sup>550</sup> The domestic courts have regarded the burden of proof on the defendant as being “on a balance of probabilities”, which is a burden lower than that resting on the prosecution, who must prove guilt so that the court is sure. This still imposes what is known as a persuasive burden, which is the onus of satisfying the court that the defence is proven, as opposed to an evidential burden, a burden simply to provide enough evidence to credibly raise the defence, which the prosecution must then disprove. The European Court deals with the question as to in what circumstances is a reverse onus in a criminal case compatible with the presumption of innocence under Article 6(2) of the Convention in many cases.

According to the European Court, the presumption of innocence does not require that guilt be proved “beyond a reasonable doubt”. Article 6(2) simply requires evidence “sufficiently strong in the eyes of the law to establish guilt”.<sup>551</sup> The definition of the elements of an offence is a matter for national law.<sup>552</sup> Article 6 (2) does not necessarily prohibit presumptions of law or fact, but any rule which shifts the burden of proof or which applies a presumption operating against the accused must be confined within “reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”.<sup>553</sup> It follows then that the

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<sup>549</sup> See e.g. *Telfner v Austria* (2002) 34 EHRR 207, para 15; *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, para 40.

<sup>550</sup> See e.g. Martin Hannibal, Lisa Mountford, *The Law of Criminal and Civil Evidence: Principles and Practice*, (Harlow: Pearson Education Limited, 2002), p214.

<sup>551</sup> *Austria v Italy* (1963) 6 Yearbook 740, p784.

<sup>552</sup> *Salabiaku v France* (1991) 13 EHRR 379, para 27.

<sup>553</sup> *Ibid.*, para 28;

presumption of innocence is not absolute and that interference with it may be justified, provided that the overall burden of proof remains with the prosecution.<sup>554</sup> For example, in the case *Salabiaku v France*, the applicant was charged with the criminal offence of illegally importing narcotics and with the customs offence, also criminal, of smuggling prohibited goods.<sup>555</sup> Under the terms of which “the person in possession of contraband goods shall be deemed liable for the offence” in Article 392(1) of the French Customs Code, the applicant complained that the almost irrebuttable presumption was incompatible with Article 6(2). The European Court maintained whether Article 392(1) conforms to the Convention cannot be considered in *abstracto*. The task for the European Court is to determine whether it was applied to the applicant in a manner compatible with the presumption of innocence.<sup>556</sup> The European Court regarded that the domestic courts were careful to avoid resorting automatically to the presumption laid down in Article 392(1) and they exercised their power of assessment on the basis of the evidence adduced by the parties before them. The domestic courts inferred from the fact of possession a presumption which was not subsequently rebutted by any evidence of an event responsibility for which could not be attributed to the perpetrator of the offence or which he would have been unable to avoid.<sup>557</sup> Moreover the domestic courts identified in the circumstances of the case a certain “element of intent”, even though legally they were under no obligation to do so in order to convict the applicant.<sup>558</sup> In the result the European Court rejected the applicant’s complaint that the French courts applied Article 392(1) in a way which infringed the presumption of innocence.

The European Court also regards that there is not necessarily a violation of Article 6(2), provided that the provision creating the presumption is restrictively worded and that it is neither irrebuttable nor unreasonable.<sup>559</sup> For example, contrary to section 30(1) of the Sexual Offences Act 1956, the applicant in *X v UK* had been convicted of knowingly living on the earnings of prostitution.<sup>560</sup> He complains the presumption under the subsection (2) of that section which provided that a man living with a

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<sup>554</sup> *Lingens and Leitgens v Austria* (1982) 4 EHRR 373, para 4.

<sup>555</sup> (1991) 13 EHRR 379.

<sup>556</sup> *Ibid.*, para 30.

<sup>557</sup> *Ibid.*, para 15 and 30.

<sup>558</sup> *Ibid.*, para 30.

<sup>559</sup> *See X v UK* (App. 5124/71 42) (1972) Collection of Decision 135.

<sup>560</sup> *Ibid.*

prostitute was knowingly living off immoral earnings was incompatible with Article 6(2). The Commission rejected this challenge and regarded that a provision could have the same effect as a presumption of guilt if widely or unreasonably worded. And it was not only the form but also the substance and effect of the provision needed to be examined. To oblige the prosecution to obtain direct evidence of “living on immoral earnings” would in most cases make its task impossible. Therefore in present instance the provision created a rebuttable, reasonable and restrictively worded presumption which the defendant could disprove, and was not a presumption of guilt.

Thus the question in any case must be whether, on the facts, the reasonable limits to which a presumption must be subject have been exceeded. This can be a difficult question to answer. Dennis regarded that the domestic courts and lawyers need to know the relevant factors to be taken into account in decisions on the allocation of the burden of proof, and they also need to know how these factors are to be weighed and whether there are general principles to structure decision-making.<sup>561</sup> Clear guidance is all the more essential given the importance of what is at stake.<sup>562</sup> Following *Salabiaku v France*, the European Court held in *Janosevic v Sweden* that in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence.<sup>563</sup> In other words, the means employed have to be reasonably proportionate to the legitimate aim to be achieved. As Sachs J of the South African Constitutional Court said in *State v Coetzee*, “there is a paradox at the heart of all criminal procedures, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become, he is most in need of the right to a fair trial.”

The European Court has consistently maintained that the same standards of fairness must apply to all types of offence.<sup>564</sup> Mere reference to the prevalence and

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<sup>561</sup> Ian Dennis, “Reverse Onuses and The Presumption of Innocence: In Search of Principle”, *Crim. L.R.* 2005, Dec, p.902.

<sup>562</sup> *Ibid.*, p903.

<sup>563</sup> (2004) 38 EHRR 22 para 101.see, generally, David Hamer, “The Presumption of Innocence and Reverse Burdens: A Balancing Act”, *C.L.J.* 2007, 66(1), pp.142-171.

<sup>564</sup> *Saunders v UK* (1997) 23 EHRR 313 para 74; *Teixeira de Castro v Portugal* (1999) 28 EHRR 101 para 36; in the terrorism context, see *Heaney and McGuinness v Ireland* (2001) 33 EHRR 12.



seriousness of the crime would not suffice or add any special element to the scales as part of a justificatory balancing exercising.”<sup>565</sup> In answer to the argument that terrorism poses an extreme threat to the security or the state, and that the state can properly require some degree of co-operation from its citizens in fighting it, the European Court declared in *Heaney and McGuinness v Ireland* that the security and public order concerns of the Government cannot justify measures which extinguish the very essence of an applicant’s defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention.<sup>566</sup> As Ashworth observed, the prosecution, therefore, might be required to demonstrate that “the reversal of the burden of proof was rationally connected to a clear policy justification, and that it was proportionate, in the sense that the objective in question could not be met by the imposition of a purely evidential burden in the context of the particular offence at issue”.<sup>567</sup>

So the attitude to the domestic cases where the law has imposed a burden of proof on a defendant should now be appraised afresh, because of the influence of the Convention case law on the approach of the domestic courts. For example, in UK, Viscount Sankey’s “golden thread” speech in *Woolmington v DPP* is one of the most celebrated passages in English criminal law: “No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained”.<sup>568</sup> The presumption of innocence is a fundamental component of the absolute right to a fair trial in UK. However, the jurisprudence in the UK on the issue of the reverse onus has still left some uncertainty and theoretical incoherence. The House of Lords gave fuller guidance on reverse burden provisions in recent cases of *R v Johnstone* and *Sheldrake v DPP (No. 4 of 2002)*.<sup>569</sup> The English House of Lords quoted the comment of *Salabiaku v France* in its case *R v Johnstone*, when deciding whether the reverse onus in s.92(5) of the Trade Marks Act 1994 was justifiable.<sup>570</sup>

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<sup>565</sup> *Saunders v UK*, (1997) 23 EHRR 313, para 74; *State v Coetzee* [1997] 2 LRC 593, para 220; also see generally, Andrew Ashworth, “Four threats to the presumption of innocence”, (2006) 10 E. & P. 2006, Issue.4, pp.241-279.

<sup>566</sup> (2001) 33 EHRR 264, para 57-58; *Saunders v UK*, para 74.

<sup>567</sup> Ben Emmerson and Andrew Ashworth, *Human Rights and Criminal Justice*, (London: Sweet & Maxwell, 2001), para 9-47.

<sup>568</sup> [1935] AC 462.

<sup>569</sup> *R v Johnstone* [2003] 1 WLR 1736; [2003] UKHL 28; [2004] Crim LR 244; *Sheldrake v DPP* [2005] 1 AC 264.

<sup>570</sup> *ibid.* para 48.

Lord Nicholls held that in order to justify a reverse onus “there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence”.<sup>571</sup> The House of Lords emphasised the need for judicial deference, noting that Parliament, not the court, is charged with the primary responsibility for deciding, as a matter of policy, what should be the constituent elements of a criminal offence.<sup>572</sup>

In *Sheldrake v DPP (No. 4 of 2002)*, the defendant in the appeal was charged before the justices with being in charge of a motor vehicle after having consumed so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to section 5(1)(b) of the Road Traffic Act 1981.<sup>573</sup> He argued that the defense under section 5(2), which cast upon the defendant the burden of proving that there was no likelihood of his driving the vehicle while over the limit, was not compliant with the presumption of innocence guaranteed by Article 6(2) of the Convention. The House of Lords concluded that the provision was directed to a legitimate object, which was the prevention of death, injury and damage caused by unfit drivers.<sup>574</sup> The provision may have infringed the presumption of innocence but it was nevertheless held that the burden it placed on a defendant was not beyond reasonable limits or arbitrary. The likelihood of driving was a matter so closely conditioned by the driver’s own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove beyond reasonable doubt that he would.<sup>575</sup>

#### **4.4.2 Prejudicial Publicity**

The presumption of innocence may also prevent prejudicial publicity concerning suspects. The evaluation of the risk of prejudicial influence should be made in the light of the circumstances of each case. It has long been argued that to succeed in establishing a violation of Article 6, the applicant has to show that his conviction was influenced by that publicity which will be very difficult, especially if he has

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<sup>571</sup> *R v Johnstone* [2003] 1 WLR 1736, para 49.

<sup>572</sup> *Ibid.*, para 51.

<sup>573</sup> [2005] 1 AC 264.

<sup>574</sup> *Ibid.*, para 40.

<sup>575</sup> *Ibid.*, para 41.

contributed to it by his own actions. For example, in case *Ensslin, Baader & Raspe v Germany*, an application against Germany by convicted members of the terrorist Baader-Meinhof gang was rejected by the Commission on the grounds that their own statements and behaviour were responsible for the unfavourable publicity and exceptional security surrounding their trial and that, in any case, a professional judge would not be influenced by these elements.<sup>576</sup> Also where the accused has a criminal record, bringing this to the attention of the judge or jury before conviction might be thought to constitute a clear violation of the presumption of innocence. It has, however, been held that as this practice is followed in a number of Contracting States, no violation is involved.<sup>577</sup> Moreover, as noted repeatedly in the case-law of the European Court, Article 6(2) governs criminal proceedings in their entirety “irrespective of the outcome of the prosecution”.<sup>578</sup> Therefore the fact that the accused was ultimately found guilty and sentenced to imprisonment cannot vacate the accused’s initial right to be presumed innocent until proven guilty according to law, as the European Court reiterates in recent case *Matijašević v. Serbia*.<sup>579</sup>

However, as noticed, Article 6 imposed obligations not only on criminal courts but also on other public authorities.<sup>580</sup> This situation may happen to a person who has been arrested by the police, even before being charged. In *Allenet de Ribemont v France* a senior police officer stated at a press conference that the applicant had been the instigator of a murder, although formal charges had not yet been brought.<sup>581</sup> Article 6(2) was violated because there had been a clear statement of the applicant’s guilt, which would have led the public to consider him guilty and which prejudged the assessment of the facts by the competent judicial authorities before he has been proved guilty according to law.<sup>582</sup> It is sufficient even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty.<sup>583</sup> The European Court acknowledged that in view of the right freedom of expression as guaranteed in Article 10 of the authorities to receive and impart information, Article 6(2) could not prevent the police from informing the public

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<sup>576</sup> (Applications no. 7572, 7586 and 7587/76), (1978) 21 Yearbook, 418, para 15.

<sup>577</sup> *X v. Austria*, (Applications no. 2742/66), (1966) 9 Yearbook, 550.

<sup>578</sup> *Minelli v. Switzerland*, (1983) 5 EHRR 554 para 30.

<sup>579</sup> (2009) 48 EHRR 38, para 46.

<sup>580</sup> *Allenet de Ribemont v France* (1995) 20 EHRR 557, para 36; also see Chap2, 6.2, pp.73-74.

<sup>581</sup> (1995) 20 EHRR 557; *Hall v UK* [1998] EHRLR 215;

<sup>582</sup> *Allenet de Ribemont v. France*, para 41.

<sup>583</sup> *Ibid.*, para 35.

about on-going criminal investigations, but they should do so with all the discretion and circumspection necessary if the presumption of innocence was to be respected.<sup>584</sup> This is also applied to a recent case *Y.B. and others v. Turkey*, where a breach of the presumption of innocence on account of statements made by the police to the press.<sup>585</sup>

A more widespread problem is that of prejudicial comments in the media concerning suspects, given ever more intrusive press coverage of the judicial process. The question arises whether journalists can publish information at any time on the progress of a legal investigation or court case, i.e. whether the public has the right to be informed at all times, at the risk of influencing the investigation or the court case if the information published has any bearings on them. This risk is especially high where juries or lay judges are involved in criminal proceedings when any article published during the *sub judice* period.<sup>586</sup> Also, it is probably sufficient that the matter of prejudicial publicity can be aired on appeal.<sup>587</sup> Since the *Sunday Times v the UK* judgment handed down by the European Court, it has been accepted that the press can and indeed should disclose information on court cases subject to certain conditions, in particular respect for “the right of individuals in their capacities as litigants”.<sup>588</sup> In this judgment, the ECHR states that Article 10 guarantees not only the right to inform the public but also the right of the public to be properly informed. It would not be realistic to expect the media to wait for the outcome of a court case that is arousing strong public feeling before reporting on it.<sup>589</sup>

The accuracy of information is important for both the credibility of judicial authorities and police services as well as the credibility of the media.<sup>590</sup> In particular, case law requires the media to observe the presumption of innocence principle. In the landmark case *Worm v Austria*, the European Court confirmed that journalists must also respect the presumption of innocence, as defined in Article 6, even for public

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<sup>584</sup> *Allenet de Ribemont v. France*, (1995) 20 EHRR 557, para 38.

<sup>585</sup> (Apps. 48173/99 and 48319/99), 28/10/2004.

<sup>586</sup> The detailed discussion as to the freedom of the media under common law see Helen Fenwick, *op.cit.*, fn 111, Chapter 5.

<sup>587</sup> *Adolf v Austria* (1982) 4 EHRR 313.

<sup>588</sup> (1979-80) 2 EHRR 245, paras 54-56, 63.

<sup>589</sup> *Ibid.*, para 65-66.

<sup>590</sup> Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings, Committee of Ministers, Council of Europe, 10/07/03, Principle 3. Also see Explanatory Memorandum to the Recommendation, para 16.

figures and politicians.<sup>591</sup> In this case, an Austrian journalist had published articles attacking a former finance minister who was tried by a magistrates' court comprised of two lay and two professional judges. By doing so, the journalist considerably reduced the politician's chances of having a fair trial and conducted a kind of pseudo-trial in the media, which, according to the ECHR, threatened to undermine public trust in the role of the courts in administering justice in criminal law cases.<sup>592</sup> The European Court has stated more recent in case *Du Roy and Malaurie v. France* that "journalists reporting on criminal proceedings currently taking place must, admittedly, ensure that they do not overstep the bounds imposed in the interests of the proper administration of justice and that they respect the accused's right to be presumed innocent".<sup>593</sup>

#### 4.4.3 Right to Silence

The right to silence is an inherent facet of the presumption of innocence. Coming from the Anglo-Saxon tradition, this right can be given either a narrow or a wide interpretation.<sup>594</sup> Even though there are substantial differences between national legal systems, there is also widespread consensus on the importance of respecting both the right to silence and the privilege against self-incrimination, as well as general agreement on the importance of the values these doctrines serve. As held in *Murray v UK*, "the right to remain silent under police questioning, and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of fair procedure under Article 6".<sup>595</sup> A set of principles in a series of cases has been crafted to define how the issue of the right to silence is understood but also how the European Court has interpreted State Parties' obligations under a human rights instrument, although there is no specific language creating a right to silence in any of the provisions of ECHR. In its first case on this topic, *Funke v. France*, the European Court held that the right of silence was infringed under Article 6 of the Convention which impliedly protects it by a French law requiring persons

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<sup>591</sup> (1998) 25 EHRR 454, paras 40-42.

<sup>592</sup> *Ibid.*, paras 50-59.

<sup>593</sup> [2000] ECHR 445 para 34; see also *T and V v UK* (2000) 30 EHRR 121.

<sup>594</sup> For discussion on the Right to silence see Andrew. Ashworth, *The Criminal Process – An Evaluative Study* (Oxford: Oxford University Press, 1994), pp. 112-118.

<sup>595</sup> (1996) 22 EHRR 29, para 60. *Saunders v UK*, (1997) 23 EHRR 313, paras 68-69.

suspected of exchange control offences to produce their bank statements to the investigators on request.<sup>596</sup>

But that does not stop the law or a court from drawing adverse inferences from silence. According to the European Court, the right to silence is not an absolute right.<sup>597</sup> Again, the European Court stressed that each case must be judged on all its particular facts.<sup>598</sup> When determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence at issue may be taken into consideration and be weighed against the individual interest that the evidence against him be gathered lawfully.<sup>599</sup> For example, it should also aware how the court should deal with the reasons for remaining silent given by the accused. In dealing with this issue it must be said that the reason often given is that the accused have been advised to do so by their legal advisers. There is overlap with the right of access to a lawyer, since representation by a lawyer is often meaningless unless some prior consultation is included in the “facilities” provided to the defendant as discussed below.<sup>600</sup> This then raises the question of how much weight should be given to the following of that advice and whether the following of the advice should enable the accused to avoid any adverse inference being drawn. As held in *Murray v UK*, the line must be drawn somewhere in the middle, according to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.<sup>601</sup> The parameters of the right to silence under Article 6 are two-fold as explain below.

On one hand, it will be incompatible with the right to silence to found a conviction solely or mainly on the accused’s silence or on a refusal to answer questions or give evidence.<sup>602</sup> In *Condon v UK*, the European Court found that Article 6 had been violated because of the insufficient direction to the jury where a solicitor had advised the accused, whom he felt were suffering from drug withdrawal symptoms, not to

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<sup>596</sup> (1993) 16 EHRR 297, para 44.

<sup>597</sup> *Murray v UK* (1996) 22 EHRR 29, para 47; *Condon v UK* (2001) 31 EHRR 1, para 56.

<sup>598</sup> *Murray v UK*, para 47. *Saunders v UK*, (1997) 23 EHRR 313, para 73.

<sup>599</sup> *Jalloh v Germany* (2007) 44 EHRR 32, para 97; also see *Heaney and McGuinness v Ireland* (2001) 33 EHRR 264, para 57-58.

<sup>600</sup> *Campbell and Fell v UK* (1984) 7 EHRR 165, see 4.6, pp.195-198.

<sup>601</sup> (1996) 22 EHRR 29, para 47; *Condon v UK* (2001) 31 EHRR 1, para 58.

<sup>602</sup> *Murray v UK*, para 47.

answer questions.<sup>603</sup> The European Court observed that as a matter of fairness, the jury should have been directed that if it was satisfied that the applicants' silence at the police interview could not sensibly be attributed to their having no answer or none that would stand up to cross-examination it should not draw an adverse inference.<sup>604</sup> Furthermore, the very fact that an accused is advised by his lawyer to maintain his silence must also be given appropriate weight by the domestic court.<sup>605</sup> The European Court regarded that the unfairness which resulted from such misdirection could not be cured on appeal, since the Court of Appeal had no means of knowing whether the applicants' silence had played a significant role in the jury's decision to convict them.<sup>606</sup> The Court therefore concluded that the applicants did not receive a fair hearing within the meaning of Article 6(1). Ovey and White regard that this case illustrates the European Court's tendency to assess the fairness of proceedings looked at as a whole, rather than to formulate rigid procedural rules.<sup>607</sup>

Therefore, the right to silence and the right to the privilege against self-incrimination have usually been considered by the European Court in relation to Article 6(1) rather than Article 6(2).<sup>608</sup> In case *Saunders v the UK*, the Court is called upon to decide whether the use made by the prosecution of the statements in trial obtained from the applicant by the Inspectors amounted to an unjustifiable infringement of the right to silence and the right not to incriminate oneself.<sup>609</sup> At the time of the applicant's interrogation by the inspectors he was under a duty under the Companies Act to reply to the inspectors' questions on pain of contempt proceedings. The European Court considered that "the notion of a fair procedure under Article 6(1) presupposed that the prosecution must prove its case without resort to evidence obtained through methods of coercion in defiance of the will of the accused". The European Court thus recognised that "the right to the privilege against self-incrimination was closely linked to the presumption of innocence contained in Article 6(2)".<sup>610</sup> Meanwhile, the European Court further emphasised that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. In

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<sup>603</sup> (2001) 31 EHRR 1; also see *Beckles v UK* (2003) 36 EHRR 13.

<sup>604</sup> *Condron v UK*, (2001) 31 EHRR 1, para 61-62.

<sup>605</sup> *Ibid.*, para 60.

<sup>606</sup> *Ibid.*, para 63-66.

<sup>607</sup> Clare Ovey and Robin White, *op.cit.*, fn 68, p199.

<sup>608</sup> See e.g. *Funke v. France* (1993) 16 EHRR 297, para 44; *Saunders v UK*, (1997) 23 EHRR 313, para 69.

<sup>609</sup> (1997) 23 EHRR 313.

<sup>610</sup> *Saunders v UK*, para 68.

this case, the issue must be examined by the European Court “in the light of all the circumstances of the case”. In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair procedure inherent in Article 6(1) of which the right not to incriminate oneself is a constituent element.<sup>611</sup>

On the other hand, the accused’s silence may also be taken into account in situations which clearly call for an explanation.<sup>612</sup> According to the European Court, although the privilege against self-incrimination may be invoked in order to prevent the use of certain evidence in criminal proceedings, it may not prevent the authorities from obtaining the information through the use of compulsory powers but which has an existence independent of the will of the suspect, such as documents acquired pursuant to breath, blood or urine samples, bodily tissue for the purpose of DNA testing, or documents obtained under a warrant, as in *Saunders v UK*.<sup>613</sup> Noticeable, it has been argued that the provisions of domestic law “drawing adverse inferences” create a very real risk that an accused will feel compelled to forfeit his right to silence, and to give potentially incriminating evidence.<sup>614</sup>

In *Heaney and McGuinness v Ireland*, an Irish statute, section 52 of the Offences against the State Act 1939 required citizens to give the authorities, if requested, an account of their movements at a given time in the context of terrorist investigations.<sup>615</sup> The Government maintained that section 52 was a reasonable measure given that a statement made pursuant to that section was not later admissible in evidence against its author and because any evidence obtained as a result of such a statement could only be admitted if the trial judge considered it fair and equitable to do so. The European Court considered that the legal position as regards the admission into evidence of section 52 statements was particularly uncertain in October 1990 when the applicants were questioned.<sup>616</sup> In any event, the applicants were provided with conflicting information in this respect by the questioning police

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<sup>611</sup> *Saunders v UK*, (1997) 23 EHRR 313, para 69.

<sup>612</sup> *Murray v UK* (1996) 22 EHRR 29, para 47.

<sup>613</sup> (1997) 23 EHRR 313, para 69; see also *IJL, GMR and AKP v UK* (2001) 33 EHRR 11.

<sup>614</sup> Also see 4.4.1, pp.167-171.

<sup>615</sup> (2001) 33 EHRR 264.

<sup>616</sup> *Heaney and McGuinness v Ireland* (2001) 33 EHRR 264, para 53.



officers. When the section 52 requests were then made during those interviews, they were then effectively informed that, if they did not account for their movements at particular times, they risked six months' imprisonment. The only reference during the interviews to the possible use of statements made by the applicants in any later proceedings was to inform them that anything they did say would be written down and might be used against them. Accordingly, the Court finds that the "degree of compulsion", imposed on the applicants by the application of section 52 of the 1939 Act with a view to compelling them to provide information relating to charges against them under that Act, in effect, destroyed the very essence of their privilege against self-incrimination and their right to remain silent.<sup>617</sup>

However, the European Court does not consider that the drawing of inferences from an accused's silence is in itself incompatible with Article 6, as long as judicial safeguards operate to ensure fairness. Article 6(1) and (2) require the prosecution at least to establish *prima-facie* that the accused has committed an offence, and that it is permissible for a court to draw an inference of guilt from the accused's failure to provide an explanation only where this is the sole common-sense conclusion to be drawn.<sup>618</sup> For example, under European jurisprudence, the European Court found in case *Murray v UK* that the anti-terrorism legislation applied did not violate Article 6 but the directions of the trial judge must be scrutinized carefully.<sup>619</sup> A convicted person Mr Murray, arrested under the Prevention of Terrorism Act 1989. He was refused to answer any questions after his arrest, despite being warned each time that a court might draw such inferences as appeared proper from his failure or refusal to do so. On his subsequent trial the judge drew adverse inferences against the accused under articles 4 and 6 of the Criminal Evidence (Northern Ireland) Order 1988. Article 4 permits the drawing of an adverse inference in certain defined circumstances against an accused person who fails to give evidence. Noticeably, the European Court thought that the judge should have stressed to the jury that they should give "due weight" to the applicant's reliance on legal advice to explain his silence.<sup>620</sup> However, the European Court noted that the applicant had not been

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<sup>617</sup> *Heaney and McGuinness v Ireland* (2001) 33 EHRR 264, para 55.

<sup>618</sup> Clare Ovey and Robin White, *op.cit.*, fn 68, p.201.

<sup>619</sup> (1996) 22 EHRR 29.

<sup>620</sup> *Ibid.*, para 50.

subject to direct coercion, being neither fined nor threatened with imprisonment.<sup>621</sup> The factor concerning the lack of legal advice on its own cannot be decisive. The European Court further agreed that “the use of inferences was an expression of the common sense implication drawn where an accused fails to provide an innocent explanation for his actions or behaviour”.<sup>622</sup> There were sufficient safeguards to comply with fairness, the repeated warning given during the interviews, and the general burden of proof remained with the prosecution who had to establish a *prima facie* case before the inference could be of relevance.<sup>623</sup> Its decision is highly relevant to future challenges asserting the right to silence.

The drawing of adverse inferences from the silence of the accused in interview also depend upon the strength of the case put to the accused and whether those questions put during interview are based on a case so strong as to warrant an explanation. This was applied in *Telfner v Austria*.<sup>624</sup> The applicant chose not to give evidence at trial, and the prosecution case relied almost entirely on the findings of the police that the applicant was the principal user of the car which is registered in his mother’s name and had not been at home at the time of the accident. The Court notes, in particular, that the victim of the accident had not been able to identify the driver, nor even to say whether the driver had been male or female, and that the Regional Court, after supplementing the proceedings, found that the car in question was also used by the applicant's sister.<sup>625</sup> The European Court held that the persuasiveness of the evidence adduced by the prosecution was extremely weak and the prosecutor had not first established a convincing *prima-facie* case against the accused.<sup>626</sup> Therefore, in requiring the applicant to provide an explanation, the courts in effect shifted the burden of proof from the prosecution to the defence, giving rise to a violation of Article 6(2).<sup>627</sup>

It could be seen there is a contrast in the UK domestic approach on the issue of right to silence. In the UK, led by Lord Bingham in *Brown v Stott*, they accepted that the

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<sup>621</sup> *Murray v UK* (1996) 22 EHRR 29, para 48-50.

<sup>622</sup> *Ibid.*, para 51-54.

<sup>623</sup> *Ibid.*, para 48, 52 and 54.

<sup>624</sup> (2002) 34 EHRR 207;

<sup>625</sup> *Ibid.*, para 18.

<sup>626</sup> *Ibid.*

<sup>627</sup> *Ibid.*

broader interests of the community in general, and the need to maintain road safety in particular, could justify a limited infringement of the right to silence of this sort.<sup>628</sup> For example, the UK courts have had to consider a large number of cases involving the “inferences from silence” provisions contained in ss.34 and 35 of the Criminal Justice and Public Order Act 1994 and equivalent provisions in Ireland since they came into operation, to the extent that the Court of Appeal described s.34 as “a notorious minefield” in *R v. B (K. J.)* in 2003.<sup>629</sup> Many domestic decisions in UK in this area thus have been on occasion difficult to reconcile both with Strasbourg case law and with each other.<sup>630</sup>

*R v Beckles* in 2004 was a case being referred back to the English Court of Appeal by the Criminal Cases Review Commission after the European Court ruled the defendant had been denied a fair trial under Article 6.<sup>631</sup> Here the Court of Appeal stated that the question in the end, which is for the jury, is whether regardless of advice, genuinely given and genuinely accepted, an accused has remained silent not because of that advice but because he had no or no satisfactory explanation to give.<sup>632</sup> The judge’s direction here was inadequate because it failed to draw the jury’s attention specifically to the need to consider the reasonableness of the defendant’s silence, nor was the jury directed to consider the genuineness of the defendant’s decision to accept the advice.<sup>633</sup> This direction appears to be crucial for UK domestic cases.<sup>634</sup> It is clear that the mere fact that silence is counselled is not sufficient to prevent s. 34 from operating.<sup>635</sup> It should also take into account whether or not that advice was honestly given or genuinely taken.<sup>636</sup> Suspects who do genuinely rely on *bona fide* legal advice should not have adverse inferences drawn against them.

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<sup>628</sup> [2001] HRLR 9; [2003] 1 A.C. 681.

<sup>629</sup> [2003] EWCA Crim 3080, para 20.

<sup>630</sup> See e.g. *Murray v UK* (1996) 22 EHRR 29; *Averill v UK* [2000] Crim. L. R.682; *Condon v UK* (2001) 31 EHRR 1.

<sup>631</sup> [2004] EWCA Crim 2766, [2005] 1 All ER 705; see also *Beckles v UK* (2003) 36 EHRR 13;

<sup>632</sup> *R v Beckles*, para 45; Noticeably, two clear lines of authority have emerged in UK on the issue concerning the genuineness of the reliance on the solicitor’s advice see *R v Betts and Hall* (2001) 2 Cr App R 16 and *R v Howell* [2003] EWCA Crim 1; [2003] Crim LR 405.

<sup>633</sup> *R v Beckles*, para 48.

<sup>634</sup> See e.g. *R v Bresa* [2005] EWCA Crim 1414.

<sup>635</sup> *R v Howell*, para 24.

<sup>636</sup> The discussion on this topic see generally, Simon Cooper, “Legal Advice and Pre-trial Silence - Unreasonable Developments”, (2006) 10 E. & P. 2006, Issue 1, 60-69.

As summed up by Woolf LCJ, it accepted that an assertion of reliance on legal advice was easy to make but difficult to investigate because of legal professional privilege, and the Court of Appeal recognised that defendants should be able to be advised by their lawyer without having to reveal the terms of that advice.<sup>637</sup> But where the defendant genuinely accepts advice honestly given, the English courts have ruled that the crucial question for determination by the jury relates to the reasonableness or the true explanation for his silence of the defendant's decision to act on that advice. The accused must not have been using the advice to conceal his lack of an adequate explanation.<sup>638</sup> Any suspect who seeks to shield himself from an adverse inference in these circumstances surely cannot be regarded as having genuinely accepted the advice he was given since the advice is being used merely as a device to shield his inability to provide an explanation.<sup>639</sup> The approach of the decision in *R v Beckles* appears a return to the approach of the courts before *R v Howell*, following "*R v Betts* which is more favourable to the accused".<sup>640</sup> It is for the jury to consider whether the defendant genuinely and reasonably relied on the legal advice to remain silent, not for the Judge to give the jury a checklist of whether the legal advice given by the accused's representative is of proper quality.

Noticeably, in a recent case *O'halloran and Francis v UK* the English approach laid by Lord Bingham in *Brown v. Stott* also had got it right under European jurisprudence.<sup>641</sup> In each case, a car belonging to the applicant had been snapped by a roadside camera when speeding. The central issue in each case is whether the coercion of a person who is the subject of a charge of speeding under section 172 of the Road Traffic Act 1988 to make statements which incriminate him or might lead to his incrimination is compatible with Article 6 of the Convention. To the extent possible, the European Court will therefore consider the two cases together. Their applications were rejected by the Grand Chamber. In this case the European Court decided that the right to remain silent, and the right not to incriminate oneself, it said, are not absolute, and certain derogations from them are permissible without infringing Article 6 of the Convention.<sup>642</sup> Relying on its earlier ruling in *Jalloh v*

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<sup>637</sup> *R v Beckles* [2004] EWCA Crim 2766, para 43.

<sup>638</sup> *Ibid.*, para 44-46.

<sup>639</sup> *Ibid.*, para 46.

<sup>640</sup> *Ibid.*, para 47.

<sup>641</sup> (2008) 46 EHRR 21.

<sup>642</sup> *ibid.*, para 53.

*Germany* the European Court concluded that “in order to determine whether the essence of the applicants’ right to remain silent and privilege against self-incrimination was infringed, the European Court will focus on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put”.<sup>643</sup> The derogation imposed by section 172 of the RTA was justified for two reasons.

The first was its direct nature.<sup>644</sup> The duty to provide information it imposes was created as part of a scheme for regulating an activity which for citizens is optional. Because motor cars are potentially dangerous, the state is justified in making laws to regulate their use; and those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles.<sup>645</sup> Secondly, there was the limited nature of the inquiry.<sup>646</sup> Section 172(2)(a) applies only where the driver of the vehicle is alleged to have committed a relevant offence, and authorizes the police to require information only as to the identity of the driver. Therefore the information requested of the applicant is thus markedly more restricted and very specific.<sup>647</sup> The European Court referred the case of *Brown v. Stott*, the identity of the driver is only one element in the offence of speeding, and there is no question of a conviction arising in the underlying proceedings in respect solely of the information obtained as a result of section 172(2)(a).<sup>648</sup> Overall the European Court considered that the nature of information sought by a notice of intended prosecution under section 172 did not destroy the essence of the applicants’ right to silence and their privilege against self-incrimination and therefore there is no violation of Article 6(1) and (2).

As Birdling commented, from the judgment of *O’halloran and Francis v UK* the previous inconsistency between British and European Court jurisprudence on the matter as to the limitation of the rights to silence and against self-incrimination appears to have now been harmonized.<sup>649</sup> In this case, the European Court insisted its

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<sup>643</sup> (2007) 44 EHRR 32, para 55.

<sup>644</sup> *O’halloran and Francis v UK*, (2008) 46 EHRR 21, para 56-57.

<sup>645</sup> *Ibid.*, para 57.

<sup>646</sup> *Ibid.*, para 58.

<sup>647</sup> *Ibid.*, para 58.

<sup>648</sup> *Ibid.*, para 60.

<sup>649</sup> Malcolm Birdling, “Self-incrimination goes to Strasbourg: *O’Halloran and Francis v United Kingdom*”, (2008) 12 E. & P. 2008, Issue.1, p.61.

own principle that while the right to a fair trial under Article 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case.<sup>650</sup> But this phrase could actually also have been drawn directly from Lord Bingham's judgment in *Brown v Stott*.<sup>651</sup> Concern has been raised on whether there is now any coherent guidance on the precise scope of the privilege against self-incrimination and the right to silence under the Convention.<sup>652</sup> Ashworth and Redmayne suggested that the apparent inconsistencies in the European jurisprudence could be harmonised in a principled fashion.<sup>653</sup> However, the European Court has developed a very flexible standard for determining what constitutes a criminal charge that would infringe Article 6 protection that accords with the diverse legal systems of its member states. It has led the European Court to approve the use of adverse inferences from silence and left doors open for member states to resolve and reconsider how to incorporate the right to silence into its domestic law, particularly in the very difficult area of the prevention of terrorism. Overall, the European Court has demonstrated its strong support for the core principle that the right to silence and the privilege against self-incrimination is an aspect of the fair trial requirement of Article 6.

#### 4.5 Admissibility of Evidence

As a result of the wide variation in rules of evidence followed in different European legal systems, the European Court has not laid down any rules of evidence regarding issues of the admissibility as a requirement of the guarantee of the right to a fair trial under Article 6.<sup>654</sup> The question for the European Court, which must be answered, is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.<sup>655</sup> As known, for example, under English law evidence was admissible if it is relevant and relevant evidence remains admissible even if it has been obtained illegally.<sup>656</sup> However, admissible evidence may be excluded at the discretion of the trial judge if it would have an unacceptably adverse effect on the

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<sup>650</sup> *O'halloran and Francis v UK*, (2008) 46 EHRR 21, para 53.

<sup>651</sup> [2001] HRLR 9, para 18.

<sup>652</sup> Malcolm Birdling, *op.cit.*, fn 649, p.61-63.

<sup>653</sup> Andrew. Ashworth and M. Redmayne, *The Criminal Process*, 3rd ed. (Oxford University Press: Oxford, 2005), pp129-37; also see M. Redmayne, "Rethinking the Privilege against Self-incrimination" (2007) 27 *Oxford Journal of Legal Studies* pp.209-232.

<sup>654</sup> *Schenk v Switzerland* (1988) 13 EHRR 242, para. 46; *Khan v UK* (2001) 31 EHRR 45, para 34.

<sup>655</sup> See *Teixeira de Castro v Portugal* (1999) 28 EHRR 101, para 34; *Mialhe v France* (1997) 23 EHRR 491 para 43; *Allan v UK* (2003) 36 EHRR 12 para 43.

<sup>656</sup> See e.g. *R v Khan* [1997] AC 558.

fairness of the proceedings.<sup>657</sup> In this aspect, the UK domestic courts proceed on a broadly similar basis as the European Convention in relation to improperly obtained evidence.<sup>658</sup>

But then a further question arises. Can it be accepted that there is a genuinely fair trial where a person's guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention? Fenwick considered that it might be found that a breach of the Convention guarantees in the pre-trial procedures would make it virtually inevitable that the trial would be rendered unfair if evidence deriving from the breach was not excluded.<sup>659</sup> What is most important is not the breach *per se*, but the way that the breach impacts on the proceedings. In a strongly worded dissenting judgment in *Khan v UK*, Judge Loucaides expressed the argument in favour of an exclusionary rule.<sup>660</sup> "Breaking the law, in order to enforce it, is a contradiction in terms and an absurd proposition".<sup>661</sup> The law enforcement authorities cannot be effectively deterred from repeating their impermissible conduct. The analysis of the preceding approaches by Ormerod also suggested that a refined discretion should be established.<sup>662</sup>

European Court has provided some guidelines as to the rules of admissibility of evidence that may be applied and a breach of one of these rules may, on the facts of a case, render a trial unfair such as in the following circumstances: evidence obtained by torture or ill-treatment contrary to Article 3;<sup>663</sup> confessions obtained by torture were admitted an evidence during a criminal trial;<sup>664</sup> evidence obtained by powers of compulsory questioning;<sup>665</sup> and evidence obtained by police incitement of an offence which would not otherwise have been committed;<sup>666</sup> the failure to make adequate disclosure or call relevant witnesses in relation to any purported illegally obtained

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<sup>657</sup> PACE, s. 78.

<sup>658</sup> See e.g. *R v Khan* [1997] AC 558; *Khan v UK* (2001) 31 EHRR 45; *Chalkley v UK* (2003) 37 EHRR 680; *Perry v UK* (2004) 39 EHRR 76; *Schenk v Switzerland* (1988) 13 EHRR 242.

<sup>659</sup> See Helen Fenwick, *op.cit.*, fn 111, p907.

<sup>660</sup> (2001) 31 EHRR 45, Opinion of Judge Loucaides.

<sup>661</sup> *Ibid.*

<sup>662</sup> For a detailed analysis, see David Ormerod, "ECHR and The Exclusion Of Evidence: Trial Remedies for Article 8 Breaches", [2003] Crim. L.R., pp61-80; Ben Emmerson and Andrew Ashworth, *Human Rights and Criminal Justice*, (London: Sweet & Maxwell, 2001), p419-430.

<sup>663</sup> *Austria v Italy* (1961) 6 Yearbook 116 at 784; *Harutyunyan v. Armenia*, (2009) 49 EHRR 9, para 62-63.

<sup>664</sup> *Ibid.*, para 179.

<sup>665</sup> *Saunders v UK* (1996) 23 EHRR 313, para 77-80.

<sup>666</sup> *Teixeira de Castro v Portugal*, (1999) 28 EHRR 101, para 36-39.

evidence.<sup>667</sup> Also, early access to a lawyer was part of the procedural safeguards to which the European Court would have particular regard when examining whether a procedure had extinguished the very essence of the privilege against self-incrimination.<sup>668</sup> The fairness is not confined to the trial itself, but extends to the pre-trial phase and to the particular methods used to gather evidence.

Here concentrates on the issue raised by the use of evidence obtained by torture, including confessions by the accused, which concern not only the procedural right to a fair trial, but also play a part in protection from the abhorrence of torture itself.<sup>669</sup> One of the general challenges is maintaining the absolute nature of the torture prohibition under Article 3 of ECHR, which cannot be suspended or weighed against competing interests even in the event of a public emergency threatening the life of the nation.<sup>670</sup> For example, in the recent case *Jalloh v. Germany*, the applicant complains that an emetic was administered to him by force to make the applicant regurgitate a tiny plastic bag of cocaine he had swallowed and about the use of evidence thus obtained, in his view illegally, in the criminal proceedings leading to his conviction.<sup>671</sup> He further claims that his right not to incriminate himself was violated. He relies on Article 3, Article 6 and Article 8 of the ECHR. The European Court noted that the forcible medical intervention had entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand.<sup>672</sup> In the European Court's view, even if it had not been the authorities' intention to inflict pain and suffering on the applicant, the manner in which the impugned measure was carried out had been liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him.<sup>673</sup> Therefore the German authorities had subjected the applicant to a grave interference with his physical and mental integrity against his will in order to retrieve evidence they could have equally obtained by less intrusive methods.<sup>674</sup> The European Court firstly found that the evidence was obtained by a measure which breached one of the core rights

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<sup>667</sup> *Ludi v Switzerland* (1993) 15 EHRR 173, para 43-50.

<sup>668</sup> *Salduz v Turkey* (2009) 49 E.H.R.R. 19, para 54. Also the right of access to legal counsel see 4.6.2.2 and 4.6.3 below.

<sup>669</sup> See generally, Tobias Thienel, "The admissibility of evidence obtained by torture under international law", E.J.I.L. 2006, 17(2), p349; also see Chap2, 4.5, pp.43-44.

<sup>670</sup> *Selmoui v France* (2000) 29 EHRR 403, para 95; also see 2.2, pp.86.

<sup>671</sup> (2007) 44 EHRR 32.

<sup>672</sup> *Ibid.*, para 78-81.

<sup>673</sup> *Ibid.*, para 82.

<sup>674</sup> *Ibid.*, para 82.



guaranteed by the Convention. He had been subjected to inhuman and degrading treatment contrary to Article 3.<sup>675</sup>

Then the next question in this case is whether the admission at trial of the real evidence obtained in violation of Article 3 renders the trial as a whole unfair.<sup>676</sup> The European Court noted that this evidence obtained through ill-treatment proved the decisive element in securing the applicant's conviction.<sup>677</sup> Moreover, although German law afforded safeguards against arbitrary or improper use of the measure, any discretion on the part of the national courts to exclude that evidence could not come into play as they considered the administration of emetics to be authorised by the domestic law.<sup>678</sup> The European Court regarded that the public interest in securing the applicant's conviction could not justify allowing the evidence obtained in a way which breached one of the core rights guaranteed by the Convention to be used at the trial.<sup>679</sup> Accordingly, in this case the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant was a sufficient base to conclude his trial as a whole was unfair and therefore constitutes a violation of Article 6(1).<sup>680</sup> The illegality of the investigation is a factor in the determination of the fairness of the proceedings.<sup>681</sup> Although the European Court left open the question whether a trial based on evidence obtained by inhuman or degrading treatment could nevertheless be fair, the European Court recognised Article 15 of the UN CAT which provides that statements which are established to have been made as a result of torture shall not be used in evidence in proceedings against the victim of torture.<sup>682</sup> From the above judgments, the violation of the absolute prohibition of torture will always outweigh any interest in using the evidence concerned. In this way, Article 3 appears to be read by the European Court as an exclusionary rule that demands exclusion of all evidence obtained by torture or ill-treatment and regardless of where it occurred.<sup>683</sup>

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<sup>675</sup> *Jalloh v. Germany* (2007) 44 EHRR 32, para 82 and 99.

<sup>676</sup> *Ibid.*, para 95-99.

<sup>677</sup> *Ibid.*, para 107.

<sup>678</sup> *Ibid.*, para 107.

<sup>679</sup> *Ibid.*, para 107.

<sup>680</sup> *Ibid.*, para 108. Also see judgement on the manner in which the evidence was obtained and the use made of it undermined his right not to incriminate himself, para 109-122.

<sup>681</sup> *Schenk v. Switzerland*, (1991) 13 EHRR 242 para 46-48

<sup>682</sup> *Jalloh v. Germany*, para 105-107.

<sup>683</sup> *G.K. v Switzerland*, UN Doc.A/58/44, 177, para 185.

This approach is also followed by another recent case *Harutyunyan v Armenia*, relying on Article 6(1), the applicant complained that his right not to incriminate himself and his right to a fair trial had been breached by the use at his trial of statements which had been obtained from him and two witnesses through torture.<sup>684</sup> The European Court first noted that the coerced statements by the applicant and witnesses played a decisive role in securing the applicant's conviction from the judgments of the courts at all three levels of jurisdiction. But none of the domestic courts at all three levels of jurisdiction explicitly declared the statements in question inadmissible, despite several requests to that effect by the defence.<sup>685</sup> The European Court emphasised that the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings.<sup>686</sup> The European Court further noted that the fact that the applicant and the two witnesses had been coerced into making confessions had been confirmed by the domestic courts when the police concerned were convicted of ill-treatment.<sup>687</sup> This respect was taken into account by the European Court for the purposes of deciding on compliance with the guarantees of Article 6.

Even the domestic courts justified the use of the confession statements by the fact that the applicant confessed to the investigator and not to the police officers who had ill-treated him and the fact those two witnesses confirmed their earlier confession later. The European Court was not convinced by such justification and addressed that the credibility of the statements made by them during that period should still have been seriously questioned, and these statements should certainly not have been relied upon to justify the credibility of those made under torture.<sup>688</sup> The European Court concluded that “regardless of the impact the statements obtained under torture had on the outcome of the applicant's criminal proceedings, the use of such evidence rendered his trial as a whole unfair”.<sup>689</sup> There has accordingly been a violation of Article 6(1) even if the admission of the evidence obtained by torture was not decisive in securing the conviction. It has been observed under European jurisprudence, the admission of evidence obtained by torture may contrary to Article

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<sup>684</sup> (2009) 49 EHRR 9.

<sup>685</sup> *Ibid.* para 58 and 59;

<sup>686</sup> *Ibid.*, para 63;

<sup>687</sup> *Ibid.*, para 64;

<sup>688</sup> *Ibid.*, para 65;

<sup>689</sup> *Ibid.*, para 63.

6(1), if the complain of coercion and torture appeared to be substantiated, regardless of any further consideration, be they related to the identity of the torturer state, to the persons concerned or to the probative value.<sup>690</sup>

The question of the admissibility of the evidence obtained by torture has been raised widely with different views in different countries, especially in the context of the worldwide prevention of terrorism. The interface between domestic law and the requirements of Article 6(1) will be of great importance. The use of evidence obtained by torture is capable of being a sufficiently grave violation of ECHR, so that domestic courts of the party states making the evaluation must even avoid a real risk of treatment contrary to Article 3 existing and therefore an unfair trial by admitting evidence has been extracted by torture.<sup>691</sup> The judgement of *A and others v Secretary of State for the Home Department* (No.2) in UK may be regarded as the leading judgment on this issue.<sup>692</sup> The ten appellant detainees, X, in the case appealed against a decision that the fact that evidence in their appeals before the Special Immigration Appeals Commission had, or might have, been procured by torture inflicted by foreign nationals without the complicity of the British authorities was relevant to the weight of the evidence but did not render it legally inadmissible.

While the Court of Appeal were content to accept the admissibility of the evidence obtained by torture, the House of Lord unanimously held that evidence is inadmissible if obtained by torture, no matter where, by whom or on whose authority the torture is inflicted.<sup>693</sup> This solution adopted by the House of Lord in UK was in full conformity with Article 6 and was in line with the general attitude international law takes towards the practice of torture.<sup>694</sup> Firstly reviewing the over 500-year history of the well-established common law rule regarding the prohibition against the use of torture, even in times of emergency, their lordships observed that the condemnation of torture by the common law as a constitutional principle is not only the unreliability of any information obtained through the use of torture, but also is

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<sup>690</sup> *Harutyunyan v Armenia*, (2009) 49 EHRR 9, para 63.

<sup>691</sup> See detail discussion on this issue, Tobias Thienel, "Foreign acts of torture and the admissibility of evidence: the judgment of the House of Lords in *A and others v. Secretary of State for the Home Department* (No.2)", (2006) 4 Journal of International Criminal Justice, No.2, pp.401-409.

<sup>692</sup> [2005] UKHL 71; [2006] 1 All E.R. 575.

<sup>693</sup> *Ibid.*, Lord Bingham, para 51.

<sup>694</sup> *Ibid.*, para 52.

mainly based on the grounds of its barbarism, its illegality and its inhumanity.<sup>695</sup> It is more than a rule of evidence. Unlike the Court of Appeal in this case, their lordship recognised that English common law insisted on an exclusionary rule and had refused to accept that oppression or inducement should go to the weight rather than the admissibility of the confession.<sup>696</sup>

Further Lord Bingham addressed that the principles of common law did not stand alone and effect had to be given to the ECHR, which itself takes account of the all but universal consensus embodied in the international law, such as Article 3 of ECHR and Article 7 of ICCPR.<sup>697</sup> Therefore examining Article 15 of CAT, Lord Bingham pointed out that it was a blanket rule broad enough applicable in all proceedings whether the offending evidence was a confession or an accusatory statement.<sup>698</sup> The same conclusion would be also reached under Article 6 of ECHR. When adjudicating upon Article 3 issues, the European Court has frequently invoked relevant provisions of the UN CAT as in *Jalloh v. Germany*. Moreover, referred to the case of *Saunders v UK* and *Teixera de Castro v Portugal*, Lord Bingham observed that although the European Court had not prescribed a standard regarding admissibility of evidence, it had held that the way in which evidence has been obtained or used may be such to render the proceedings unfair since the proceedings are to be assessed as a whole for their fairness and the manner in which evidence has been obtained is one element of the proceedings.<sup>699</sup> Therefore if the evidence is used against the victim of an act of torture, the right against self-incrimination renders such evidence inadmissible.<sup>700</sup> If it is used against someone who has not been tortured, the unreliability of evidence obtained by torture will weigh heavily in the overall assessment as to the fairness of the proceedings.<sup>701</sup> Based on a series of international instruments and statements stating that measures taken in the war on terror must also be compatible with international human rights standards, the Lord Bingham held that the house has not been referred to any decision, resolution, agreement or advisory opinion suggesting that a confession or statement obtained by

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<sup>695</sup> *A and others v Secretary of State for the Home Department* (No.2) [2005] UKHL 71, Lord Bingham para 11 and Lord Hope para 112.

<sup>696</sup> *Ibid.*, Lord Bingham para 15.

<sup>697</sup> *Ibid.*, para 52.

<sup>698</sup> *Ibid.*, para 35.

<sup>699</sup> *Ibid.*, para 26.

<sup>700</sup> See e.g. *Saunders v UK*, (1997) 23 EHRR 313; *Jalloh v. Germany* (2007) 44 EHRR 32

<sup>701</sup> *A and others v Secretary of State for the Home Department*, see Lord Bingham at para 26.

torture is admissible in legal proceedings if the torture was inflicted without the participation of the state in whose jurisdiction the proceedings are held, or that evidence is admissible in proceedings related to terrorism.<sup>702</sup>

On the issue relating to evidence of torture, Lords firstly unanimously agreed that it would be unfair to impose the burden on the appellants, therefore “the appellants would only have to point out that a statement had been or may have been provided by a foreign state suspected of practising torture, upon which the burden of proof would have been discharged, and the duty of investigation would fall on SIAC itself”.<sup>703</sup> However, the House split on whether evidence would be excluded in relation to cases in which there was only “a real risk” that it had been obtained by torture.<sup>704</sup> The majority judgment on this issue as to standard of proof gives reasons for concern, by holding that exclusionary rule applied only if a statement could be proved to have been obtained by torture.<sup>705</sup> On the contrary, Lord Bingham stated in his minority opinion that this is a test which, in the real world, can never be satisfied. “The foreign torturer does not boast of his trade”.<sup>706</sup> The decision on the issue of standard of proof appears different from the approach under Article 6 of ECHR. For example, in case *Mamatkulov and Askarov v Turkey*, it has been recognised that a state can violate Article 6 by extraditing a person to another State, if there is a real risk of a grossly unfair trial in the receiving state.<sup>707</sup>

In *A and others v Secretary of State for the Home Department (No.2)*, joined in his dissent by Lords Nicholls and Hoffman, Lord Bingham argued that adopting “a real risk” standard of proof as required by Article 5(4) of ECHR was essential to maintain the overall fairness of the “very far from ordinary” s.25 proceedings, which were already heavily weighted against the appellants with an undoubtedly grave disadvantage.<sup>708</sup> Therefore he advocated that if SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to

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<sup>702</sup> *A and others v Secretary of State for the Home Department (No.2)* [2005] UKHL 71, see Lord Bingham at para 45.

<sup>703</sup> *Ibid.*, see Lord Bingham para 55; Lord Hoffmann para 98; Lord Hope para 116; Lord Carswell para 155. Lord Nicholls, para 80; Lord Rodger and Lord Brown, para 145.

<sup>704</sup> *Ibid.*, see Lord Bingham, para 56-62 and Lord Hope para 118.

<sup>705</sup> *Ibid.*, see e.g. Lord Hope para 117-126.

<sup>706</sup> *Ibid.*, see e.g. Lord Bingham para 59.

<sup>707</sup> (2005) 41 E.H.R.R. 25, para 67; see also *Soering v UK*, (1989) EHRR, para 45.

<sup>708</sup> *A and others v Secretary of State for the Home Department (No.2)*, see Lord Bingham, para 58.

admit the evidence.<sup>709</sup> However, the majority argued that the use of real risk standard in *Mamatkulov and Askarov v Turkey* by the European Court had been developed in order to assess the possibility of future violations.<sup>710</sup> On the contrary, the exclusionary rule under consideration related to past events, and it should be possible to establish what has happened in the past even if only on a balance of probabilities, as required by Article 15 of the UN CAT.<sup>711</sup> In other word, if there was no more than a possibility that the statement was obtained by torture, then it would not have been established and the statement would be admissible.<sup>712</sup> The majority also stated that they sought to devise a test that occupies high moral ground but at the same time serve the public interest and is practicable.<sup>713</sup> Lord Hope implicitly acknowledged that the test he advocated may not be as fair as expected in terms of Article 5(4) and 6(1) of EHCR, but that these obligations were to be balanced against the obligation to protect the right to life in Article 2.<sup>714</sup>

Grief comments that the judgment is firmly rooted in the common law and makes a notable contribution to international law.<sup>715</sup> The unanimous judgment on the inadmissibility of the third-party torture evidence before SIAC was important in signalling that the use of torture is universally forbidden under all circumstances, and that states have positive duties to give effect to that prohibition, including by treating as inadmissible in any proceedings of evidence obtained through torture.<sup>716</sup> However, the approach on the standard of proof in the judgment may not completely remove the possibility to seek admissibility of the evidence acquired through the use of torture. The UK test as to the standard of proof imposed on the individual may add another grave disadvantage to him. At the same time, as commented by Shah, “if the executive is able to use whatever information is necessary, this signals to ‘would-be’ torturers that there is a use for the information they will obtain and gives them no reason to stop their proscribed activities”.<sup>717</sup> The UK domestic courts still seek to

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<sup>709</sup> *A and others v Secretary of State for the Home Department* (No.2) [2005] UKHL 71, see e.g. Lord Bingham at para 56.

<sup>710</sup> *Ibid.*, see e.g. Lord Hope at para 121.

<sup>711</sup> *Ibid.*, see e.g. Lord Hope at para 122-125.

<sup>712</sup> *Ibid.*, see e.g. Lord Brown at para 172;

<sup>713</sup> *Ibid.* see e.g. Lord Carswell, para 158.

<sup>714</sup> *Ibid.*, see e.g. Lord Hope at para 119;

<sup>715</sup> Nicholas Grief, “The Exclusion of Foreign Torture Evidence: A Qualified Victory for the Rule of Law”, EHRLR (2006), 2, p201-216.

<sup>716</sup> Also see 2.3.2, pp.91-94.

<sup>717</sup> Sangeeta Shah, “The UK's Anti-terror Legislation and the House of Lords: The Battle Continues”, H.R.L. Rev. 2006, 6(2), p.434.

strike a proper balance among different interests and rights. As regarded by Ashworth, it is precisely in the investigation of serious crime, where the pressures to obtain convictions are strongest, that protection of suspects' rights and remedies against police impropriety are most needed.<sup>718</sup> The government should do nothing to encourage torture. From the above cases it may be found that the European Court has further made it clear that while the rise in organised crime requires appropriate measures, "the public interest cannot justify the use of evidence obtained as a result of police incitement", right from the outset, the applicant was definitely deprived of a fair trial.<sup>719</sup> Fairness is a fundamental value and, unlike the balancing process at the heart of the public policy discretion, is less amenable to trumping by countervailing considerations, such as the importance of bringing offenders charged with serious offences to justice and ensuring that reliable evidence is placed before the courts.<sup>720</sup>

#### **4.6 Time and Facilities to Run a Defence**

The European Court reiterates in its cases that the accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings.<sup>721</sup> The following minimum guarantees for "everyone charged with a criminal offence" under Article 6(3), the adequate time and facilities required by Article 6(3)(b) related to the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial.<sup>722</sup> The right to assistance of a counsel is usually closely connected with the right to adequate time and facilities for the preparation of the defence.<sup>723</sup> Therefore, Article 6(3)(b) and (c) may often be invoked together. For example, in respect of the assignment of a lawyer and in respect of the time allowed for such assignment, the European Court regarded that where it is obvious that a lawyer has not had adequate time to prepare the defence properly and familiarise himself with the case, the

<sup>718</sup> A. Ashworth, "What is Wrong with Entrapment?" [1999] Singapore Journal of Legal Studies 293, p.310.

<sup>719</sup> See *Teixeira de Castro v Portugal*, (1999) 28 EHRR 101, para 36; *Ludi v Switzerland* (1992) 15 EHRR 173, where the role of the police did not go beyond that of undercover agent, para 47-50.

<sup>720</sup> S. Bronitt, "The Law In Undercover Policing: A Comparative Study Of Entrapment And Covert Interviewing In Australia, Canada And Europe", CLWR 2004 33.1(35).

<sup>721</sup> See e.g. *Can v Austria*, (1985) 7 E.H.R.R. CD421, para 53; *Mayzit v. Russia*, (2006) 43 E.H.R.R. 38, para 78; *Galstyan v. Armenia*, (2010) 50 E.H.R.R. 25, para 84.

<sup>722</sup> See ECHR, Article 6(3)(b); *Mayzit v. Russia*, para 78-79; *Galstyan v. Armenia*, para 84; also see Chap2, 6.3.1, pp.75-78.

<sup>723</sup> ECHR, Article 6(3)(c); also see Chap2, 6.3.1, p.76; see generally, Stephanos Stavros, *op.cit.*, fn 484, p.177.

domestic court should consider adjourning the case on its own motion.<sup>724</sup> The role of Article 6(3)(b) and (c) in this regard is to achieve “equality of arms” between the prosecution and the defence, a principle also considered an element of fairness under the general fair trial guarantee of Article 6(1). The European Court reiterates that “Article 6 – especially paragraph 3 – may be relevant at the stage of the preliminary investigation in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions”.<sup>725</sup> Therefore, the requirements of Article 6(3) are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6(1).<sup>726</sup>

#### 4.6.1 Adequate Time

The time element of this guarantee acts as a safeguard to protect the accused against a hasty trial.<sup>727</sup> Like the other guarantees as to timeliness under the Convention, Article 6(3)(b) applies from the moment the accused is arrested or is otherwise substantially affected or when he is given notice of charges against him.<sup>728</sup> The issue of adequacy of time afforded to an accused must be assessed in the light of the circumstances of each particular case.<sup>729</sup> For example, in the English courts, accused persons frequently meet their legal aid barrister for the first time only minutes before their trial, but in *X v UK* the Commission has decided that this is not a breach of Article 6(3)(b) unless the applicant can show “prejudice to his representation during the proceedings”.<sup>730</sup> The later case *Twalib v Greece* adopts similar approach to this issue.<sup>731</sup> The applicant in this case pointed out that as the applicant’s counsel did not appear at the hearing in the first-instance proceedings, his counsel had been appointed by the trial court during the hearing and had been given less than an hour to study his case file. Also, that lawyer was representing another co-accused whose interests were in conflict with him.<sup>732</sup> However, the European Court observes that “it does not appear from the evidence that the applicant’s lawyer contended on appeal

<sup>724</sup> *Goddi v Italy*, (1984) 6 EHRR 457, para 31.

<sup>725</sup> See *Imbrioscia v. Switzerland*, (1994) 17 EHRR 441, para 36; *John Murray v. the UK* (1996) 22 EHRR 29, para 62.

<sup>726</sup> See *Poitrimol v. France* (1993) 18 EHRR 130, para 29; *Galstyan v. Armenia*, (2010) 50 EHRR 25 para 83.

<sup>727</sup> *Krocher and Moller v Switzerland* (1981) 26 DR 24, para 15.

<sup>728</sup> See e.g. *Campbell and Fell v UK* (1985) 7 EHRR 165, para 98.

<sup>729</sup> *Galstyan v. Armenia*, para 84; See e.g. issue on the complexity of the case: *Albert and Le Compte v Belgium* (1983) 5 EHRR 533; defence lawyer’s workload: *X and Y v Austria* (1978) 15 DR 160, para 3(c); the stage of proceedings: *Huber v Austria* (1974) 46 CD 99; accused’s representation of himself: *X v Austria* (1967) 22 CD 96;

<sup>730</sup> *X v UK* (1970) 13 Yearbook 690, p696;

<sup>731</sup> (2001) 33 EHRR 24.

<sup>732</sup> *Ibid.*, para 40.



that the conviction was unsafe and that a retrial should be ordered on account of the defects in the applicant's representation at first instance; nor is there any clear indication that the appeal court could assume that there had been a defect in the first instance proceedings without being alerted to the matter".<sup>733</sup> Under this situation, the European Court found that there has been no violation of Article 6(1) in conjunction with 3(b) in this case.

In case *Öcalan v. Turkey*, the European Court considers that the restriction on the number and length of the applicant's meetings with his lawyers was one of the factors that made the preparation of his defence difficult.<sup>734</sup> The charges against the applicant included numerous acts of violence perpetrated by an illegal armed organisation and that he was alleged to be the leader of that organisation and the principal instigator of its acts. Therefore the European Court considered that the presentation of those highly complex charges generated an exceptionally voluminous case file. However, after the first two visits by his lawyers, which were approximately two weeks apart, contact between the applicant and his lawyers was restricted to two one-hour visits per week. The European Court considered that in order to prepare his defence the applicant required skilled legal assistance equal to the complex nature of the case.<sup>735</sup> Since the restrictions imposed on the number and length of their visits made it impossible for the applicant's lawyers to communicate the documents in the file to their client until late or to involve him in its examination and analysis, they found themselves in a situation that made the preparation of the defence case particularly difficult.<sup>736</sup> Therefore the European Court concluded that the special circumstances of the case did not justify restricting the applicant to a rhythm of two one-hour meetings per week with his lawyers in order to prepare for a trial of that magnitude.<sup>737</sup> Also the Government have not explained why the authorities did not permit the lawyers to visit their client more often or why they failed to provide more adequate means of transport, thereby increasing the length of each individual visit, when such measures were called for as part of the "diligence" the Contracting States must exercise in order to ensure that the rights guaranteed by

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<sup>733</sup> *Twalib v Greece* (2001) 33 EHRR 24, para 41-42.

<sup>734</sup> (2005) 41 EHRR 985.

<sup>735</sup> *Ibid.*, para 135.

<sup>736</sup> *Ibid.*, para 137.

<sup>737</sup> *Ibid.*, para 135.

Article 6 are enjoyed in an effective manner.<sup>738</sup> The European Court reiterates that waiver of the exercise of a right guaranteed by the Convention must be established in “an unequivocal manner”.<sup>739</sup>

In the recent case *Galstyan v Armenia*, the applicant submitted that the trial was not fair, that he was not given time to prepare his defence and that he was tricked into refusing legal assistance.<sup>740</sup> The applicant were arrested and examined in an expedited procedure after the applicant was kept at the police station for only a few hours, during which time the police record was signed by the applicant and therefore legal assistance were refused by the applicant. However, the European Court considered that the mere fact that the applicant signed a paper in which he stated that he did not wish to have a lawyer did not mean that he did not need adequate time and facilities to prepare himself effectively for trial.<sup>741</sup> Nor did the fact that the applicant did not lodge any specific requests during the short pre-trial period necessarily imply that no further time was needed for him to be able to properly assess the charge against him and consider his defence in adequate conditions.<sup>742</sup> The European Court noted that, during that time, the applicant was either in transit to the court or was being held at the police station without contact with the outside world. During his short stay at the police station, he was also questioned and searched. The European Court doubted that the circumstances in which the applicant’s trial was conducted enabled him to familiarise himself properly with and to assess adequately the charge and evidence against him, and to develop a viable legal strategy for his defence.<sup>743</sup> Therefore nothing suggested that his signing of the record pursued any other purpose to confirm that he was familiar with it and aware of his rights and the charge against him. The European Court concluded that there had been a violation of Article 6(3) taken together with Article 6(1) according to all above situations.

## **4.6.2 Adequate Facilities**

### **4.6.2.1 Access to Information**

The European Court regards the facilities which everyone charged with a criminal

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<sup>738</sup> *Öcalan v. Turkey*, (2005) 41 EHRR 985, para 135.

<sup>739</sup> *Ibid.*, para 136.

<sup>740</sup> (2010) 50 EHRR 25.

<sup>741</sup> *Ibid.*, para 86.

<sup>742</sup> *Ibid.*, para 86.

<sup>743</sup> *Ibid.*, para 87.

offence should enjoy include the opportunity to acquaint himself for the purposes of preparing his defence with the results of investigations carried out throughout the proceedings.<sup>744</sup> Hence, in order for the adversarial process to work effectively, as regard to the entitlement to disclosure of relevant evidence which was discussed above, the European Court continues to issue strong statements that both the accused and their counsel must be granted access to appropriate information at all stages of proceedings.<sup>745</sup> In practice, it appears that the parties should have the opportunity to make copies of the relevant documents from the court file.<sup>746</sup> For example, in *Öcalan v. Turkey*, the European Court noted that the applicant was not permitted to inspect personally the evidence produced by the prosecution against those complex charges until a very late stage in the proceedings.<sup>747</sup> Also, the applicant's lawyers only received the large voluminous case documents approximately 2 weeks before the beginning of the trial.<sup>748</sup> The fact that the applicant was given permission later to consult the case file under the supervision of two registrars did little to remedy that situation, in view of the considerable volume of documents concerned and the short time available to the applicant.<sup>749</sup> Moreover, the European Court found the applicant's lawyers actually were not able to pass on to his client any documents before submitting their comments on the prosecution evidence.<sup>750</sup> Under this situation, the European Court assumed that, had he been permitted to study the prosecution evidence directly for a sufficient period, the applicant would have been able to identify arguments relevant to his defence other than those which his lawyers advanced without the benefit of his instructions.<sup>751</sup> The European Court therefore holds that the fact that the applicant was not given proper access to any documents in the case file other than the bill of indictment also served to compound the difficulties encountered in the preparation of his defence.

#### 4.6.2.2 Right to Confidential Communication with Counsel

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<sup>744</sup> *Foucher v France*, (1997) 25 EHRR 234, paras 26-38.

<sup>745</sup> see *Jasper v UK*, (2000) 30 EHRR 441, para 51; *Rowe and Davis v UK* (2000) 30 EHRR 1, para 60; also see 4.3, p.162 and 164.

<sup>746</sup> See generally, P van Dijk and G van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3<sup>rd</sup> ed, (Kluwer, 1998), pp.430-431.

<sup>747</sup> (2005) 41 EHRR 985, para 138.

<sup>748</sup> *Ibid.*, para 123; See 4.6.1 above.

<sup>749</sup> *Ibid.*, para 141.

<sup>750</sup> *Ibid.*, para 140-142.

<sup>751</sup> *Ibid.*, para 143.

Another important issue considered under this head is the right to communications with a lawyer which is covered by Article 6(3)(b) and (c).<sup>752</sup> As far as the ICCPR and the ECHR are concerned, Article 9 of ICCPR and Article 5 of ECHR, do not specifically provide for the access to a lawyer of persons arrested on remand.<sup>753</sup> Both the HRC and the European Court have, however, relied for the purpose on the fair trial provisions of Article 14 of ICCPR and Article 6 of ECHR respectively, although in different ways and with partly different results.<sup>754</sup> The European Court follows a more complex approach, which has been set out in the 1993 *Imbrioscia v Switzerland* judgment.<sup>755</sup> The European Court regarded that “the right set out in paragraph (3)(c) of Article 6 is one element, amongst others, of the concept of a fair trial in criminal proceedings contained in paragraph (1)”.<sup>756</sup> The European Court specifically pointed out that the domestic proceedings conducted in the case as a whole must be considered, including the special features of any pre-trial investigation and the facts of the case.<sup>757</sup> Assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused.<sup>758</sup>

In its *Murray v UK* judgment the European Court followed the above approach that the absence of legal representation during the preliminary investigation could in certain circumstances affect the fairness of the proceedings as a whole.<sup>759</sup> Mr Murray had been denied access to his solicitor for 48 hours while he was interviewed by police. The European Court observed that the scheme contained in the Criminal Justice (Northern Ireland) Order 1988 was such that it was of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation, as he was confronted with a fundamental dilemma relating to his defence.<sup>760</sup> The applicant was undoubtedly directly affected by the denial of access and the ensuing interference with the rights of the defence.<sup>761</sup> In such circumstances Article 6 will normally require that the accused be allowed to benefit

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<sup>752</sup> Also see 3.6.2, pp.149-152.

<sup>753</sup> See Chap2, 5.7, p.67.

<sup>754</sup> See Chap2, 6.3, pp.74 and 76.

<sup>755</sup> (1994) 17 EHRR 441.

<sup>756</sup> *Ibid.*, para 37.

<sup>757</sup> *Ibid.*, para 38; *Murray v. UK* (1996) 22 EHRR 29, para 63;

<sup>758</sup> *Imbrioscia v Switzerland*, para 38; see 4.6.3, pp.203.

<sup>759</sup> (1996) 22 EHRR 29, para 62.

<sup>760</sup> *Ibid.*, para 66; the dilemma concerning whether the accused should choose remain silence or not, see discussion at 4.4.3, pp.175-178.

<sup>761</sup> *Murray v UK*, (1996) 22 EHRR 29, para 68.

from the assistance of a lawyer already at the initial stages of police interrogation.<sup>762</sup> Noticeably, in contrast with other provisions of Article 6 of ECHR, the applicant does not need to show that he has suffered actual prejudice as a result of the failure of the state to secure legal assistance for him.<sup>763</sup> The standard appears much lower. As held in *Artico v Italy*, the European Court will ask merely whether it is plausible that a lawyer would have been of assistance but not nomination.<sup>764</sup>

According to this approach, on the one hand, the applicant's right of access to a lawyer during the first 48 hours had been extremely restricted. For example, in *Magee v UK* where the national legislation permitted to draw adverse inferences from the suspect's silence at police questioning, the applicant was kept *incommunicado* by the police for the first 48 hours.<sup>765</sup> The European Court observed that the austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent.<sup>766</sup> Having regard to these considerations, the European Court is of the opinion that the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators.<sup>767</sup> Also, the European Court observed that the applicant did opt to break his silence and began to confess before he was allowed to consult his lawyer.<sup>768</sup> The European Court therefore noted that irrespective of the fact that the domestic court drew no adverse inferences under Article 3 of the 1988 Order, the Article 3 caution administered to the applicant was an element which heightened his vulnerability to the relentless rounds of interrogation on the first days of his detention.<sup>769</sup> The European Court found a violation of Article 6 (1) in conjunction with Article 6(3)(c) thereof as regards the denial of access to a lawyer. Similarly, the European Court did find a breach of Article 6(3)(c) read with Article 6(1) in *Averill v UK*, where the applicant was denied access to a solicitor during the first 24 hours of

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<sup>762</sup> *Murray v UK*, (1996) 22 EHRR 29, paras. 63

<sup>763</sup> *Artico v Italy* (1981) 3 EHRR 1, para 35.

<sup>764</sup> *Ibid.*

<sup>765</sup> (2001) 31 EHRR 35.

<sup>766</sup> *Ibid.*, para 43.

<sup>767</sup> *Ibid.*, para 43;

<sup>768</sup> *Ibid.*, para 39 and 43.

<sup>769</sup> *Ibid.*, para 43.

interrogation and his solicitor was not allowed to be present during subsequent interviews.<sup>770</sup>

On the other hand, no violation was found in *Brennan v UK* where the denial of access to a lawyer had lasted 24 hours and during that period the applicant had not made incriminating admissions.<sup>771</sup> The applicant argued that in the absence of independent evidence of video or taped records of the police interviews, and the absence of the accused's solicitor, there were considerable difficulties for an accused to convince a court, against the testimony of the police officers, that any oppression took place. In this respect, the European Court noted that the circumstances in which the confession evidence was obtained were subjected to strict scrutiny on the *voir dire*.<sup>772</sup> Also, the European Court considered that the adversarial procedure conducted before the trial court at which evidence was heard from the applicant, psychological experts, the various police officers involved in the interrogations and the police doctors who examined him during his detention, was capable of bringing to light any oppressive conduct by the police.<sup>773</sup> In the circumstances, the lack of additional safeguards, such as the recording of interviews and the attendance of the suspect's lawyer, has not been shown to render the applicant's trial unfair. The European Court concluded, therefore, that there had been no violation of Article 6(1) or Article 6 (3)(c) regarding the police interviews.

However, the accused must be allowed to receive a usefully and meaning fully visit from his lawyer in private in order to convey instructions or to pass or receive confidential information relating to the preparation of his defence.<sup>774</sup> This was particularly the case where the applicant was of pliable personality and low intelligence, subject to restrictions on access to legal advice and coercive interrogation sessions.<sup>775</sup> Both Article 6(1) and (3)(c) may be invoked, for example, to complain that private access to a lawyer has been frustrated by the authorities. For instance, in *Brennan v UK*, the applicant also submitted that his right under Article 6

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<sup>770</sup> (2001) 31 EHRR 36, para 59.

<sup>771</sup> (2002) 34 EHRR 18, para 44.

<sup>772</sup> *Ibid.*, para 52.

<sup>773</sup> *Ibid.*, para 53.

<sup>774</sup> See *S v Switzerland* (1992) 14 EHRR 670, para 48; *Campbell and Fell v UK* (1985) 7 EHRR 165, para 111-115; *Can v Austria* (1986) 8 EHRR 121, para 17; See further, Tarn Spronken and Jan Fermon, "Protection of Attorney-Client Privilege in Europe", 27 Penn St. Int'l L. Rev. 439 2008-2009, p439-463.

<sup>775</sup> *Brennan v UK*, para 56.

(3)(c) to be assisted by a lawyer was violated by the presence of a police officer attending within sight and hearing of the consultation. The European Court noticed that the presence of the police officer was a restriction of very limited duration, and may in that respect be distinguished from the breach found in the case of *S v. Switzerland*, where the restriction on consultations lasted for about eight months.<sup>776</sup> At the same time, the European Court regarded that while it is not necessary for the applicant to prove, assuming such were possible, that the restriction had a prejudicial effect on the course of the trial, the applicant must be able to claim to have been directly affected by the restriction in the exercise of the rights of the defence.<sup>777</sup>

However, the European Court noted that there is no compelling reason arising in case *Brennan v UK* for the imposition of the restriction, and both the applicant and the solicitor had been warned that no names should be mentioned and that the interview would be stopped if anything were said which was perceived as hindering the investigation.<sup>778</sup> In particular, the European Court recognized that the importance to the rights of the defence of ensuring confidentiality in meetings between the accused and his lawyers has been affirmed in various international instruments, including European instruments.<sup>779</sup> Therefore the European Court emphasized again that the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him.<sup>780</sup> Then the assistance from the lawyer would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.<sup>781</sup> The European Court concluded that the presence of the police officer within hearing during the applicant's first consultation with his solicitor infringed his right to an effective exercise of his defence rights and that there has been, in that respect, a violation of Article 6 (3)(c) of the Convention taken in conjunction with Article 6 (1).

Noticeably, in *Murray v UK*, the European Court also recognized that the right of access to a lawyer may be subject to restrictions for good cause and the question in

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<sup>776</sup> (2002) 34 EHRR 18, para 60; also see *S v. Switzerland* (1992) 14 EHRR 670.

<sup>777</sup> *Brennan v UK*, para 58.

<sup>778</sup> *Ibid.*, para 59 and 62.

<sup>779</sup> *Ibid.*, para 38-40 and 58; *Öcalan v. Turkey*, (2005) 41 EHRR 985 para 133.

<sup>780</sup> *Brennan v UK*, para 62; see also the *Öcalan v. Turkey*, para. 140-144.

<sup>781</sup> *Brennan v UK*, para 58; see also *S v Switzerland*, para 48.

each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.<sup>782</sup> However, restrictions on lawyer's visits must be justified in public interests such as prevention of escape or prevention of the obstruction of justice. In finding a violation of Article 6(3)(c) in *S v Switzerland*, the European Court considered that there is nothing extraordinary in a number of defence counsel collaborating with a view to co-ordinating their defence strategy.<sup>783</sup> According to the observation of the European Court, neither the professional ethics of the defence lawyer, nor the lawfulness of his conduct were at any time called into question of collusion and perjury in this case. The European Court therefore rejected the Government's arguments that the possibility of collusion between defence and counsel could justify such interferences.<sup>784</sup> It may be permissible for a lawyer to be restricted from discussing with his client information about the case that would disclose the name of an informer.<sup>785</sup> Furthermore, the right to private access to the lawyer does not only apply to face to face meetings but also to other forms of communication. Here the right to respect for correspondence also applies and the problem arises as to whether the issue ought to be examined in the light of one or the other of the Articles, such as Article 8, or both together.<sup>786</sup> For example, in case *Zagaria v Italy*, there is a genuine belief held on reasonable grounds that the discussion between the suspects and their lawyers would be listened to and inevitably inhibit a free discussion between them, and thus hamper the effectiveness of the assistance which the lawyer could provide.<sup>787</sup> The European Court therefore held unanimously that there had been a violation of Article 6(1) and 3(c) and that it was not necessary to examine whether there had also been a violation of Article 8 where there was interception of a private telephone conversation between an accused taking part in a hearing by video conference and his lawyer.<sup>788</sup>

#### 4.6.3 Defence through Free Legal Assistance

Free legal assistance will only be required where the defendant has insufficient means to pay and where it is required in the interests of justice.<sup>789</sup> However, problem

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<sup>782</sup> (1996) 22 EHRR 29, para 63; also see *Brennan v UK*, (2002) 34 EHRR 18, para 58.

<sup>783</sup> (1992) 14 EHRR 670, para 49.

<sup>784</sup> *ibid.*

<sup>785</sup> *Kurup v Denmark* (1985) 42 DR 287.

<sup>786</sup> For a further discussion read Stefan Trechsel, *op.cit.*, fn 488, Chapter 20.

<sup>787</sup> (App.58295/00), 27/11/07, para 35;

<sup>788</sup> *Ibid.*, para 36 and 39; see also *Campbell and Fell v UK* (1984) 7 EHRR 165.

<sup>789</sup> Article 6(3)(c) of ECHR; also see Chap2, 6.3.2, pp.79.



arises how Member States to determine whether the accused and the defendant are able to pay for legal representation or not. There is no definition of “sufficient means” in the Convention and no case law as to the factors to be taken into account in the means test to determine an award of legal aid. But the onus is on the applicant to demonstrate at least “some indications” that he lacks sufficient means to retain his own counsel and there is in the absence of clear indications to the contrary.<sup>790</sup> The European Court has set out the applicable criteria for the concept of “interests of justice” in relation to the free legal assistance from its case law. It held that the assessment of what justice requires will depend upon the severity of the penalty, the ability of the accused to conduct or contribute to his own defence and the complexity of the case in question.<sup>791</sup> Of these factors, the potential penalty is the most important. For instance, in *Twalib v. Greece* the Court first considered that in view of the seriousness of the offence for which the applicant was convicted in conjunction with the severity of the sentence imposed on him there can be no doubt that the interests of justice required that he received free legal assistance.<sup>792</sup> An additional factor is the personal ability of the applicant and the nature of the proceedings. For instance, the need to develop appropriate arguments on complicated legal issues or procedure, as the Cassation procedure in *Twalib v. Greece*, may necessitate that he be granted free legal assistance from the point of view of the interests of justice.<sup>793</sup> Where the accused faces being deprived of his liberty, the interests of justice in principle require that free legal representation is provided.<sup>794</sup> It should not matter that the accused has little prospect of success on appeal.<sup>795</sup> Any decision to refuse legal aid should be periodically reviewed to examine whether circumstances have changed and the interests of justice require a different decision.<sup>796</sup>

There is, however, a primary, indispensable requirement of the “interests of justice” that must be satisfied in each case, as European Court stated in *R. D. v Poland*.<sup>797</sup> That is the requirement of a fair procedure before courts, which, among other things,

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<sup>790</sup> *Croissant v Germany* (1992) 16 EHRR 135, para 37; *Pakelli v Germany* (1983) 6 EHRR 1, para 34.

<sup>791</sup> *Lagerblom v Sweden* (App. 26891/95), 01/11/01, para 51; *Quaranta v. Switzerland*, (App.12744/87), 24/05/91, para 32-34; *Benham v. UK*, (1996) 22 EHRR 293, para 60.

<sup>792</sup> *Twalib v. Greece*, (1998) 33 EHRR 584, para 52; *Boner v UK* (1995) 19 EHRR 246, para 41.

<sup>793</sup> *Ibid.*, para 53.

<sup>794</sup> *Benham v UK* (1996) 22 EHRR 293, para 61; *Aff'd in Perks and others v UK* (2000) 30 EHRR 33, para 75.

<sup>795</sup> *Boner v UK*, para 40-41.

<sup>796</sup> *Ibid.*, para 41-43; *Granger v UK* (1990) 12 EHRR 469, para 47.

<sup>797</sup> (2004) 39 EHRR 11, para 49;

imposes on the State authorities an obligation to offer an accused a realistic chance to defend himself throughout the entire trial.<sup>798</sup> It means that member States are obliged to ensure that the legal assistance for accused persons is practical and effective, the mere “nomination” of a legal aid lawyer is not sufficient to discharge the government’s obligations.<sup>799</sup> This means that there will be a breach of Article 6(3)(c) if official action has frustrated the ability of the lawyer to represent his client, such as the failure of the court to inform him of the date of a hearing as shown in *Goddi v Italy*.<sup>800</sup>

Moreover, there is a general rule that the accused’s choice of lawyer should be respected.<sup>801</sup> The *Croissant v Germany* case raised issues of the relationship between the choice of a lawyer and entitlement to free legal aid.<sup>802</sup> In this case, the European Court recognised that a “court should, as a rule, endeavour to choose a lawyer in whom the defendant places confidence”.<sup>803</sup> Indeed, in this case, German law contemplates such a course for the applicant. Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, the European Court regarded that this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned.<sup>804</sup> When there are relevant and sufficient grounds, the accused’s choice of lawyer can be overridden by holding that this is necessary in the interests of justice. In the present case, having considered all the facts, the European Court found that there was no evidence to show that the relationship between the applicant and the designated lawyer was so strained as to make a proper defence impossible.<sup>805</sup> Instead, the grounds on which the national courts based their appointment of Mr Hauser and their rejection of the reasons advanced by the applicant in favour of its revocation are, in the European Court’s view, relevant and sufficient.<sup>806</sup> Accordingly, the European Court found no violation of Article 6(3)(c) either in the appointment of multiple counsel nor in the appointment of counsel against the wishes of the defendant.

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<sup>798</sup> *R. D. v Poland* (2004) 39 EHRR 11, para 49.

<sup>799</sup> *Artico v Italy* (1980) 3 EHRR 1, para 33.

<sup>800</sup> (1984) 6 EHRR 457, para 30-31; *Tripodi v Italy*, (1994) 18 EHRR 295.

<sup>801</sup> *Pakelli v UK* (1983) 6 EHRR 1, para 31; *Goddi v Italy* (1982) 6 EHRR 457; See Chap2, pp.78-79.

<sup>802</sup> (1993) 16 EHRR 135.

<sup>803</sup> *Ibid.*, para 29; also see *Lagerblom v Sweden* (App. 26891/95), 01/11/01, para 54.

<sup>804</sup> *Ibid.*, para 29.

<sup>805</sup> *Ibid.*, para 10 and 31.

<sup>806</sup> *Ibid.*, para 30.

## 5. Conclusion

As mentioned in the introduction of this thesis, a full comparable analysis of rights protection in criminal proceedings would have to include the European standards, on human rights protections for the suspects. As can be seen from the study contained in this chapter, while the UN standard will be used as a starting point to weigh the Chinese criminal justice law, the European mode will be used for reference to explore the relevant questions as to developing direction. As the world leading jurisprudence and approach, ECHR has become “a constitutional instrument of European public order in the field of human rights”.<sup>807</sup> A growing case law not only confirms the importance of Article 3, 5 and 6 of ECHR in practice, but also demonstrates that it has a number of different facets. Perhaps most significantly for European mode, the European Court and Commission have always afforded themselves a degree of flexibility, considering the ECHR as “a living instrument”.<sup>808</sup> Thus the European Court is not bound by previous judgements. The dynamic interpretation embodies a willingness to re-examine the interpretation already given to a particular provision, ideas and values can re-evaluate in its decisions in the light of changing circumstances. By taking this approach the judicial bodies can continue to respond to the challenges faced by new as well as traditional forms of violation.

More importantly, the jurisprudence of the European Court has had an enormous impact, not merely through the outcome of specific cases on the parties to the individual cases, but in a general symbolic, educative and preventive sense.<sup>809</sup> Elaborated from its cases, the European Court intends to lay down certain minimum international standards, whilst a given judgment for guidance as to the compatibility of their own domestic law with the requirements of the Convention.<sup>810</sup> It is prepared to intervene where they regard the procedure adopted as violating the essence of human rights protection. But definitely because of such as the “fourth instance” doctrine, the margin of appreciation, the process which an application will pass is

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<sup>807</sup> *Chrysostomos, Papachrysostomou and Loizidou v Turkey*, (1991) 68 D. R. p242;

<sup>808</sup> See e.g. *Tyrer v UK* (1978) 2 EHRR 1, para 31.

<sup>809</sup> See Helen Fenwick, *op.cit.*, fn 111, p.19.

<sup>810</sup> Paul De Hert, “Balancing security and liberty within the European human rights framework: A critical reading of the Court’s case law in the light of surveillance and criminal law enforcement strategies after 9/11”, (2005) 1 Utrecht Law Review (September), Issue 1, <http://www.utrechtlawreview.org/publish/articles/000005/article.pdf>, p.72.

still likely to be lengthy, and inadequate enforcement in the Member State there are limitations to affect its ability to bring about change in the laws and practices of Member State.<sup>811</sup> However, some of these lacunae are filled by other provisions in the Convention and Protocols, Article 1 of Protocol No. 7. In addition, the European Court has read procedural guarantees into some of the substantive rights under the Convention, for example, in accordance with Article 13, an effective domestic remedy must be provided in respect of all arguable breaches of the Convention.<sup>812</sup>

Since ECHR is seeking to identify at most the minimum which a particular legal system should attain, recognising the diversity in the Contracting States, the domestic systems may have had much more extensive protection in the criminal justice system than the ECHR did. As Lord Hope pointed out in *R v Director of Public Prosecutions ex parte Kebilene* “the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules”.<sup>813</sup> The concepts used in the Convention are therefore to be understood in the context of the democratic societies of modern Europe.<sup>814</sup> In light of the current situation, incorporation of the ECHR into domestic law is a step in the right direction. For example, the Human Right Act 1998 in UK makes it unlawful for a public authority to act in any way that is incompatible with any of the Convention rights. This step represents a radical change in the way fundamental human rights is to be protected in the UK. Also since the Human Right Act has afforded the Convention further effect in UK law it would impose on the judicial authorities the duty to interpret the law in a way which is consistent with the international standard and allow any laws which do not comply a chance to be amended. ECHR creates an environment in which the legal cultures of other jurisdictions are of direct relevance for practising lawyers, increasing, rather than decreasing, the need for a knowledge of comparative law.

Therefore, the latest jurisprudence and approach of the ECHR, with the important issues and legal developments in the member states regarding to the purpose of enhancing and maximizing the protection of individuals in this chapter, were used to

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<sup>811</sup> *Johnson v UK* (1999) 27 EHRR 296; See the analyse in Helen Fenwick, *op.cit.*, fn 111, pp.34-37; Ben Emmerson and Andrew Ashworth, *Human Rights and Criminal Justice*, (London: Sweet and Maxwell, 2001).

<sup>812</sup> *Z and others v UK* (2002) 34 EHRR 97; *Chahal v UK* (1997) 23 EHRR 413.

<sup>813</sup> [1999] 3 W.L.R. 972, Lord Hope at p381.

<sup>814</sup> *Tyrer v UK* (1978) 2 EHRR 1.

highlight the relevant principles in the ICCPR and can be a useful guidance for the Chinese criminal justice reform. It should be deeply concerned how those international human rights protection standards for the suspects can really been “brought home” in the Chinese legal reform. Although treaties such as the ECHR are not directly enforceable in the Chinese courts, they are increasingly likely to offer interpretative guidance to the Chinese legal reform and to inspire new developments in similar ways to those in which the Convention was used by the judiciary in the UK pre-HRA and Post-HRA. Furthermore it is expected that a culture of respect for human rights become embedded across the whole of Chinese society as discussion in next Chapter.

**A Critique of Human Rights Protection for Suspects in the Chinese  
Criminal Justice System:**

An Examination of the Extent to which There Is and Could in Future Be  
Compatibility between Chinese Law and Practice and International Human  
Rights Norms

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## **Part III**

### **The Reform of Chinese Criminal Procedure Law: Continuity and Change**

## **Chapter Four**

# **General Principles and Movement towards Meeting International Human Rights Standards**

### **1. Introduction**

After discussing the relevant international treaties in part one of this thesis, which include ICCPR and ECHR concerning human rights protection for suspects, this part therefore correspondingly, investigates the current situation, progress made and potential areas of difficulty in meeting international standards in four specific areas of Chinese criminal justice reform. Changes in legal ideology have opened up the way for changes in the legal system. This chapter attempts to provide an extensive analysis of the unique historical development of the ideology of CCPL which has followed a dramatically different course from that in the west. It will hopefully deepen the understanding of the difficulty for China in maintaining the rule of law and establishing the ideology of human rights protection for suspects. The important question concerning how to transplant and accommodate the modern legal ideology and concepts embraced in the International Covenants into the Chinese criminal justice system and the Chinese legal cultural heritage can also be effectively explored. An overview of the traditional Chinese legal culture and concepts of criminal procedure law prior to the reform of 1996 are taken as the starting point. Following this, the major changes in the basic ideologies are addressed and the problems and difficulties in their application in current practice in the reform of 1996 in order to comply with the relative stipulations and spirit of ICCPR are dealt with in detail. Suggestions reflecting upon the existing problems concerning the change of guiding ideology are offered for the coming CCPL reform.

A detailed and comprehensive historical examination of the Chinese traditional legal system and culture is beyond the scope of this thesis. However, it is important to note that the impact and influence of traditional law, especially the traditional legal culture on contemporary law, cannot be disregarded or underestimated, as Lubman states.<sup>1</sup> This should be taken into consideration in order to gain an insightful understanding of the relationship between law and other social factors, of the actual operation of the legal system in society, and of its future direction.<sup>2</sup> Much of the story of China's legal reform efforts concerns the struggle to adapt international norms to local conditions. It offers China a warning of the dangers of uncritical acceptance of simplistic comparisons between Chinese law and its parallel foreign law models while ignoring the profound influence of the traditional legal culture and the prevailing social situation. Despite the influences exerted by foreign legal norms, Chinese law remains currently dominated by its traditional legal culture. The influences of traditional legal norms greatly affect the acceptance of globalized legal norms in China.

Potter has observed that the development of the Chinese legal system over the past twenty years has reflected a process of selective adaptation, by which borrowed foreign norms concerning law and legal institutions have been mediated by local legal culture.<sup>3</sup> This process is particularly evident in the areas of criminal law and procedural human rights protection. Various levels of human rights have existed for centuries. In theory they can be traced to the liberal democratic tradition of Western Europe, which set the stage for wider recognition of human rights and freedoms.<sup>4</sup> While most of the legal forms, structure, and terminology currently used in China were derived from concepts of European and North American liberalism, their

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<sup>1</sup> See Stanley Lubman, "Bird in a Cage: Chinese Law Reform After Twenty Years", (2000) NW.J.Int'l L. & BUS 383, p. 405.

<sup>2</sup> See Chengguang Wang and Xianchu Zhang (ed), *Introduction to Chinese Law*, (Hong Kong & Singapore: Sweet & Maxwell Asia, 1997), p.2. Stanley Lubman, *Bird in a Cage: Legal Reform in China After Mao*, (Stanford: Stanford University Press, 1999), pp. 11-13.

<sup>3</sup> See Pitman B. Potter, *The Chinese Legal System Globalization and Local Legal Culture*, (Routledge: London & New York, 2001), p. 14.

<sup>4</sup> See R.J.Vincent, *Human Rights and International Relations*, (Cambridge: Cambridge University Press, 1986), Chapter 2.

operation still reflects the influences of traditional legal culture on criminal justice. Internationalization brings legal systems into closer contact with each other than ever before. However, this cannot remove all the differences between them. Legal reform, even if carried out with greater support by government and the Chinese Communist Party (中国共产党, CCP), must contend with traditional Chinese attitudes towards law that have caused the populace to avoid and fear involvement with formal legal institutions.<sup>5</sup>

China therefore needs to conduct a creative transfer of certain traditional judicial concepts. Several problems need to be considered. What are the values and ideology lying beneath the current CCPL? In what direction and manner will the coming CCPL amendment with Chinese characteristics take? Moreover, what has been the ultimate objective of the CCPL reform? While the reception and implementation of the new institutions and rules of criminal justice may depend on their accommodation to legal tradition, no deep and comprehensive reform process is likely to happen if its guiding ideology and values fail to truly reflect the social needs of the people and keep up with the pace of development in a modern society in the first place. It is necessary to define appropriately the basic ideology of guidance for the law before discussing the question of how to modify the law. This is not only vital for the civilized and rational progress of criminal justice, but is also important for unified society ruled by law.

## **2. Historical Background of Chinese Criminal Procedure Law Prior to Reform in 1996**

### **2.1 Legal Traditions Affecting Legal Reform**

The judicial system developed gradually during the long process of China's historical evolution, along with political, economic and other social systems.<sup>6</sup> In the last

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<sup>5</sup> See Stanley Lubman, op. cit., fn 1, pp. 405-407.

<sup>6</sup> The development of Chinese legal system see general, Honglie Yang, *The Development of Chinese Law*, 2<sup>nd</sup> ed, 212

hundred years a great number of legal doctrines have been adopted from other countries but the current Chinese criminal justice system as a whole is the outcome of Chinese legal history and practical experience.<sup>7</sup> Before the first decade of the twentieth century, China had maintained a unique legal system for more than two millennia. The term “law” was equated with “punishment” in ancient China, and the early statutes were mainly sketches of an elaborate system of punishment.<sup>8</sup> It is no exaggeration to say that the backbone of the entire Chinese traditional law (pre-1911) is criminal law, as it is constructed on the basis of a comprehensive code that contains all types of rules with criminal punishments, even in what nowadays would be described as civil actions.<sup>9</sup> The most striking characteristic is probably the lack of respect for individual rights and its emphasis on the prevention of crime and social control.<sup>10</sup>

### 2.1.1 Lack of Protection of Individual Rights

China lacks the tradition of emphasis on the rights of the individual in criminal justice.<sup>11</sup> It is hard to find a concept in this legal tradition that is equivalent to what the West understands as human rights, a concept that undeniably formed the starting point for the international regime of human rights as it is today.<sup>12</sup> The criminal justice system of the feudal period of China’s history is characterized by the “presumption

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(Shanghai: Shanghai Bookstore Publishing House, 1990); Jinfan Zhang et al. ed. *Chinese Legal History*, (Beijing: Law Press, 1999); Jianfu Chen, *Chinese law: Context and Transformation*, (Leiden & Boston: Martinus Nijhoff Publishers, 2008).

<sup>7</sup> See generally, Demei Zhang, *A Study of the Legal Transplantation in Late Qing Dynasty*, (Beijing: Tsinghua University Press, 2003).

<sup>8</sup> See Zhiping Liang, *The Pursuit of Harmony in Natural Order: A Study on Chinese Traditional Legal Culture*, (Beijing: China University of Political Science and Law Press, 2002), [hereafter Zhiping Liang, *The pursuit of Harmony in Natural Order*], p. 36 and 107; Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases Translated from the 'Hsing-an hui-lan' with Historical, Social, and Juridical Commentaries*, (Cambridge, Mass: Harvard University Press, 1967), [hereafter Derk Bodde and Clarence Morris, *Law in Imperial China*], pp. 3-4.

<sup>9</sup> See Jinfan Zhang, *op. cit.*, fn 6, Vol 7, p.14; Xianyi Zeng, et al. ed., *History of Chinese Legal System*, (Beijing: Beijing University Press, 2000), p.171; Shaoxian Gao, *Essence of the History of Chinese Criminal Law*, (Beijing: Law Press, 2001), p.1.

<sup>10</sup> See Zhiping Liang, *op.cit.*, fn 8, p.35.

<sup>11</sup> For a detailed discussion of human rights and Chinese tradition see the following comparative studies of legal culture: Yong Xia, *The Origin of Human Rights Idea: A Philosophy on the History of Rights*, 2<sup>nd</sup> ed, (Beijing: China University of Politics and Law Press, 2001); Stanley Lubman, *op.cit.*, fn 2, pp. 14-18.

<sup>12</sup> see Stijn Deklerck, “Human Rights in China: Tradition, Politics and Changes”, *Studia Diplomatica*, Vol.LVI: 2003, nr.6, pp53-108; Yong Xia, *op.cit.*, fn 11, p. 285.



of guilt”.<sup>13</sup> However, that does not mean Chinese legal culture does not recognise individuals and their dignity and value. Many legal provisions from the ancient codes of law can be found to support the assertion that certain elements of presumption of innocence existed in traditional China. For example, in an early statement on criminal procedure, LüXing described that in doubtful cases, if guilt is not conclusive, the court should not deal with the case.<sup>14</sup> This notion running through the imperial era may to some degree have tempered the presumption of guilt in the trials of the ancient court. However, what has been emphasized is the fact that a person whose guilt could not be proved by the evidence was allowed to redeem his sentence in money or property if he could afford to do so in all the Codes and commentaries in ancient China.<sup>15</sup> The European Court found that this kind of judicial decision, implying that the accused is guilty, infringed the principle of presumption of innocence in *Minelli v. Switzerland*.<sup>16</sup> More importantly, the forms of interrogation both before and during the formal trial in ancient China demonstrated that the defendant was assumed to be guilty as long as he could not prove his innocence.

Firstly, suspects had to prove to the judge’s satisfaction during the course of the interrogation that they were innocent and had been falsely accused. Secondly, suspects had very low status in the criminal procedure. Torture was a lawful way of obtaining evidence in ancient China. For example, a common tool was the bastinado, applied to the buttocks and thighs. As discussed in Chapter Six, this use of torture has become endemic as a national chronic disease.<sup>17</sup> Also, in order to ensure security and the smooth running of trials, all suspects were automatically detained in custody once arrested in ancient China. As discussed in Chapter Five, the compulsory measure system and practice in China has been profoundly influenced by this

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<sup>13</sup> The feudal period in China is from 475 B.C. to A.D. 1840; See, e.g., Zipei Zhang, “Analysis of the Principle of the Presumption of Innocence”, (1980) 3 Legal Research p. 30.

<sup>14</sup> See the judicial interpretation of Five Penalties, ShangShu in LüXing, 尚书·吕刑, [http://guji.artx.cn/Article/607\\_660.html](http://guji.artx.cn/Article/607_660.html).

<sup>15</sup> See, e.g. 唐律疏议 (Tang Code), Chapter 30, para. 17.

<sup>16</sup> see *Minelli v Switzerland*, Chap3, 4.4, p.168.

<sup>17</sup> See Chap6, 1.2, pp. 341-342.

traditional practice.<sup>18</sup> Thirdly, in the Chinese legal tradition, the court was quite adamant in prohibiting the practice of law as a profession. Those who provided legal advice for a living were called “litigation masters” (讼师).<sup>19</sup> Instructing or assisting a third party in how to argue cases in court was a crime punishable by exile. Thus, no third party would be allowed to argue a case in court on behalf of a suspect. This has influenced the right to defence by lawyers in the CCPL now, which will be discussed in Chapter Seven.<sup>20</sup> There will never be a real examination of the evidence in the presence of the suspects either before or after the confession. The accused was only a subject to be questioned and confess was assumed to be his obligations. It was up to the judges, officials at the Autumn Assizes Board, and ultimately, the Emperor to judge whether suspects were guilty and what kind of punishment convicted criminals would receive.

Why are individual rights strictly limited, while in contrast, the power of the national authorities is emphasized and expanded in Chinese criminal proceedings? In Chinese traditional culture, individuals were subordinated to the group and had to serve the group first.<sup>21</sup> The nation acts on behalf of all the individuals and it embodies the common good and long-term interests of the community. Therefore, the legislators do not find it difficult to believe that the individual rights of citizens are not of essential benefit to the nation. In a harmonious and collective culture, the investigative organs believe in collective duties and responsibilities while individual citizens also tend to think themselves as part of the war against crime.<sup>22</sup> Where there is some contradiction or conflict between the public interest and the interest of an

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<sup>18</sup> See Chap5, 3.1, pp. 284-289.

<sup>19</sup> See generally, Xiaotong Fei, Gary G. Hamilton and Zheng Wang, *From the Soil, the Foundations of Chinese Society: a Translation of Fei Xiaotong's Xiangtu Zhongguo with an Introduction and Epilogue*, (Berkeley and London: University Of California Press, 1992), pp.101-107; Jingliang Chen, “Songshi and Lawyer: the Differences and Their Significance between Chinese and Western Judicial Traditions”, (2001) 3 Chinese Legal Science, pp.144-156.

<sup>20</sup> See Chap7, 2.2, pp. 419-422.

<sup>21</sup> For the detailed relationship between the individual and group see generally, Xin Ren, *Tradition of the Law and Law of the Tradition: Law, State, and Social Control in China* (Greenwood Press, 1997) pp. 24-30.

<sup>22</sup> see Jianhong Liu, Lening Zhang, Steven F. Messner, eds., *Crime and Social Control in a Changing China*, (Westport Connecticut: Greenwood Press, 2001), p.165.

individual, there should be some limits on the individual's rights.<sup>23</sup> In particular circumstances, the government and the law enforcement organs think that they can even sacrifice some individuals' interests to protect the majority or the public as a whole. Acts of this kind were applauded as highly virtuous.<sup>24</sup> With respect to the criminal proceedings they consider that during the criminal investigation, the public or national interest will be contrary to the suspect's individual rights. Any limitation on the authority to arrest and detain will damage the capacity of the investigation to detect crimes. To guarantee the capture of suspects and the punishment of criminals, they deem it necessary to grant enough authority to the investigative organs for them to take compulsory measures and limit the individual rights of the suspects. According to this tradition of presumption of guilt in criminal justice and the emphasis not on the right but the obligation of the individual in the whole of traditional society, suspects' cooperation with law enforcement in criminal investigations is taken for granted in China. The concept of human rights failed to emerge and develop in Chinese history as it did in the west. Hence it was difficult for the modern concept of the presumption of innocence to take root.

### **2.1.2 A Tradition of Disregarding Procedural Law and Due Process**

Confucianism helped to shape the communitarian foundation of Chinese society with its emphasis on a hierarchical social order, group orientation, and morale, rather than on legally-based behavioural principles.<sup>25</sup> With regard to criminal justice, China has a tradition of emphasizing substantive law and disregarding procedural law, and of emphasizing crime control and disregarding due process. In ancient China, each dynasty had their own written statutes and customary laws comprising their criminal law.<sup>26</sup> However, there was no separate code to regulate criminal procedure. Criminal

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<sup>23</sup> For a detailed explanation of the attitude to the public interest and the individual interest in ancient Chinese society see Zhiping Liang, *op.cit.*, fn 8, p.168.

<sup>24</sup> See Youping Xie, "A Discussion of Procedural Culture—on the Modernization of China's Procedure System", in Chongyi Fan, ed., *New Studies on Procedure Law – Collection of Papers Celebrating Professor Chen Guangzhong's 70<sup>th</sup> Birthday*, (Beijing: China Law Press, 2000), pp. 235-238.

<sup>25</sup> See Zhiping Liang, *op.cit.*, fn 8, pp. 199-264.

<sup>26</sup> A detailed introduction to the Chinese legal system see Jinfan Zhang, eds., *op.cit.*, fn 6, Volumn 1-8.

procedure was found in the Criminal Code. There were no independent judicial organs, while judicial power and administrative power were mixed.<sup>27</sup> According to Chu Tongtsu's description, the chief of a province or county was more than a judge.<sup>28</sup> They could try criminal cases in person. Although these chiefs were subject to the supervision of higher governments, with the local government they held absolute power and were beyond the supervision and check of any mechanism. They not only conducted hearings and made decisions, but also conducted investigations and inquests, and detected criminals. Therefore in terms of modern concepts, their duties combined those of judge, prosecutor, police chief, and even coroner. They comprised everything relating to the administration of justice in its broadest sense, and the failure to carry out any of these duties incurred disciplinary action and punishment, as defined in the many laws and regulations.<sup>29</sup>

As the central authority in ancient China, the Emperor had the supreme power. While the laws created by the Emperor were binding on all of his subjects, the same law did not bind the emperor. As the supreme judicial power, the Emperor could determine the guilt of accused individuals, dictate the penalty, or modify the judgments given by lower judicial authorities. From the perspective of establishing a modern judicial system, the most significant impact of this traditional model of a highly centralized government is that it prevented the knowledge and development of genuine judicial independence and an adequate legal profession. These are the important safeguards for a fair trial.<sup>30</sup> These all hamper the effectiveness of the judicial review system and therefore the occurrences of violation of individual rights often exist to prevent crimes and maintain social stability as illustrated in the following chapters.

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<sup>27</sup> Much research has been done about the Chinese traditional judicial function of local officials. See Tungtsu Chu, *Local Government in China under the Ching*, (Cambridge, Mass: Harvard University Press, 1962), [hereafter Tungtsu Chu, *Local Government in China under the Ching*]; Shiga Shuzo et al., Yaxin Wang et al.(ed.), *Civil Justice and Civil Contracts in Ming and Qing Dynasties*, (Beijing: Law Press, 1998); Hsiefeng Yang, *Judicial System of Ming Dynasty*, (Taipei: Liming Cultural Enterprises Co., 1978); and Jiyuan Wu, *The Judicial Functions of Local Government in the Qing Dynasty*, (China Publisher of Social Science, 1998).

<sup>28</sup> Tungtsu Chu, *op. cit.*, fn 27, p.116.

<sup>29</sup> See generally, Derk Bodde, and Clarence Morris, *op.cit.*, fn 8, p.113.

<sup>30</sup> See General Comment 32, para. 19.

### 2.1.3 The Traditional View on Law as an Instrument of Rule

Through the ages the Chinese government's approach to law has been fundamentally instrumental.<sup>31</sup> The traditional core value and purpose of criminal justice comes mainly from two schools of thought: Confucianism and Legalism.<sup>32</sup> Confucianism in China is the ideology of obedience and the supremacy of sovereign interests. It promotes a well-ordered society and prefers the behavioral exemplification of the righteousness and selfless superior man's moral virtue. This school of thought is deemed to be useful for crime prevention by building morality in society. On the other hand, legalism emphasizes control through formal laws. It considers that in times of chaos, harsh laws are needed. Therefore law is only an instrument of the government, and the government is above the law. This approach to the role of law derives from a long tradition in Chinese history where law has been aimed primarily at achieving social control but also used in pursuit of economic goals.<sup>33</sup> Therefore, firstly it was an important task for the governor to nurture obedience in the minds of the people.<sup>34</sup> Ancient China is famous for strict laws and severe punishments. This is written into the language with phrases such as "kill one to warn hundreds" (杀一儆百). Since the Qin dynasty, by the equivalent perspective of legalism, the governors must, first and foremost, concentrate on what needs to be done to maintain power.<sup>35</sup> This means that laws and regulations are intended to be instrument of policy enforcement to achieve the immediate policy objectives of the regime.<sup>36</sup> It has been incorporated in the ideologies of rule through recent Chinese history, whether

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<sup>31</sup> See generally, Ronald C. Keith, *China's Struggle for the Rule of Law*, (New York: St Martin's Press, 1994), pp. 218-21.

<sup>32</sup> The history of Chinese legal thought see, generally, Honglie Yang, *History of Chinese Legal Thought*, (Beijing: China University of Political Science and Law Press, 2004), Chapter Three; Tung-tsu Chu, *Law and Society in Traditional China*, (Paris: Mouton & Co, 1961), Chapter Six; Derk Bodde & Clarence Morris, *op.cit.*, fn 8, Chapter 1.

<sup>33</sup> General reading as to the official legal culture see Derk Bodde and Clarence Morris, and Michael Dutton, *Policing and Punishment in China: From Patriarchy to "The People"*, (Hong Kong: Oxford University Press, 1992); Stanley Lubman, *op.cit.*, fn 2, chapter 7.

<sup>34</sup> See Yat-Sen Sun, "The Outline of State Foundation", in Lianxiang Sha, *Nation Character of China I*, (Beijing: China Renmin University Press, 1989), p.3.

<sup>35</sup> See Zhiping Liang, *op.cit.*, fn 8, pp.62-99;

<sup>36</sup> e.g. see Supreme People's Court's Opinion on Various Issues of Fully Implementing Civil Policy and Law, 1990;

derived from the Confucianism of imperial China, the republicanism of China under the Kuomintang (国民党, KMT), or the Marxist-Leninism of China after 1949.

Thus it is a traditional concept that criminal proceedings are a tool to be used by the state to control society and for fighting against enemies and criminals, not as a bulwark for the individual against the state. The criminal procedure was mainly an educational experience for the individuals concerned. Restraint on imperial executive power relied more upon the ethical behaviour of the enlightened ruler rather than any checks and balances of power. Neither the legislator nor the judicial authority viewed criminal proceedings as a confrontation process between men and the state. As Xia Yong states, the most important social political principles in ancient China were the righteousness of benevolence, the golden mean and harmony rather than Western style fairness and justice connected with disputes over rights and obligations.<sup>37</sup> Therefore there was no independent, neutral arbitrator between the government and men. The government itself was the arbitrator. The procedural justice value of the law was radically ignored. Therefore as to the confrontation between the government and men and a fair judgment by an independent court which does not take orders from the government, these effective means of restricting the abusive power of the state cannot be realized and tolerated. Even the general public were not particularly sympathetic to the plight of the suspects, although they also suffered from the arbitrariness and cruelty of the criminal process. Since the traditional teaching placed a high status on the social harmony, familial loyalties and gender differences, criminals were often excluded by their own communities and the harassment of a small number of individuals at the tough hands of the government was generally considered acceptable and worthwhile in order to maintain social stability and family reputations. There is no doubt that this structure of the legal system is not reasonable from the viewpoint of modern law.

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<sup>37</sup> See Yong Xia, *op.cit.*, fn 11, pp.289-290.

Throughout China's history, the modern concept of law and the notion of the rule of law did not emerge in Chinese society until the late 1970s, when the PRC decided to rebuild and modernize its socialist legal system after the turmoil of lawlessness generated by ultra-leftist thought and especially by the "Cultural Revolution" (文化大革命). However, even the decision to pursue legal reform was the result of a policy product by the CPP and government to build an institutional framework to support economic growth.<sup>38</sup> For example, the policy towards the rule of law reflects an ambivalence that is sharply illustrated by President Jiang Zemin's public address in February, 1996, when he pronounced a four-character slogan generally translated as "govern the country according to law", which was given extensive publicity throughout China. However, this terminology formed part of a sentence in which his reference to law was counterbalanced by the phrase "protect the nation's long-term peace and stability". The term "stability" is often an indirect reference to preserving the leading role of the CCP in Chinese society. Therefore, law is still not a limit to state power under the policy of the CCP, but is meant to maintain public order, to help the government to better implement various policies and consolidate and strengthen the leadership in the reform program. The function of law has mainly shifted from being an "instrument of proletarian dictatorship" to being a mechanism exercised by the state to support economic development.

One of the consequences of legal instrumentalism as practiced in China until now is that laws and regulations are intentionally ambiguous, so as to give both policy makers and implementing officers, significant flexibility in interpretation and implementation.<sup>39</sup> According to Pitman, law is not only seen as a tool by which desired social, economic, and political goals can be attained but is also presumed to

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<sup>38</sup> Since the Communist Party is described as a guarantor for the modernizations process and its socialist character, the Party's policies form the basis of law. See Zhen Peng, "With Regard To Several Questions About The Socialist Legal System", (1979) 11 *The Red Flag*, pp.3-7.

<sup>39</sup> For in-depth analysis see generally, Joseph Levenson, *Confucian China and Its Modern Fate*, (Berkeley: University of California Press, 1958).

be an effective tool for policy enforcement.<sup>40</sup> However, many Chinese laws and regulations are intentionally drafted in “broad, indeterminate language” such as in the CCPL, which do not lend predictability or transparency to the regulatory process.<sup>41</sup> One may argue that this arises from the need to accommodate and harmonise different and complex situations in the country, but its result, in the view of many academics, is to increase the discretion of officials in interpreting the law. While this permits local implementing officials to use broad discretion in ensuring that regulatory enforcement satisfies policy objectives, it also makes uniform interpretation and enforcement difficult if not impossible to obtain. In criminal justice, this makes the standards by which the human rights protection system for the suspect is carried out, vary from place to place and person to person. The influence of legal instrumentalism on the criminal justice legal reform will be addressed during the analysis of the detailed problems in the following chapters.

## **2.2 A Brief Historical Survey of the Development of Modern Criminal Procedure in China**

Chinese traditional legal culture has exerted a great deal of influence on contemporary society. In addition, the discussion and the development of the guiding ideologies behind Chinese criminal justice have also been closely related to the political climate.<sup>42</sup> Furthermore, for reasons other than political ones, scholars have differing opinions on the guiding ideologies behind the CCPL during the years of development and reform.

### **2.2.1 Stage of Transition of Traditional Law on Criminal Procedure towards Modernization**

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<sup>40</sup> See Pitman B. Potter, *op.cit.*, fn 3, p.12.

<sup>41</sup> See Perry Keller “Sources of Order in Chinese Law”, (1994) 42 *American Journal of Comparative Law*, pp.749-752.

<sup>42</sup> See generally, Albert HY Chen, *An Introduction to the Legal System of the People's Republic of China*, (Singapore: Butterworths Asia, 1998), p.209; Jianfu Chen, *Chinese Law: towards an Understanding of Chinese Law, its Nature, and Development*, (Hague: Kluwer Law International, 1999), pp.3-55.



By the late 19<sup>th</sup> century, the traditional values and system were facing strong challenges and pressure for reform, from within and outside.<sup>43</sup> The Qing government (1644-1911) was forced to reform its legal system, including the judicial system. The contemporary western doctrines of criminal law and procedure, which included the presumption of innocence, emerged and were introduced in China by a group of law reformers.<sup>44</sup> The draft criminal procedure law of 1906 was informed by the basic proposition that a suspect was to be presumed innocent unless proven otherwise, and included the abolition of ill-treatment of defendants and the imposition of fixed limits on pre-trial detention. In 1910, the Qing government formulated the *Qing Criminal Procedure Law*. This was the first single criminal procedure code in Chinese history. In most of its contents, this law copied the German criminal procedure law patterns. Unfortunately, the legal reform failed in substance and actually the doctrine never came into force since this law was never implemented. The reasons for the failure were multiple. Wang Chengguang considered that one was the incompatibility of the newly-designed legal system with the old and obstinate social structure.<sup>45</sup> The new legal regime was based on totally different social and economic structures which were opposed to Chinese traditional law and culture. But the reform had a significant impact on later reforms.

In 1912 the Republic of China was founded as a result of Dr Sun Yat-sen's democratic revolution. In 1928, the KMT government formulated another Criminal Procedural Law, which was a combination of Continental legal principles, Chinese tradition and the Nationalists' political ideology in the 1920s and 1930s. It is worth mentioning that presumption of innocence was first codified by the KMT Criminal Procedure Code of 1935. But these laws were never effectively implemented

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<sup>43</sup> For a detailed history and studies of political, economic and social conditions as well as legal reform movements in China in the late 19<sup>th</sup> century, see, generally, Denis Twitchett and John K. Fairbank, *The Cambridge History of China*, Vol.10, Late Ching, 1800-1911, Part I, (New York: Cambridge University Press, 1978); Jinfan Zhang, *The Tradition and Modern Transition of Chinese Law*, 2<sup>nd</sup> ed, (Beijing: Law Press, 2005);

<sup>44</sup> see generally, Demei Zhang, *op.cit.*, fn 7, pp.220-246;

<sup>45</sup> See Chengguang Wang and Xianchu Zhang ed, *op.cit.*, fn2, p.8.

throughout the nation either, due to the failure of the government to unify the country and to make thorough social changes. This law is still valid in Taiwan today, although of course, it has been amended many times. At the same time, when the power of the Chinese Communists was concentrated in the countryside areas, presumption of innocence also existed in the legal documents in those areas. For example Article 32 of *Trial Measures on the Summary Procedures for Hearing Cases in the District of Jinan* states that criminals should be acquitted if the criminal facts cannot be proved.

Regardless of its form and results, the legal reform scheme at this stage attempted to replace the Chinese legal tradition by introducing modern western types of law. However, the issue of developing traditional law into a modern one is more than a will. The nature of a law system was in many respects the outcome of a deep-rooted and long-standing historical tradition, cultural heritage, social customs and philosophy. As Wang Chengguang stated, law forms part of a particular society and is bound to be shaped, modified and transformed by the people of that society in the course of historical development.<sup>46</sup> From the institutional to the ideological, there was no direct link between traditional law and contemporary law in China, whether it was in the legal system of Republican or Communists at that period. Therefore, despite the western style structures and concepts that have been adopted as guidance when China has been building a new legal system, in many ways tradition has remained strong sociologically and philosophically and lacks harmony with the state and society right up to the present day.

In particular, traditional ideology was extremely difficult to displace merely by importing the guise of those western European legal concepts that began to arise in the late 19<sup>th</sup> century. Moreover, the new legal ideology might easily have been

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<sup>46</sup> See Chengguang Wang and Xianchu Zhang ed, *op.cit.*, fn2, p.1.

gradually absorbed through a combination of doctrinal development and practical experience in a stable and united society. However, the period from late Qing until PRC and several periods after the establishment of PRC proved to be troublesome times for China. The trials were commonly engaged in the torture-induced confessions that had characterized the old imperial order in the course of their investigatory and judicial activities. Presumption of innocence apparently existed primarily on paper. The majority of the Chinese knew little of these legal codes. The ideology of presumption of guilt was sustained throughout the entire span of traditional Chinese law and has persisted obstinately until now. Therefore the traditional legal system is extinct, but the traditional legal culture continues to exert its influence on contemporary society.<sup>47</sup> The transition is far from being completed to date.

### **2.2.2 Stage of the Destruction of the Whole Legal System**

In 1949, the PRC was established. The legal history of the PRC begins with the abolition in 1949 of all the laws of the predecessor state, the Republic of China.<sup>48</sup> At that time, neither the necessity of assimilating legal doctrines that were effectively part of the common cultural heritage, nor the danger involved in allowing a gap between abolition and re-establishment was clearly realized.<sup>49</sup> This left a substantial legal vacuum that ultimately had to be filled by whatever authoritative materials the decision makers had available. These materials include Party newspaper editorials, policy documents, and leaders' speeches. Moreover, there was, for many years, little need for a formal legal system in many areas of national life, since the economy was largely subject to state planning and conflicts that could thus be resolved without reference to legal rights and duties.

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<sup>47</sup> Whether the Chinese legal tradition has died or not is very much under debate. See Typically, Shuchen Wu, *Chinese Traditional Legal Culture*, (Beijing: Peking University Press, 1994), p.6 and 15; Zongling Shen, *General theory of Comparative Law*, (Beijing: Peking University Press, 1987).

<sup>48</sup> See generally, Albert Y.H.Chen, "Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law", (1999)17 UCLA Pac. Basin L.J. 125, pp.125-165.

<sup>49</sup> An analysis of the reason for the abolishment see Yang Cheng, "Criminal Procedure in China: Some Comparisons with the English System", (1988) 1 ICLQ, 190, p.191.

It was also believed in theory that Marxists should “smash” the existing “bourgeois State machinery”, including the whole legal system, which was presumed to be an instrument of the “bourgeois dictatorship”.<sup>50</sup> Therefore, for many years the symbolic values of the westernised legal system, such as the presumption of innocence, were seen as “a bourgeois doctrine”. After the establishment of PRC, such ambiguity is apparent. As a bourgeois principle, it should be rejected by a socialist legal system, yet it has the positive and progressive elements that a socialist legal system should adopt. In the mid-1950s, China began to rehabilitate the legal system after the enactment of the *Constitution* in 1954 and the *Organic Law of the People’s Court* in 1954. The government attempted to draft a criminal procedure law between 1957 and 1963. However, such efforts were defeated by the national campaign against “Right Opportunism” (右倾), the national movement for “Four Clearances” (四清) and the “Cultural Revolution” (文化大革命).<sup>51</sup> Anything representing the values or beliefs of capitalist society was sharply criticized and strictly forbidden. For example, some scholars were labelled “rightists”, simply because they had expressed a positive opinion on the principle of presumption of innocence in the 1950s. During the ten-year “Cultural Revolution” from 1966 to 1976, the criminal justice system was almost destroyed with a political movement against spiritual pollution by ideas regarded as “bourgeois”. The principle of presumption of innocence had for a long period been a taboo subject together with many other questions of criminal procedure. Defendants were regarded as class enemies who had no right to protect themselves. Thus, from 1949 to 1978, China again did not have a separate criminal procedure law. Instead, the National People’s Congress (NPC), the Supreme People’s Court (SPC), the Supreme People’s Procuratorate (SPP), the State Council, the Ministry of Justice

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<sup>50</sup> See e.g. Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, (New York: International Publishers, 1963) pp.121-122. Karl Marx and Frederick Engels, *Selected Works* in One Volume, (New York: International Publishers, 1968), p323; And the impact of Mao’s Ideology on Criminal Law see general, Stanley Lubman, *op. cit.*, fn 2, Chapter 3 pp. 40-70; and Chapter 4, pp.71-87.

<sup>51</sup> Weidong Chen, *The Criminal Procedure Law of China*, (Hong Kong: Joint Publishing (HK) Co. Ltd, 1997), pp.8-9.

(MOJ), and the Ministry of Public Security (MPS) produced a number of regulations on how to handle criminal cases.

### **2.2.3 Reconstruction of the Criminal Procedure Law since 1979**

In the light of the experience of the previous 30 years, especially of the deeply painful experience of the “Cultural Revolution”, the Chinese government aimed to develop a legal system to restrain abuse by official authority and revolutionary excess.<sup>52</sup> Immediately after the Cultural Revolution, a highly favourable analysis of the presumption of innocence appeared in 1979 in the official People’s Daily, concluding that this doctrine was preferable to the presumption of guilt in these circumstances and better embodied the spirit of “seeking the truth from facts” (实事求是).<sup>53</sup> Following that analysis, a great many law reviews appeared, and again, brought up the issue of whether all old laws, “bourgeois” laws and legal concepts had to be rejected without analysis by a socialist legal system; or whether these laws and concepts could be selectively adopted and adapted to meet the needs of developing the socialist system.<sup>54</sup> For example, Zhao Hong and Dou Jixiang commented that presumption of innocence is a scientific principle that could inform and benefit the socialist legal system.<sup>55</sup>

In 1982, the NPC adopted a new state constitution that emphasized the rule of law under which even party leaders are theoretically held accountable. In late 1978, an “Open Door and Reform” policy (改革开放) was introduced and the criminal justice system was reconstructed. In 1979, the CCPL was adopted. This was the first criminal procedure code since the foundation of the PRC. It laid a foundation for the Chinese criminal procedural system and was an important step in China’s transition

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<sup>52</sup> For a general account of legal reforms since 1978, see Stanley Lubman, *op.cit.*, fn 2; and Randall Peerenboom, *China’s Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002).

<sup>53</sup> See People’s Daily, 17/02/79.

<sup>54</sup> See e.g. Changdao Li, “Old Law Cannot Be Used Critically but May Only Be Used For Reference”, (1979) 3 *Cass Journal of Law* 45, pp.45-47; Hong Zhao and Jixiang Dou, “Understanding of the Principle of the Presumption of Innocence”, (1979) 3 *Cass Journal of Law* 47, pp.47-48.

<sup>55</sup> *Ibid.* p.48.

towards rule of law. It was recognised that the law of criminal procedure is not only a law of punishment, but is also a law of protection. The judicial organs began to handle criminal cases according to the law.

### **2.2.3.1 Historical Limitations on the CCPL of 1979**

However, although it was supposed to be a comprehensive code following a continental legal model, the CCPL of 1979 was subject to unavoidable historical limitations, because it was adopted shortly after the end of the Cultural Revolution.<sup>56</sup>

It is a nascent system emerging from the demise of the long-sustained Chinese traditional law. Jurisprudence was overshadowed by the political ideology of Communism. A number of aspects of this law at that time had distinctive Chinese characteristics. Legal principles were subordinated to political slogans. “Human rights” were still regarded as a concept of bourgeois legal theory and were to be avoided. Therefore, from a human right’s perspective, the state powers granted by the CCPL of 1997 were obviously much stronger than the rights granted to the individual. Many provisions were general and ambiguous, and fell far short of the minimum requirements for the administration of justice and the protection of human rights.

Most strikingly, with a strong Soviet influence, Marxism was regarded as the highest guiding authority in all spheres after the CCP started governing China, including the area of criminal justice. The criminal justice system, therefore, was a tool for class dictatorship in this period. According to Article 1, in criminal procedure the accused persons were regarded as class enemies and the judicial authority was seen as the tool with which to punish them.<sup>57</sup> During the Cultural Revolution, many innocent people were punished as enemies, so the CCPL of 1979 emphasized that the enemy

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<sup>56</sup> An overview introduction of CCPL 1979 see, generally, Jianfu Chen, “A Criminal Justice System for a New Millennium?”, in Edward B. Vermeer and Ingrid d’Hooghe ed., *China’s Legal Reforms and Their Political Limits*, (Richmond & Surrey: Curzon Press, 2002), pp.78-98. Fu Hualing, “Criminal Procedure Law”, in Chengguang Wang and Xianchu Zhang, *op.cit.*, fn 2, pp.129-167.

<sup>57</sup> CCPL 1979, Article 1.

should be dealt with correctly. However, at that time, it was held that after the end of the violent revolution, the fiercest class struggle would be found in the area of criminal justice. It reflected vividly the Marxist theory of class struggle.

Fundamentally, many important “fair trial” or in common law terms “due process” principles, such as the presumption of innocence, judicial independence, adequate right to legal counsel, etc., were absent from the CCPL of 1979. Regarding the presumption of innocence, some scholars such as Luo Xinmin held that presumption of innocence was illogical because there was not a sensible explanation for the following question: why were judicial organs entitled to arrest or detain the suspect, if he was intrinsically presumed innocent? In practice, most accused persons were found guilty.<sup>58</sup> On the other hand, some scholars such as Long Zongzhi contended that failure to adopt presumption of innocence as a guiding ideology at all stages of criminal procedure had led to the presumption of guilt and to the view that the trial was a formality.<sup>59</sup> Thus, after examining those arguments put forward in late 1979, some scholars drew the conclusion that the Chinese legal system does not “presume” anything and the Marxist principle of seeking truth from facts should be observed.<sup>60</sup> In criminal procedure, the true status of the suspect was that he was a dubious person. He should be *presumed* neither guilty nor innocent. This view was called the doctrine of “presuming neither guilt nor innocence”; Rather, the guiding principle at all stages of the process is “taking the facts as the basis and the law as the criterion”.<sup>61</sup> Actually the CCPL of 1979 was produced under this ambiguous concept. The debates on the

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<sup>58</sup> See Xinmin Luo, “Presumption of Innocence is not the judicial principle for socialist system”, (1982) 3 Modern Law Science, 27, pp.27-28; also see Chongfan Deng, “Insist on Seeking Truth from Facts, Get over the Presumption of Innocence”, (1983) 3 Seeking Truth, 1983, p.53.

<sup>59</sup> See Long Zongzhi, “New Thoughts concerning Presumption of Innocence”, (1989) 2 Modern Law Science, pp.18-19; also see Li Jingbing, “Presumption of Innocence should be Incorporated into the Constitution”, (1989) 1 Law Science, p.5.

<sup>60</sup> For a good summary of discussion concerning the presumption of innocence in late 1979 see generally Timothy A. Gelatt, “The People’s Republic of China and the Presumption of Innocence”, (1982) 73 *The Journal of Criminal Law and Criminology*, No.1, pp.281-284.

<sup>61</sup> See Zhengmin Ma, “The Basic Principle of Criminal Procedure Law is ‘Taking the Facts as the Basis and the Law as the Criterion’”, 3 (1980) *Journal of Peking University (Humanities and Social Sciences)*, p.41; Zipei Zhang, “Discussion on the Guiding Ideology of Criminal Procedure Law”, (1979) 3 *Cass Law Journal*, pp.19-20.

presumption of innocence have continued along with the implementation of the CCPL of 1979.<sup>62</sup>

### 2.2.3.2 The Implementation of the CCPL of 1979

The deficiencies in the CCPL of 1979 law, both regarding its own provisions and in its actual practice, soon became apparent and, thus attracted severe criticism, particularly from international human rights organizations.<sup>63</sup> It was made even worse by many decisions of the NPC's Standing Committee, issued during various anti-crime campaigns colloquially known as "Strike Hard" (严打). Together with the inability or unwillingness of the law enforcement organs to act within the law, the practical consequences for society were serious abuses of human rights, including the wide application of administrative, non-criminal sanctioning methods and disregard for procedural protection.<sup>64</sup> In February 1980, one month after the CCPL of 1979 came into effect, the NPC's Standing Committee had authorized the Standing Committees at the provisional level to approve extensions of time limits for handling criminal cases as prescribed by the CCPL of 1979.<sup>65</sup> Indeed, after that, the NPC's Standing Committee had made no less than twenty revisions concerning criminal procedure matters in the form of Decisions and Supplementary Provisions alone by the end of 1995. Many of these provisions were internal inconsistencies and contradictions. While these rules were only binding on the institution which issued them, they contained the grounds of conflict that could only be reconciled through interpretation or revision at the NPC level. This chaos mostly arose from the notion of law as an instrument of rule, as mentioned above.

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<sup>62</sup> CCPL 1979, Article 4; CCPL 1996, Article 6; see 4.2, pp. 250-252.

<sup>63</sup> General reading as to the major deficiencies of the CCPL 1979 see Chen Guangzhong and Yan Duan (ed.), *Annotated Proposed Draft of the Revised Criminal Procedure Law of the People's Republic of China*, (Beijing: China Fangzheng Press, 1995); the reports on human rights violations in relation to criminal processes in China by international human rights organizations see. e.g. Amnesty International, *China "Punishment without Crime: Administrative Detention"* (London, 1991); Lawyers Committee for Human Rights, *Criminal Justice with Chinese Characteristics: China's Criminal Process and the Violation of Human Rights* (New York, 1993).

<sup>64</sup> "Criminal Justice with Chinese Characteristics: China's Criminal Process and Violations of Human Rights", Lawyers' Committee for Human Rights (1993), pp.9-10.

<sup>65</sup> See Decision of the Standing Committee of the NPC Regarding the Questions of Implementation of the Criminal Procedure Law, 12/02/80.



These series of interpretive or implementing rules issued by the police, procuratorate, courts and other bureaucracies also reflected a clear trend towards expanding the power of the police and judicial organs and striving to make investigation, prosecution, and adjudication more convenient while restricting the exercise of various rights by suspects.<sup>66</sup> This trend is typically shown in the “Strike Hard” campaigns.<sup>67</sup> At the heart of the different “Strike Hard” campaigns is the requirement for speedy justice and harsh punishment. For example, in the 1983 “Strike Hard” campaign, for violent offences such as murder, rape and armed robbery which “were punishable by death”, the NPC deleted the CCPL of 1979’s requirement of at least seven days’ advance notice of trial, thus effectively denying the accused any opportunity to prepare a defence. It also reduced the period in which defendants in such cases could appeal against their sentences from ten days to three.<sup>68</sup> Under the combined influence of “Strike Hard” and continued complaints that the time limits in the CCPL of 1979 were unrealistically strict, in 1984 the NPC permanently extended the periods during which suspects could be held in custody during the investigation, trial and appeal of certain “major or complicated” cases. In cases where suspects were subjected to less severe restrictions known as “granting of bail and awaiting trial” (取保候审) and “supervised residence” (监视居住) or had to undergo psychiatric evaluation, the time limits in the CCPL could be waived altogether.<sup>69</sup>

## 2.2.4 Early Stage of the CCPL Reform since the 1990’s

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<sup>66</sup> See Minyuan Wang, “Research on the Rights of Criminal Defendants”, in *Toward the Age of Rights: A Research on the Development of Civil Rights in China*, Yong Xia ed. (Beijing: China University of Politics and Law Press, 1995), pp. 499-521.

<sup>67</sup> For a further discussion on “Strike-Hard Campaign” see 4.1.1 pp. 246-249.

<sup>68</sup> See Decision of the Standing Committee of the National People’s Congress Concerning the Procedure for the Prompt Adjudication of Cases Involving Criminals Who Seriously Endanger Social Order, adopted September 2, 1983.

<sup>69</sup> See Provisions on Procedures for the Handling of Criminal Cases by Public Security Organs, 18/03/87; Supplementary Provisions of the Standing Committee of the National People’s Congress Concerning the Time Limits for the Handling of Criminal Cases, 07/07/84.

Chinese academia began to discuss how to improve the CCPL in the early 1990s.<sup>70</sup> From 1979 to 1991, dramatic changes took place in China. Chinese society was opening up, especially with the planned economy being transformed into a market economy. The Chinese recognised that Marxism could not provide the answer to every question in society. Chinese scholars and officials soon recognised that China's economic reforms required the Chinese legal system to conform more to the international system.<sup>71</sup> They looked increasingly to Europe and North America for inspiration and began to rethink the question of what the foundation stones of the legal system should be. The PRC Government did attempt to build a society based on the rule of law, which, of course, must be the "rule of law" as understood by the CCP. Reform has brought a fundamental new orientation towards governing China, in which formal legislation has become the major framework for the organization and operation of the Chinese government.<sup>72</sup> The Chinese legal system is constantly changing, in response to domestic conditions such as socio-economic and political change, and in reaction to external factors such as WTO membership. There is evidence that the combination of economic reform, social change, and government-promoted mass legal education has stimulated greater rights consciousness among many Chinese citizens.<sup>73</sup>

In the area of criminal justice, increased attention to individual rights has permitted the development of human rights and criminal law and procedure inspired by foreign models.<sup>74</sup> As familiarity with the outside world has increased, the significant gap existing between the CCPL and internationally accepted practice has become more

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<sup>70</sup> See Zhenjiang Zhao (ed), *Forty Years of the Chinese Legal System*, (Beijing: Beijing University Press, 1990), pp.373-375.

<sup>71</sup> Zongling Shen, "Examples of Borrowing Foreign Law in Contemporary China", (1997) 5 Chinese Legal Science, pp.22-23; Daohui Guo, "Market Economy and the Change in Legal Theory and Concepts of the Legal System", (1994) 2 Jurisprudence, pp.2-6.

<sup>72</sup> Stanley Lubman, "Prospect for the Rule of Law in China after Accession to the WTO", <http://www.law.berkeley.edu/institutes/csrls/lubmanpaper.doc>.

<sup>73</sup> See e.g. Hongjun Gao, "The Gradual Progress of Chinese Citizens' Rights Consciousness", at Yong Xia, *op.cit.*, fn 66, p3; Yong Xia, "The Formation of Rural People's Public Law Rights", *op.cit.*, fn 66, p.659.

<sup>74</sup> See Angran Gu, *The Socialist Legal System and Legislative Work*, (Beijing: China University of Political Science and Law Press, 1989), p.206.

and more evident. The theory of class struggle should obviously not be applied to criminal justice any more; if the accused is regarded as a class enemy, his rights are most likely not respected and protected. It has been an important stimulant to domestic efforts to revise the CCPL in order to bring the Chinese criminal justice system in line with the rest of the world.<sup>75</sup> International pressure has also served to reinforce domestic reform efforts. Over the last twenty years, international human rights NGOs have produced a series of analyses of the Chinese criminal justice system and shown the ways in which the Chinese legal system, including key statutes such as the CCPL, either implicitly condones practices of human rights violation or fails to provide adequate safeguards against them.<sup>76</sup> Reference to international standards has become a legitimate form of argumentation employed within China, particularly among legal academics and officials, to promote greater respect for the rights of criminal suspects and defendants.

It gradually became accepted among legal academics that a reorientation of the guiding ideology and a change to some contents of the CCPL were necessary. The change in guiding ideology brought a need for revision of the provisions in the law of 1979. In 1989, the SPC published a judicial explanation, stating that suspects in doubtful and difficult cases should be treated as not guilty.<sup>77</sup> It also wrote presumption of innocence into the basic laws that would govern the administration of justice in Hong Kong and Macao after they reverted to Chinese sovereignty.<sup>78</sup> From 1991 to 1996, the reform of the CCPL was the central topic of discussion at the annual conferences held by the Research Association for Procedural Law, a

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<sup>75</sup> Guangzhong Chen and Hongxiang Wang, "Thoughts On The Question of Revising the Criminal Procedure Law, (1991) 5 The Political Science and Law Tribune, pp.2-5.

<sup>76</sup> See e.g. Amnesty International, *China: No One is Safe* (New York, 1996); Human Rights in China, "Detained at Official Pleasure", (New York, 1993).

<sup>77</sup> Reply of The Supreme People's Court on the Issue about Implementation of the Provisions Regarding the Criminal Cases Involving Acquittal on the First Instance Judgment, November 4, 1989.

<sup>78</sup> See Basic Law of people's Republic of China for the Hong Kong Special Administrative Region, 04/04/ 90, Article 87(2); Basic Law of the People's Republic of China for the Macao Special Administrative Region, 31/03/93, Article 29(2).

subordinate conference to the Chinese Law Society.<sup>79</sup> In 1993, the Director of the Legislative Affairs Committee, Mr. Gu Angran, officially announced that a formal decision had been made by the Standing Committee to include the revision of the CCPL in the legislative agenda of the NPC.<sup>80</sup> In October 1993, the Legislative Affairs Commission of the NPC entrusted Professor Chen Guangzhong with the responsibility for drafting a new Criminal Procedure Code.<sup>81</sup> Professor Chen organized a group of experts to draft the new law and this group produced a preliminary draft in 1994, which turned out to be a good basis for the revision of the CCPL.

When the preliminary draft was prepared, it was held that a balance between punishing crimes and protecting human rights should be pursued. In particular, expanding suspects' rights should be an important aim in reforming the CCPL. It was regarded as important to respect international standards and norms for protecting human rights, because those standards and norms express the common values of mankind. Due to the legal tradition in China described above, whether under the feudal autocratic society or under the planned economic regime, the previous CCPL pays a great deal of attention to the necessity of fighting crime without taking the protection of the rights of the suspects into account.<sup>82</sup> Therefore, most scholars suggested that the revised CCPL should include the principle of presumption of innocence.<sup>83</sup> According to the old principle of "seeking truth from facts", a dubious criminal should be treated neither as guilty nor as not guilty. In such a situation, the judicial organ will release the defendant, but he will remain a suspect. He is no

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<sup>79</sup> See e.g. Jianwei Zhang, "Focus: Revision on Criminal Procedure Law, A Review of the National Conference on Procedural Law Research", (1996) 1 People's Procuratorial Semimonthly, p36-38; Rongbin Cheng, Zhen Zhen, "Review and Expectation of the Research on Criminal Procedure Law in 1995", (1) 1996 Jurist Review, pp57-62; Min Cui, "Overview of the Key research and Discussion on the Amendment and Perfection of the Criminal Procedure Law", (1995) 1 Modern Legal Science, pp. 92-97.

<sup>80</sup> See Legislative Agenda of the Standing Committee of the Eighth NPC.

<sup>81</sup> Chen Guangzhong, a professor of the Chinese University of Political Science and Law was chairman of the Research Association for Procedural Law; See Cui Min, *op cit.*, fn 80, p.92.

<sup>82</sup> See 2.1.1, pp. 213-216.

<sup>83</sup> See Guangzhong Chen and Fucheng Li, "Written discussion on Amendment and Perfection of the Criminal Procedure Law, (1994) 5 Chinese Legal Science", pp.31-50.

longer regarded as a normal citizen in society. Scholars consider that the suspect being presumed innocent in law is totally different from his being innocent. The purpose of establishing the principle of presumption of innocence was to change the old situation in which the suspects were presumed guilty and had no fair trial rights.<sup>84</sup> Under the principle of presumption of innocence, a dubious criminal should be treated as not guilty. Chen Guangzhong also pointed out that the CCPL should require the state to gather all the evidence proving guilt or innocence and that a guilty verdict cannot be reached solely on the basis of the defendant's confession.<sup>85</sup> In 1996, the NPC discussed the *Draft Amendment to the Criminal Procedure Law* and adopted the *Decision to Revise the Criminal Procedure Law*. It is the view of Chen Jianfu that the revision of the CCPL is a modest step towards improving the criminal justice system in China, but the outcome is mainly a result of major compromises with opposing views and arguments among scholars, officials and different forces in the Chinese legal system.<sup>86</sup>

### 3. Major Positive Changes of the CCPL in 1996

The amendment of the CCPL in 1996 was intended to make it a code that tallied with the requirements of a modern democratic country under the rule of law, links up with international criminal justice rules, and accords with the situation of the country.<sup>87</sup> For this, particular trends in the reform progress are the change in core values to strengthen the protection of human rights and due process. The change in guiding ideology can be seen in the contrast between the aims set in the opening of the old law and those in the new law. Comparing the old provisions with the new ones, in Article 1 of the 1996 CCPL, there are no provisions with the terms “taking Marxism-Leninism-Mao Zedong Thought as a guide”, “the People's Democratic Dictatorship”,

<sup>84</sup> see Chap2, 6.2, pp. 72-74; Chap3, 4.4, pp.167-168.

<sup>85</sup> Chen Guangzhong, Yan Duan, *op.cit.*, fn 63, p173; CCPL 1996, Article 46 and CCPL 1979, Article 35.

<sup>86</sup> Jianfu Chen, *op. cit.*, fn 56, p78; see also Angran Gu, *Litigation, Arbitration and the State Restitution System*, (Beijing: Publishing House of Law,1996),pp.1-2.

<sup>87</sup> Gu Angran, who took part in drafting the original Criminal Procedure Law, had a special reference to the background and reasons for the revision of the law. see Angran Gu, *op.cit.*, fn 87.

or “striking the enemy”.<sup>88</sup> In Article 2 of the 1996 CCPL, there is no provision for a “socialist revolution”.<sup>89</sup> It can be concluded that the guiding ideology has been changed and the aim of the CCPL in 1996 is seeking to combine the discovery of the truth, punishment of crimes and the protection of citizens’ rights and the realizing of judicial impartiality through due process.<sup>90</sup> This change is beneficial for protecting human rights for suspects in criminal justice according to international standards. In December 2004, the UN Working Group on Arbitrary Detention noted that the official Chinese statements on the importance of human rights represented a positive development.<sup>91</sup> Senior Chinese officials also publicized efforts to crack down on corruption and abuses in the criminal justice system and stressed the need to balance “Strike Hard” efforts and the protection of suspects’ rights.<sup>92</sup> There are calls for the campaign to continue even now.

### **3.1 Observation on Positive Development of Presumption of Innocence**

The importance of the principle, presumption of innocence, in criminal proceedings hardly needs further comment and explanation. As illustrated in Chapter Two, the HRC has identified this as one of the non-derogable aspects of the right to a fair trial.<sup>93</sup> When amending the CCPL, the legislature came to accept the basic tenor of presumption of innocence. Looking at the CCPL of 1996, Article 12, a newly added clause, says that no one shall be found guilty without a verdict according to law by a people’s court. This reform weakened the implication that all persons subject to

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<sup>88</sup> See CCPL 1979 and CCPL 1996, Article 1.

<sup>89</sup> Ibid., Article 2.

<sup>90</sup> See Guangzhong Chen, “Discussion on the Guiding Ideology of the Amendment of the Criminal Procedure Law”, (1995) 4 Law and Social Development, p44-45; Jingcun, Xu, “The Concept Evolution of Criminal Procedural Legislation in China”, (2009) 2 Journal of Political Science and Law, pp.5-6.

<sup>91</sup> Report of the Working Group on Arbitrary Detention: Mission to China, E/CN.4/2005/6/Add.4, 29/12/04, [hereinafter UNWGAD Report], para. 68(a). UNWGAD officials interviewed more than 70 detainees according to UNWGAD’s terms of reference.

<sup>92</sup> For crackdowns on abuses, see, e.g., Supreme People’s Procuratorate Annual Work Report, [hereafter SPP Work Report], 09/03/05; Weihai Yang, “Supreme People’s Procuratorate Confirms Emphasis of Investigative Supervision This Year”, Xinhua News, 16/05/05, [http://news.xinhuanet.com/legal/2005-05/16/content\\_2964053.htm](http://news.xinhuanet.com/legal/2005-05/16/content_2964053.htm). For statements on balancing the fight against crime and human rights protection, see, e.g., Yu Tian, “Clear up Situations involving Extended Custody and Xiaoyang said Suspects who cannot be found guilty should be released”, Xinhua News, 25/08/03, [http://news.xinhuanet.com/newscenter/2003-08/25/content\\_1042837.htm](http://news.xinhuanet.com/newscenter/2003-08/25/content_1042837.htm).

<sup>93</sup> See Chap2, 6.1, pp.71-72; see *Heaney and McGuinness v Ireland* and *R v Johnstone*, Chap3, 4.4.1, pp.172-173.

arrest are guilty.<sup>94</sup> For the first time, the reform appears to partially institute the principle of presumption of innocence, a key building block of a fair legal system. This implied incorporation of the concept of the presumption of innocence in Article 12 of the 1996 CCPL has been injected into the criminal justice system in China as an important element signalling the right direction, which all the recent legal reforms have taken, to change the previous Chinese legal ideology and to contribute towards the protection of human rights.

### **3.1.1 New Terminology**

The amended CCPL does make an important symbolic change in language to show the positive signal that the presumption of innocence contained in Article 14(2) of ICCPR is recognised and accepted in China. In the former CCPL, the two terms “defendant” (被告) and “offender” (罪犯) were used to designate the accused at all stages of the criminal process. In the revised CCPL, the terms “defendant” and “offender” are replaced by “suspect” (嫌疑人) and “defendant” (被告). “Suspect” is used to designate the accused before he is prosecuted; “defendant” is used to designate him after he is prosecuted. This change reflects the intention to prevent law enforcement officials from presuming the accused guilty before he or she is found guilty by a court.<sup>95</sup> As will be discussed later, certain procedural rights usually associated with the presumption of innocence are strengthened, particularly the right to defence such as the fact that lawyers are allowed to be involved in the investigation.<sup>96</sup> In order to avoid indefinite pre-trial detention, the mechanism called “Shelter and Investigation” (收容审查) used by the police to bypass the formal criminal procedure has been abolished.<sup>97</sup>

### **3.1.2 Abolition of Exemption from Prosecution**

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<sup>94</sup> CCPL 1996, Article 60; also see Chap5, 3.1.1, pp.285-286.

<sup>95</sup> See Chap2, 6.2, p73. Also see Chap3, 4.4.2, pp.174-175.

<sup>96</sup> CCPL 1996, Article 36 and 37.

<sup>97</sup> See *Cagas, Butin and Astillero. v. The Phillippines* Chap2, 6.2, p.74; also see Chap5, 2.1, pp. 270-273.

Under the former CCPL, the prosecutor was allowed to make a decision called “Exemption from Prosecution” (免于起诉), in which the suspect was found guilty and the case was dropped without going through any judicial process.<sup>98</sup> The revised CCPL abolished this practice and removed the prosecutor’s power to determine guilt. One reason is that according to the principle of presumption of innocence, public authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial.<sup>99</sup> Only the competent court has the power to pronounce a citizen guilty, as illustrated in *Allenet de Ribemont v France*.<sup>100</sup> Another reason is that in practice, the prosecuting authority used this power arbitrarily. This power had a dual function for the prosecuting authority: On the one hand, if prosecutors felt that a case would be hard to win in court, the prosecuting authority could use this power to reach a guilty verdict even when the evidence was insufficient without going through the trial process. On the other hand, the prosecuting authority could also allow individuals who had committed crimes to escape punishment. In some special cases, if they went through the trial process, the suspects would probably receive fixed-term imprisonment. In this situation, prosecutors could use this power to help suspects avoid punishment. The prosecuting authority often used this power to resolve sensitive and controversial cases, including cases of corruption.

Legal scholars were eager to abolish “Exemption from Prosecution”, but the prosecuting authority was vigorously opposed to its abolition.<sup>101</sup> In the end, the People’s Congress adopted the opinion of the legal scholars.<sup>102</sup> Under the revised CCPL, only the courts have the power to find the accused guilty, and no other state

<sup>98</sup> CCPL 1979, Article 93, 101, 102 103.

<sup>99</sup> see *Gridin v Russian Federation* Chap2, 6.2, pp. 73-74.

<sup>100</sup> see *Allenet de Ribemont v France* Chap3, 4.4.2, p.174.

<sup>101</sup> See e.g. Jianlin Bian, “Important Reform of the Prosecution System”, (1996) 3 Peking University Law Journal, pp.39-40; Min Cui, “Why should Exemption from Prosecution be Abolished?”, (1996) 7 Chinese Lawyer, pp.36-39.; also see Zuofu Wang and Weidong Chen, “Exemption from Prosecution Should be Insisted on and Perfected”, (1991) 1 Chinese Criminal Science, pp.49-52; Zongzhi Long, “Exemption from Prosecution should be Further Perfected”, (1987) 5 Law Science, pp.27-29.

<sup>102</sup> See Guangzhong Chen, “A New Chapter to Strengthen Human Rights Protection in the Judiciary”, (1996) 4 Tribune of Political Science and Law, pp.10-11.



organ is entitled to the same power. If the procuratorate believes that the evidence provided by the supplementary investigation is inadequate and that the case does not comply with the prosecution requirements, it may decide not to prosecute.<sup>103</sup> Moreover, the standards of proof for a verdict of guilty shall be of the evidence being reliable and sufficient. “Reliable” means that all the evidence is based on facts; “sufficient” means that the evidence gathered is adequate enough in quantity to prove that the defendant has committed a criminal act, and that there is no room for doubt.<sup>104</sup> According to Article 162 of the revised CCPL, if the evidence is insufficient, the defendant shall be pronounced innocent.<sup>105</sup> This means that a dubious suspect shall be treated as innocent, which complies with the requirement of principle of presumption that the suspect has benefit of doubt.<sup>106</sup> It provides a way of closure to cases which had previously remained unresolved for extended periods of time, much to the detriment of the accused. Therefore this provision helps to provide better protection for the suspects against over eager prosecutors or police officials who would otherwise find it easier to intimidate the accused on the basis of presumption of guilt.

### 3.1.3 The Reform of “Supplementary Investigation”

Xiong Qihong considered the “Supplementary Investigation” (退回补充侦查) measure as one of the biggest loopholes in the CCPL of 1979.<sup>107</sup> This formal law gave the procuratorate the power to return to the police for supplementary investigation cases it felt were not ready for trial, that is, where the evidence was insufficient to warrant a conviction.<sup>108</sup> It also allowed courts to return cases to the

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<sup>103</sup> CCPL 1996, Article 141(4); the issue of “Supplementary Investigation” measure will be discussed at 3.1.3, pp.239-240.

<sup>104</sup> Ibid., Article 35.

<sup>105</sup> Ibid. Article 162.

<sup>106</sup> See Chap2, 6.2, pp.72-73; Chap3, 4.4.1, p.169-173; *Saunders v the UK*, Chap3, 4.4.3, p.178;

<sup>107</sup> See Xiong Qihong, “The Reform of the Chinese Criminal Procedure Law in A Human Rights perspective”, 01/03, <http://www.humanrights.uio.no/forskning/publ/hrr/2003/01/hrr.html>; Also see CCPL 1979, Article 99 and 108.

<sup>108</sup> CCPL 1979, Article 99.

prosecuting authorities by an order for supplementary investigation.<sup>109</sup> This request from the court was a sign of presumption of guilt, because when the court issued an order for supplementary investigation, it would have to assume that the defendant was guilty, even if the evidence presented to the court was insufficient. This decision obviously contravenes the requirement of the presumption of innocence, *cf.* the ruling in *Minelli v Switzerland*.<sup>110</sup>

According to the revised CCPL, prosecutors can only send a case back to the police for supplementary investigation twice and the judge cannot use the measure at all.<sup>111</sup> The removal of the court's power to order a supplementary investigation in this reform is in itself welcome. According to Article 140 of CCPL, the prosecutor may decide not to initiate a prosecution if the evidence is insufficient with respect to a case for which supplementary investigation has been conducted and the case does not meet the conditions for initiation of a prosecution.<sup>112</sup> If the judge holds that the evidence is insufficient after a case is tried, he should declare the defendant innocent, as stated in Article 162(3) of 1996 CCPL.<sup>113</sup> It is the first time that the CCPL of 1996 included limits to the number of times a case can be sent back to a previous agency for “supplementary investigation”. It ends the cycle of supplementary investigation and seemed to bring China closer to recognizing that where the state could not carry its burden of proof, the case should be resolved in favour of the defendant, as Article 14(2) of ICCPR required.<sup>114</sup> The spirit of the change shows the courts have attempted to be more neutral in the criminal process and it is a good step forward to fully incorporating the presumption of innocence in China and to clearly affirming the international standard set in ICCPR.

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<sup>109</sup> *Ibid.*, Article 108.

<sup>110</sup> See *Minelli v. Switzerland*, Chap3, 4.4, p.168.

<sup>111</sup> CCPL 1996, Article 140.

<sup>112</sup> CCPL 1996, Article 140

<sup>113</sup> *Ibid.*, Article 162(3).

<sup>114</sup> see Chap3,4.4.1, p.169.

### 3.1.4 The Increasing Consciousness of Human Rights

Along with the widening of the reform of criminal justice in China, the concept of human rights protection has gradually taken root in the mind of the government and the public. On March 10, 2004, Xiao Yang, president of the SPC, delivered an annual Work Report at the Second Meeting of the 10<sup>th</sup> NPC, very unusually giving top priority to human rights protection. In this report, Xiao proposed that efforts should be made in practice to protect the legitimate rights and interests of the public, by implementation of the policy of “justice for the people” in a profound way.<sup>115</sup> On the same occasion, Jia Chunwang, president of the SPP, delivered an annual Work Report, emphasizing that efforts would be made to seriously investigate cases of violation of the personal rights and democratic rights of citizens.<sup>116</sup>

The SPC, SPP and MPS issued administrative instructions in the form of “notice” (通知) and “official and written replies” (答复) to rectify and stop extended custody and confessions obtained under torture.<sup>117</sup> At the same time, given that the rules of evidence in the CCPL are too simple to ensure fair play between accuser and accused, and that disorder prevails in the application of evidence, the Chinese legislature, with the support of jurisprudential circles, started to work on a criminal evidence law.<sup>118</sup> Efforts have also been concentrated on the formulation of rules concerning the right to silence, disclosure of evidence, the appearance of witnesses in court and the exclusion of illegal evidence.<sup>119</sup> Chinese judicial officials announced ambitious reform goals in 2005 that would address structural problems affecting the Chinese judiciary. These included changes to court adjudication committees, the system of

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<sup>115</sup> See Supreme People’s Court Annual Work Report, [hereafter SPC Work Report], on 10/03/04.

<sup>116</sup> See SPP Work Report, 10/03/04.

<sup>117</sup> See Chap5, 2.5, pp.278-283; Chap6, 4, pp. 384-396.

<sup>118</sup> See Guangzhong Chen and Mei Liu, “Reform of Criminal Evidence System in China”, Paper presented at The 20th Anniversary Conference of the International Society for the Reform of Criminal Law (1987-2007) – Twenty Years of Criminal Justice Reform: Past Achievements and Future Challenges, 06/07, <http://www.isrcl.org/Papers/2007/Chen.pdf>; Also see Chap6, 4.2.2, pp. 387-389.

<sup>119</sup> For the discussion concerning the right to silence in China see Chap6, 3.3, pp 361-374; for the discussion on disclosure of evidence in China see Chap7, 4.3, pp. 456-461.

people's assessors, and a judicial review of death penalty cases.<sup>120</sup> There were numerous reforms made to the CCPL of 1996 and the judiciary system in China.<sup>121</sup>

The public call for revision came when the Chinese media and the masses frequently exposed cases of injustice, including such cases these of men named She Xianglin and Nie Shubin.<sup>122</sup> These cases elicited a strong reaction in the Chinese news media and prompted public scrutiny and discussions of the salient problems in the criminal justice system. Not only did it demonstrate the country's improved democratic atmosphere but also pushed forward the country's judicial reform, especially the widening ideology of presumption of innocence throughout the country. For example, the She Xianglin case is known to almost every household in China after the media's extensive reporting on his grievances.<sup>123</sup> After this unjust case was highlighted, a slew of wrongly-tried cases related to the extortion of confession by torture were exposed. Official newspaper, Xinhua News and the People's Daily noted that Mr She's case had "exposed some holes in the judicial system" and prompted a "reconsidering" of human rights protection.<sup>124</sup> Chinese scholars and journalists, invoking many wrongful conviction cases, published detailed critiques on many problems in the criminal justice system.<sup>125</sup> These discussions offered new insights

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<sup>120</sup> Although structural reform for the judicial authorities is a valuable problem to discuss in detail due to word and time limit, this paper will not analyse it. Party authorities and local governments, however, continue to limit the independence of China's courts. Internal administrative practices of Chinese courts also compromise judicial efficacy and independence, see generally, Liming Wang, "The Achievements and Prospects of Court Reforms in China", (2006) 1 *Frontiers of Law in China*, Vol.1, pp1-13; Randall Peerenboom ed., "Judicial Independence in China: Lessons for Global Rule of Law Promotion", (New York, Cambridge University Press, 2010).

<sup>121</sup> But so far these reforms have yielded little result.

<sup>122</sup> For two of the many detailed Chinese accounts of the Nie and She cases, see e.g. Zhiyong Pei, "Supreme People's Procuratorate Publishes Three Criminal Cases of Serious Infringements on Human Rights Involving Confessions Obtained Through Torture, etc.", *Procuratorate Daily*, 26/07/05 [http://news.xinhuanet.com/legal/2005-07/27/content\\_3271730.htm](http://news.xinhuanet.com/legal/2005-07/27/content_3271730.htm); Rong Zhao and Duosi Ma, "Authority indicates that Compensation May be Available to the Wrongful Execution Case Involving Nie Shubin", *Beijing Morning Post*, 18/03/05, [http://news.xinhuanet.com/newscenter/2005-03/18/content\\_2712116.htm](http://news.xinhuanet.com/newscenter/2005-03/18/content_2712116.htm).

<sup>123</sup> The detailed discussion of the She Xianglin Case concerning the extortion of confession by torture see Chap6, 1.1, pp.339-341.

<sup>124</sup> See, e.g. Na Meng, "Unjust Case of Wife Murder Causes China's Judiciary to Rethink Protection of Human Rights", *Xinhua News*, 06/04/05, [http://news.xinhuanet.com/newmedia/2006-05/08/content\\_4521294.htm](http://news.xinhuanet.com/newmedia/2006-05/08/content_4521294.htm). For an English-language version of the article, see "Return of 'Murdered Wife' Calls China's Justice System into Question," *People's Daily*, 05/04/05, [http://english.peopledaily.com.cn/200504/05/eng20050405\\_179578.html](http://english.peopledaily.com.cn/200504/05/eng20050405_179578.html).

<sup>125</sup> For an useful collection of translations and English-language briefings on some of the topics addressed in these articles, see e.g. Wing Lam and Zenobia Lai, "Review of Procedure Laws Raises Hopes for Justice", (2005) 2 *China Rights Forum*, pp.43-50.

into China's criminal justice system and shaped the debate over criminal justice reforms. There are many voices protesting that the law enforcement organs have failed to follow the principle of presumption of innocence and this principle should be written into the CCPL in order not to impede its implementation in reality.

### **3.2 The Significance of Laying Stress on Procedural Justice in China Today**

Constantly strengthening the ideology and measures for human rights protection in criminal legislation and justice administration can not only prevent the state from violating citizens' rights, but also ensure the implementation of due process, especially procedural justice, in China. There are two kinds of justice in legal systems: substantive justice and procedural justice.<sup>126</sup> The principle of due process, or fair trial, is widely recognised by international human rights treaties as a fundamental principle to protect individuals from the unlawful and arbitrary deprivation of other basic rights and freedoms, as illustrated in Part One.<sup>127</sup> Nowadays, the ideas of respecting the principle of due process and guaranteeing the right to fair trial have both been reflected in China's academic research and official documents. For example, many scholars in China, such as Chen Weidong, considered that "the substantive justice requests judicial organs to manifest the spirit of justness in trial results. The essence of it lies in an accurate trial result. While procedural justice requests judicial organs in the entire process to exercise fairness and equality and to strictly and justly observe procedural principles in carrying out judicial activities. The essence of it lies in the rightness of the process."<sup>128</sup> Also, according to the *Order of Further Handling Cases in Strict Accordance with the Law and Ensuring the Quality of Death Penalty Cases* which was jointly issued in 2007 by the SPC, the SPP, the MPS, and the MOJ, a correct substantive result of a case and fair and lawful criminal procedure shall both be guaranteed. China has gradually

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<sup>126</sup> See Ruihua Chen, *Principium of Criminal Justice*, (Beijing: Peking University Publisher, 1997), pp.53-54.

<sup>127</sup> See Richard Clayton & Hugh Tomlinson, *The Law of Human Rights*, (Oxford: Oxford University Press, 2000), p.550; also Chap1, p.3; Chap3, 4.2, p.159.

<sup>128</sup> See Weidong Chen, "The Basic Concepts of Re-modifying the Criminal Procedure Law", (2006) 2 *Frontiers of Law in China*, p.155.

recognised and adopted procedural justice, which has its own independent value in that it is an essential component of social justice.

In particular, due process requires that the statutory procedures be strictly observed in criminal proceedings. Article 3(2) in the CCPL of 1996 provides that in criminal procedures, the people's court, people's procuratorate and public security organ shall comply with the relevant provisions of this law and other laws. Such a provision of guiding ideology in the CCPL of 1996 is an implicit embodiment of the principle of due process. This shows a trend towards greater concern for the real equality of the parties, and therefore enhances the protection of the suspect and guarantees justice in criminal proceedings from which both claims and an effective defence can be put forward while participating in proceedings. It is a step forward to ensuring a fair trial for suspects and to fulfilling the obligation of Article 14(1) of ICCPR.<sup>129</sup> Under this guiding ideology, several reforms in the CCPL on concrete issues pave the way for China to fully respect international standards on fair trial in criminal justice and some of these will be discussed in the coming chapters, including some restrictions on the power of judicial authorities in the pre-trial compulsory measures, the efforts to suppress illegally obtained evidence through torture and the expansion of a suspect's right to access to legal counsel.<sup>130</sup>

#### **4. Problems and Difficulties at the Stage of Further Reform**

In China, with the introduction of a human rights provision into the Constitution and a growing acknowledgement of the relevant ideologies of international human rights in criminal justice, the change of the guiding ideologies to the CCPL is a logical further development. The change has had an influence that has affected the reform in criminal procedures, and has particularly promoted greater respect for the rights of

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<sup>129</sup> see Chap2, 6.1, pp 71-72; Chap3,4.2, pp. 159-161.

<sup>130</sup> For Discussion on Pre-trial Compulsory Measure see Chap5, 2, pp. 269-283; suppression on illegally obtained evidence see Chap6, 4, pp. 384-396; the expansion of the right to access legal counsel see Chap7, 3, pp.428-440.

suspects in China, as shown above. However, the CCPL of 1996 is still stringent towards suspects as illustrated below. It does not seem easy to reach a simple conclusion as to what kind of guiding ideology can be given full acceptance in future reforms. However, some problems and difficulties related to the changing of the guiding ideology and its implementation needs to be addressed in more depth.

#### **4.1 Contradictions between Fighting Crime and Human Rights Protection**

China boasts one of the fastest growing economies in history. There is broad public support for reforms in many other areas of law, whether they are commercial, family, environmental, or administrative. Citizens see reforms in all of these areas as promoting or at least not harming their own interests. In contrast, because the average expects person never to run foul of the law, they can not understand what they are able to benefit from criminal justice reforms. On the contrary, great opposition to proposals to enhance human rights protection for the suspect in criminal justice can be expected from the law enforcement authorities and the majority of the Chinese public. Most of them believe such reforms are likely to harm their interests by eliminating the powers of investigation and allowing criminals to escape punishment and engage in further crime or by sending the wrong message to would-be criminals who then turn to crime.<sup>131</sup> There is an inherent tension between the combined desire of the state and the public to punish crime and to protect the human rights of suspects. This is a primary obstacle for the CCPL reform.

##### **4.1.1 Great Pressure on Crime Control**

Along with the speedy economic development and social transformation in the country's complex situation, China faces three gaps: the development gap between urban and rural areas, the gap between rich and poor, and the gap between eastern

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<sup>131</sup> See e.g. special discussion on "Abolishment of the Death Penalty", on People's Daily, <http://legal.people.com.cn/GB/43027/43503/index.html>; also see Branch of Communist Party at Peace and Order of the Political and Legislative Affairs Committee of the Communist Party of China Central Committee, "Comprehensive Administration of Social Security is A Way with Chinese Character China to Maintain Long-term Stability and Order", 09/02/10, <http://theory.people.com.cn/GB/10959926.html>.

area and western area.<sup>132</sup> This has all resulted in a social environment that lacks stability while crime rates in China have generally been on the rise in recent years.<sup>133</sup> As it moves towards a socialist free market economy China is also experiencing new types of crimes that did not exist under the more totalitarian communist rule. Public corruption, economic crime, computer crime, narcotics trafficking, robbery, and murder are all more prevalent than they were 30 years ago. Recently, the Chinese government has put forward the policy of “building a harmonious society” in the country during this social and economic transitional period.<sup>134</sup> The task is to maintain smooth economic growth, to sustain steady social development and to preserve the well-being of the country. Therefore, the Chinese criminal justice system is burdened with the dual challenges of increased crime rates and the need to modernize the whole system, to be fully compatible with the spirit of human rights.

While officials published a few statistics reflecting positive trends, such as a drop in some violent crimes in 2006,<sup>135</sup> leadership statements, public surveys ranking security as a major concern and regional complaints about increases in petty crime were all pointing to a growing crime problem.<sup>136</sup> To address this problem, the first of China’s “Strike Hard” campaigns took place from August 1983 to January 1987; the second campaign was launched in April 1996. Law enforcement and judicial officials

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<sup>132</sup> See related study, e.g. Qiaozhi Chen and Shichao Deng, “A Preliminary Research on Globalisation and Chinese Social Rich-Poor Gap: Taking Guangdong Province as a Case”, [http://www.ritsumei.ac.jp/acd/re-k-rsc/hss/book/pdf/vol01\\_09.pdf](http://www.ritsumei.ac.jp/acd/re-k-rsc/hss/book/pdf/vol01_09.pdf); Hiroshi Ohnishi, “Is China’s Regional Disparity Widening?”, Working Paper No.88, 06/06/07, <http://www.econ.kyoto-u.ac.jp/~chousa/WP/88.pdf>; Hongmin Cao, “The Strategy and Its Impact of Cooperation between Eastern and Western Regions in Alleviating Poverty”, <http://conferences.ifpri.org/2020Chinaconference/pdf/004CaoHongmin.pdf>.

<sup>133</sup> See, generally, T. Wing Lo and Guoping Jiang, “Inequality, Crime and the Floating Population in China”, (2006) 1 Asian Criminology, pp.103–118.

<sup>134</sup> See “Building a Harmonious Society Crucial for China’s Progress: Hu”, People’s Daily, 27/06/05, [http://english.peopledaily.com.cn/200506/27/eng20050627\\_192495.html](http://english.peopledaily.com.cn/200506/27/eng20050627_192495.html).

<sup>135</sup> For selected positive statistics, see “Violent Criminal Cases Down; Economic Crime Crimes on Rise”, Xinhua News, 09/08/06, [http://english.people.com.cn/200608/09/eng20060809\\_291261.html](http://english.people.com.cn/200608/09/eng20060809_291261.html); MPS, “Ministry of Public Security Publicizes Mobilization of the Whole System for Fighting against Severe Snow and Ice Storms with Utmost Effort the Situation of the Nation’s Public Security Organs Striking at Crime and Preserving Social Order in 2007”, 30/01/08, <http://www.mps.gov.cn/n16/n1237/n1432/n1522/142529.html>.

<sup>136</sup> For sources suggesting a growing crime problem, see, e.g., SPP Work Report 2005; Shu Wang, “Ministry of Public Security said Criminals were More to Public Places”, Xinhua News, 12/08/05, [http://news.china.com/zh\\_cn/hmt/1004/20050812/12563831.html](http://news.china.com/zh_cn/hmt/1004/20050812/12563831.html); Hangwei Du, “Outline for the Speech at the Ministry of Public Security Press Conference concerning Special Action for Combating Crimes of Abduction and Trafficking in women and Children”, 07/05/09, <http://www.mps.gov.cn/n16/n1237/n1432/n1522/1933768.html>.



have continued this trend over the past years. The current campaign, which was officially launched in April 2001, appears to have evolved from periodic and intense national crackdowns into a lower-intensity but permanent feature of the political landscape. Within this evolving “Strike Hard” framework, public security agencies have continued to launch frequent, small-scale anti-crime campaigns targeting particular regions or crimes.<sup>137</sup> In the years leading up to the revision of the CCPL, law enforcement officials continually pressed home the argument that they needed more latitude, particularly with regard to arrest and detention, to deal with the growing threat to public order. Even under the current political context of building a “harmonious society”, the strike hard policy is still emphasized by Chinese criminal policy makers as the harsh side of the new criminal policy “combining leniency and harshness” (严宽相济).<sup>138</sup>

Stone has mentioned that what is more difficult is to maintain respect for freedoms when a society is facing serious challenges while at the same time ensuring that any restriction of those freedoms is at the minimum level necessary for the situation.<sup>139</sup> Public complaints about police inefficiency and the handling of several notable criminal cases in the past years have suggested that a significant level of popular dissatisfaction with the performance of law enforcement agencies and courts. The targets selected for “Strike Hard” campaigns reflect public anxieties over rising crime and the incidence of specific offences. As an important criminal policy in China, it has played a certain positive role in particular historical periods. Its implementation often results in immediate effects by reducing committing of crimes and maintaining public order. For example, the MPS announced in August 2006 that

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<sup>137</sup> See, SPP Work Report, from 2003 to 2008; also see e.g., Yu Tian, “People’s Courts will Continue to Uphold the Strike Hard Policy”, Xinhua News, 06/01/06, [http://news.xinhuanet.com/legal/2006-01/05/content\\_4014841.htm](http://news.xinhuanet.com/legal/2006-01/05/content_4014841.htm).

<sup>138</sup> See generally, Weizhi Chu and Heli Zhao, “On Harmonious Society Construction and The Realization Of Temper Justice With Mercy Policy”, (2007) 1 Law Science Magazine, pp.5-9; Xinliang Chen, “Study on the Criminal Policy of Combining Punishment with Leniency”, (2006) 1 Law Science Magazine, pp.17-25; Yong Li, “Sampling Analysis of Implementing the Criminal Policy of Combining Punishment with Leniency”, (2009) 4 Justice of China, pp.31-33.

<sup>139</sup> Richard Stone, 6<sup>th</sup> ed., *Textbook on Civil Liberties and Human Rights*, (Oxford: Oxford University Press, 2006), p.211.

violent crimes such as murder, rape, arson and explosions caused by criminal negligence, dropped by 14.9%, 6.3%, 17.5% and 18.3% in the first half of this year respectively compared to the same period in the previous year.<sup>140</sup> The decline is generally attributed to a series of ongoing national crackdowns.

Therefore, while there is broad public support for the government's efforts to fight crime, the public seems to have a limited appetite for or understanding of the need for procedural protections that would result in lenient treatment of criminals.<sup>141</sup> This is also greatly influenced by the legal traditions, as mentioned above.<sup>142</sup> For example, in 2003, a Shenyang court commuted the death sentence of the notorious mafia boss Liu Yong after finding that the confession of a key government witness had been coerced.<sup>143</sup> In response to a flood of public outrage over the decision, the SPC retried the case and reinstated the death sentence, which was carried out immediately.<sup>144</sup> It is the first time the SPC has retried an ordinary criminal case, and overturned the previous ruling of the second-instance trial. This situation obviously contradicted the principle of presumption of innocence, which requires that prejudicial publicity concerning suspects should not influence his conviction, as in *Ensslin, Bader & Raspe v German*.<sup>145</sup> Legal scholars lamented that "Liu Yong was killed by the media",<sup>146</sup> and the case had "set reform of the criminal justice system back 10

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<sup>140</sup> The MPS did not release the total number of cases of each of these crimes. Zhi An, "Violent Criminal Cases Down; Economic Crimes on Rise", Xinhua News, 19/01/06, <http://www.heb.chinanews.com.cn/news/shfz/2006-01-19/3525.html>.

<sup>141</sup> Randall Peerenboom, *op cit.*, fn 52, pp.375-376.

<sup>142</sup> See 2.1 pp. 212-221.

<sup>143</sup> For the detailed report and discussion of the whole case see e.g. Sina News Centre, Special Report on Liu Yong Case, <http://news.sina.com.cn/z/liuyongsy/index.shtml>; Southcn Chinese News Centre, <http://www.southcn.com/news/china/china04/ly/>; see also public discussion on Xinhua News Forum, [http://news.xinhuanet.com/forum/2003-12/31/content\\_1087359.htm](http://news.xinhuanet.com/forum/2003-12/31/content_1087359.htm).

<sup>144</sup> See SPC Judgment on Liu Yong case, "Retrial Judgment of the Supreme People's Court, Xingtizi No 5, 2003", [http://news.xinhuanet.com/legal/2003-12/23/content\\_1245110.htm](http://news.xinhuanet.com/legal/2003-12/23/content_1245110.htm), 23/12/03; Also the detailed analysis of different ideas and the background knowledge of various groups in China in this case, see Xiaolei Yang, "Knowledge in the Process of Establishment of Rule: Based on the Liu Yong Case Affair", (2007) 2 Peking University Law Review, Vol.8, pp.335-352.

<sup>145</sup> See *Ensslin, Bader & Raspe v German* Chap3, 4.4.2, pp.174.

<sup>146</sup> See Jun Xiao, "Analyzing the Relationship of the Judicial Independence and the Media Supervision: the reflections on the Liu Yong case and the Xu Ting case", the Legal System and Society, 2008 (12), p108; Also see *Worm v Austria* Chap3, 4.4.2, pp.175-176.

years”.<sup>147</sup> However, numerous polls suggest that the general public rates security as a major concern and supports tough measures to address crime.<sup>148</sup> Thus, the government perceives the “Strike Hard” campaigns as a necessary measure to satisfy popular demand for strong action and therefore to maintain social stability and state power.<sup>149</sup>

However, China has carried out the “Strike Hard” struggle for over 26 years, but the number of serious criminal cases still increases constantly. Many criminals might simply wait for the periodic campaign to end and then resume their activities. Even during the campaign, the overall crime rates continued to rise in China in 2008, according to official statistics and regional reports.<sup>150</sup> Prosecutors brought 4.69 million persons to court from 2003 to 2008, which is an increase of more than 32.8% over the previous 5 years.<sup>151</sup> This experience is enough to demonstrate that “Strike Hard” campaigns have done little to stem the rising tide of crime and there has been no fundamental improvement in social order in the long term. Moreover, the side-effects of excessive use of “strike hard” should not be underestimated. All possible safeguards generally required for suspects by international standards, such as the presumption of innocence, the right to a fair and public hearing and the right to have adequate time and facilities to prepare the defence, are unavailable or inadequately guaranteed, apparently not only during “Strike Hard” campaigns but also as long-standing issues in the present Chinese justice system. There has been widespread international and Chinese criticism of “Strike Hard” campaigns.<sup>152</sup> China is being

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<sup>147</sup> John Pomfret, “Execution Reveals Party’s Grip on China: Case Highlights Flaws in Legal System” Washington Post, 23/12/03, pA12; Xizao Yan, “Investigation Vital To Rebuild Confidence,” China Daily, 22/12/03.

<sup>148</sup> See, e.g. Chinese Politics Study Group, “Social Conditions Survey and the Current Ideological and Political Work”, (2006) 6 Politics Research Dynamic, p.19; Songmin Guo, “Finding Fault from the 87.4% satisfaction Rate of Social Condition Poll by Statistical Bureau of Sichuan Province”, People’s Daily Online, 07/04/06, <http://finance.people.com.cn/GB/4281049.html>.

<sup>149</sup> Bin Yu, “New Arrangements for Public Security Prevention and Control”, (2004) 6 Outlook, p.12.

<sup>150</sup> See SPC Work Report, 10/03/08 and 11/03/03.

<sup>151</sup> See SPP Work Report, 10/03/08 and 11/03/03; also see recent data released by Chinese Academy of Social Sciences, Lan Yu, “CASS: China’s violent crimes rise for the 1st time in a decade”, People’s Daily Online, 03/01/10, <http://english.peopledaily.com.cn/90001/90782/90872/6905399.html>.

<sup>152</sup> See e.g. Amnesty International, “The Death Penalty in China: Breaking Records, Breaking Rules”, 08/97.

urged to respect for the law during the crackdown and warned against violations of the law when dealing with criminals harshly and speedily.

#### **4.1.2 Room for Improvement in the Presumption of Innocence**

##### **4.1.2.1 Imprecision of Article 12**

In China the presumption of innocence is an old, serious and difficult problem.<sup>153</sup> There is a continued debate on whether Article 12 does in fact state the principle of presumption of innocence along with the implementation of the revised CCPL. Some scholars hold that Article 12 concerns presumption of innocence. For example, Cao Jianming stated at the 3<sup>rd</sup> Asian Law Institute Conference that the CCPL of 1996 sets the principle of presumption of innocence.<sup>154</sup> However, most other scholars think it may be said to contain the basic concepts of presumption of innocence but not necessarily to be a standard statement of presumption of innocence.<sup>155</sup> At present, after more than 10 years of implementation, it is possible to say that Article 12 in the CCPL of 1996 comes close to establishing the presumption of innocence but has not reached international standards such as Article 14(2) of ICCPR yet.

One reason is that the vague expression of the principle of presumption of innocence in Article 12 itself has not yet met the demand of Article 14(2) of ICCPR. Compared with Article 14(2) of ICCPR and Article 6(2) of ECHR, Article 12 in the CCPL of 1996 does not speak directly of “presumed innocent” or “decide innocent”.<sup>156</sup> It only states no one shall be decided guilty. Furthermore, according to the second paragraph of Article 142 in the CCPL of 1996, which states, “with respect to a case that is minor, and the offender needs not be given criminal punishment or needs to be exempted from it according to the Criminal Law, the People’s Procuratorate may

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<sup>153</sup> For the detailed description of the historic background of the development of Presumption of Innocence in China, see Timothy A. Gelatt, *op.cit.*, fn.60, pp. 259-316.

<sup>154</sup> Jianming Cao, Grand Justice of the first rank and Vice President of the SPC, Opening Address at the 3<sup>rd</sup> Asian Law Institute Conference, 25/05/06, [http://law.nus.edu.sg/asli/3rd\\_asli\\_conf/opening\\_address\\_3rd\\_asli\\_conf.html](http://law.nus.edu.sg/asli/3rd_asli_conf/opening_address_3rd_asli_conf.html).

<sup>155</sup> See, e.g. Guangzhong Chen, “Outlook of Revision of Criminal Procedural Law of China”, China Law, August 2005, p.57.

<sup>156</sup> See Chap2, 6.2, p72.

decide not to initiate a prosecution”.<sup>157</sup> In other words, it seems to follow the principle of presumption of innocence. However, in practice, this provision will be applied while the procuratorate announces that the suspect is guilty. In the final legal decision, the suspect is not innocent although he has not been prosecuted. Therefore, even though the original meaning of this provision is to save the cost of judiciary and avoid heavy social burden created by the litigation, its practical implementation of Article 142 in the CCPL of 1996 has indeed violated the idea of presumption of innocence before the final trial of the court, as ruled in *Minelli v. Switzerland* and *Alenet de Ribemont v France*.<sup>158</sup>

Another reason is the legislative authority’s attitude to this question. In the legislative interpretations of the 1996 CCPL, the provision in Article 12 is not definitely regarded as the presumption of innocence. This provision is mainly concentrated on the power of the court to try a case, which is incompatible with the requirements of the principle itself.<sup>159</sup> Moreover, due to traditional ideology, budgetary and resource constraints, public security and procurator organs still tend to focus on evidence that has incriminated the suspects in a criminal investigation and to attach insufficient importance to extenuating evidence or evidence that has supported a suspect’s innocence.<sup>160</sup> As discussed in the following chapters, together with the absence or limitation of other key rights or measures such as the exclusion of illegally obtained evidence and an effective supervision system for the pre-trial compulsory measures, it obviously leaves China still far from fully accepting presumption of innocence.<sup>161</sup>

#### **4.1.2.2 Aims for the CCPL**

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<sup>157</sup> CCPL 1996, Article 142.

<sup>158</sup> See *Minelli v. Switzerland*, Chap3, 4.4, p.168; *Alenet de Ribemont v France* Chap3, 4.4.2, p.174.

<sup>159</sup> See *Gridin v Russian Federation*, Chap2, 6.2, p.73-74.

<sup>160</sup> See 2.1.2 pp.216-217.

<sup>161</sup> Discussion on Lack of Exclusionary Rule see Chap6, 3.2.1, pp.353-359; Lack of Supervision System for Pre-trial Compulsory Measure see Chap5, 3.4, pp.302-317; Chap6, 3.4, pp.374-384.

As mentioned above, it is a specific tradition that underwrites the lack of protection for the suspect and defendant's rights in the Chinese legal system where the law is understood to be a tool.<sup>162</sup> Under this stubborn traditional ideology, for many law enforcement officials, "to protect the people" and "to protect the citizen's right" in the text of the CCPL of 1996 is still today understood as a concept for protecting the "people's democratic dictatorship" in China. As a result, the criminal is still in a sense regarded as an enemy. The effect of this ideology threatens the rights of suspects. Enemies and suspects are two different kinds of concepts. While "suspect" is a legal concept, "enemy" is a political concept. The concept of the enemy stresses the political viewpoint, opposition, and class interest, while the concept of the suspect implies that a person is suspected of having committed a crime described by law. "Enemy" cannot equal "suspect". Political concepts and standards should not take the place of legal ones.

For example, as will be discussed in Chapter Five, almost every suspect is still held in custody regarded as a guilty person to be punished.<sup>163</sup> The power of police and judicial organs are not effectively restricted when it comes to detention of suspects.<sup>164</sup> The suspect is the one who is just assumed to have committed a criminal offence. Even though a person is suspected by the investigative organ, and there is sufficient evidence against him or her, he or she is not guilty until the court makes that judgement, as interpreted in *Matijašević v. Serbia*.<sup>165</sup> According to official national statistics, the conviction rate for all crimes for the five years from 2003 to 2007 was 99.7%.<sup>166</sup> An almost "perfect" conviction rate is rather a troubling phenomenon in the context of factors demonstrated in this document. Factors include

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<sup>162</sup> See 2.1.3, pp.218-221.

<sup>163</sup> see Chap5, 3.1.2, pp.287.

<sup>164</sup> See Chap5, 3.2 and 3.3, pp.289-302.

<sup>165</sup> See *Matijašević v. Serbia* Chap3, 4.4.2, p.174.

<sup>166</sup> See SPC Work Report, on 10/03/08; The SPC reports that between 2003 and 2007, a total of 760,000 criminals were sentenced to death, life imprisonment, or more than five years in prison, accounting for 18.18% of all criminals having been sentenced. And 14,000 were found innocent. The report offers no statistics on the success or failure rates of appeals.

such things as increased detentions and arrests, torture to extort confessions, restricted access to legal representation, extreme pressure on the police, procuratorate and courts to secure convictions particularly during “Strike Hard” campaigns, and courts passing guilty verdicts through a sense of political obligation and a desire to maintain resolve rather than rigour. A breach might be found in Article 14 read with Article 7 and 9 of ICCPR on the basis that it firstly infringes the presumption of innocence under Article 14(2). Under such intense circumstances, rights abuses and miscarriages of justice are inevitable while it is possible that people are executed “in error” on an almost daily basis.<sup>167</sup>

#### **4.1.2.3 The Retention of the “Supplementary Investigation”**

For the same reasons as discussed above, the continuance of the “Supplementary Investigation” has made it apparent that the principle of presumption of innocence has not been firmly acknowledged in China, which breaches Article 14(2) of ICCPR.<sup>168</sup> The procuratorate may decide not to institute proceedings if the evidence gathered after the supplementary investigation is deemed insufficient, as mentioned above.<sup>169</sup> However, on the other hand, Article 35 in the revised law, retained from the 1979 CCPL, states that the responsibility of a suspect is, on the basis of the facts and the law, to present material evidence and opinion proving that the suspect is innocent, or that his crime is minor, or that he should receive a more lenient punishment or be exempted from criminal responsibility.<sup>170</sup> This provision appears to place the burden of proof on the party of defence, overtly broad and without any compelling reason. This might contradict the principle of presumption of innocence. Where the law has imposed a burden of proof on a suspect may be not necessarily a violation of the principle of presumption of innocence, as in *Salabiaku v France* and

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<sup>167</sup> See Fei Zheng, “Crime Crackdown Must Observe Justice Principles”, China Daily, 18/12/04, [http://www.chinadaily.com.cn/english/doc/2004-12/18/content\\_401261.htm](http://www.chinadaily.com.cn/english/doc/2004-12/18/content_401261.htm).

<sup>168</sup> See 3.1.3, pp. 239-240.

<sup>169</sup> CCPL 1996, Article 140.

<sup>170</sup> Ibid. Article 35; also see CCPL 1979, Article 28.

*X v UK*.<sup>171</sup> However, as illustrated in Chapter Three, the latest approach to the reversal of the burden of proof under the ECHR shows that in a manner compatible with the presumption of innocence, the reverse onus clauses has to fall within reasonable limits and be directed by a legitimate objection, and that it was proportionate.<sup>172</sup>

The presumed innocence of the suspects should be the starting point. Its essence is that the prosecution should bear the burden of proving, beyond reasonable doubt, that the defendant committed the offence charged. Therefore, mere reference to the great pressure of crime control in China does not suffice to justify the provision to shift the burden of proof to the suspects, as a number of UK cases demonstrated in Chapter Three.<sup>173</sup> Strong and specific reasons for various proper compulsory measures that may be taken against the suspect are required. Article 35 of CCPL of 1996 indicated that the suspect is required to establish a special defence or exception, but the burden it placed on a suspect is not restrictively worded and appears beyond reasonable limits and arbitrary. Instead of being used in the context of the particular offence, the means employed is commonly used in China to extend the detention period, as discussed in Chapter Five.<sup>174</sup> In Chinese textbooks of criminal procedure law, it is argued that Article 35 has never been intended as placing the burden of proof on the defence. It only states the function of a defender or the way in which a lawyer should defend the accused. The revisions of the trial process reinforce the prosecution's duty to gather and produce all relevant evidence. The burden of proof is put on the prosecutor in CCPL.<sup>175</sup> However, while this provision can be read and interpreted in various ways, the law does not clearly express that the overall burden of proof remains with the prosecution. Therefore, it can be also interpreted that the law still

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<sup>171</sup> See *Salabiaku v France* and *X v UK* Chap3, 4.4.1, pp 170-171.

<sup>172</sup> See *Janosevic v Sweden* Chap3, 4.4.1, pp.171.

<sup>173</sup> See Chap3, 4.4.1, pp172-173.

<sup>174</sup> See Chap5, 3.1.2, pp. 288-289, 303.

<sup>175</sup> See Text book on Criminal Procedure Law e.g. Guangzhong Chen, and Jingcun Xu (eds), *Criminal procedure law Science*, 3<sup>rd</sup> ed., (Beijing: China University of Politics and Law Press, 2002).



does not explicitly confirm the obligation to give suspects the benefit of the doubt in the light of the principle of presumption of innocence.

#### **4.2 Excessive Emphasis on Substantive Justice and Truth Finding**

The issue of facts in judicial judgment is one of the long-standing and most difficult problems in pursuing trial justice in Chinese criminal justice.<sup>176</sup> Since China customarily pays much more attention to comprehensively controlling and maintaining social order, it therefore follows a principle of cracking down on crimes to prevent criminal activities by eradicating their root cause.<sup>177</sup> Lawful punishment of criminals is a necessary and important method of crime prevention and social harmony. However, it generally believes that regardless of how the procedure was handled, as long as the result is correct, the judicature can be said to be fair. It can be seen that criminal justice in China stresses the objective truth without demanding anything concerning the legality of fact finding. This one-sided pursuance of substantive justice shows the great impact of the traditional procedural instrumental value on law.<sup>178</sup>

This view was not only thoroughly reflected in the CCPL of 1979 but can also to a great extent be found in the amended CCPL. As discussed above, the standard of proof in criminal cases, “based on facts and taking law as the criterion” is always followed in China.<sup>179</sup> For instance, Article 2 in the CCPL of 1996 rested on this ideology. The meaning of these “facts” refers to objective facts.<sup>180</sup> If “the facts are clear and the evidence is reliable and sufficient” in Article 162(1), the court is further required to clarify the “objective truth” in the process of criminal adjudication. Chen

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<sup>176</sup> Amid philosophical or epistemological arguments, the notion of truth in criminal procedure is introduced as the substantive truth based on Correspondence Theory, the procedural truth on Consent Theory, etc.

<sup>177</sup> See Aiying Wu, Deputy Minister of Justice, said at the annual meeting of the UN Commission on Crime Prevention and Criminal Justice in Vienna in May 2004, Xinhua News, 12/05/04, [http://english.peopledaily.com.cn/200405/12/eng20040512\\_143071.html](http://english.peopledaily.com.cn/200405/12/eng20040512_143071.html).

<sup>178</sup> See 2.1.3, pp. 218-221.

<sup>179</sup> see 2.2.3 pp.226 and 2.2.4 pp.233-234.

<sup>180</sup> See Rongbin Cheng, *Textbook on Chinese Criminal Procedure Law*, (Beijing: China Renmin University Press, 1997), p.278; Guangzhong Chen, *Criminal Procedure Law* (new version), (Beijing: China University of Political Science and Law Press, 1996), p.148.

Guangzhong considered that this requirement obviously exceeds the standard of “beyond a reasonable doubt” applied in common law countries like the UK.<sup>181</sup> Also it requires judicial officers to apply all their talent and ability and to be in full possession of all necessary materials. Even in setting the standard for filing a case which is somewhat vague and general, the CCPL proceeds on the assumption that it is possible, even at this earliest stage, to ascertain whether “there are the facts of a crime”.<sup>182</sup> Any rule that promotes conflict or detracts from the tribunal’s ability to render an uncontested verdict is discouraged. This bedrock principle colours every facet of Chinese criminal justice relevant to human rights protection for suspects as discussed in the following chapters.

However, in a system that sacrifices procedural justice for the sake of substantive justice, the danger of arbitrary government power and the threat to individual liberty will be too great. Eventually, that system will lead to substantive injustice as well. For instance, if the principle of “basing on facts” were overlooked, common practice in the fact-finding stage of investigation would easily result in paying sole attention to confession, or stressing circumstances unfavourable to the suspect, rather than collecting all the relative evidence, which contrary to the requirement of a fair procedure.<sup>183</sup> Also, the failure to follow the principle of due process has reflected on the practice that the courts are reluctant to exclude the illegally obtained evidence if such evidences can prove the truth of the case is the most typical example, as discussed in Chapter Six later.<sup>184</sup> Therefore the police have been prone to extort confessions through torture in order to improve their rate of criminal case solutions. As Chen Guangzhong stated, experience of China’s judicial practice proves that all

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<sup>181</sup> see CCPL 1979, Article 120; CCLP 1996, Article 162(1); also see Guangzhong Chen, Yan Duan, *op.cit.*, fn 63, p.173.

<sup>182</sup> CCPL 1996, Article 83 and 86.

<sup>183</sup> See *Heaney and McGuinness v Ireland*, Chap3, 4.4.3, pp.179-180.

<sup>184</sup> see Chap6, 3.2.1, pp.356-359.

miscarriage of justice cases are the results of simply overemphasizing obtaining the actual facts of the case from the confession of the suspect.<sup>185</sup>

The procedure has its own independent value in that it is an essential component of social justice, representing democracy, rule of law, human rights and civilization, and directly influences the acceptability of the result of a case; in other words, how a person is treated is as important as the substantive result he or she receives in a trial.<sup>186</sup> When the criminal procedure only concentrates on substantive justice, other interests and demands of society, such as the importance of efficiency in the legal proceedings, will not usually have been taken into account and may even have been omitted. An adjudication delay might bring an uncertain future for the suspects. As the international standard discussed in previous chapters, justice without efficiency cannot be justice. Therefore it would be difficult to apply laws correctly and challenge human rights protection. Besides Article 14(2) of ICCPR, it might also have an impact on those concrete measures during the criminal proceedings which contradict Article 9(3), Article 9(4) and Article 14(3) of ICCPR, as discussed in the coming chapters.<sup>187</sup> Moderating the relation between justice and efficiency to achieve a balance between them is the problem that has to be faced in Chinese criminal procedural reform.

## **5. Suggestions for Further Reform**

China is considering a further revision of its CCPL to pave the way for ratification of the ICCPR. Following the above analysis, it is time to change the ideology and look for other more effective ways of preventing crime and protecting human rights. During China's rapid social-economic transformation era, it is vital and necessary to

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<sup>185</sup> See Weihua Liao, "Criminal Procedure Law is in Hope of Amendment by National People's Congress Next Year, Emphasis is on the Prevention of Coonfession Obtained by Torture", Beijing News, 13/07/05, [http://news.xinhuanet.com/legal/2005-07/13/content\\_3212099.htm](http://news.xinhuanet.com/legal/2005-07/13/content_3212099.htm).

<sup>186</sup> See Guangzhong Chen and Mei Liu, *op.cit.*, fn 118, p.4.

<sup>187</sup> ICCPR standard see Chap2, 5.3, pp.55-58; 5.4, pp.58-61; 5.6, pp.64-66; Also see the relevant discussion in ECHR: Chap3, 3.5.3, pp.129-134; 3.5.5.1, pp.137-140; 3.6.4, pp.153-156.

review and update those guiding ideologies for the CCPL and its practice first of all, in order to ensure the implementation of the new law, to facilitate the legal cultural change in the whole society concerning human right protection and due process and to fall into line with the spirit and rules of the ICCPR. A further revision of the CCPL should deal with the following major tasks: to further balance the relationship between judicial fairness and procedural efficiency, and between combating crimes and protecting human rights; to properly handle the relationship between the effects of domestic laws and international conventions.

### **5.1 Combining Crime Control and Guaranteeing Human Rights**

Countries around the world have established fighting crime as the basic principle of their criminal justice system for a long time. With the steady progress of human civilization, the guidelines for the procedure governing a suspect underwent huge and significant changes in the developmental process of criminal procedure. In every modern country conditions for a suspect have greatly improved from his being punished without due process to being able to enjoy his fully protected right. However, as criminal acts committed by criminals always endanger national and social security, social order, personal rights, property rights, democratic rights and other rights of citizens, they actually infringe human rights either directly or indirectly. In this regard, human rights protection cannot be guaranteed without the effective punishment of crime. In order to effectively punish crime, the state has entrusted judicial organs with many compulsory measures sometimes including detention and arrest to limit or remove an individual's rights and liberties. These measures can forcefully crack down on crime and therefore may facilitate a guarantee of state security and social stability, but only if they are applied appropriately and on particular occasions.

Therefore whenever there is a clear conflict between human rights and security needs, the balance usually falls in favour of security.<sup>188</sup> Law enforcement authorities are subject to pressure from political entities and the public to be tough on crime. Suspects are therefore particularly at risk of losing their personal freedom and being detained in vulnerable positions where they may be subject to torture.<sup>189</sup> In a sense, stressing the punishment of crime unilaterally and ignoring the protection of the lawful rights of citizens will lead to the abuse of judicial power and cases of miscarriage of justice. This has produced an implication that is even worse than the criminal act with regard to the violation of human rights. Suspects are in need of a legal system that takes their rights seriously. But it must be admitted that the national and public interests are not abstract. There is no national benefit separate from individual rights. It can be expressed through any individual right. Although in order to protect the rights of all citizens, human rights must be everyone's rights and this also includes the rights of suspects. Because of the uncertainty of social life and of precise recognition, no one can be absolutely sure not to be taken as a suspect under certain circumstances in judicial practice.<sup>190</sup> This means that every citizen faces the possibility of becoming a suspect if there is something suspicious going on around him or her. So from another perspective, suspects, in a particular way, act as representative on behalf of the common interest of the citizens in the whole of society in criminal procedures. For these reasons, in criminal proceedings, not only the punishment of crime but also the protection of human rights should be emphasized.

In the UK, for example, as discussed in previous chapters, there are considerable tensions between the operations of the criminal justice system and the protection of human rights.<sup>191</sup> It is a balancing act between two different goals. A fear of rising

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<sup>188</sup> See Chap3, 3.5.5.2, pp.140-141.

<sup>189</sup> See Chap3, 2.4.2, pp.105-108; also see *Jalloh v. Germany* Chap3, 4.5, pp.187-188.

<sup>190</sup> See 4.1, pp.245-249.

<sup>191</sup> e.g. Chap3, 3.5.5.2, pp.140-145.

crimes, such as “terrorism”, has led to measures restricting suspects’ rights and extending the scope of criminal law. Meanwhile, this has also raised questions about human rights compliance and fairness. So far the UK government has sought to “deal with the threat of terrorism by imposing restraints on the freedom of those (who) the executive suspects, but cannot prove, are involved in terrorism”.<sup>192</sup> For example, the case of *A v Secretary of State for the Home Office* which was found to be incompatible with Article 5 of ECHR is a typical example of this balancing act.<sup>193</sup> Fenwick condemns the expanding definition of terrorism laid down in the Terrorism Act of 2000 as “immensely broad and imprecise”.<sup>194</sup> Also Parliament agreed that recent cases have not given cause to introduce a lengthier detention period.<sup>195</sup>

However, even the restrictions did not prevent the 2005 attack and later terrorism attacks. Terrorism is not just a series of attacks, but is spawned by ideology and is an on-going conflict. To secure the country against current threats and future atrocities the government ought to consider a two-fold strategy of short-term prevention of imminent attacks and long-term protection by securing the end of the ideological conflict. The significance of human rights as one of the underlying causes of terrorism has been recognised for a long time. Human rights standards constitute the bare minimum of standards necessary to protect the safety and integrity of individuals from abuse of power.<sup>196</sup> The abuse of human rights helps to sustain and increase terrorism.<sup>197</sup> From this reason it follows that the robust protection of human rights within counter-terrorism is fundamental to ensuring the flames of conflict are not fanned, thus helping to fulfil the long-term security aims of protecting the

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<sup>192</sup> The Rt. Hon. The Lord Phillips, Lord Chief Justice of England and Wales Terrorism & Human Rights University of Hertfordshire Law Lecture, 19/10/06,

[http://www.judiciary.gov.uk/publications\\_media/speeches/2006/sp191006.htm](http://www.judiciary.gov.uk/publications_media/speeches/2006/sp191006.htm);

<sup>193</sup> See *A v Secretary of State for the Home Department* Chapter 3, 3.5.5.2, pp.143.

<sup>194</sup> Helen Fenwick, “The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?” (2002) 65 MLR 724 at p.734.

<sup>195</sup> Home Affairs Committee Fourth Report, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/91002.htm>, 07/06.

<sup>196</sup> Amnesty International, “Rights at Risk”, <http://web.amnesty.org/library/index/engACT300012002?OpenDocument>, 18/01/02.

<sup>197</sup> General Assembly of the UN 1985 Resolution on Terrorism, A/RES/40/61, para. 9.

country against terrorism. Stones considered that individual freedom should only be restricted when there is a real and pressing need to do so, not simply when it might be regarded as helpful to the police and security services.<sup>198</sup> Therefore the protection of individual rights is central to ensuring security and protecting the whole of society from terrorist attacks. Individual rights and state security are mutually dependent.

Therefore, such measures to prevent crime should be implemented within a framework of protection for all human rights. This principle can also be applied to China today when it faces the great pressure of crime control during this time of social development. According to the *Order of Further Handling Cases in Strict Accordance with the Law and Ensuring the Quality of Death Penalty Cases*, “adherence to the combination of crime punishment and human rights protection” was clearly listed as a significant principle for handling criminal cases. In the process of further amending the CCPL, according to the current limitations of the traditional guiding ideology on criminal procedure, the value of human rights protection should continue to be emphasized and thus the demands that the coming CCPL should pay full attention to those principles to protect the suspect’s rights. Some of the difficulties and tensions faced by the Chinese are found in developing a criminal procedure theory and system that can meet the local practical, sociological and ideological needs of the country. For example, it can well be expected that the presumption of innocence will continue to be controversial in China.

However, further moves should definitely be made towards the direction of full acceptance of the presumption of innocence. Firstly the presumption of innocence should be openly stated according to the language in Article 14(2) of ICCPR.<sup>199</sup> This would avoid the divergence of opinions regarding implementation. The public interest in combating prevalent and serious crimes might ultimately be addressed by

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<sup>198</sup> Richard Stone, *op.cit.*, fn 137, p.210.

<sup>199</sup> See ICCPR, Article 14(2); Chap2, 6.2 p.72.

the resources applied to detection and prevention and the substantive statutory provisions establishing criminality and penalties. Denial of the right to be presumed innocent in respect of such crimes would undermine the right enacted as a minimum standard. The presumption of innocence serves not only to protect a particular individual on trial but also to maintain public confidence in the enduring integrity and security of the legal system. Secondly, indeed, appropriately matched measures should also be modified or adopted to ensure the implementation of the presumption of innocence. For example, in order to cover all the subjects of human rights protection, the terms “protecting the people” can be replaced by “safeguarding human rights”; the terms “to protect the citizen’s personal rights” can be replaced by “to protect the legal rights of individuals and units”. Complete elimination of the “Supplementary Investigation” measure should be considered in the coming revision. The lawfulness of the limitations and the deprivations imposed on the suspects before trial and the relevant concrete measures to effectively prevent the abuse of authority to damage the implementation of human rights should be well established as discussed in the following chapters.

Certainly, China should avoid shifting from one extreme to the other. Criminal justice carries out the functions of fighting and preventing crime, maintaining social order and protecting public lives and property. Therefore, criminal justice in China should combine fighting crime and protecting human rights. Unilaterally stressing the protection of human rights and the ineffective punishment of crime by the judicial organs would allow criminals to go unpunished and encourage them to commit crime; thus human rights would not be guaranteed. Therefore, law enforcement officials have to continue to stress the need for both greater efficiency and more accountability. However, while the past judicial concept of emphasizing crime control but not protection should be rectified, there must be a balance between protecting suspects and ensuring that those who commit crimes are caught,



investigated and convicted. This ideology should be insisted on all through the reform.

## **5.2 Towards Integration of Justice, Due Process and Efficiency**

With the increasing awareness of the value of human rights protection and the gradual establishment of the modern concept of criminal justice, the view on due process and the efficiency of legal proceedings cannot be neglected. During the legal system reform there has been a great deal of controversy in China about how to balance the commitment to accurate fact-finding and the commitment to fair conflict resolution in the criminal procedure. The core of this discussion is focused on how to bring about rational fact finding and enhance the credibility of evidence. Whether the legal facts and the objective facts can be kept consistent at the maximum degree is the basic symbol to measure whether the evidence rules are successful or not. Many scholars such as Chen Guangzhong and Zhang Jianwei have maintained that whether or not someone has committed a crime is a matter of ascertainable fact, which is substantive truth.<sup>200</sup> The rules of criminal procedure are a means to disclose those objective facts and make the judge aware of the case. The guiding function of substantive truth should not be replaced by procedural truth.<sup>201</sup>

In contrast, some scholars such as Chen Ruihua suggest denying the guiding function of objective truth and assert the value of procedural justness.<sup>202</sup> According to their views, the court should demonstrate the facts of a case with evidence being offered by both the investigative organs and the suspects, or from those collected by the courts themselves. The process by which the judicial officers deal with cases is actually the process in which they can realize something of the true circumstance of

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<sup>200</sup> See e.g. Guangzhong Chen, Haiguang Chen and Xiaona Wei, "Criminal Evidence System and Epistemology", (2001) 1 Law of China., pp.37-52; Jianwei Zhang, "Theory Base of Evidence Law", (2002) 2 Modern Law, pp.34-48;

<sup>201</sup> See Guangzhong Chen, *ibid.*, p.44.

<sup>202</sup> See Ruihua Chen, "From Epistemology to Procedural Value: Reflection and Reconstruction on the Theory of Evidence Law", (2001) 1, Law Science, pp.21-28; Chongyi Fan, "View on Substantive Truth and discussion on the standard of proof in Criminal Justice", (2000) 1 Chinese Legal Science, pp.114-120;

the case according to the evidence presented.<sup>203</sup> As Kong Xiangjun stated, generally, although legal facts are consistent with the objective facts of the case, they are not equal and can never be identical. It should be acknowledged that inconsistency is inevitable for various reasons such as the inherent weakness of human beings to ascertain objective truth.<sup>204</sup> The pursuit of legal facts for the objective facts is realized through a series of system design in evidence law. In most cases, judicial decisions are made according to the facts confirmed within the scope of legality and supported by certain evidence, namely legal facts. Whether the facts of the cases are clear and definite can only be considered in the premise of procedural justice. Due process is one of the judiciary's primary safeguards against the full range of errors in the generation of evidence. The goal of the criminal system should be to create a value of legal reality and a set of rules that will help it to determine the truth as close as possible.

Therefore it makes sense to emphasize the priority of due process in China today. Crime prevention and security should be compatible with democratic values and due process. Without fair and just procedures, there is no guarantee that the end result will be just. Procedural justice requires the law enforcement organs to conform to just stages and proper means in seeking for the reality of the case. This may lead to the sacrifice of part of the substantive justice to ensure the role of procedural justice. But it is the necessary cost for guaranteeing justice in general and on the whole. In a system that pays attention to procedural justice, arbitrary government power will be checked and constrained, individual liberty will be protected, and substantive justice will be preserved in the long term. As Selznick puts it, legality has to do mainly with how policies and rules are made and applied rather than with their contents.<sup>205</sup> In

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<sup>203</sup> See Ruihua Chen, *ibid.*, p.22.

<sup>204</sup> See Xiangjun Kong, "Discussion on Legal Facts and Objective Facts", (2002) 5 *Tribune of Political Science and Law*, pp.94-95.

<sup>205</sup> See P. Selznick, *Law, Society and Industrial Justice* (New York: Russell Sage Foundation, 1969) cited from Yuanyuan Shen "Conceptions and Receptions of Legality: Understanding the Complexity of the Law Reform in China", in *The Limit of the Rule of Law in China*, ed. Karen G. Turner, James V. Feinerman and R. Kent Guy, (Seattle: University of Washington Press, 2000), p.30.

other words, as long as the process is fair, transparent and consistent, justice is obtained and legality is achieved. Such procedural justice is seen as a necessary condition for substantive justice. Also the pursuance of procedural justice can reduce and limit the time and cost of crime investigation and prosecution.

Procedural justice or efficiency could surely not be pursued unilaterally. Again, the importance of rights protection for the suspects could not be partially emphasized. The goal of criminal procedure is to realize justice by uncovering the substantive truth. This given fact emphasizes exact and accurate fact finding, which is required as a premise for impartial criminal justice. The general relationship between legal facts and objective facts is that objective facts are the basis of legal facts, and legal facts are the recurrence or reaction of objective facts. Legal truth must take objective truth as the final goal to be pursued. The pursuit of legal facts is realized through evidence law with a series of measures. The facts are confirmed under the strict limitation of the procedural law. No doubt it will take a long time for China to comprehensively establish a new truth-finding concept.

It is feasible to combine substantive justice with procedural justice for truth finding in criminal procedure in China. The current design of the criminal procedure in China should also give priority to justice with due consideration to efficiency. Therefore the criminal procedure should be justly implemented. There should be an attempt to keep legal facts and objective facts consistent to the greatest possible degree. The punishment of criminals should be impartial. The rules stated in the CCPL should guide the court appropriately to recognise the degree of accurate and the credibility of the evidence. For example, all the terms presenting the aims of the CCPL which only stress the traditional view of emphasising substantive justice but neglecting procedural justice should be changed to the new perspective of integration of crime control, justice and efficiency.

## **6. Conclusion**

The brief description of historical and current Chinese legal ideology regarding criminal procedure law presented above should suffice to illustrate the unique and dynamic legal reform process of criminal procedure law. China's legal traditions have been evolving within a continuous civilization for more than two thousand years. The emphasis of law is on the protection of government powers and social interests rather than on the protection of individual rights and due process. Law has been, and continues to be, an instrument of government to change its policies for social and political control. The CCPL used to pay a great deal of attention to the needs of fighting crime without taking into account the protection of the rights of suspects. At the same time, rising crime rates have united the general populace with the government in their desire to strike hard at crime. It is not an easy task for China to establish a human rights protection system for suspects in criminal justice.

The primary purpose of the CCPL reform in China today is to live up to its promises with respect to human rights and fair trial protection for suspects. It is necessary to define appropriately the guiding ideology when discussing the question of how to modify the CCPL. Some reforms in 1996 have already made a significant mark on the guiding ideology of the criminal justice system as discussed above. Most strikingly, the amended CCPL even seems to have made a tentative step towards the recognition of the presumption of innocence. The change of ideology can be shown in the contrast between the old and new terminology, the abolition of the "Exemption from Prosecution", the reform of the "Supplementary Investigation" and the rise of human rights consciousness in the country. The amended CCPL has also tried to embody the principle of due process. It should be acknowledged that the guiding ideology of the 1996 CCPL attached greater importance to the protection of human rights than its previous versions, making remarkable headway in this respect.

However, the comparative analysis of relevant provisions in the CCPL of 1996 with international guidelines undertaken above has pointed out the ways in which the ideology behind the law has not completely conformed to the aim of the reform and international human rights protection standards. Under the complex phenomenon of increasing crime rates in China, both the government and the public favoured combating crime with a strong hand. This might entail abuses against suspects, especially in a country that has a history of lack of respect to individual rights in the criminal justice system. The notion of human rights protection still needs to be strengthened in the minds of the public and the law enforcement officials. The principle of presumption of innocence has not been firmly acknowledged and implemented, as shown in the statement of Article 12 in the CCPL of 1996, the aims of the law still carry political colour, and the “Supplementary Investigation” remains in the CCPL of 1996. Therefore it has been viewed as inconsistent with relevant ICCPR standards, Article 14(2) of ICCPR particularly. Moreover, due process can be sacrificed under the justification of crime control. Therefore the safeguards for suspects set by the law can be avoided or infringed by operating entirely outside the legal schemes. The guarantee for suspects can be marginalised. The task of deepening and broadening their reach for universal fundamental human rights concepts continues to face critical difficulties arising from new values and new forces unleashed by the economic reforms, long-term dominant political ideology and widely-held traditional Chinese legal culture.

China continues undergoing rapid social and economical transformation that threatens to undermine social stability and hence inflates crime rates. Traditional law has its contribution and value, including its rich experience of legal practice, the stable function of the law in maintaining social harmony and the emphasis on the educational function of the law. To establish a modern criminal procedural system,

traditional ideology for the CCPL needs to be creatively updated and transformed as suggested above. The forthcoming reform of the CCPL should purposefully and selectively overcome those traditional ideas, values, beliefs and ideologies, such as emphasizing punishment and substance, belittling human rights protection and ignoring due process, which contradict the modern judicial idea of law. Instead, a series of modern judicial ideas, such as combining the punishment of crimes and guaranteeing human rights protection, emphasizing substantive justice and procedural justice, to embody the spirit of “human rights” in the amendment to the Constitution. The legal system therefore can be brought more into line with those embraced in international standards such as ICCPR and ECHR discussed in previous chapters. Primarily, the principle of presumption of innocence should be fully accepted and established in the CCPL according to the requirement in Article 14(2) of ICCPR

In the following chapters the thesis will examine some recent steps concerning the measures taken in China towards providing a better system of justice for suspects while considering the effectiveness of these reforms in practical terms. Prohibition of torture and illegally obtained evidence, guarantees of lawyers’ rights, improvement of the compulsory measure and so forth are the main priorities of the amendments. All the analysis will be a detailed comparison with the relevant ICCPR standard in order to demonstrate the need for China to adopt further reforms, to provide suspects with more protection and to bring China’s criminal procedure closer to international standards regarding fair trial and human rights.

## Chapter Five

# Pre-trial Compulsory Measures System in CCPL and Movement towards Meeting ICCPR Standards

### 1. Introduction

One of the most criticized aspects of the CCPL of 1996 is still the enormous discretion vested in officials to detain suspects without genuine and independent judicial review.<sup>1</sup> In criminal justice, protection of human rights has two aspects: protecting the individual's rights and limiting state powers. The course of pre-trial investigation is an important stage of recognition of human rights protection for suspects and the application of compulsory measures in this stage directly concerns the personal liberty and safety of suspects.<sup>2</sup> Because of this severe character, as discussed in Part One, the ICCPR and ECHR pay close attention to compulsory measures in criminal cases which should be properly used.<sup>3</sup> The avoidance of the abuse of compulsory measures during the pre-trial procedure in China not only concerns the smoothly process of the criminal proceedings, but also concerns the issues of guarantee the human rights in criminal proceedings.

Therefore the aim of this chapter is to address how criminal compulsory measures can be better controlled in order to reduce the abuse of pre-trial detention and arrest and protect the legal rights of suspects under the current situation in China, according to the international standard, particularly Article 9 of ICCPR, which contains the principle which pre-trial detention is an exception.<sup>4</sup> This chapter will firstly examine the current CCPL for pre-trial compulsory measures with certain major reforms that are already ongoing in terms of the new procedural safeguards afforded to suspects and of the new restrictions placed on the police; secondly it will consider several

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<sup>1</sup> Guanagzhong Chen, "Overcome the Difficulties, Promote the Re-amendment of the Criminal Procedure Law", (2007) 23 People's Procuratorial Semimonthly, p.6.

<sup>2</sup> See *De Wilde, Ooms and Versyp v Belgium* Chap3, 3.2, p.111.

<sup>3</sup> See Article 9 of ICCPR, chap2, 5.1, pp.45-47; Article 5 of ECHR, Chap3, 3, pp.109-111.

<sup>4</sup> See Chap2, 5.5, pp.61-62; Chap3, 3.5.2, p.129.

respects in which the current system fails to adhere to the ICCPR, and various difficulties faced in trying to bring about reform to ensure compliance with those international standards; thirdly, it will consider the further reforms that would be necessary in order to ensure such compliance. The last part will close the chapter by concluding how close is the pre-trial compulsory measure systems to meet the ICCPR standards and re-emphasizing the direction for the coming reform.

Regarding the forms on deprivation of liberty, the compulsory measure system in the CCPL of 1996 includes five measures, namely, “compulsory summon” (拘传), “granting of bail and awaiting trial” (取保候审), “residential surveillance” (监视居住), detention (拘留) and arrest (逮捕).<sup>5</sup> These compulsory measures are considered be investigative techniques.<sup>6</sup> They can be further divided into two categories: custodial detention and non-custodial detention. As the ECHR approach illustrates, the distinction of the means on deprivation of liberty is a matter of degree and intensity and the actual deprivation of liberty.<sup>7</sup> It is clear that the custodial detention constitutes deprivation of liberty of Article 9 of ICCPR and Article 5 of ECHR. However, in practice, the law enforcement authorities adopt and use the pre-trial compulsory measures to dissolve all the risks under the circumstances that the criminal evidence is not sufficient while it is difficult to judge suspects guilty or not. With this intention, the non-custodial detention is not a kind of right to guarantee the personal liberty of suspects pending trial.<sup>8</sup> This phenomenon reflects the principle of presumption of innocence has not been accepted generally indeed.<sup>9</sup> Therefore, the non-custodial coercive measures defined in the CCPL also fall under the category of deprivation of liberty and should be viewed accordingly.

## **2. Current Improvement on the Compulsory Measures in the CCPL**

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<sup>5</sup> See CCPL 1996, Chapter VI ‘Compulsory Measures’.

<sup>6</sup> Ibid., Article 82.

<sup>7</sup> See Chap3, 3.2.1, pp.111-112.

<sup>8</sup> See *W. Delgado Páez v. Colombia*, Chap2, 5.1, pp 46-47; *X v Germany* and *X v Austria*, Chap3, 3.2.1, pp.112-113.

<sup>9</sup> See Chap4, 4.1.2, pp.249-254.



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Article 37 of the Constitution of PRC says that the personal liberty of citizen shall not be infringed.<sup>10</sup> Any citizens will not be arrested unless being ratified by the procuratorate or decided by the court and enforced by the police organs. It is forbidden to illegally detain or any other methods to deprive or limit the citizen's personal liberty and forbidden to illegally forage about the citizen's body. Article 59 of the 1996 CCPL reiterates the regulations in the Constitution. A number of important revisions to the CCPL in 1996 set limits to the power of the public security organs and the prosecuting authorities, therefore apparently brought China closer to eliminating arbitrary detention in its criminal process according to Article 9 of ICCPR.

### 2.1 1996 Reform to Measure of the “Shelter and Investigation”

“Shelter and Investigation” (收容审查) was originally initiated by the police as a way to control transient population, namely, people who failed to register their residence with the police as required by the household registration law.<sup>11</sup> It was a kind of administrative measure provided by No. 56 State Council document in 1982, neither the scope nor the executing procedures are clearly defined.<sup>12</sup> The former CCPL did not provide this measure. But in practice it was widely used and abused by the Chinese police to unilaterally detain people suspected of “minor acts of law-infringement or crime” whose identities and addresses were not clear, or of “having moved from place to place to commit crimes”, or of forming criminal gangs for extended periods with little or no access to the outside world.<sup>13</sup> Although the police supposedly should have used the measure only in cases where a suspect's

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<sup>10</sup> See Constitution of People's Republic of China (4<sup>th</sup> Amendment), 15/03/99, Article 37.

<sup>11</sup> See generally, Hualin Fu, “A case for abolishing shelter for examination: Judicial review and police powers in China”, (1994) *Police Studies*, 17(4), pp.41–60; More research on Administrative Detention in China see generally, e.g. Randall Peerenboom, “Out of the Pan and into the Fire: Well-intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detention in China”, (2004) 3 *Nw. U.L. Rev.* Vol. 98, pp.991-1104; Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China*, (New York: Cambridge University Press, 2007).

<sup>12</sup> See The Shelter and Repatriation Measures of Beggars and Homeless People Living in Cities, No. 56 Document issued by the State Council, 12/05/82 (Repeal).

<sup>13</sup> Ibid, Article 2. Also see Yan Wang, “Several Problems on Detention, Arrest and Shelter and Investigation”, (1994) 2 *Modern Law Science*, p.81.

identity was unknown, in practice they used the measure to detain people with known identity as well.<sup>14</sup> The abuse of the measure was especially manifested in the police's use of the measure to circumvent the time limits set in the CCPL of 1979.

A distinctive feature of the CCPL in 1979 is that though it granted the police broad power to make the initial detention decision, it set strict restrictions on the period of detention. According Article 48 of the 1979 CCPL, the police are permitted to detain a suspect only for 3 days; within 3 days, they must either submit a request for arrest to the Procuratorate or release the suspect from custody; If the police believes that the suspect should be arrested they must gather sufficient evidence within those 3 days, they may apply the Procuratorate for an extension of another 1 to 4 days; the maximum time allowance for the police to make their case for arrest is therefore 7 days; the procuratorate have to make the decision on the application of arrest within 3 days.<sup>15</sup> The legislative intent for the relatively short detention period was to prevent the police from detaining a suspect for too long at this initial stage of criminal investigation. The short detention period became a main source of police complaints against the old CCPL. They complained that the seven-day period was far too short for them to collect sufficient evidence to support a request for arrest.

In order to avoid the short detention period in the CCPL of 1979, the police turned to a more flexible way know as "shelter and investigation" to expand their power.<sup>16</sup> Whenever the officers felt that they could not collect sufficient evidence to support a request for arrest within 7 days, they would conveniently detain a suspect under "shelter and investigation", thus avoiding the seven-day time limits. As Zhou G. J. Observed, the public security organs could hold people under "shelter and investigation" without any judicial review for as long as three months, and possibly

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<sup>14</sup> See Shimin Zhao, "The Shelter and Investigation Measure should be Improved", (1990) 8 Law Science, p.28.

<sup>15</sup> See CCPL 1979, Article 48.

<sup>16</sup> Several serious problems on Shelter and Investigation were identified and discussed widely by the Chinese scholars. Detailed analyses See, e.g. Xinxin Wang, "Shelter and Investigation should be Abolished: A discussion with Chen Weidong and Zhang Tao", (1993) 3 Legal Science in China, pp.112-113. Also see Weidong Chen and Tao Zhang "A Further Talk on Why Shelter and Investigation Should Not Be Abolished: An Answer to Comrade Wang Xinxin", (1993) 3 Legal Science in China, p.113.

longer.<sup>17</sup> Sometimes suspects could be detained for several years. The use of the “shelter and investigation” clause was almost totally unsupervised by any other agency and the police tended to use it arbitrarily. The police can use torture to extract confessions in the detention centers. The cases of detainee’s escape and suicide were frequently reported.<sup>18</sup> This measure seriously violated ICCPR, particularly every aspect of Article 9 of ICCPR, and was long criticized by international human rights groups.<sup>19</sup>

Therefore one of the encouraging revisions with respect to pre-trial detention in the CCPL of 1996 is the incorporation of “Shelter and Investigation”, a type of indefinite administrative detention, into legislative forms.<sup>20</sup> This is a step towards the lawful deprivation of liberty which requires the arrest and detention must have been carried out according to the procedural and substantive rules of national law, as the European Court has emphasized in the recent cases.<sup>21</sup> On August 1 2003, the No.56 document in 1982 had been repealed and replaced by new regulations, *The Assistance and Management Measures of Beggars and Homeless People Living in Cities*, which is a relief system with relief centers instead of Custody centers.<sup>22</sup> This significance change effectively and officially abolished the administrative detention “Shelter and Investigation”. However, it is interesting to note that the time limits for various forms of detention were actually increased in the CCPL of 1996 which will be discussed below.<sup>23</sup> It was seen as a trade off for the elimination of “Shelter and Investigation”. In his explanatory speech on the draft amended CCPL to the Fourth Meeting of the Eighth NPC, Gu Angran stated that the draft has absorbed the contents of “Shelter and Investigation” needed in practice for the struggle against crime into the CCPL by

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<sup>17</sup> Guojun Zhou, “On Whether Shelter and Investigation Should Be Abolished”, (1989) 1 Forum of Politics and Law, pp.39-40.

<sup>18</sup> Ibid., p.40; also see Hualing Fu, *op.cit.*, fn 11, pp. 41-60.

<sup>19</sup> See e.g., Human Rights in China, “Detained at Official Pleasure”, (New York, 1993); Lawyers Committee for Human Rights, “Criminal Justice with Chinese Characteristics”, (New York, 1993).

<sup>20</sup> See Guanghua Guo, “Higher Requirement: The Revision on the Criminal Procedure Law”, (1996) 6 People’s Police, p7; Zhongcheng Li, “The Reform of the Compulsory Measure System and its Significance”, (1996) 3 Peiking University Law Journal, pp.36-37.

<sup>21</sup> See *Voskuil v. the Netherlands* Chap3, 3.2.2, pp.113-114.

<sup>22</sup> See *The Assistance and Management Measures of Beggars and Homeless People Living in Cities*, No. 381, State Council, 23/06/03, Article 18.

<sup>23</sup> See 3.2.2.1, pp292-297.

supplementing and amending the relevant criminal coercive measures.<sup>24</sup> Therefore, he proclaimed that the administrative compulsory measure of detention for investigation should not be retained.<sup>25</sup> Also, an internal document issued by the MPS in 1996 requires public security organs at all levels to cease using “Shelter and Investigation” by the end of October of that year. In form, “Shelter and Investigation” was abolished after the amended CCPL came into effect. The law is getting closer to Article 9 (1) of ICCPR, which provides that deprivation of liberty must be in accordance with domestic substantive and procedural law.<sup>26</sup>

## 2.2 Clarified the Conditions for the Detention

Article 61 of the 1996 CCPL provides conditions that must be met before a suspect may be detained.<sup>27</sup> In China, the system of non-custodial detention was originally intended to those suspects or defendants who are not suitable for detention but has certain social danger and may probably disturb the smooth implementation of litigation activities. There was no provision in the CCPL of 1979 pertaining specifically to define the suspect’s designated place to stay on non-custodial detention.<sup>28</sup> Therefore, supervised residence was often been using as means of holding suspects under conditions as those being arrested, usually in Public Security’s guest houses, under old CCPL. The insufficiently precise provision, as considered in the European case *Steel and others v UK* and *Baranowski v Poland*, breached the requirement as to “the prohibition on arbitrariness”.<sup>29</sup> According Article 56 and 57 of the 1996 CCPL, suspects who were at “granting of bail and awaiting trial” are not to leave their city or county of residence without police permission. Those under residential surveillance are restricted to their homes or, if they have no fixed abode, to a designated location.<sup>30</sup> Since most suspects will presumably have a usual place of residence, the new provision in the CCPL of 1996

<sup>24</sup> Angran Gu, “Explanatory Speech on the Draft Amended Criminal Procedure Law”, the Fourth Session of the Eighth National People’s Congress, 12/03/96.

<sup>25</sup> Ibid.

<sup>26</sup> See Chap2, 5.1, pp.47-52.

<sup>27</sup> CCPL 1996, Article 61.

<sup>28</sup> See CCPL 1979, Article 38.

<sup>29</sup> See *Steel and others v UK*, *Baranowski v Poland*, Chap3, 3.2.2, pp.114.

<sup>30</sup> CCPL 1996, Article 56 and 57.

suggests the intention to cure the prior practice by setting those standards for an initiation of the detention. It gives the impression that the detention of suspects is less than automatic and seems to be founded on a specific and accessible rule in China. The reform tries to comply with Article 9(1) of ICCPR that the grounds for a deprivation of liberty must be clearly and precisely established by law.<sup>31</sup>

### 2.3 Clearer Time Limits in Detention

Under the CCPL of 1996, in order to avoid that a person being charged, to be remained too long in a state of uncertainty about his fate, pretrial detention was reformed with better time limits and more clearly defined in procedures in some respects. It is an elementary step to achieve the requirement of Article 9(3) that everyone detained shall be entitled to trial in a reasonable time or to release pending trial.<sup>32</sup> It has been reported that the central authorities in China have strengthened supervision of detention exceeding time limits, and have ordered administrative discipline for local leaders who have allowed detention beyond stipulated time limits.<sup>33</sup> Since 2005, the MPS has amended the *Procedural Provisions for the Handling of Administrative Cases by Public Security Organs* and the *Procedural Provisions for the Handling of Criminal Cases by Public Security Organs*, formulated the regulations on the length of detention for criminal cases applicable to public security organs and other regulations.

The first compulsory measure addressed by the CCPL of 1996 is summons to compel appearance. Prior to the 1996 reforms, the time limit for holding a suspect for the first interrogation was 24 hours. However, the police routinely initiated a new 24-hour period as soon as the previous one expired, rendering the time limit meaningless and permitting unlimited interrogation. In 1996, the reform provided that a criminal shall not be detained under the disguise of successive summons.<sup>34</sup>

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<sup>31</sup> See *Clifford McLawrence v. Jamaica* Chap2, 5.1, p.47.

<sup>32</sup> See Chap2, 5.4, pp.58-59; Chap3, 3.5.3, p.130.

<sup>33</sup> See SPP and SPC Work Report, 2002 – 2008.

<sup>34</sup> CCPL 1996, Article 92.

Once a case file is opened, authorities may forcibly take in a suspect for up to 12 hours of questioning.<sup>35</sup> All judicial authorities may apply this measure.<sup>36</sup> Thus under current law if the police choose to hold a suspect beyond the initial 12 hour period they must use another compulsory measure, bail, residential surveillance or detention. This new time frame and limited measure on non-custodial detention brings the CCPL closer to the requirement of “promptly” in Article 9(3) of ICCPR.<sup>37</sup>

Even more significant, for the first time the CCPL of 1996 imposes limits on the duration of the non-custodial detention. “Granting of bail and awaiting trial” is not to exceed 1 year and residential surveillance is limited to 6 months.<sup>38</sup> These new provisions show that the CCPL of 1996 intends to get closer to the standard as Article 9(3) of ICCPR requires right to trial in a reasonable time.<sup>39</sup> After a suspect is arrested and taken into custody, an immediate concern for the suspect is how long it will take for the police to complete the investigation so that the case can be brought to trial. Article 72 of the 1996 CCPL obligates the police to interrogate a suspect within 24 hours of the arrest.<sup>40</sup> The original purpose of this timely interrogation is not for the purpose of facilitating the police to obtain confession but to obligate the police to re-examine whether the arrest is indeed properly made. The law further requires that the police release the arrested person immediately if they find the arrest is inappropriately made after the interrogation.<sup>41</sup> This is tied to the principle of presumption of innocence set by Article 14(2) of ICCPR and specifically complied with the term “promptly” required by Article 9(3) of ICCPR.<sup>42</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> The detailed practices in applying this measure see: Interpretation of the Supreme People’s Court on several Issues about the Implementation of the Criminal Procedure Law of the People’s Republic of China, [hereafter SPC Interpretation 1998], 02/09/98, Articles 63-65; Supreme People’s Procuratorate Rules on the Criminal Process for People’s Procuratorates [hereafter SPP Rules 1999], 18/01/99, Articles 32-36; Regulations on the Procedures of Handling Criminal Cases by Public Security Agencies, [hereafter MPS Regulations 2007], 01/12/07, Articles 60-62.

<sup>37</sup> See Chap2, 5.3, p.55; Chap3, 3.5.5.1, pp.137-140

<sup>38</sup> CCPL 1996, Article 58.

<sup>39</sup> See Chap2, 5.4, pp.61; Chap3, 3.5.3, pp.130-134

<sup>40</sup> CCPL 1996, Article 72.

<sup>41</sup> Ibid.

<sup>42</sup> See Chap2, 5.3, p.55; 6.2, pp.72-73.

To prevent prolonged post-arrest detention, Article 124 of the 1996 CCPL provides that in ordinary cases the police must complete their investigation within 2 months. If a case is complicated and the police cannot complete the investigation within 2 months, with the approval of the procuratorate at a higher level, they may extend the investigative detention for another month. In normal cases, the CCPL of 1996 therefore allows the police to detain a suspect for a maximum of 3 months while conducting the investigation.<sup>43</sup> The setup of time frame for the investigation tries to bring suspects to trial in a reasonable time as required by Article 9(3) of ICCPR.<sup>44</sup> As discussed in Chapter Four, the revisions removed or restricted the ability of the court, prosecutor and the police to repeatedly invoke a need for “Supplementary Investigation”.<sup>45</sup> The “Supplementary Investigation” remanded to the police is compelled to conclude within one month.<sup>46</sup> Before this restriction is being placed, in practice, some suspects could remain in detention indefinitely while the case passed back and forth between the judicial authorities. Because there were no restrictions on how often this measure could be used, the clock could restart for the relevant time limits of detention whenever this measure was requested. Its implement was found to have seriously breached the requirements on the reasonable time limits of the detention in Article 9 (3) of ICCPR.<sup>47</sup> Therefore the new requirements at least help to reduce the prolonged detention and drive the reform in a positive direction to fulfil the international obligation under Article 9(3), and also Article 14(2) of ICCPR as discussed in Chapter Four.<sup>48</sup>

There is one more new measure under the reform to control the time limits for the pre-trial detention. According to Article 52, the suspect in custody and his legal representatives or near relatives shall have the right to apply for their release upon

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<sup>43</sup> CCPL 1996, Article 124.

<sup>44</sup> See Chap2, 5.4, pp.59-61.

<sup>45</sup> See Chap4, 3.1.3, pp.239-240.

<sup>46</sup> CCPL 1996, Article 140; Notice of the Supreme People’s Procuratorate on Printing and Distributing the Opinions on Several Issues concerning Procuratorial Organs’ Implementation of Criminal Procedure Law, 31/12/1996.

<sup>47</sup> See Chap2, 5.4, p.59; Chap3, 3.5.3, pp.130-133.

<sup>48</sup> See Chap4, 3.1.3, p.240

bail pending trial.<sup>49</sup> As this right previously only applied to pre-arrest detention in the CCPL of 1979, the revisions extended it to all five forms of pre-trial compulsory measures. This legitimate claim for release in exchange for bail has started to follow the safeguards set out in Article 9(3) of ICCPR, that pre-trial detention shall not be the general rule.<sup>50</sup> Moreover, according to Article 75 of 1996 CCPL, suspects, his legal representative and near relatives shall have the right to demand cancellation of the compulsory measures that exceeds the time limits.<sup>51</sup> As observed from these provisions literally, it is for certain that they are at least, roughly, going to offer a chance for a suspect to review the detention according to law. It shows a will to attain the requirement of Article 9(4) of ICCPR to create procedures for challenging the lawfulness of detention and obtaining release if the detention is unlawful.<sup>52</sup>

#### **2.4 Restriction on the Police Power to Arrest**

The CCPL of 1996 tries to make a distinction between the police power to arrest and to detain through separating the decision power and implementing power of the arrest measure, which is aimed to establish a restrict system on arrest. According to Article 59 of 1996 CCPL, to make an arrest, the police must, in all cases, seek approval from the procuratorate or decision by the court.<sup>53</sup> A suspect can be arrested without delay “when there is evidence to support the facts of a crime and the criminal suspect or defendant could be sentenced to a punishment of not less than imprisonment, and if such measures as allowing him to obtain a guarantor pending trial or placing him under residential surveillance would be insufficient to prevent the occurrence of danger to society”.<sup>54</sup> Therefore, there are the necessity of an arrest should be based on consideration of three requirements. Firstly, the law implies that only those whose offenses are verified by evidence shall be arrested. In 2006, SPP further specified that “the evidence to prove the facts of a crime” means that there is

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<sup>49</sup> Ibid., Article 52.

<sup>50</sup> See Chap2 5.5, pp.61-63.

<sup>51</sup> CCPL 1996, Article 75;

<sup>52</sup> See Chap2, 5.6, pp.64-66; Chap3, 3.6, pp.146-156.

<sup>53</sup> CCPL 1996, Article 59; SPC Interpretation by the SPC 1998, Section 77; SPP Rules, 1999 Rule 103 and 104.

<sup>54</sup> CCPL 1996, Article 60; also see Joint Regulation 1998, Regulation 26; SPP Rules 1999 Rule 86.



evidence to prove the facts that a crime has committed.<sup>55</sup> Secondly, in order to ensure the suspect's appearance at trial, the law presumes that a fixed term imprisonment is one of the conditions to for arrest because the suspect is more dangerous or more likely to flee. Thirdly, the decision to arrest must be based on consideration whether there are risks presenting that the suspect is a danger to the community or he is likely to flee and there is no other measures exist to avoid them. Therefore, the law implies that if a fix-term imprisonment is presumed, a suspect may still be allowed a guarantor pending trial or be placed under house surveillance.

To ensure that a decision to arrest is made in a timely fashion, the CCPL of 1996 provides that if the public security authority deems it is necessary to arrest a detainee, it shall, within 3 days after the detention, submit written request of approval of arrest together with the case file and evidence to the Procuratorate or the court to testify the necessity and lawfulness of the arrest.<sup>56</sup> Once the police submit to the procuratorate a request for arrest, the procuratorate will examine the application of arrest and must make a decision whether or not to authorize arrest, within 7 days if a suspect is already detained by the police, or within 15 days if a suspect is not detained.<sup>57</sup> If approval is denied, the police may seek review but the detainee must be released.<sup>58</sup> This new restriction placed on the police seeks to strengthen the legal supervisions of the procedures for arrest and to afford better protections to suspects being properly implemented by the police. Therefore it is a positive sign of real progress in the direction to guarantee the right to be brought before a judge or other judicial officer authorized by law to exercise judicial power, as it is spelt out in clear terms under Article 9(3) of ICCPR.<sup>59</sup>

## **2.5 Effort against Illegally Prolonged Detention**

Unlawful extension of detention is a kind of “stubborn disease” that is difficult to

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<sup>55</sup> The Quality Standard of Reviewing arrestment for the People's Procuratorate (Trail), 28/09/06, Article 4.

<sup>56</sup> Article 66 and 69 of CCPL 1996.

<sup>57</sup> Ibid., Article 69; SPP Rules 1999, Rule 103 and 104.

<sup>58</sup> CCPL 1996, Article 70.

<sup>59</sup> See Chap2, 5.3, pp.55-58; Chap3, 3.5.4, pp.134-137.

cure in judicial practice in the country.<sup>60</sup> It has great interference on the liberty of a person who is presumed to be innocent. The phenomenon has long caused great concerns and drawn sharp criticisms in and outside China. With numbers of cases on the list, there are three forms of extended detentions in China: extended by public security authorities during the period of criminal police investigation, extended by public prosecution authorities during the period of processing cases and extended by judicial authorities during the period of court investigation. According to statistics released by SPP, at the end of 2002, there were 43,438 suspects endured illegally prolonged detention.<sup>61</sup> From 1987 to 2001, the SPC, SPP and the MPS issued as many as 20 official documents on settlement of the problem of unlawful extension of detention and tried to meet the requirement of Article 9 and Article 14(2) and 14(3)(c) of the ICCPR as to the reasonableness of the period of pre-trial detention. For example, in 1998, the SPC, the SPP and the MPS Jointly issued the *Notice on Resolute Settlement of the Problem of Unlawful Extension of Detention in Strict Implementation of the Provisions of the Criminal Procedure Law for the Time Limit of Detention of Criminal Suspects and Defendants (Notice on Resolute Settlement)*, which is still valid today.

Since late 2002, the MPS, the SPP and the SPC have coordinated efforts with one another in investigating cases of extended detention accordance with the law. In May 2003, the Chinese police, prosecution and judicial authorities jointly launched a campaign to solve the problem of extended detention further. It is a popular campaign for the realization of “sunshine custody” (阳光羁押) named by the academic.<sup>62</sup> Later, the *Notice on Practical Prevention and Correction of Cases of Extended Detention in Strict Compliance with the Criminal Procedure Law* was jointly issued by the MPS, the SPP and the SPC on November 12, 2003. Obviously,

<sup>60</sup> See Leiming Wang and Huanqing Wu, “A Look into Extended detention – How Far Away We Are From Sunshine Custody”, Xinhua News, 10/11/03, <http://www.people.com.cn/GB/shehui/1063/2179276.html>; Genju Liu and Lixin Yang, “Judicial Review Concerning the Compulsory Measure Issued by Investigative Authorities”, (2002) 4 Criminal Science, p.70.

<sup>61</sup> This number was revealed by SPP at the 12<sup>th</sup> Procuratorate National Working Conference, 29/06/06, see Zhiyong Pei, “The Prosecution Authority has Strengthened Judicial Supervision and 3 Million People had been Prosecuted in Last 3 Years”, People’s Daily, 30/06/06, <http://politics.people.com.cn/GB/1026/4545809.html>.

<sup>62</sup> See Leiming Wang and Huanqing Wu, *op.cit.*, fn 58; also see China’s human right net.

this notice made an effort to fundamentally put an end to the occurrence of cases of extended. It tried to attach equal importance to both the substantive law and procedural law, to emphasize correct application of the 1996 CCPL on the basis of respecting human dignity and safeguarding human rights, and to establish the concept that any extension of the period of detention for trial means violation of law.

During these years, Chinese courts applied administrative or disciplinary sanctions to a large number of their functionaries who were found to have violated relevant legal provisions for the time limit of the processing cases. Those were found to have committed acts constituting crime would be investigated to establish their criminal responsibilities.<sup>63</sup> Noticeably, in August 2003 the system of public supervisors (人民监督员) was introduced, in which procuratorate authority invites people from all walks of life to act as “public supervisors” for better monitoring of the work of judicial departments on unlawfully prolonged custody involving suspects, aiming to ensure justice and curb wrong verdicts.<sup>64</sup> The pilot scheme of instituting people’s supervisors is proceeding smoothly and has yielded good results. Until 2007, the range of the experiment has been extended, involving 86 percent of procuratorates throughout the country.<sup>65</sup> The SPP urges to institutionalize and improve this measure to better regulate law enforcement behaviour.<sup>66</sup>

The SPP also adopted the *Several Provisions from the Supreme People’s Procuratorate Regarding the Prevention and Correction of Extended Detention in Procuratorial Work* at a meeting held on September 24, 2003, which was promulgated and became effective on November 24, 2003 as well. The requirements in this regulation to the procuratorates at each level include: to ensure the procedures on arrest and other compulsory measures being applied correctly accordance with the

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<sup>63</sup> See e.g. The Notice on Practical Prevention and Correction of Cases of Extended Detention in Strict compliance with the Criminal Procedure Law, 12/11/03, para 5; SPC Work Report 2003-2008; Provisions on the Application of the Term of Criminal Custody by Public Security Organs, 27/01/06, chapter 4;

<sup>64</sup> See Provision on the system of the Public Supervisors by the Supreme People’s Procuratorate (for Trial Implementation), 26/08/2004; also see SPP Work Report of 2004.

<sup>65</sup> SPP work Report of 2007 and 2008.

<sup>66</sup> Ibid.

relevant provisions of the CCPL, to implement and improve the system of hearing and notification and to put into effect the system of sharing information about the status of a detention.<sup>67</sup> The procuratorates are also demanded to establish a mechanism for complaining and correcting unlawful extension of detention.<sup>68</sup> The system for strict investigation and prosecution to the relevant personnel liabilities with extended detentions shall be further strengthen and carried out.<sup>69</sup> The regulations are intended to guide the practical work of public prosecution authorities at lower levels and spell out specific measures to prevent unlawful extension of detention. Moreover, public hotlines to hear reports of job-related human rights violations, including unlawfully extended detentions, have been established by the SPP.<sup>70</sup> It can be able to provide important clues for tracking down illegal prolonged custody.

At the same time, in order to fundamentally solve the longstanding problem of extending detention, particularly during the period of investigation, Xiao Yang, the President of the SPC, explicitly proposed the principle of bringing whoever is found guilty to justice and releasing whoever is innocent.<sup>71</sup> The initiation of this principle designed to practically prevent and redress unlawful extension of detention according to the principle of the presumption of innocence under Article 14(2) of ICCPR is yet another major progress in the reform of China's legal system. It contributes to fundamentally negating the mentality of presumption of guilt, and is based on safeguarding the human rights of suspects and respecting the principle of fair trial.<sup>72</sup> Moreover, the SPC promulgated on December 1, 2003 the *Notice on the Implementation of Ten Systems to Practically Prevent the Occurrence of New Cases*

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<sup>67</sup> Several Provisions from the Supreme People's Procuratorate Regarding the Prevention and Correction of Extended Detention in Procuratorial Work, 24/11/03, Provision 1-6.

<sup>68</sup> Ibid., Provision 7.

<sup>69</sup> Ibid., Provision 8.

<sup>70</sup> See SPP Work Report of 2004.

<sup>71</sup> See Yu Tian, "Clear up Situations involving Extended Custody and Xiaoyang said Suspects who cannot be found guilty should be released", Xinhua News, 25/08/03,

[http://news.xinhuanet.com/newscenter/2003-08/25/content\\_1042837.htm](http://news.xinhuanet.com/newscenter/2003-08/25/content_1042837.htm)

Also see News in English, "Courts Correct Custody Quandary", Xinhua News, 01/12/03,

[http://news.xinhuanet.com/english/2003-12/01/content\\_1206207.htm](http://news.xinhuanet.com/english/2003-12/01/content_1206207.htm).

<sup>72</sup> Also see Chap4, 3.1.4, pp. 240-242.

*of Extended Detention.* The implementation of the ten systems prescribed by this notice is intended to provide a mechanism to strictly prevent any extension of detention in judicial work in an effort to regularize and institutionalize the law enforcement in China. China may genuinely succeed in fundamentally solving the problem of unlawful extension of detention only by earnestly implanting the principle of the presumption of innocence into the minds of the personnel with the law enforcement authorities at all levels and enabling them to implement it in their practical work. This Regulation shows a major embodiment of positive development of China's legal system towards the international common minimum standard of criminal justice.

A promising development is that many of such reforms are currently kept on being discussed and debated on China. For example, in the autumn of 2003, an international conference in Shanghai addressed the problems facing criminal defence lawyers in China, including the lack of access to detained clients and other issues relating to pretrial detention.<sup>73</sup> They suggested that the adoption of the right to remain silent and the presumption of innocence, which have been the hot topics in Chinese legal circles for quite a while, would remove the incentives which the police currently have to hold suspects for as long as it takes to extract a confession.<sup>74</sup> Moreover, there is a discussion, which will be addressed below, of the need for independent judicial review of arrest and detention, and the right for a detainee to challenge the lawfulness of his detention through a habeas corpus-type provision.<sup>75</sup> In July 2006, another international symposium on comparative criminal justice was held in Beijing.

According to official statistics, the SPP only received 85 hotline reports in 2005 on

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<sup>73</sup> See Chap7, 4.2, pp. 442-456.

<sup>74</sup> Also See Chap6, 3.3.2, pp.373-374.

<sup>75</sup> The brief summarization of the conference see Wei Zhou and Erxi Chao, "Reflection on Problems, Approaches and Value Orientation – Summary of the International Conference on Countermeasures to Criminal Defence", (2003) 11 Journal of Shanghai Jiaotong University, pp.16-19.

extended custody, compared with the figure as 1,991 in the year of 2002.<sup>76</sup> The SPC pronounced in March 2005 that they had cleared all cases of illegal extended detention.<sup>77</sup> China will step up fight against unlawful extension of detention by implementing more stringent monitoring system across the country, the SPP announced in September 2006.<sup>78</sup> The SPP's 2007 Report to the NPC focused on the increased level of effort it has been devoting to improving the criminal justice system by concentrating on "strengthening legal supervision and safeguarding fairness and justice", which are the central themes of the SPP's ongoing procuratorial reform process.<sup>79</sup> In the same year, the MPS constructed *The Provisions on the Application of the Term of Criminal Custody by Public Security Organs* for preventing any injury on the legitimate rights and interests of criminal suspects due to overdue custody. There were at total of 85 people endured illegally prolonged detention and the cases have been corrected by the procuratorial organs in 2007, while the same type of figures stood at 24,921 in 2003.<sup>80</sup>

### 3. Existing Problems in the Current System

Despite several positive steps carrying on, the revised provisions of the CCPL on pre-trial compulsory measures system and their applications are still far from a system that a deprivation of liberty must in all cases be carried out in accordance with the law and not be arbitrary, as the requirement in international standards, which mainly are Article 9 of ICCPR. An overwhelming majority of people awaiting trial in China are still detained in custody before trial.<sup>81</sup> Contrasting the requirement of Article 9(3) of ICCPR, detention may still be the general rule for the suspects in

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<sup>76</sup> See SPP Annual Working Report 2006; Shiyu Lin, "Consolidated Work of Correcting Extended Detention Has Been Effective; 96.2% Drop in New Cases of Extended Detention Throughout the Nation Last Year", Procuratorial Daily, 21/05/06, <http://www.jcrb.com/n1/jcrb942/ca491551.htm>.

<sup>77</sup> See SPC Annual Working Report 2005.

<sup>78</sup> See "SPP to step up fight against illegally prolonged custody", Xinhua News, 02/09/06, [http://news3.xinhuanet.com/english/2006-09/02/content\\_5038902.htm](http://news3.xinhuanet.com/english/2006-09/02/content_5038902.htm).

<sup>79</sup> See SPP Annual Working Report 2008.

<sup>80</sup> *ibid.*

<sup>81</sup> See the data concerning the rates of suspects being detained before trial during 1992-2001, Law Yearbook of China (Beijing: the Press of Law). Also see latest report: Du Meng, "The Pre-trial Detention Rate is 85% in the Last Ten Years", Legal Daily, 03/03/10, [http://www.legaldaily.com.cn/index/content/2010-03/03/content\\_2071726.htm?node=21768](http://www.legaldaily.com.cn/index/content/2010-03/03/content_2071726.htm?node=21768).

China.<sup>82</sup> The widespread use of illegal or extra-judicial measures to detain suspects even allows law implementation agencies severely to circumvent the minimal safeguards for the rights of suspects contained in the CCPL of 1996.<sup>83</sup> The discussion below will mainly focus on some relative parts under CCPL.

### 3.1 Limitations on the Notions of the Pre-trial Detention

Lubman mentioned that as a part of the criterion for society, law is tightly connected with especially history, the structure of society, and cultural tradition.<sup>84</sup> Internationally accepted human rights standards, especially international criminal human rights norms, help protect the individuals from arbitrary detention in the context of domestic criminal justice. But most of the law enforcement authorities and the general public in China lack of human right education and therefore also lack of the knowledge and understanding the essence of the right to liberty in the criminal justice. While it is laudable that the criminal procedure law in China is gradually in place and trying to require liberty deprivations to be made in accordance with a procedure prescribed law, the underlying ideologies safeguarding the fundamental right of liberty for suspects have not been widely aware and accepted within society due to the persisting of the pre-existing dominant ideologies.<sup>85</sup> Particularly, as illustrated in Chapter Four, the principles of fair trial and the presumption of innocence have not yet been genuinely accepted in China.<sup>86</sup> A mentality of “protecting the interests of the majority of people is the maximum impartiality” is actually a deep-rooted legal tradition in practice instead.<sup>87</sup> These dominant ideologies clearly still have strongly impacted and reflected on both the attitude and behaviour of both the authorities and the general public to the criminal justice, and particularly to the human right protection for suspects. Therefore, these influences

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<sup>82</sup> See Chap2, 5.5 pp.61-62; *Wemhoff v Germany*, Chap3, 3.5.2, p.129.

<sup>83</sup> The detailed discussion about extra-judicial detention in China see Sarah Biddulph, “The Production of Legal Norms: A Case Study of Administrative Detention in China”, (2004) 20 (2) UCLA Pacific Basin Law Journal, pp.217-277; Randall Peerenboom, *op.cit.*, fn 11, pp. 999-1045.

<sup>84</sup> Pitman B. Potter, *The Chinese legal System: Globalization and Local Legal Culture*, (Routledge: London & New York, 2001), pp. 4-15.

<sup>85</sup> See Chap4, 2.1, pp.212-221.

<sup>86</sup> See Chap4, 4.1.1, pp.245-249; 4.2, pp.254-257.

<sup>87</sup> See Chap4, 2.1.3, pp.218-221.

have firstly been shown on both the legislations of the criminal procedure and its comprehension and implementations. It is likely that the gap between the law and practice will actually grow wider in China's criminal justice system if the legal culture in the society has not been well-developed.<sup>88</sup>

### 3.1.1 The Rare Use of Alternative Preventive Measures

According Article 50 in the CCPL of 1996, the courts, the procuratorates and the police may, depending on the circumstances of a case, issue a warrant to compel the appearance of the criminal suspect or defendant, order him to obtain a guarantor pending trial or subject him to residential surveillance. However, deeply influenced by the crime-control oriented ideology as discussed in Chapter Four, in common practice suspects normally are regarded as danger to the society in China.<sup>89</sup> Once the investigative organs suspect some citizen, he will be required to afford the responsibility of cooperating to punish crimes. In practice, there is a common view in the Chinese criminal justice regarding that suspects concerned should passively sacrifice their personal freedom to wait for the postponed completion of work by law enforcement authorities that should have been completed in time. Therefore, there is no intentions or even in passing considerations concerning the possibility of applying other preventive measures, such as bail or release under residential surveillance, to secure the conduct of the trial in the law and practice. A consideration of the justification of the detention as required in ECHR therefore is commonly be ignored in China.<sup>90</sup> As a result, the proportion of application of “granting of bail and awaiting trial” or “residential surveillance” to avoid the custodial detention is very small, whether at the initial or at a later stage of the criminal proceeding.<sup>91</sup> The right to a provisional release once the continuing detention ceases to be reasonable cannot be guaranteed.<sup>92</sup> The provisions and their implement concerning non-custodial

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<sup>88</sup> See Jonathan Hecht, *Opening to Reform? An Analysis of China's Revised Criminal Procedure Law*, (New York: Lawyers Committee for Human Rights 1996), [hereafter Jonathan Hecht, *Opening to Reform?*].

<sup>89</sup> see Chap4, 2.1.1, pp.213-214.

<sup>90</sup> See *Neumeister v. Austria*, Chap3, 3.5.1, p.122-123.

<sup>91</sup> See Working Report of SPP 2006; also see Zongbin Hou, Report on Implementation of CCPL 1996.

<sup>92</sup> See Chap2, 5.4, p.58-59.



detention in China contravene Article 9(3) of ICCPR that pre-trial detention in custody shall be used as a means of “last resort” in criminal proceedings.

In all the decisions on the implementation of the compulsory measures in China, the authorities usually relied on the abstract reasons of public interests, such as the time-consuming in investigation and collection of evidence related to severe crimes or uncertain identity, risk of flight, the interference with the course of justice prior to trial, and the need to maintain public order and protection of suspects. With all these reasons, the investigative organs were provided with sufficient power to prolong the detention in the CCPL of 1996. However, there is no requirement in the law to ascertain whether such ground is sufficient and relevant, or exists a genuine public interest to justify a departure from the fundamental rule of respect for individual liberty. The reasons to use and extend the detention have seldom been substantiated in each case while these factors cannot justify the detention pending trial in each case.<sup>93</sup> Firstly, in practice, the police and procuratorate may decide the continued detention merely in an identical form of words and therefore the detention may exceed the reasonable-time requirement, as shown in *Sarban v. Moldova* and *Solmaz v. Turkey*.<sup>94</sup> Secondly, the continued detention might not be justified solely on either of those grounds set in the law, as reflected in *Chraidi v. Germany*.<sup>95</sup> The lack of a sufficient explanation on how the formalistic grounds provided by law applied to the accused’s case for the allowance of arrest and detention in China is not an accidental or short-term omission, but become a rather customary way of dealing with applications for the release pending trial in practice.<sup>96</sup> The implementation of the continuing detention in China might be viewed as unjustified on a person presumed to be innocent before trial. This is inconsistent with Article 14(2) and Article 9(3) of ICCPR, which respectively guarantee presumption of innocence and the right to presumption of release pending trial.<sup>97</sup>

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<sup>93</sup> See Chap3, 3.5.1, p.123; *Khudobin v Russia*, Chap3, 3.5.3, p.131.

<sup>94</sup> See *Sarban v. Moldova*, Chap3, 3.5.1.1, pp.125-126; *Solmaz v. Turkey*, Chap3, 3.5.3, pp.132.

<sup>95</sup> See *Chraidi v. Germany* Chap3, 3.5.1.1, pp.124-125.

<sup>96</sup> See *Letellier v France*, Chap3, 3.5.1.3, p.128.

<sup>97</sup> See Chap2, 5.4, pp. 58-59.

### 3.1.2 No Separation between Detention and Arrest

The setup of China's arrest procedure considered little function of that the arrest should have to be prevented from depriving the personal liberty at will. There are different conceptions of detention and arrest between China and the international routine practice.<sup>98</sup> There is no separation between arrest and pre-trial custodial detention in China. Firstly, in order to prevent a suspect to escape from the detection, litigation and judgment and avoid social danger in Chinese criminal justice, both detention and arrest are the compulsory system of depriving the personal liberty of a suspect and detaining him or her for a certain period on the basis of the law adopted by the police, procuratorate and court. Secondly, the arrest and detention thus have also become important detection methods in the Chinese criminal proceedings. The investigative organs take it for granted that the term in which a suspect is held in custody is the best timing for information gathering or to obtain the confession of the suspect so that the phenomena of inquisition by torture and overtime detention happen frequently even though numerous rules on prohibition of torture.<sup>99</sup> Thirdly, while a crime-control approach to criminal procedure and the whole legal culture still prevails in legal practice, as Yan Youyi regards, arrest and detention is also to be used by the law enforcement as punishment to appease victims and the public in China, though the CCPL was not deliberately designed to this effect.<sup>100</sup>

Therefore, the arrest mostly means certain period of custodial detention. Detention House Rules of China stipulates that the accused should be detained in the detention house governed by the police.<sup>101</sup> This makes the accused to become the object for detection and inquisition, and be totally controlled by the detection organs. To meet

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<sup>98</sup> The in-depth introduction concerning international practice of arrestment and detention see Richard Vogler, *A World View of Criminal Justice*, (Aldershot and Burlington: Ashgate Publishing Limited, 2005). Jianlin Bian and Mei Liu, *Foreign Criminal Procedure Law*, (Beijing: China University of Politics and Law Press, 2008); Weidong Chen and Guangwei Sui, "The Characteristics of Modern System of Custody: Its Purposes, Functions and Necessary Elements for Implementation", (2004) 9 *Justice of China*, pp59-62; Phil Fennell, *Criminal justice in Europe: a comparative study*, (Oxford: Oxford University Press, 1995).

<sup>99</sup> See Chap6, 2.2, pp.343-348; chap4, 2.1.2, pp.216-217.

<sup>100</sup> Youyi Yan, "The Arrest as Punishment", (2008) 10 *Punishment & Society*, Issue.1, p.14.

<sup>101</sup> Detention Center Rules of China, 17/03/90, Article 2.

the needs of their own work, the compulsory measure, especially detention and arrest, is widely used to limit suspects' liberty more than the factual requirements of the situation in case would call for. Arrest is the most severe custodial detention in the compulsory measures of criminal proceedings, which not only deprives the personal liberty of the suspect at the time when the action conducts but usually also keeps them in the custody till the court's judgment came into effect.<sup>102</sup>

As shown above, the CCPL 1996 sets restrictions on the power of arrest.<sup>103</sup> Some scholars, such as Chen Weidong, are criticizing the legal prescriptions for arrest as too strict and the standards for pre-trial detention as too high, which is not sufficient to strike criminals speedily.<sup>104</sup> Nevertheless, the standard for approval of arrest has been further relaxed indeed, compared with the CCPL of 1979. Firstly, the three legal requirements for arrest in Article 60 are not implemented firmly in practice.<sup>105</sup> The condition of fix-term imprisonment and the consideration of alternative measures are usually disregarded once behaviour constitutes a crime. Instead of considering those three requirements together, the judicial interpretation suggests that where one of the requirements is met, the suspect can be arrested.<sup>106</sup> There is no standard of proof necessarily to demonstrate whether there is any risk of the suspect's flight or corresponding danger to society.<sup>107</sup> Secondly, instead of having to produce clarification on the principal facts of the crime that required under Article 40 of the 1979 CCPL, arrest can be authorized just if there is evidence to prove the facts of the crime under Article 60 in the CCPL of 1996.<sup>108</sup> Though the high level of suspicion might not be required at this stage, as shown in *Brogan v UK* and *Murray v UK*, it may satisfy the requirement of the "reasonable suspicion".<sup>109</sup> However, research into

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<sup>102</sup> See *Clifford McLawrence v. Jamaica*, Chap2, 5.1, p. 47; *Baranowski v Poland*, Chap3, 3.2.2, p.114.

<sup>103</sup> See 2.4, pp.278-279.

<sup>104</sup> See Weidong Chen, *Detention System and Human Rights Protection*, (Beijing: China's People's Procuratorate Press, 2005), pp.97-98; see also Wenzhi Cao, "A Comparison on the Arrest Systems between China and America", (2004) 5 *Journal of Chinese People's Public Security University*, p.94.

<sup>105</sup> CCPL 1996, Article 60; also see 2.4, p.274.

<sup>106</sup> Provision 1 of Provisions of Supreme People's Procuratorate and Ministry of Public Security on Relevant Issues concerning Application of Arrests According to the Law, 16/08/01.

<sup>107</sup> See *Neumeister v Austria* (No 1), Chap3, 3.5.1, p.122-123.

<sup>108</sup> CCPL 1979, Article 40; CCPL 1996, Article 60.

<sup>109</sup> See *Brogan v UK* and *Murray v UK*, Chapter 3, 3.3, p.119.

the widely use of arrest in China is shown that the concept of “evidence” to prove the facts of crime is interpreted very flexibly by the police officers in practice. Sometimes, the national authorities have not fulfilled the obligation to furnish some facts or information objectively to show that the arrested person was reasonably suspected of having committed alleged offence.<sup>110</sup> The suspects can be being held in custody as long as they can even just by neglecting the law under the excuse of tracing the truth.<sup>111</sup> The arrest and detention discretion in Chinese criminal justice therefore may not exercised in accordance with “reasonable grounds” for suspicion as required in *Fox, Campbell and Hartley v UK*.<sup>112</sup> This practice should never be in conformity with the important principles expressed or implied in Article 9(1) and 14(2) of ICCPR.

### **3.2 Problems with the Length of the Time Limits**

Despite the improvements on the time limit for the compulsory measures made in the new CCPL as discussed above, the length of permissible investigatory detention is not easily gleaned from the CCPL of 1996. The time limits on pretrial compulsory measures prescribed in the CCPL of 1996 still fall short of the substantial standards articulated in the ICCPR and other international documents completely.<sup>113</sup> Detention exceeding time limit was described as the “longstanding difficult problem” (老大难问题) between construction of a socialist legal system and an enforcement practice.<sup>114</sup> The challenges have been huge as discussed below.

#### **3.2.1 Defects concerning Non-custodial Detention**

Besides the bias of the legislative concept as illustrated above, the laws have leakages in its time frame regarding the non-custodial detention as well. For summons, the CCPL of 1996 does not limit the number of times that summons may

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<sup>110</sup> See Chap3, 3.3, p.118.

<sup>111</sup> *Menesheva v Russia*, Chap3, 3.2.2, p.115. *Van Alphen v the Netherlands*, Chap2, 5.1, p. 49.

<sup>112</sup> See *Fox, Campbell and Hartley v UK*, Chap3, 3.3, pp. 116-117.

<sup>113</sup> Report on the Visit to the PRC, E/CN.4/2005/6/Add.4, 29/12/04, para. 32.

<sup>114</sup> See “China has Changed by Rule of Law: 10 Years Journey and Testimony on Rule of Law in China – Report at the 10<sup>th</sup> Implementation Anniversary of the Strategy of Governing the Country according to the Law”, 12/09/07, <http://npc.people.com.cn/GB/14840/6250093.html>.

be used, nor does it specify how long authorities must wait between the uses of consecutive summonses. According to some reports, some police repeatedly applied the summons measure to the same person without discontinuing questioning.<sup>115</sup> Furthermore, a similar administrative form of detention, called “taking in for questioning” (留置盘问) and defined in the People’s Police Law, stipulates that the police have the power to detain people for questioning for as long as 24 hours, with a possible extension of an extra 24 hours.<sup>116</sup> Actually there is no apparent legal differentiation between this form of questioning and summons in terms of crime investigation in practice. Therefore, these two methods can be conveniently manipulated or abused by officials. It suggests that officials have employed these two measures in turn as a means to hold suspects in custody pending trial for a longer time period if they cannot attain enough evidence to arrest the suspects.<sup>117</sup> In contrast, even though the threat posed to Britain by terrorism from Northern Ireland in 1988, British provisions which authorized the detention without judicial oversight of a person suspected of terrorism offences for 102 hours were found to breach the equivalent of Article 5(3) in *Brogan v UK*.<sup>118</sup> Therefore the deficiency of the provision as to the time limits for summons and its implementation in China would seriously contravene the “promptness” in Article 9(3) of ICCPR.<sup>119</sup>

Also the practical application on time limit of the “residential surveillance” and “granting of bail and awaiting trial” is chaotic. Article 58 of 1996 CCPL stipulates that the maximum period for suspects or defendants shall not exceed 12 months and that of residential surveillance shall not exceed 6 months. However, the implementing regulations stipulated by public security, procuratorate and the courts respectively, which stipulates that each of the organs can re-calculate the period for those two measures. This leads to some unusual phenomena, for example, repeatedly

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<sup>115</sup> See Guangzhong Chen and Yinghui Song, *Research on the Issues in Implementation of the Criminal Procedure Law*, (Beijing: China Legal Publishing House, 2000), pp83-84.

<sup>116</sup> People’s Police Law of PRC, 08/02/95, Article 92.

<sup>117</sup> See *Albert Womah Mukong v. Cameroon*, Chap2, 5.1, pp.49-50.

<sup>118</sup> See *Brogan v UK* Chap3, 3.5.5.1, pp.138-139.

<sup>119</sup> See Chap2, 5.3, pp.55-56.

carried “granting of bail and awaiting trial” on the same person under the same reason of the existence of a suspicion.<sup>120</sup> The total period of “residential surveillance” in China can be 18 months without any judicial control. The total period of “granting of bail and awaiting trial” can be as long as 3 years. This makes the originally slight compulsory measure to become a severe measure that restricts the personal liberty for a rather long period without any judicial control.<sup>121</sup> Either the 18 months or the 3 years period might be considered as an “extremely long period” by HRC if the national authorities have not displayed “special diligence” in the proceedings’ conduct.<sup>122</sup> Obviously the restriction imposed by this kind of non-custodial detention is intensive as a deprivation of liberty to suspects rather than a way to release pending trial.<sup>123</sup> Therefore, a prolong period of the “residential surveillance” and “granting of bail and awaiting trial” without judicial control in practice may also greatly conflict with Article 9(3) that the accused is brought promptly before a judge.

### **3.2.2 Limitation on Custodial Detention**

#### **3.2.2.1 Prior to Arrest**

Compared with the CCPL of 1979, the CCPL of 1996 substantially extends the custodial detention period in several circumstances. Firstly, according to Article 69 in the CCPL of 1996, under special circumstances, the time limit for submitting a request for examination and approval of arrest may be extended by 1 to 4 days.<sup>124</sup> Moreover, in the final version of the CCPL of 1996 passed by the NPC, the public security organs had managed to claw back more power to sufficiently enforce their investigation function than the discussion draft would have allowed, in effect incorporating many aspects of “Shelter and Investigation” into the CCPL. Most noticeably, according to Article 61 of the 1996 CCPL, the condition to initiate a pretrial custodial detention have been expanded to when a suspect refuses to tell his

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<sup>120</sup> See *Solmaz v Turkey* and *Baltaci v Turkey* Chap3, 3.5.3, p.130-131.

<sup>121</sup> See *Neumeister v Austria*, Chap3, 3.5.2, p.129.

<sup>122</sup> See Chap2, 5.4, p.61.

<sup>123</sup> See Chap3, 3.2.1, pp.112-113.

<sup>124</sup> CCPL 1996, Article 69.

name or address, and his identity cannot be established; and when the police suspect that the person is a transient criminal repeated offender, or an offender who has committed crimes in conspiracy with other.<sup>125</sup> The latter two circumstances are exactly the same as the categories of persons under which “Shelter and Investigation” was meant for. Under these circumstances, the time limit for submitting a request for examination and approval may be extended to 30 days.<sup>126</sup>

Therefore, as indicated above, since the amended CCPL legally provides the police with the enhanced power to detain when they deal with cases under these additional “circumstances”, such as transient criminals, repeated offenders, and criminal conspirators, issue that arises naturally is how to determine whether a particular offender falls within the statutorily specified categories. Some definitions, however, are provided in *Regulation on the Procedures of Handling Criminal Cases by Public Security Agencies* subsequently issued by the MPS in 1998 which revised in 2007. According to this regulation, transient criminals are those who commit crimes repeatedly by crossing city or county borders; repeated offenders are those who have committed more than three crimes; and offenders who conspire with others to commit crimes are those who commit crimes with one or more other offenders.<sup>127</sup> However, these definitions are obviously vague and broad.<sup>128</sup> The CCPL of 1996 itself contains no definitions of those named offender categories.<sup>129</sup> Therefore, the claim under Article 9(1) of ICCPR might succeed, as the HRC has consistently requires that all law should be sufficiently precise to allow the citizen to foresee with appropriate advice, to a degree that is reasonable in all circumstances, as found in *Van Alphen v the Netherlands*.<sup>130</sup>

Furthermore, scholars have noted that even those current definitions from MPS for

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<sup>125</sup> Ibid., Article 61 (5) (6) and (7).

<sup>126</sup> Ibid., Article 69.

<sup>127</sup> MPS Regulation 2007, Regulation 105(7) and 110.

<sup>128</sup> See *Steel and others v UK* Chap3, 3.2.2, p.114.

<sup>129</sup> see *Baranowski v Poland* Chap3, 3.2.2, pp.114.

<sup>130</sup> See *Van Alphen v the Netherlands* Chap2, 5.1, p. 49.

those “circumstances” are often ignored by the police in practice.<sup>131</sup> When the CCPL of 1996 allows the police to detain suspects under those circumstances for 30 days, some officers seem to feel justified in detaining all suspects up to that limit without any judicial control.<sup>132</sup> This practice has not achieved the promptness requirement to be brought before a judicial body, following *Salov v. Ukraine*.<sup>133</sup> Under this situation, although the police must seek the procuratorate’s approval of arrest within 3 days of the initial detention according to Article 69, it is a fairly common practice that officers would detain a suspect for more than 3 days even though the case they handle does not fall within the statutorily specified categories. In other words, before the approval be obtained from the prosecutor for formal arrest, the police on their own authority without any opportunity for review by a judge can easily subject anyone to incarceration for up to 37 days, which has obviously exceeded much longer than “a few days” as accepted by Article 9(3) of ICCPR.<sup>134</sup> Moreover, comparing with Article 46 of the 1979 CCPL, the period within which the procuratorate must make its decision even has been lengthened in the CCPL of 1996 to 7 days, hence a time limit for legal detention might be a maximum of 44 days.<sup>135</sup> This pre-trial detention can be excessively long to suspects without valid reasons for holding them in custody for the whole period in question.

Noticeably, the MPS also issued some departmental notice and rules interpreting police-related provisions of the 1996 CCPL which further expanded the calculation of the time limits for detention of suspects who were targets of the former “Shelter and Investigation”.<sup>136</sup> In particular, these interpretations asserted that where a criminal suspect’s identity is not able to establish within 30 days, after receipt of approval from the responsible person in the public security organs at county level or

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<sup>131</sup> See Yongsheng Chen, “The Problems, Reasons and Measures of the unsettled Detain in China”, (2003) 4 Chinese Criminal Science, p.71; “The Powers of the Police and the Rights of Suspects under the amended Criminal Procedure Law of China”, (2003) 3 *American Journey of Police*, Vol. 26, p.495.

<sup>132</sup> Yue Ma, *ibid.*, p.497; see Chap3, 3.5.3, pp.133-134.

<sup>133</sup> See *Salov v. Ukraine*, Chap3, 3.5.4 and 3.5.5.1, pp.137-138.

<sup>134</sup> See *McLawrence v. Jamaica* Chap2, 5.3, p.55.

<sup>135</sup> CCPL 1996, Article 69; see CCPL 1979, Article 48: the prosecurate shall make the decision on the application of the arrest within 3 days.

<sup>136</sup> See e.g. MPS Regulations 2007.



above, the time limits for detention will not commence until there is clarification of the name, address and background of the detainee.<sup>137</sup> Moreover, according to the departmental rules initiated by the SPP, if a case is complicated or involved serious crimes, the procuratorate is permitted to make a decision no later than 20 days after receiving the police request.<sup>138</sup> Then the period of detention can be extended much longer than 44 days and indeed it would be easier for the previous measure “Shelter and Investigation” to remain unchanged in practice. All these provisions related with the time limits of custodial detention in the CCPL of 1996 facilitate prolonged detention and severely contradict the right to a prompt appearance before a judge. Therefore, their practical implement may not be in conformity with China’s obligations under Article 9(3) of ICCPR.

This vastly extended detention period seems be justified in China due to the very nature and characteristics of the crimes committed by suspects.<sup>139</sup> The releasing of the labour and commodity markets has brought tens of millions of people from rural areas to cities and coastal areas in search of work. This free movement of people has created a sizable “floating population” (流动人口).<sup>140</sup> These groups move from city to city in search of work, but with little education and no residency cards, it can find only menial and seasonal labour. According to the Asia Times, 120 million Chinese live below the poverty line and an additional 150 million are seasonal migrant worker.<sup>141</sup> This represents a serious threat to social stability. Taking advantage of the weakened police control over the people in large municipal areas, criminals began to use the “floating population” to conceal their activity.<sup>142</sup> They travel from one city to

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<sup>137</sup> MPS Regulations 2007, Article 112; Provisions on the Application of the Term of Criminal Custody by Public Security Organs, 27/01/06, Article 16.

<sup>138</sup> CCPL 1996, Article 69; SPP Rules 1999, Article 99, 103 and 104.

<sup>139</sup> Also see 4.1.1 Chap4, pp.245-248.

<sup>140</sup> See Sheng Zhang “Explanation on Crimes by Floating Population”, (2009) 1 Legal System and Society, p120; T. Wing Lo and Guoping Jiang, “Inequality, Crime and the Floating Population in China”, (2006) 1 Asian Criminology, pp.112-114.

<sup>141</sup> See e.g. News Report, “Chinese Agriculture Program Bears Sweet Fruit”, [http://www.atimes.com/atimes/china\\_Business/HI27Cb01.html](http://www.atimes.com/atimes/china_Business/HI27Cb01.html), Asia Times Online, 27/09/06.

<sup>142</sup> See e.g., Liqun Cao and Yisheng Dai, “Inequality and crime in China”, in Jianhong Liu, Lening Zhang, Steven F. Messner (Eds.), *Crime and Social Control in a Changing China*, (Westport, Conn.: Greenwood Press, 2001), pp.73-88; Jianzhong Fang, “The Empirical Research on Crimes by Floating Population” (2003) 6 Seeker, p.132.

another, not in search of work but in search of opportunities to commit crime. The police may need more time and energy to control these suspects and collect evidence to support a request for arrest. The emergence of transient criminals poses a serious challenge to the police. Available statistics indicated that transient criminals were responsible for a large number of violent and serious property crimes.<sup>143</sup> Therefore the CCPL reformed in 1996 still provides the police with broadened power to detain in order to protect and keep the community harmony as a whole from the urgent desire to control crime at this stage in China. The complexity and special characteristics of the investigations may be acceptable grounds to extend the detention, following some ECHR cases.<sup>144</sup>

However, firstly, the long detention without any judicial control in China are not acceptable, because the complexity of a case can never be taken to the point of impairing the very essence of the right to be brought before a judge or judicial officer promptly, as interpreted in *Brogan and Others v. the UK* and *Murray v UK*.<sup>145</sup> Secondly, as mentioned above, the reasons given for the suspect's continued detention on remand usually cannot justify the length of the detention in custody.<sup>146</sup> Even under the state of emergency, the government has a corresponding duty to ensure that counter-terrorism measures are fully compatible with its obligations under human rights law, as explained in *Brannigan and McBride v UK* and *Aksoy v Turkey*.<sup>147</sup> For example, under the very controversial provision of Terrorism Act 2006 in the UK the detention is then reviewed by a judicial authority for an initial period of 48 hours.<sup>148</sup> So the fact that arrests and detentions are only inspired by the legitimate aim of controlling the crime appears not sufficient enough to ensure that there are specific indications of a genuine requirement of public interest.<sup>149</sup> Therefore a conflict with Article 9(3) of ICCPR in conjunction with Article 9(1),

<sup>143</sup> See e.g. SPC Work Report of 2005; Guixin Wang and Yiyun Liu, "Analysis on Character and Reason of the Crime Committed by the Floating Population in Shanghai", (2006) 3 Population Journal, pp45-46.

<sup>144</sup> See *Wemhoff v Germany*, *W v Switzerland*, Chap3, 3.5.3, p132; Chap2, 5.4, p.59-60.

<sup>145</sup> See *Brogan and Others v. the UK*, Chap3, 3.5.5.1, pp.138-139.

<sup>146</sup> See 3.1.1 pp. 286-287.

<sup>147</sup> See *Brannigan and McBride v UK* and *Aksoy v Turkey*, Chap3, 3.5.5.2, pp141 and 145

<sup>148</sup> See Terrorism Act 2006, Section 23(7).

<sup>149</sup> See Chap3, 3.5.1, p123.

which is belong to the fundamental human rights for suspects, might arise. With the UK's experience on anti-terrorism, especially as *A(FC) and others v Secretary of State for the Home Department* illustrated, further revision for balancing the powers of the police and the rights of suspects is necessary for the criminal justice in China.<sup>150</sup>

### **3.2.2.2 after Arrest**

Articles 125, 126 and 127 in the CCPL of 1996 contain several exceptions to the general three-month requirement to complete the investigation of a case after the approval of arrest for up to 4 months. It provides that in cases which involve crimes being committed in outlying areas to which transportation is inconvenient, in cases which involve organized crime, and in cases which involve serious crimes being committed by transient criminals, if the police cannot complete the investigation within 3 months, they may apply to the procuratorate at the provincial level to have the investigation period extended for another 2 months.<sup>151</sup> If the police are unable to complete the investigation even after the two-month extension and if they believe that a suspect could be sentenced to more than 10 years of imprisonment if convicted, they may apply to the procuratorate at the provincial level to have the investigative period extended for another 2 months.<sup>152</sup> The police thus in cases with exceptional circumstances may detain a suspect for as long as 7 months without being brought before a judge. This possibility is certainly an unwelcoming prospect for suspects and it might constitute violation to Article 9(3) of ICCPR, since the HRC has implied that a six-month limit on pre-trial detention is already too long to be compatible, although "reasonable time" is subject to interpretation.<sup>153</sup>

But a more uncertain prospect for suspects is the circumstance under which the police may extend the detention without even seeking the approval of any other

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<sup>150</sup> See Chap3, 3.5.5.2, pp.142-145.

<sup>151</sup> CCPL 1996, Article 126.

<sup>152</sup> Ibid., Article 127.

<sup>153</sup> See Chap2, 5.4, pp.560-61.

competent legal authorities, which is related to the issue of judicial approval and review on the pre-trial compulsory measure as discussed below.<sup>154</sup> According to Article 128 of CCPL of 1996, the police have the discretion to determine when the time limit of an investigative detention may re-commence under two circumstances. It first provides that while conducting an investigation, if the police find that the suspect has committed a new major crime other than the one under investigation, they may re-calculate the time limit of the detention from the date they discovered the new crime. Second, after a suspect's arrest, if the police cannot establish the suspect's identity because of his refusal to reveal details such as his name and address, the police may decide that the time limit of the detention does not commence until after they can establish the identity of the suspect.<sup>155</sup>

Again, the definitions on these additional circumstances to justify the continued detention in Article 128 are abstract and vacuous. Meanwhile, there is no relative requirement on the number of times it can be applied while the longest time for custody is not clarified in that law or related ordinances. With the same reason as discussed above, the requirement in Article 9(1) of ICCPR as to appropriateness and predictability of the laws and their application would be technically evaded by Article 128 and therefore the essence of the safeguard would be impaired.<sup>156</sup> For instance, there are no details given in the present CCPL on what may constitute the "new major crimes". How to define the major crime also remains vague. Therefore a tactic often used by the police to prolong a suspect's detention in multiple-offense cases is that when the "new major crimes" are the same as the crimes originally charged, but only involve different "circumstances" officials, the detention can be "reset the clock". Even though the police already know that a suspect has committed more than one crime, they would submit the request for arrest on the basis of only one. After the suspect is arrested and detained, at the point when the time limit for the detention is about to run out, they would declare that the suspect is responsible

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<sup>154</sup> See 3.3, pp300-303.

<sup>155</sup> CCPL 1996, Article 128; see also MPS Regulations 2007, Article 112.

<sup>156</sup> See 3.2.2.1, pp.292-293; also see Chap2, 5.1, pp 49-52; and *Steel and others v UK*, Chap3, 3.2.2, p.114.

for another crime. There is no requirement set in the CCPL that the police need to be able to demonstrate the arrested person had been reasonably suspected for having committed a new offence, as required in *Fox, Campbell and Hartley* or *Lukanov v Bulgaria*.<sup>157</sup> The police then may re-calculate the time limit of the detention from the time when they “discovered” the new crime. However, even though there is reasonable suspicion of the involvement of the person concerned in a serious and complex offences, while constitutes sufficient and relevant factor, it alone might not justify to continue being detained, as in *Solmaz v. Turkey*.<sup>158</sup>

Similarly, taking advantage of the provision that permits the investigative officers to calculate the length of detention from the time they can establish a suspect’s identity if a suspect’s identify is not readily known, the police in many cases simply pretend that they cannot establish a suspect’s identity to accomplish the end of detaining a suspect beyond the legally permitted limit. Furthermore, if the procuratorate decides that “for a given reason, the case is unfit for adjudication” for a relatively long period, Article 125 stipulates that with special approval by Standing Committee of the NPC, the time limit on the detention may be extended indefinitely upon request from the SPP.<sup>159</sup> This measure is obviously aimed at dealing with sensitive cases, such as high-profile cases involving dissidents or high-ranking officials. To sum up, a detainee can therefore now effectively be “investigated” for considerably longer than 7 months before formal trial begin, without violating the flexible time limits stipulated in the CCPL of 1996.<sup>160</sup> Again, there is a continuing obligation on the authorities in charge of detention throughout the period of the detention to consider whether its continuation is really justified and if not to release the person concerned there and then, as established in *Wemhoff v Germany*.<sup>161</sup> However, failing to do so and even expanding the power to extend the detention by using the procedural deficiencies, China appears to severely undermine the obligation to Article 9(3) in

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<sup>157</sup> See *Fox, Campbell and Hartley* and *Lukanov v Bulgaria*, Chap3, 3.3, pp.116-117 and 118.

<sup>158</sup> See 3.5.3 Chap3, *Solmaz v. Turkey*, p.132.

<sup>159</sup> CCPL 1996, Article 125.

<sup>160</sup> See *United States v. David M. Hicks*, Chap2, 5.1, pp.51-52; Chap2, 5.4, p.60-61.

<sup>161</sup> See *Wemhoff v Germany*, Chap3, 3.5.2, p.129; Chap2, 5.5, p.61-62.

conjunction with Article 9(1) of ICCPR.<sup>162</sup> Noticeably, following *Aksoy v Turkey*, long periods of unsupervised detention, together with the lack of effective safeguards provided for the protection of suspects as discussed in the coming chapters, facilitated the greater the risk of practice of torture or other arbitrary treatments.<sup>163</sup>

### 3.3 Phenomenon of Unlawfully Prolonged Detention

Promulgation of laws alone is far from sufficient to assure that officers would follow the procedures required by the law. The CCPL of 1996 contains an open statement on the conditions and the time limits to the pre-trial compulsory measures in the CCPL to comply with Article 9 of ICCPR. But Chen Xinliang points out that in practice there is actually no limit to the holding of suspects in custody in China because it can be prolonged limitlessly.<sup>164</sup> Although the official reports all claimed that a large number of cases which contain problems of overly long detention had been collectively liquidated and corrected as mentioned above, the phenomena of holding suspects in custody illegally and holding suspects in custody by police, prosecution or judicial authorities beyond the legal time limits in fact has never been fundamentally eliminated in law enforcement.<sup>165</sup> Such claims that all the illegal prolonged detention cases have been cleared up are impossible to verify. Even if many such cases have been cleared, only to launch a major campaign, “sunshine custody” as mentioned above, actually cannot put an end to the problem of illegal prolonged detention nationwide immediately and permanently. Observed from the official statistic data in recent years, new cases of illegal prolonged detention have still occurred constantly shortly after or even while redressing the old cases.<sup>166</sup> The phenomena of maintaining detention without trial due to reasons, such as the shortage of the resources and the disputes of the criminal jurisdiction, have not been effectively curbed. It is still far from achieving a final success in uprooting this “chronic disease”.

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<sup>162</sup> See *Michael and Brian Hill v Spain*, Chap2, 5.5, p.63.

<sup>163</sup> See *Aksoy v Turkey*, Chap3, 2.3.3 and 3.5.5.2, pp.97 and 145; Chap2, 5.8, pp.67-70; Chap6, 3.2.2, pp.359-361.

<sup>164</sup> See Xingliang Chen, *The Mission of the Rule of Law*, (China: Law Press, 2001), p.409.

<sup>165</sup> See 2.5, pp.279-280.

<sup>166</sup> e.g. see SPC and SPP Work Report, 2003-2008.

On the one hand, in China, it has already become an ordinary fact that most of suspects are held in long term custody awaiting investigation, prosecution and trial in China.<sup>167</sup> But most suspects, no matter detained legally or beyond legal time limits, will usually be found guilty by court later after trial. According to Article 41, 44, and 47 of CCL of 1997, the duration of custody can be calculated into the duration of imprisonment sentenced by the court. Seen from the imprisonment's perspective, there may not make too much of differences for the suspect how long they are being held in custody in the course of the investigation, if his final destiny is to be confined in prison after being found guilty. But the harm is obvious. Mainly the suspect's rights to be presumed innocent until proved guilty guaranteed by Article 14(2) is ignored.<sup>168</sup> Moreover, that will lead to the loss of the dignity and value of the rule of law. Behind endless detention of suspects is the loss of responsibility for final judgment on the part of courts.<sup>169</sup> For example, it can easily be happening in practice that if suspects should be sentenced to a shorter term of imprisonment than the term they have been held in custody indeed because of the fact of their crimes, there will be some form of national compensation responsibility to their loss. So these suspects usually are being sentenced for a longer term of imprisonment which can match the time of their being held in custody indeed. This phenomenon does undermine the spirit of fair trial as enshrined in the ICCPR, particularly of Article 9 and 14.

On the other hand, in the CCPL's implementation, crime investigation authorities, especially public security departments, always complain that restrictions on compulsory measures prescribed in the CCPL have impeded crime investigation. A tendency is therefore undeniable that some police, prosecution and judicial authorities remain hostile to the newly enacted limitations on their powers. Certainly, the investigative organs can manipulate those vague terms in the law to confuse the

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<sup>167</sup> See e.g., Cai Ping, "Nine Years of Extended Detention without Settlement So Far – Comments by Legal Experts on the Processing of Cases", Beijing Youth Daily, 13/08/2003, [http://news.xinhuanet.com/legal/2003-08/13/content\\_1023495.htm](http://news.xinhuanet.com/legal/2003-08/13/content_1023495.htm).

<sup>168</sup> See *Ilowiecki v Poland*, Chap3, 3.6.4, p.155.

<sup>169</sup> See SPC Working Report, 2007.

time limit for detention. They may be doing everything possible to find “loopholes” and “dead corners” of the CCPL, trying to formulate “counter-strategies” just in order to fulfil their work duties assigned by higher authorities, giving rise to the political guidance of “putting the fulfilment of work duties above anything else” or “putting political achievements first”.<sup>170</sup> Failing to carry out the procedural rules appears to engage in the violation of the right to liberty, as in *Voskuil v. the Netherlands*.<sup>171</sup> As HRC stated, this long period of *incommunicado* detention also may violate Article 7 of ICCPR.<sup>172</sup>

The hostile attitude to the suspect’s right to liberty exist even in the context of those departmental regulations proposed by the law enforcement and judicial authorities on settlement of the problem of unlawful prolonged detention. As mentioned above, it can be noticed that “shall” is a term frequently used in the judicial Notice and interpretations to order correction upon discovery of unlawful extension of detention. However, there is the absence of specific measures following the term “shall”.<sup>173</sup> Namely, the Notice has not assumed any specific responsibility for the relevant law enforcement authorities and their staff members who directly held liabilities for not carrying on the investigation and correction of the cases about unlawful extended detention.<sup>174</sup> Besides, “in a timely manner” is another frequently used vague term in these new reform measures. The Notice has no definition on whether “in a timely manner” refers to one day, one week or even one month. It shows an indecisive and weak-kneed attitude in the reform to control the police discretion on detention, and the implementation of these pre-trial compulsory measures in China, as shown in *Menesheva v Russia*, obviously is arbitrary and unlawful.<sup>175</sup> All these provisions on time limits in the CCPL of 1996, those relevant departmental interpretations and new rules to cure the unlawful detention particularly have not been attained the demand of

<sup>170</sup> See e.g. Hengyang He and Zhiliang Wu, “Guilty or Not Guilty: An Empirical Analysis on 73 Disputed Murder Cases”, (2008) 1 Journal of SWUPL, p132; Xiaobin Guo, “On Reform and Development of the Work of Crime Investigation After the New Criminal Procedure Law Took Effect”, (1998) 1 Criminology Research, p11-12;

<sup>171</sup> See *Voskuil v. the Netherlands*, Chap3, 3.2.2, pp.113-114.

<sup>172</sup> See Chap2, 5.8, pp.67-79 and Chap6, 3.2.2, pp.359-361.

<sup>173</sup> See 2.5, pp.280-283.

<sup>174</sup> See Chap2, 5.6, p.66.

<sup>175</sup> See *Menesheva v Russia* Chap3, 3.2.2, p.115; *United States v. David M. Hicks*, Chap2, 5.1, pp.51-52.



Article 9(1) of ICCPR which requires the law for deprivation of liberty must be manifestly proportional, just or predictable.<sup>176</sup>

The essence of the safeguard afforded by Article 9(1) has not been secured in China yet. It is obvious that the systemic design of compulsory measures under the influence of the traditional ideologies about the criminal procedure law has led to the danger of losing the incentive of the investigative organs to protect suspects' legal rights. Therefore China must be fully aware that those in-depth causes resulting in illegal prolonged detention have not been eradicated, that the system against illegal prolonged detention is yet to be improved, and that the existing legislation to this effect is still defective. Judicial reform in China for the compulsory system, and also for all the issues under reform which include the two are to be discussed in the following chapters, involves not only the changing of the criminal justice system itself, but also social adjustment, reconstruction of state management, alteration of social consciousness and of the people's fashion of thought, as addressed in Chapter Four. In particular, the way of thinking on the part of law enforcement personnel, needs to be further renewed and promoted.

### **3.4 No Judicial Approval and Review concerning Compulsory Measures**

As discussed above, a number of important revisions to the CCPL of 1996 apparently brought China closer to eliminating arbitrary detention in its criminal process as required by ICCPR. However, large evidence available from the official information have already indicated that the continuing and widespread abuses of power in law enforcement, especially in the pre-trial stage of the criminal procedure, remains as a serious problem in Chinese criminal justice, including illegal extended detentions and torture.<sup>177</sup> For example, in February 2006, the MPS announced that it had

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<sup>176</sup> See Chap2, 5.1, pp.49-52.

<sup>177</sup> See e.g. SPC and SPP Work Report, 2004 – 2008; Interview with the Procurator -General of the Supreme People's Procuratorate Jia Chunwang: Earnestly Implementing the Duty of Judicial Supervision and Comprehensively Promoting and Implementing the fundamental principle of Ruling the Country by Law", 27/02/08, [http://news.xinhuanet.com/legal/2008-02/27/content\\_7675359.htm](http://news.xinhuanet.com/legal/2008-02/27/content_7675359.htm); "Introductory Remarks by Baodong Li, Head of Chinese Delegation, at the Meeting for Examination of the 4<sup>th</sup> and 5<sup>th</sup> State Periodic Report of the People's Republic of China on 41<sup>st</sup> Session of the Committee Against Torture", 07/11/08,

suspended a total of 10,034 police officers since 1997 for breaches of discipline.<sup>178</sup> These kinds of announcements acknowledged the problem of the police's misconduct and expressed a high-level commitment to confront the problem while improving the image of the police. At the same time, it also confirmed that local police in some areas openly collude with criminals, without fear of reprisal.<sup>179</sup>

As observed above, the CCPL of 1996 obviously invested investigative organs with huge discretion to the compulsory measure. In the course of investigation in China, the power of investigation, the power of judgment and detention power are not separated, and are all authorized to the investigative organs. While they have to make a thorough investigation, the investigative organs have rights to examine the facts of the criminal case. The judicial rights cannot get involved in the proceedings and it is almost only the authorities of police and procuratorates, which decide, execute, prolong and change the compulsory measures. Therefore there is still a strong administrative character in the pretrial compulsory measures system under the CCPL of 1996, which conflicts to the requirement of Article 9 of ICCPR that no one shall be subject to arbitrary arrest or detention.<sup>180</sup>

Noticeably, there are some confused ideas about the concept of judicial organs in China's judicial practice, even in the considerations of legislators. As stipulated in Article 94 of the CCL of 1997, judicial personnel includes the staff who have the authorities of investigation, prosecution, trial, and prison management. Therefore the investigative organs, including the procuratorates, are considered as judicial organs

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<http://www.china-un.ch/chn/hyyfy/t524628.htm>.

<sup>178</sup> See Wang Shu, "During Nine-Year Span, Over 10,000 People's Police Who Breached Discipline Were Suspended", Beijing News, 15/02/06; also see current data: Ridan Xu, "Remarkable Achievements in Judicial Supervision and Inspection Campaign on Criminal Trial", Procuratorial Daily, 02/02/10, <http://www.spp.gov.cn/site2006/2010-02-02/0005426280.html>.

<sup>179</sup> See Chen Peng and Liu Yihui, "3 Hunan Public Security Cadres Who Served as 'Cover' for Criminal Forces are Sentenced", Xinhua News, 16/04/06, <http://legal.people.com.cn/GB/42733/4302457.html>; Also see the Wenqiang Case and its related reports: e.g. Emily Chang, "Trial Begins in Chinese Corruption Crackdown", CNN, 02/02/10, <http://www.cnn.com/2010/WORLD/asiapcf/02/02/china.corruption.crackdown/index.html>; "Former Judicial Official Stands Trial in China Gang Crackdown" Xinhua News, 02/02/10, [http://news.xinhuanet.com/english2010/china/2010-02/02/c\\_13160044.htm](http://news.xinhuanet.com/english2010/china/2010-02/02/c_13160044.htm); Ruixian Qiu and Zhou Du, "13 Years Unwritten Rules of the Power Trading in Chongqing Police have been Exposed by the 5 Days Trail of Wen Qiang Case", Guangzhou Daily, 10/02/10, [http://news.xinhuanet.com/legal/2010-02/10/content\\_12964042.htm](http://news.xinhuanet.com/legal/2010-02/10/content_12964042.htm).

<sup>180</sup> See *Albert Womah Mukong v. Cameroon*, Chap2, 5.1, p.49-50; *Steel and others v UK*, Chap3, 3.2.2, p.114.

in line with the courts in China.<sup>181</sup> Also according to the Constitution Law and the CCPL of 1996, the procuratorate is a judicial organ with special legal supervisory function and therefore has the authority to supervise all the pre-trial compulsory measures.<sup>182</sup> Therefore some Chinese official reports and research have tried to resort this domestic reference to conclude that the national judicial authority with supervisory function, namely the procuratorates, is of compatibility with the requirement as to judge and judicial officer in Article 9(3) and (4) of ICCPR to guarantee prompt appearance before a court and speed review of the detention.<sup>183</sup> However, as indicated in previous chapters, the meaning of the requirements and phrases in Article 9 is determined by the Covenant and the HRC, not by those references to the domestic law.<sup>184</sup> It could be said that all the provisions in the CCPL of 1996, concerning compulsory measures before the criminal trial, had clear failed to achieve requirement as to judicial control under Article 9(3) and (4) of ICCPR, as illustrated below.

### 3.4.1 No Approval of Detention

As shown above, there is no judicial examination for implementing detention to protect the individual against arbitrary interferences by the state with his right to liberty. According to the CCPL, the police have the right to directly issue and execute orders with respect to compulsory investigations without outside approval, such as search, collect evidence and capture, detention and wanted order that involve personal property, privacy, freedom and other interests. With respect to compulsory measure, arrest is the only compulsory measure, which requires review and approval by the procuratorates other than the police. Prior to arrest, police officers dominate the decision-making and executing process by themselves to impose the different

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<sup>181</sup> Yinghui Song, *The Aim of Criminal Proceeding*, (China: People's Public Security University Press, 1995), p.194.

<sup>182</sup> Constitution Law, Article 129; CCPL 1996, Article 96; also see SPP Work Report 2003; National Human Rights Action Plan of China (2009-2010), 15/04/09, Part II (2), <http://www.china-un.ch/eng/bizl/t557378.htm>.

<sup>183</sup> See Guangzhong Chen, Weiqiu Cheng and Vincent Cheng Yang, ed., *A study on the Issues of Ratifying and Implementing of International Covenant on Civil and Political Rights*, (Beijing: China Legal System Press, 2002), p.155; Also see Chap2, 5.3 pp.55-56; Chap3, 3.5.4, pp.133-136.

<sup>184</sup> See HRC, General Comment No. 24, Reservations to the ICCPR, U.N. Doc. CCPR/C/21/Rev.1/Add.6 04/11/1994, para.11.

forms of detention, which is obviously not compatible with Article 9(3) of ICCPR.<sup>185</sup> The state's duty to have the accused's detention examined and approved by a judge or "other officer authorized by law" to exercise judicial power at an early stage, as emphasised in *Schiesser v Switzerland*, has been completely excluded in the criminal proceedings in China.<sup>186</sup>

Also under the current notification system in the CCPL of 1996, the accused is easily held *incommunicado*, and Article 9(2), Article 9(3) and Article 9(4) of ICCPR appear not to be satisfied.<sup>187</sup> According to Article 96 of the 1996 CCPL, during the first interrogation up to 12 hours, the suspect has no right to consult with anyone. After the initial police interrogation, then the suspect should be notified of his right to contact a legal representative and his family.<sup>188</sup> Article 64 and Article 71 of the 1997 CCPL also prescribes that within 24 hours of detaining and arrest, the family or the unit to which the suspect belongs shall be notified of the reasons for detention or arrest and the place of custody.<sup>189</sup> From the day on which compulsory measures are adopted against the suspect or after the first time interrogation, if the suspect has a legal representative, the police have a duty to notify that representative.<sup>190</sup> However, a more subtle technique frequently used by police and prosecutors to defeat a defence right to be notification is simply to exploit an exception also stating in Article 64 and Article 71 of the CCPL. The investigation organs need not to notify the family or legal representative of suspects, in their own opinion and discretion, if "this notification hinders the investigation of the crimes or cases", or there is no way of notification.<sup>191</sup> These exceptions are vaguely and broadly defined. In most cases the only reason that notification might interfere with the investigation is that it might lead the family or employer to retain counsel to meet the detainee in accordance with the CCPL in order to explain the nature of the offense suspected, relevant procedures

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<sup>185</sup> See Chap2, 5.3, p55.

<sup>186</sup> See *Schiesser v Switzerland*, Chap3, 3.5.4, pp.134-135.

<sup>187</sup> See Chap2, 5.2, pp. 52-53; 5.3, 5.4, pp.66-70 *E. D. Santullo Valcada v. Uruguay*, 5.6, p. 65.

<sup>188</sup> CCPL 1996, Article 96.

<sup>189</sup> *Ibid.*, Article 64 and 71.

<sup>190</sup> *Ibid.*, Article 96.

<sup>191</sup> *Ibid.*, Article 64; See *Kerr v UK* and *Ireland v UK*, Chap3, 3.4, pp.121.

and the rights of the detainee.<sup>192</sup> The right to be notified in Article 9(2) has been always ignored easily.

Under such exception, in most cases, throughout the investigation of a case by police, suspects are detained without any notification to anybody even members of their immediate families are not allowed to see or have contact with them.<sup>193</sup> However, the risk that the communication between lawyers and their clients would “hinders the investigation of the crimes or cases” may not justify the restriction on the right to access to legal advice, as found in *S v Switzerland*.<sup>194</sup> The right under Article 75 to appoint a lawyer or contact with somebody and file petition or complaints on his behalf has not been effectively available in practice.<sup>195</sup> It is therefore actually no chance for them to obtain a guarantor pending trial under Article 52 in China. Lack of access to a lawyer in detention has been found to fall within Article 9(3) of ICCPR, as indicated in *D. Wolf*.<sup>196</sup> One commentator claimed that to his knowledge not a single application for bailing out suspects had been granted by the people’s procuratorates since the 1996 reforms.<sup>197</sup> On the contrary, the provisions and their implementation in the CCPL 1996 effectively barred from promptly challenging his arrest and detention protected by 9(4) of ICCPR, following series cases in Uruguay and Jamaica.<sup>198</sup> Furthermore, under this circumstance of *incommunicado* detention, Article 7 of ICCPR might be engaged where condition of detention itself was found to amount to inhuman treatment owing to inadequate provision for external contacts, as discussed in Chapter Six.<sup>199</sup>

### 3.4.2 The Approval of the Arrest

As mentioned above, comparing with other compulsory measures, the CCPL imposes

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<sup>192</sup> The discussion on the right to counsel at this stage see Chap7, 3.2, pp.432-438.

<sup>193</sup> See *Öçalan v. Turkey*, Chap3, 3.6.2, p.149; Chap2, 5.8, pp.68-69.

<sup>194</sup> See *S v Switzerland*, Chap3, 4.6.2.2, p. 203.

<sup>195</sup> See *Nikolov v Bulgaria* and *Lamy v. Belgium* Chap3, 3.6.2, p.151; also see Chap7, 4.2, pp. 442-456.

<sup>196</sup> See *D. Wolf v. Panama*, Chap2, 5.7, p.67; also see *Magee v UK*, Chap3, 4.6.2.2, p.200.

<sup>197</sup> Zhijun Liu and Yuhong Song, “The Report on the Symposium on Criminal Defense: Indispensable Pillars for Building a Judicial Justice System”, (1998) 1 *Chinese Lawyer*, p.17.

<sup>198</sup> See Chap2, 5.6, pp. 64-66; Chap2, *Campbell v Jamaica*, 5.7, p.67; Chap3, 3.6.2, pp.149-150.

<sup>199</sup> see Chap6, 3.2.2, pp.359-361; and also Chap2, 5.8, pp. 67-69.

strict restrictions on the police power to arrest.<sup>200</sup> However, the safeguard for the suspects against arrest arbitrarily in Article 60 appears to be inadequate for satisfying the objective nature of the reasonable suspicion as discussed above.<sup>201</sup> Then there is an essential problem following up which needs to be discussed, namely whether the measures of examination and approval of arrest by procuratorates is an effective judicial control of the holding of suspects in custody when the standard for approval of arrest is loose. The limitation of the procuratorial supervision in China can be observed from the implementation of this measure.

### **3.4.2.1 Current Procuratorial Supervision on the Approval of Arrest**

As mentioned above, the procuratorates are seen as the judicial organs in line with the courts and granted a kind of judicial right, an authority of judgment under current Chinese criminal justice system.<sup>202</sup> Therefore, at the first glance, under Chinese law, there is a judicial organ with judicial power, the procuratorates or the court, conducting supervisory function and exercising some external examination of the arrest. A fact cannot be denied that in the current legal system the Procuratorates have worked hard in their capacity of deciding on arrest.<sup>203</sup> Some legal experts think that the legal control of the criminal compulsory measures should be maintained at the current status. They analyzed that if the court is to exercise the authority of decision on arrest, it will involve a conflict of interests and bias for the judge upon the judgment before the trial. In the cases where the suspect is detained or arrested, the courts are bound not to adjudicate for the suspect acquittal. Therefore these academics believe that if there is a judicial review system in the procedure before the trial it will easily lead to a prejudgment on the judges' behalf. For instance, Zhang Zhihui regards that compared with the authority of decision on arrest exercised by the courts or other judicial organs, the authority of decision on and approval of arrest exercised by the procuratorates is more suitable, and that it is the best way of

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<sup>200</sup> See 2.4, pp.278-279.

<sup>201</sup> See 3.1.2, pp. 288-290.

<sup>202</sup> see 2.5 pp.282-284.

<sup>203</sup> See SPP Work Report of 2003 and 2008.

authority distribution.<sup>204</sup>

Hodgson noticed that in some civil-law countries, including France and Switzerland, prosecutors rather than judges review the decision to arrest and detain.<sup>205</sup> Fairchild and Dammer observed that in general, civil law systems tend to allow longer periods of detention while the investigation is being carried out.<sup>206</sup> Given the cultural preference on social stability and the facts on the rising crime rates and the large “floating populations” as shown above, China is all the more likely to use compulsory measures to control suspects.<sup>207</sup> This mode of investigation based on the theory of procuratorial supervision has really had good effects on punishing crimes and directing investigations, and it has had a positive function for a certain period. Therefore, in certain circumstances, this kind of supervision might even be consistent with Article 5(3) of the ECHR, which requires that a person arrested or detained be brought immediately before a judge empowered to exercise judicial functions, as shown in *Schiesser v Switzerland*.<sup>208</sup> There are many scholars in China contend that in order to get in line with the international standard while keeping the basic legal system steady, it would be an improvement if the procuratorate of a higher level is empowered to review the self-investigation cases of the prosecution service and approve the arrests of those cases.<sup>209</sup>

#### 3.4.2.2 Lack of Independent Examination on the Application of Arrest

It is hard to ensure that the prosecutors taking the approval of arrest be requisite truly independent according to the finding in *Schiesser v Switzerland* under the current

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<sup>204</sup> See Xiaoqing Zhu, “Several Issues of China’s Procuratorial System”, (2007) 2 China Legal Science, pp.116-125; Zhihui Zhang, “Discussion of Legal theory of Approval Arrest Again”, (2000) 5 Law Science, pp.38-39.

<sup>205</sup> Detailed discussion see Jacqueline Hodgson, “Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform”, (2002) 51 Int’l & Comp. L.Q., 781, p.814.

<sup>206</sup> See Erika Fairchild and Harry Dammer, *Comparative Criminal Justice Systems*, 3<sup>rd</sup> ed. (Belmont, California: Wadsworth-Thompson Press, 2006) p.148.

<sup>207</sup> see 3.2.2.1, pp.295 and Chap4, 4.1.1, pp.245-249.

<sup>208</sup> See *Schiesser v Switzerland*, Chap3, 3.5.4, p.135.

<sup>209</sup> See Changyong Sun, A Study on the Arrest Approval Power of the Procuratorial Organ, (2009) 2 Journal of National Prosecutors College, pp61-62; Jianlin Bian, “Reform of the Criminal Procedural System and the Distribution of the Procuratorial Power”, (2008) 4 Journal of National Prosecutors College, p85.

legal and political systems in China.<sup>210</sup> The effectiveness of the current procuratorial supervision in control and examining the application of arrests is limited. For instance, as discussed above, there are still many incidents of holding suspects in custody beyond the legal time limit and the abuse of compulsory measures happens uninterruptedly. The status and role of the prosecutors in China are quite similar to those of the prosecutors in some eastern European Countries such as Hungary and Ukraine. Consequently, any understanding and analysis of the role of the procuratorates in the context of Article 9(3) have to be taken into account and be subject to the interpretation of the Committee in this respect, as indicated in case *Vladimir Kulomin v Hungary*.<sup>211</sup>

Firstly, in addition to the reason indicated above concerning the different conceptions of detention and arrest, under the CCPL of 1996, it is primarily the procurator that is in charge of the prosecution, who later makes the decision to arrest in China. Courts in China do not have a power of judicial review at the stage of investigation in the criminal procedure on the ground that courts do not enter a criminal case until after indictment. The UN Working Group on Arbitrary Detention regards that this is a clear breach the independence of an officer authorized by law to exercise judicial power within the meaning of Article 9(3) of ICCPR.<sup>212</sup> The examination of the arrest by prosecutors who could intervene in subsequent proceedings as a representative of the prosecuting authority is totally a unilateral authority action, as suggested in *Assenov v Bulgaria*.<sup>213</sup> The result is unchecked discretion for the investigators and total frustrations for suspects and their lawyers. In practice, during the investigation stage, the law enforcement authorities do not consider the necessity of detention.<sup>214</sup> They incline to decide whether or not to detain the suspect according to the needs of the investigation.

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<sup>210</sup> See *Schiesser v Switzerland*, Chap3, 3.5.4, p.135; The issue related to judicial independence in China deserve a separate research.

<sup>211</sup> See *Kulomin v Hungary*, Chap2, 5.3, p.57.

<sup>212</sup> Report of the UN Working Group on Arbitrary Detention: Mission to China, E/CN.4/2005/6/Add.4, 29/12/04, para 32 (c).

<sup>213</sup> See *Assenov v Bulgaria* Chap3, 3.5.4, pp. 135-136.

<sup>214</sup> See 3.1, pp.285-290.



According to Article 7 of the CCPL of 1996, the consistency of prosecution interests of the procuratorate authorities and police and their legal mutual cooperation relationship in China decide that it is not easy at all for the procuratorate authorities to keep the objective, neutral and transcendent attitudes on whether or not to arrest or detain suspects.<sup>215</sup> Influenced by the traditional repression thought and crime control ideology as observed in Chapter Four, in practice, the prosecution organs and the police, regardless of the positions they have in the criminal proceedings, frequently attach more importance to evidence or make decisions which are disadvantage to suspects, but are beneficial to their own work.<sup>216</sup> The requirement in Article 43 of the 1996 CCPL for the police and the procuratorates to respect the facts of the cases and collect various kinds of evidence in accordance with law is usually implemented incompletely. For example, the “Supplementary Investigation” measure still remains in the CCPL of 1996 and is widely used in practice to collect more evidence not beneficial to suspects.<sup>217</sup> Even if the procuratorates exercise the responsibility of legal supervision to control all forms of detention according to the law, they often stand in a position of tracing the criminal case effectively, and seldom do it from the angle of the protection to suspects. Without the purpose to do any collection of evidence which can benefit the suspect in the investigation, it is almost impossible for the police to submit any evidence to prove that the arrest of the suspect is unnecessary, provided the arrest measure has been applied. The police can even take unnecessary compulsory measures against suspects with the purpose of increasing the proportion of solved criminal cases. The substantive requirement which imposes the obligation on the procuratorates in reviewing whether there are reasons to justify detention and of ordering release if there are no such reasons, fails to achieve.<sup>218</sup>

Secondly, it should be noted that the CCPL of 1996 is silent on whether the suspect

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<sup>215</sup> CCPL 1996, Article 7; See *Salov v Ukraine*, Chap3, 3.5.4, p.137.

<sup>216</sup> See Chap4, 2.1.2, pp.216-217.

<sup>217</sup> See Chap4, 4.1.2.3, pp.252-253.

<sup>218</sup> see *Schiesser v Switzerland*, Chap3, 3.5.4, p135.

has to be brought before the procurator for the purpose of the approval of the extension of the detention. As a practical rule, the suspect who is supposed to be arrested has no right to stand in front of the procurator and argue about the crime he is suspected of and whether the arrest imposed on him is appropriate. The procurator is not under the obligation himself, of hearing the individual brought before him. While the procuratorate and the court ratify or decide the arrest, they are only required to check up the written materials in relation to a case and no need to hear the suspect's opinions. This might breach the procedural requirement on the effective control of a judicial or other authority to detention as set in *Schiesser v Switzerland*.<sup>219</sup> The defence lawyer can do nothing during the period of examination but wait for the result quietly in his own office.<sup>220</sup>

Therefore, under the current system, the Chinese procuratorates do not appear to be the kind of genuine independent judicial authorities in examination of the application of arrest as the “officer” required in *Schiesser v Switzerland*.<sup>221</sup> But similar to the situation in case *Salov v Ukraine*, the prosecution authorities in China not only belong to the executive branch of the state, but they also concurrently perform investigative and prosecution functions in all the criminal proceedings according to Article 3 of the 1996 CCPL.<sup>222</sup> Obviously this function of procuratorates to trace crimes and to be in charge of prosecuting criminal cases always conflicts with the implementation of legal supervision in practice.<sup>223</sup> Under the current state management, the procuratorates are even less likely to intervene in an investigation by either the MPS or the MSS, whose investigators generally outrank their procuratorate counterparts in the Communist Party's political pecking order. It will put the suspect in a real disadvantageous position. Furthermore according to Section 10 of Chapter Two in the CCPL of 1996, the procuratorates have been given power

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<sup>219</sup> See *Schiesser v Switzerland*, Chap3, 3.5.4, p135.

<sup>220</sup> See Chap7, 4.1, pp.441-442.

<sup>221</sup> See *Schiesser v Switzerland*, Chap3, 3.5.4, pp. 135-136.

<sup>222</sup> See *Salov v Ukraine*, Chap3, 3.5.4, p.137.

<sup>223</sup> CCPL 1996 Article 3.

to arrest in the cases that they carry on the investigation directly.<sup>224</sup> For the investigation of cases that are directly accepted by the procuratorates, the decisions to arrest or detain suspects are also made by the procuratorates themselves.<sup>225</sup> Under this situation, the procuratorates obviously appear without incentive to self-monitor their own investigations in China following the finding in *Niedbala v Poland*.<sup>226</sup>

The proposition mentioned above that the power of arrest approval rests with the procuratorate cannot ultimately repair the limitation of the unbalance and unchecked problem on the approval of arrest in China under the influence of the traditional legal culture and current social situation. The real purpose and meaning of Article 9(3) should be fully understood and achieved in Chinese criminal justice. The procuratorial power and legal supervision power are two species of different power states in nature. The legal supervision power should be a kind of transcendent and independent State power. This disposition stresses the importance of judicial review after execution. It guarantees that the authorities of law enforcement implement independently and therefore to safeguard and prevent violations of the accused's fundamental rights. Since the purpose of the judicial review in the course of investigation are to assess whether sufficient legal reason exists for the arrest or detention and whether the detention before trial is necessary, the object of supervision should include the procuratorial power. Therefore the law supervision power and the procuratorial power are not possible to be on the same one level. Chen Ruihua regards it is like a fairy tale to make a national organ, which is in charge of criminal prosecution, supervise and guarantee the implementation of law and the correct behaviour of other national organs, when their activities are not legal.<sup>227</sup> The current setup and the implementation of the approval of arrest from the prosecution authorities in China's criminal procedure indeed conflict to Article 9(3) of ICCPR

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<sup>224</sup> Ibid., Article 18.

<sup>225</sup> Ibid., Article 132.

<sup>226</sup> See *Niedbala v Poland*, Chap3, 3.5.4, p.136.

<sup>227</sup> See Ruihua Chen, "The Nature of Judicial Authority", (2000) 5 CASS Journal of Law, p55; see also Yinzhong Hao, "The Legal Theory of the Approval Power to Arrest and the theoretical Approval Power to Arrest", (2000) 1 Law Science, pp.20-22.

which requires an impartial and independent judicial body to safeguard the right to liberty from arbitrary compulsory measures.

### **3.4.3 No Judicial Review after the Execution of the Compulsory Measures**

As mentioned above, once the suspect is arrested, most possibly he will be detained for a long time. However, more importantly, except the general description in Article 75 mentioned above, there is no formal and effective judicial review on the lawfulness of the deprivation of liberty after it has been executed to the detained person in the CCPL of 1996.<sup>228</sup> In particular, some suspects know that the police are flouting the statutorily stipulated time limits. They try to redress the situation during the course of investigation. However, once the suspect is detained on remand, due to the typical and long-term existing problem of *incommunicado* detention in China as illustrated in the following chapters, there is no effective way for them to complain the unlawful deprivation of liberty.<sup>229</sup> This appears to be considered as severely hampering the secure set for the detained person's right to effectively challenge the lawfulness of his detention after some time, following *De Jong, Baljet and van der Brink v Netherlands*.<sup>230</sup> Therefore a violation of Article 9(4) of ICCPR has also occurred.<sup>231</sup>

During the period of detention, there is also no concrete scheme for the courts in China to start some adversarial hearing to the procedural problems of the detention or arrest before the substantive trial, or even to give some legal orders regarding those compulsory measures, which are limiting the liberty of citizens. There is no formal and express law even for the procuratorial authority which is claimed to take supervisory function in the legal system to carry out the review of legality of the detention. Moreover, the decision to initiate an extension of detention is entirely at the discretion of the investigative organs Under the CCPL of 1996. None of those

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<sup>228</sup> See 2.3, p.277-278.

<sup>229</sup> See 3.4.1 pp.306-307.

<sup>230</sup> See *De Jong, Baljet and van der Brink v Netherlands*, Chap3, 3.6.3, pp.152-153.

<sup>231</sup> See Chap2, 5.6, p.64

exceptions for extension of detention mentioned above is subject to any judicial review, which could examine if there is reason to justify the continued detention.<sup>232</sup> Detailed rules on implementing the CCPL of 1996 issued by the SPC and the SPP also contain no procedure to review the legality of time limit extensions either before or after they have been initiated. The detainee's right to have a regular judicial review of the lawfulness of his detention, as required in the *De Wilde, Ooms and Versyp v Belgium*, has completely been excluded from the Chinese criminal justice.<sup>233</sup> A breach of Article 9(4) of ICCPR on such aspect is found.<sup>234</sup> Even the prosecutor carries out its supervisory duty to redress the unlawful detention under the current legal system, such situation still appears to fall out of the requirement on a court with judicial character for judicial review, based on *Vodenicarov v Slovakia* and *Varbanov v Bulgaria*.<sup>235</sup>

The sole restriction on the use of detention is the internal check among the investigative organs. Before investigators implement some compulsory measures, they must obtain an approval from the chief of police and a permission order signed by the chief police officer. It is doubtful whether the self-policing scheme can be able to serve as an effective means to assure the legality of police action.<sup>236</sup> The internal examination procedure tends to be administrative. In most criminal cases the suspect is denied the application of “granting of bail and awaiting trial”, again a decision made by the investigating agency alone. Since the initial request for detention is made by the police, after the procuratorate examines the evidence forwarded by the police and determines that the police have sufficient evidence to make the arrest, it is highly unlikely that the police would later come to the conclusion that there is no sufficient evidence to detain. Thus this internal supervision on the lawfulness of the detention under the CCPL of 1996 could be viewed completely incompatible of Article 9(4) of ICCPR, bearing *Torres v Finland* in mind as HRC made sure to

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<sup>232</sup> See 3.2.2.2, pp.297-300.

<sup>233</sup> See *De Wilde, Ooms and Versyp v Belgium*, Chap3, 3.6.1, pp.146-147.

<sup>234</sup> See Chap2, 5.6, p.66.

<sup>235</sup> See *Vodenicarov v Slovakia and Varbanov v Bulgaria*, Chap3, 3.6.2, p.148.

<sup>236</sup> CCPL 1996, Article 72.

require the body reviewing the lawfulness of detention must be a court in order to ensure a high degree of objectivity and independence.<sup>237</sup> The lack of judicial review for the victims for the police violations probably has seriously contributed to the problem of unlawful extension of post-arrest detention as mentioned above.<sup>238</sup>

#### **3.4.4 Difficulties in Obtaining a Remedy**

Since the right to challenge the lawfulness of one's deprivation of liberty is not effectively available as illustrated above, the right to compensation under Article 9(5) of ICCPR has thus also been strictly restricted.<sup>239</sup> Under Chinese domestic law suspects are vulnerable in obtaining any remedy for the breach of the right to liberty, whether or not the detention was unlawful under national law.<sup>240</sup> The Chinese authorities are failing to fulfil its obligation to provide a compensation for wrongful detention, as reiterated by both ECHR and HRC.<sup>241</sup> For example, for the first time in the history of the PRC the State Compensation Law, which was enacted in 1994, provides citizens with the right to sue the police for violation of their rights and to be recovered by monetary damages. However, only those who have been detained wrongly, arrested wrongly, or held in custody but judged innocent will get compensation from the national authorities.<sup>242</sup> Similar to the situation in *Harkmann v. Estonia*, a person whose suffered unlawful prolonged detention has not been entitle a right to compensation under the current law.<sup>243</sup> This narrowly defined circumstance has left no judicial remedy under any relevant provisions of the Chinese domestic law for the suspects who are lawfully arrested, but unlawfully detained by the police. Thus it is not compatible with Article 9(5) of ICCPR.

It might be argued that in China, detention decisions may be challenged through several other channels, including administrative litigation in a court before a judge,

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<sup>237</sup> See *Torres v. Finland*, Chap2, 5.6, p.64.

<sup>238</sup> See 3.3, pp.295-298.

<sup>239</sup> See 3.4.3, pp.314-316; Chap2, 5.9, pp.70-71.

<sup>240</sup> See *Öcalan v. Turkey*, Chap3, 3.6.2, pp.149.

<sup>241</sup> See *Bolanos v Ecuador*, Chap2, 5.9, p.71; Chap3, 3.7, p.156.

<sup>242</sup> State Compensation Law of PRC, Article 15.

<sup>243</sup> See *Harkmann v. Estonia*, Chap3, 3.7, p.157.

administrative reconsideration, administrative supervision, and through the system of letters and visits whereby disgruntled citizens write letters to or visit judges, government officials, people's congress delegates, or virtually anyone else the citizens think may assist them, including party officials.<sup>244</sup> But any attempt to obtain administrative reconsideration of investigators' decisions by their higher authority is usually fruitless. The authorities have attempted to respond to this concern by strengthening administrative reconsideration of the decisions from the judicial authorities. New regulations, effective January 1, 2003, clarify the rights to challenge the public security decisions for the detainees and others who disagree with the decisions.<sup>245</sup> The regulations clarify a number of evidentiary issues, such as confirming that the public security may not obtain or rely on additional evidence not available at the time the initial decision was made. The rules also deal with the problem of local protectionism and possible retaliation to some extent by allowing detainees to appeal to a higher-level public security organ and then to appeal that decision to the next highest level and, if still not satisfied, to challenge the decision in court pursuant to administrative litigation.

However, critics keep on arguing that these channels are not substitutes for a prompt review, or that they are not very effective as judged by the number of reversals.<sup>246</sup> The reasons are mainly because on one side, the administrators tend to side with their colleagues; on the other side, detainees are often ignorant of their rights and not told their rights by authorities. Moreover, many of the detainees may lack the financial means to pursue these various legal channels for challenging the decision.<sup>247</sup> There is no clear data on the success rates of challenges by persons subject to the various forms of detention. Also there is no figure on how many cases are correctly charged or conversely how many should result in the detainee being released. These so called

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<sup>244</sup> See Chap6, 3.4.3, pp.382-383.

<sup>245</sup> See Regulations for the Procedures for Administrative Reconsideration Cases Handled by the Public Security 2003, 10/10/02.

<sup>246</sup> See Amnesty International, "China: Rule of Law and Human Rights – Time for Institutional Reforms", (2002); Veron Mei-Ying Hung, "Improving Human Rights in China: Should Re-Education Through Labor Be Abolished?", (2003) 41 Colum. J. Transnat'l L. pp.319-323.

<sup>247</sup> Also see discussion on legal aid service in China, Chap7, 4.2.2.3, pp. 449-450.

remedies in China could not show with a sufficient degree of certainty and therefore the situations of obtaining compensation for the unlawful detention could not satisfy the guarantee of an effectively available remedy to the victims, as required in *Ciulla v Italy*.<sup>248</sup> Even when successful, administrative litigation is usually a time consuming process and does not ensure a prompt hearing before judge. This will not necessarily remove the immediate threats from officials seeking to intimidate detainees from exercising their rights, or to retaliate against those persons who tried to challenge the law enforcement authorities. The victims of wrongful detention in China are still suffering a violation of Article 9(5) of ICCPR.

#### **4. Further Reform**

In meeting with the relevant minimum requirements of international standards, China shall keep an eye on the existing compulsory measures in the CCPL of 1996 with the emergence of new situations in the society. This existing compulsory measures should be examined and those found in conflict with international standards as analysed above should be revised, so that the country can better prepared to ratify the ICCPR and fulfil its obligation to guarantee their people's human rights. Meanwhile China shall take active actions on formulating legislatures on new measures for better protection of the rights of security and liberty and fair trial for the suspects in pre-trial proceedings. Under the discussion of this chapter, the further reform mainly according to Article 7, 9 and 14 of ICCPR shall be focused on the following aspects:

##### **4.1 Redefinition of the Compulsory Measures**

The litigation concept should be reformed to at most keeping up with the basic demand of Article 9 and Article 14. The law should clearly state that all the pre-trial compulsory measures should be established by law and using the extra-judicial measures to detain suspects as a criminal investigation technique should be widely opposed, as required by Article 9(1) of ICCPR.<sup>249</sup> The situation concerning the

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<sup>248</sup> See *Ciulla v Italy*, Chap3, 3.7, pp.157-158.

<sup>249</sup> see Chap2, 5.1, pp.45-52.



non-custodial detention should be more clearly defined and limited in order to distinguish different conditions for different non-custodial detention measure, such as summon, “residential surveillance” and “granting of bail and awaiting trial”. The power for the police to detain suspects in China has to be reduced and restricted. The law must define openly that when the suspect waits for trial, they are free in principle, as required by Article 9(3) and Article 14(2) of ICCPR.<sup>250</sup> Furthermore, it is necessary to prohibiting the suspect who has been imposed pre-trial compulsory measure without being brought before the competent judicial officer, also as required by Article 9(3) of ICCPR.<sup>251</sup> Therefore the judiciary needs to meet the criteria of independence and impartiality. The role of the procuratorate needs to be reconsidered while the law should at least, also be make clear that other local regulations cannot impose additional restrictions on personal freedom beyond those imposed by national laws.

#### **4.1.1 Compulsory Summon**

Firstly, the measure “taking in for questioning” in Police Law should be incorporated into the CCPL.<sup>252</sup> To comply with Article 9(1) of ICCPR, this power should be carefully and properly determined in the law.<sup>253</sup> The police may stop and question a person if there are reasonable grounds for suspicion that he has committed an offence.<sup>254</sup> For example, the investigators may temporarily forbid the relevant persons to leave and question them because a crime has been committed nearby and the investigators are looking for someone that may fit the description. The police officer must have a good reason for questioning. The person should not be stopped or questioned only because of some arbitrary reasons such as his race, colour, religion or he has committed a crime in the past.<sup>255</sup> In order to establish a judicial control over all the pretrial compulsory measures, for the necessity of investigating the

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<sup>250</sup> see Chap2, 5.5, pp.61-64; 6.2, pp. 72-74.

<sup>251</sup> see Chap2, 5.3, pp.55-58.

<sup>252</sup> see 3.2.1, p.291.

<sup>253</sup> see Chap2, 5.1, pp.47-48.

<sup>254</sup> see *Fox, Campbell and Hartley*, Chap3, 3.3, pp.116-117.

<sup>255</sup> see *Albert Womah Mukong v. Cameroon*, Chap2, 5.1, p.49-50.

involvement of a suspect in a crime and collecting relevant evidence, a summon shall be issued by the court for the appearance of a suspect. In case of emergency, the prosecutor or the police may take necessary actions, provided that the same request shall be referred immediately to the court concerned for approval. The law should also clearly spell out these emergent circumstances. They might include the situations, such as if the suspect is strongly suspected of having committed an offense while if he has no fixed domicile or residence; or if he has absconded, destroy and forge the evidence or there are facts sufficiently to justify an apprehension that he may do that; or if he has committed an offense punishable with death penalty or life imprisonment, or with a minimum punishment of imprisonment for no less than 3 years.

#### **4.1.2 Arrest**

In order to perfect the arrest system and to decrease the abuse of the arrest under the CCPL, the on-going efforts are encouraged to separate the concept of arrest and detention in China. The original concept of arrest might be changed into detention in custody. It would bring the legal system more in line with international standards, Article 9(1) and 9(3) of ICCPR, by providing a new concept of arrest in China's criminal justice. The new concept of arrest might be clearly described as only when there is reliable evidence to show the strong suspicion of committing a crime by the suspect, and the suspect could be sentenced to fixed-term imprisonment of no less than three years, and he fails to appear without good reason after a summon had been legally served, thus necessitating his arrest, the suspect shall be immediately arrested according to law.<sup>256</sup> The power of arrest should be described clearly in the CCPL. In order to set up an efficient judicial supervision on police power, normally the police and the investigative organs have powers to arrest under warrant. A written request for approval of arrest together with the case file and evidence should be submit to the court when a suspect is believed to meet the conditions of an arrest.<sup>257</sup> To comply

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<sup>256</sup> See Chap3, 3.3, pp.115-119.

<sup>257</sup> See Chap2, 5.3, pp.56-57; Chap3, 3.5, pp.122-145.

with Article 9(3) of ICCPR, if the court found that the suspect should not have been arrested, he must be immediately released and issued a release certificate.<sup>258</sup>

In order to circumvent Article 9(3) of ICCPR, when examining an arrest, the court should interrogate the suspect and heed the opinions of his legal representative.<sup>259</sup> The decision made by court should accord to the circumstances of the case either to approve the arrest or disapprove the arrest. The police should execute the decision that approve the arrest immediately and inform the court about the result without delay. If the court disapproves the arrest, reason should be given. If the police consider the decision to disapprove an arrest to be incorrect, it may request reconsideration with the immediately release of the accused. To achieve the requirement in Article 9(4) of ICCPR, if the arrested person, his legal representative or family refuses to accept the approval of the arrest, they may present a petition to the court of the next level against the court that approves the arrest.<sup>260</sup> If the petition is presented, the court should hold hearings to heed the opinion of the procuratorate, the arrested person and his legal representatives and make an order in light of different situations speedily, for example, within 3 days.<sup>261</sup> When necessary, the court may inform the witnesses to appear in court and give testimonies. But the petition and the hearings shall not affect the execution of the arrest. If the compulsory measures adopted against a suspect are found inappropriate, such measures should be cancelled or modified without delay.<sup>262</sup> The heavy workload of the courts in China should not be used as an excuse to delay or even avoid the judicial review, as shown in *Bezicheri v Italy*.<sup>263</sup> If a police releases an arrested person or substitute the measure of arrest with a different measure, it should notify the court that has approved the arrest.

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<sup>258</sup> see *Michael and Brian Hill v Spain*, Chap2, 5.5, p.63.

<sup>259</sup> See Chap2, 5.7, p.67; Chap3, 3.5.4, p.134.

<sup>260</sup> see Chap2, 5.6, pp.64-66.

<sup>261</sup> see *Schops v Germany*, Chap3, 3.6.2, p.147.

<sup>262</sup> See *A v Australia*, Chap2, 5.1, p.47

<sup>263</sup> see *Bezicheri v Italy*, Chap3, 3.6.4, pp.155-156.

The powers to arrest may be carried out without warrant by either police or any other person but have been restricted.<sup>264</sup> For example, a person in *flagrante delicto* may be arrested without a warrant by any person. A person is considered to be in *flagrante delicto* if a person who is discovered about to commit an offence, or in the act of committing an offence or has committed an offence. For example, if the suspect is pursued with cries that he is an offender or he is found in possession of a weapon, stolen property, or other items sufficient to warrant a suspicion that he is an offender or his body, clothes and the like show traces of the commission of an offence sufficient to warrant such suspicion. Therefore the CCPL can regulate that the powers to arrests without warrant may only be used if it is necessary to the grounds such as to ascertain the person's name or address; to prevent the person causing physical injury to himself or any other person, suffering physical injury, causing loss of or damage to property, causing an unlawful obstruction to the public place; to protect children or other vulnerable person from the person; to allow prompt and effective investigation of the offences if there are facts sufficient; or to prevent the disappearance of the person if he is in the execution of detention, or is strongly suspected of having committed an offence by facts sufficient in themselves.

The performance of this power by the police also affects anyone whom the police constable has reasonable grounds for suspecting to be about to commit an offence, or be committing an offence, or have committed an offence; anyone who is implicated to be a co-offender by someone in *flagrante delicto* and there are facts sufficient to warrant the strong implication; anyone who is strongly suspected of having committed an offence punishable with death penalty or life imprisonment, or with minimum punishment of imprisonment for not less than 3 years. If the arrest is executed by a police, it may be made without a warrant only when the circumstance is too urgent to report to the court; an application for the issuance of an arrest warrant shall be made to the court immediately after the arrest. If the court rejects to issue a warrant, the arrestee shall be released immediately.

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<sup>264</sup> See Chap3, 3.5.1, pp.122-127.

### 4.1.3 Establishment of a Formal Bail System

As many scholars suggested, the reform of bail system in China should be promoted gradually and with the Chinese characteristics to give real efficacy to Article 9(3) of ICCPR.<sup>265</sup> However, whether it would result in much relief for those detained is highly questionable. As mentioned above, there is no evidence that Chinese judges secure more just results. On contrary, as observed by Peerenboom, the vast majority of people in China is likely to share the prevailing and wide society belief in the need to be tough on criminals.<sup>266</sup> Even in some other developed countries, the authorization for detention is granted routinely unless there is clearly no legal basis for arrest.<sup>267</sup> However, the low percentage of refusals does not mean that the bail system is entirely useless or ineffective in practice. The fact that such a procedure exists may at least send a signal to prosecutors that arbitrary arrests are unacceptable and thus may lead to a change in norms and behaviours, including self-restraint on the part of prosecutors. Some of the worst abuses might be caught, especially when the authorities are detaining someone on the suspicion without adequate evidence.<sup>268</sup> Those were initially detained upon approval of the judge should then be afforded basic procedural rights.<sup>269</sup>

Then, in order to improve the current system of “granting of bail and awaiting trial” in China, the bail condition, bail category, an effective bail application procedure, bail judicial examination system and remedy system should be provided in detail in

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<sup>265</sup> There are works which suggest to reform the system of Granting of bail and Awaiting Trial instead of establishing a new bail system, see e.g. Yi Yuan, “Comparative Study of the System of Obtaining Guarantors and Awaiting Trial and its Reform”, (2008) 2 Journal of Comparative Law, pp.110-119; other scholars suggest to establish a process similar to the system of habeas corpus in common law countries See Zhihui Deng, “Habeas Corpus and Human Right Proction – from the Vision of Criminal Justice”, (2004) 4 China Legal Science, p.166; Amnesty International, “China: Abolishing Reducation through Labour and other forms of punitive administrative detention”, ASA 17/016/2006, <http://web.amnesty.org/library/print/ENGASA170162006>.

<sup>266</sup> See Liu Yong case, Chap4, 4.1.1, p.244; Randall Peerenboom, “Assessing Human Rights in China: Why the Double Standard?”, (2005) 38 Cornell International Law Journal, p.88.

<sup>267</sup> See Robert Reiner, 3<sup>rd</sup> ed., *The Politics of the Police*, (Oxford: Oxford University Press, 2000), p.181; David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan*, (Oxford/New York: Oxford University Press, 2002), p.62; Jacqueline Hodgson, “Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform”, (2002) 51 Int’l & Comp. L.Q., 781, pp.796-797;

<sup>268</sup> See 3.5.5.2, Chapter 3, pp.139-144.

<sup>269</sup> See 5.2 Chap2, p50-53; 5.7 Chap2, pp65-66.

the CCPL.<sup>270</sup> For example, the bail conditions should be clearly defined. The law should state openly in what kind of circumstance the court definitely should or should not grant a bail to a suspect if he has applied. The circumstances that a suspect should be granted a bail might include if the suspect is under the age of 18 unless the crime charged is especially serious; or if the maximum punishment for the offense charged is imprisonment for a period of less than three years, detention, or a fine and he would not endanger society if a bail is granted; or the suspect has been pregnant or are breast-feeding her own baby; or the suspect is ill and it appears that cure will be difficult unless he is released for medical treatment. The circumstances that a suspect should not be granted a bail might include if he may be punished by life imprisonment or the death penalty; or if he has or if he is a recidivist, or a person who makes the commission of crime a habit or occupation, a person who commits a crime during the period of a previous bail, or a person detained under the certain crime charged according to the law; or if he is attempting to escape or injure or disable himself, or there are facts sufficient to justify he may do that, or if he has destroyed, forge, or alter evidence or conspire with a co-offender or witness or there are facts sufficient to justify an apprehension that suspects may do that.<sup>271</sup> The suspect or the persons who may act as his representative may, at any time, apply to the court for the suspension of detention of the suspect on bail.<sup>272</sup> During the investigation stage the prosecutor may apply to the court for the suspension of detention of the suspect on bail.

#### **4.1.4 Residential Surveillance**

Also custodial detention of a suspect may be suspended without bail with limitation on his residence imposed. If a suspect, who should be custodial detained according to the crime charged, is not suitable for custodial detention, and has no fixed domicile, the court may subject him to residential surveillance. Residential surveillance shall be executed by the organ that applies it. The rights and obligations for the suspect

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<sup>270</sup> See Chap2, 5.5, pp.60-61.

<sup>271</sup> See Chap3, 3.5.1, pp.122-127.

<sup>272</sup> See Chap2, 5.5, pp.61-64; Chap3, 3.5, p.122.

who are under residential surveillance should also be specifically stated clearly in law to avoid the violation of Article 9(1).

#### **4.1.5 Custodial Detention**

To cover the requirement of Article 9 of ICCPR, the pre-trial custodial detention should remain exception in China.<sup>273</sup> The law should openly state that unless a detention order has been applied to the court the suspect shall be released after the interrogation immediately. When the investigative organ believe that a suspect meets the conditions of custodial detention, it should submit a written request for detention order together with the case file and evidence to the court for examination and approval promptly, such as within 2 days.<sup>274</sup> When a judge is making the examination, the prosecutor may present and state the reason for applying detention order and present necessary evidence.<sup>275</sup> After examining the accused, despite the existence of the circumstances as specified below, the judge may nonetheless order to release the accused on bail, or with a limitation on his residence if the detention is deemed unnecessary.<sup>276</sup>

The suspect may be detained in custody after he has been examined by a judge and is strongly suspected of having committed an offense, due to the existence of some circumstances it is apparent that there will be difficulties in investigation, prosecution, trial or execution of sentence and if such non-custodial detention would be insufficient to prevent the occurrence of danger to society. Some offense may be regarded as practically endanger society such as the offense of constructive arson, rape, and terrorism.<sup>277</sup> All the circumstances for detention should be specially declared in the CCPL. They might include that a suspect is attempts to commit suicide or has absconded, or there are facts sufficient to justify an apprehension that

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<sup>273</sup> See Chap2, 5.5, p.61.

<sup>274</sup> See Chap2, 5.3, pp.55-58; Chap3, 3.5.5.1, pp.137-139.

<sup>275</sup> See *Schiesser v Switzerland*, Chap3, 3.5.4, p135.

<sup>276</sup> See *A v Australia*, Chap2, 5.1, p.47; Chap3, 3.5.4, p.134.

<sup>277</sup> See Chap3, 3.5.1.3, p.128.

he may abscond;<sup>278</sup> or there are facts sufficient to justify an apprehension that he may destroy, forge, or alter evidence, or conspire with a co-offender or witness;<sup>279</sup> or the suspect under non-custodial detention is strongly suspected of committing crimes intentionally from one place to another, repeatedly, or in a gang, or if there are facts sufficient to justify an apprehension that he may re-commit the same offense;<sup>280</sup> or the suspect has committed an offense punishable with the death penalty, life imprisonment, or a minimum punishment of imprisonment for no less than 3 years; and if he violates the obligations prescribed by the law, he may be detained.

The law should also clearly state that within 24 hours after detaining of a suspect, the police should notify the court in a written form. Provided that if it is necessary to continue the measure, the court may, prior to the expiration of the period, extend such period by a ruling after examining the suspect with all those specific circumstances as mentioned above.<sup>281</sup> If no prosecution has been initiated or no judgment has been rendered at the expiration of the detention period, the detention shall be deemed cancelled, and the accused should be released. When the accused is released by the police or the prosecutor, the court shall be immediately notified. If the suspect, his legal representative or family refuses to accept the detention order, they may present a petition to the court in the next level. The court should hold hearings within 3 days after receiving the petition to heed the opinion of the procuratorate, the suspect and his legal representatives or defenders, and make an order in court in light of the different situations quickly.<sup>282</sup>

#### **4.2 Shorten and Firmly Implement the Time Limits**

Although the number of unlawful extension of detention cases has dropped to a historical record low, more is needed to resolve the problem while a long-term prevention system is still required to eliminate such cases in the future to comply

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<sup>278</sup> See Chap3, 3.5.1.1, pp.124-126.

<sup>279</sup> See *W v Switzerland*, Chap3, 3.5.1.2, pp.126-127.

<sup>280</sup> See *Matznetter v Austria* and *Assenov v Bulgarian*, Chap3, 3.5.1.2, p.127.

<sup>281</sup> See Chap2, 5.6, p.66; Chap3, 3.6.3, pp.152-153.

<sup>282</sup> See Chap3, 3.6.2, pp.147-152.



with Article 9(3), Article 9(4) and Article 14(2) of ICCPR. Another regulation on the prevention and redressing of unlawful extension of detention drafted by the SPP is expected to be publicized after further discussion with the SPC and the MPS.<sup>283</sup> It remains to be seen, of course, how many of these and other reforms aimed at dealing with the problem of unlawful detention actually make it into the next revision of the CCPL, and even if written into law, how effective its implementation will be. Scholars such as Chen Guangzhong and Song Yinghui have strongly advocated limits on the time period of the compulsory measures.<sup>284</sup> All the time limits should be set in line with the international standard of time limits for the pre-trial compulsory measure. Those periods for making such a measure should be clearly prescribed. Time period should be specifically calculated by hours, days and weeks. No extension of the time period of the compulsory measure should be allowed due to a holiday. For example, a suspect who is under the pre-compulsory measures shall be examined immediately, unless there are unavoidable circumstances that make such examination impossible. The law could states that at the stage of investigation, if an arrest or detention in custody is deemed necessary after the interrogation of the suspect, an examination and approval should be applied within 24 hours from the time of executing the measure.<sup>285</sup> The court should make the related decision within 3 days from the date of receiving the written request. Under some special circumstances the time limit for submitting a request for examination and approval may be extended by 1 to 3 days. The court should make the decision thereon within 1 to 7 days.

The administrative form of detention, “taking in for questioning”, should be strictly used in the circumstances prescribed by law and it should not be used as an alternative as summon. The time limit for the summon shall be cut to no exceed 4

<sup>283</sup> “SPP to step up fight against illegally prolonged custody”, Xinhua News, [http://english.china.com/zh\\_cn/news/china/11020307/20060903/13595087.html](http://english.china.com/zh_cn/news/china/11020307/20060903/13595087.html), 03/09/06, however, it has no further news about it so far.

<sup>284</sup> See e.g. Guangzhong Chen and Yinghui Song, *op.cit.*, fn 115; Ming Ai, “On the Perfection for the Disposition of the Coercive Measures in Criminal Investigation in China”, (2004) 3 Chinese Criminal Science, pp.56-66; Yongsheng Chen, “The Problems, Reasons and Measures of the unsettled Detain in China”, (2003) 4 Chinese Criminal Science, pp.66-74.

<sup>285</sup> See Chap2, 5.3, pp.54-55.

hours at most. A minimum of 24-hour break should be set between two summonses. The period granted by public security organ for residential surveillance shall not more than 4 weeks. An extension of 8 weeks may be allowed with the approval of the court. The total period for residential surveillance implementing by all the enforcement authorities is 12 weeks. Furthermore the law should clearly prescribe that the total periods for “granting of bail and awaiting trial” implementing by all the enforcement authorities are 48 weeks. The time period for detention of a suspect may not exceed 8 weeks during the stage of investigation, 6 weeks during the stage of prosecution before first trial.<sup>286</sup> When necessary, application for a ruling for extension of the detention period during the stage of investigation shall be made by the public prosecutor with reasons and submitted to the court no later than 5 days prior to the expiration of the period. The ruling made shall, unless pronounced in court, be effective upon serving a true copy on the accused prior to the expiration of the custodial detention period and the period shall be extended accordingly. If the ruling has not been legally served by the expiration of the detention period, the detention shall be deemed cancelled. The extension of the detention period, during the investigation stage, may not exceed 4 weeks and normally only two extensions are allowed. The extension period shall not exceed 4 weeks in the prosecution stage and normally only 1 extension is allowed.<sup>287</sup>

In the CCPL it should contain all the clear definitions concerning the categories of the suspects who may be extended the time limit for pre-trial compulsory measures, such as the condition of a complicated case, serious crimes and inconvenient transportation.<sup>288</sup> The law should clearly stipulate that all the time limits concerning the compulsory measures could be reset only under the approval of the court under certain circumstances. These circumstances include such as a new major crime being discovered or a suspect of uncertain identity; a major suspect involved in crimes committed from one place to another, repeatedly, or in a gang; the grave and complex

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<sup>286</sup> See Chap2,5.4, pp.58-61; *Khudobin v Russia*, Chap3, 3.5.3, p131.

<sup>287</sup> see *McTaggart v Jamaica* and *Thomas v Jamaica*, Chap2, 5.4, p60.

<sup>288</sup> See *Wemhoff v Germany*, *W v Switzerland* and *Chraidi v. Germany*, Chapter 3, 3.5.3, pp.131-134.

cases in outlying areas where traffic is most inconvenient; the grave and complex cases involving various quarters and for which it is difficult to obtain evidence. These conditions should be carefully set and stated in detail in the law.<sup>289</sup>

#### **4.3 Establish a formal System of Notification**

In keeping with Article 9(2) and 9(4) of ICCPR, a more legal binding system of notification, especially by the way of warrants, should be established in the CCPL.<sup>290</sup>

The law should require when interrogating a suspect, the police, the procurator and the court should promptly inform him of the nature of the crime charged and the reasons for the compulsory measures as well as the related rights for suspects, including the right to defence, the right not be subject to torture or ill-treatment, and the right to make charges against the illicit conduct of investigators to the court and the right to have the lawfulness of his detention reviewed in court. The same should also be stated in the record of the interrogations. Once the compulsory measure has begun, the executing organ should also notify the family member or someone requested by the suspect who is under the compulsory measures the same information, and inform the suspect concerning the result of the notification.

Therefore the warrant shall consist of three slips, and in making a compulsory measure one slip thereof shall be handed to the accused, and one slip thereof shall be handed to the members of his family, or someone requested by the suspect. In the execution of a writ of detention, the writ shall be sent to the prosecutor, the accused, the detention house, the defence attorney, and the family or someone requested by the accused. The notice to appear for interrogation shall be signed by the head of the judicial police office. A warrant of non-custodial detention shall be signed by a prosecutor who is only in charge of the case filing during the stage of investigation or by a judge during the stage of trial. A warrant of arrest and custodial detention should be signed by a judge. The suspect should be presented a written decision with

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<sup>289</sup> See *Clifford McLawrence v. Jamaica*, Chap2, 5.1, p.47.

<sup>290</sup> See Chap2, 5.2, pp.52-55; Chap3, 3.4, pp.119-122.

statement of the reasons if the residential surveillance is decided to subject on him. When executing an arrest, the police must produce the warrant of arrest. A writ of detention is necessary to detain an accused and shall be signed by a judge.

#### **4.4 Establish a Judicial Review System concerning Pre-trial Compulsory Measures in China**

As Lyons said, all pain is punishment.<sup>291</sup> Even though there are obvious diversities in judicial systems and criminal proceeding models among different countries, obviously the painful process of pre-trial detention serve being measures with a similar effect as a punishment. The pre-trial compulsory measures should generally be put aside if there is not enough sufficient evidence which testifies to the necessity to keep a person in detention, in accordance with the principle of presumption of innocence enshrined in all the human rights international covenants.<sup>292</sup> The forthcoming judicial reform should firstly ensure the enforcement of the investigation can be effectively supervised. The most significant safeguards available for the right to against the arbitrary compulsory measures include such as a formal system of notification as mentioned above, the right to silent as discussed in Chapter Six, and the right to access to the outside world, especially the legal counsel as discussed in Chapter Seven. Also as Sun Changyong regards, the existence of a judicial review system offers an opportunity to individuals to relief their rights and an occasion for individuals to resist national authorities effectively and equally.<sup>293</sup> The judicial review system of the compulsory measures in criminal proceedings is the inevitable outcome of the development of procedure justice.<sup>294</sup>

Since the methods in the respect of judicial review for the compulsory measures

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<sup>291</sup> William Lyons, "Perhaps all Pain is Punishment: Community Corrections and the Hyperghetto", in Austin Sarat and Patricia Ewick, eds, *Punishment, Politics, and Culture*, (Oxford: Elsevier, 2004), pp125-60; Also see generally, Malcolm M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court*, (New York: Russell Sage Foundation, 1979).

<sup>292</sup> See Chap3, 3.5.1, p.122.

<sup>293</sup> Changyong Sun, "Legal Restrains on Compulsory Investigative Measures and Judicial Review", (2005) 5 *Modern Law Science*, p.76; see also Guangzhong Chen and Wei Jiang, *Proceedings Law Comment*, (China: Law Press, 2000), p.56;

<sup>294</sup> Youping Xie and Yi Wan, "Judicial Review Principle and Pretrial Procedure Reform in China", (2004) 2 *Journal of Sichuan Normal University*, 2004(2), p.25.

offered by existing criminal justice system are too general or even blank at all as mentioned above, China should provide an available and effectively mechanism for the people who seek to challenge the lawfulness of the compulsory measure to attain the requirement of Article 9(4) of ICCPR.<sup>295</sup> From the historical perspective, it is obvious that the modern judicial review system is so fresh to China where it needs more attention and support to be established smoothly. Judicial reform involves not only the changing of the power arrangement of judicial and law enforcement organs on criminal justice system, but also the whole social adjustment, reconstruction of state management, alteration of social consciousness and of the people's fashion of thoughts. It is for sure not a handy project, some important directions for the further reform on the judicial review system in China could be as shown below.

#### **4.4.1 Further Clarified the Legal Responsibility for the Judicial Officers**

In conducting pre-trial compulsory measures, the court, procuratorate and the police must strictly observe the CCPL and should not exceed the authorities prescribed in the law in order to keep up with Article 9 of ICCPR.<sup>296</sup> The officers in charge of the criminal justice should ensure that the implementing the pre-trial compulsory measures to suspects are duly and within an attitude that respects and safeguards the human rights. More importantly, in respect to the judicial acts against the statutory procedure, in accordance with the degree of the wrongful acts and the consequence thereof, the system should clearly identify different liabilities of the public officers and the state. If the a judicial organ or its personnel, while illegal executing its duties, infringes the lawful rights and interests of a citizen or legal person and causes damages, it shall bear civil liability. The criminal liability that a state organ or its personnel must bear, after it severely encroaches upon the lawful rights and interests of a citizen or legal person and causes damages has been or will be stipulated by the CCL of 1997.<sup>297</sup> Compensatory schemes should be adopted to provide an effective remedy for the victim of the unlawful measures to be in fact able to recover

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<sup>295</sup> See Chap2, 5.6, pp.64-66.

<sup>296</sup> See *Van Alphen v the Netherlands* Chap2, 5.1, pp.49-52.

<sup>297</sup> See Chap6, 4.3, pp.393-396.

compensation as required by Article 9(5) of ICCPR.<sup>298</sup>

#### **4.4.2 Proper National Organs Authorized to Exercise Judicial Review in China**

In accordance with Article 9(4) of ICCPR, the mode of having the procuratorial authority as supervisory authority under current CCPL should be modified. In accordance with the international standard, there should be no doubt that none other than courts are competent to exercise judicial review of detention and arrest during the procedure of criminal investigation.<sup>299</sup> The claim that judges will be involved in the conflict of interests of the judgment before trial can be avoided.<sup>300</sup> There should be different judges to approve the compulsory measures and to try the case. There are already successful examples in the judicial practice in many countries such as the UK, and the judges are exercising their judicial authority with respect and independence in so far as the different stages in the criminal case. It seems to be more reasonable that the investigative organs are only in charge of the investigation, and that detention and arrest are to be decided on by courts. This will guarantee the impartial forward motion of the investigation.

However, as long as the provision that the procuratorial organs are state organs of legal supervision and enjoyed equal status as courts in the Chinese Constitution remains unchanged as discussed above, it seems very difficult to remove the supervisory power from the procuratorial organs and to implement the judicial review of compulsory measures solely by the Courts overnight. With such constitutional constraint, the construction of the relevant systems takes a period of time and is a gradual procedure. But in the long run, the courts should be the sole legitimate organs to exercise judicial review of each major step in the pre-trial proceedings. This is the ultimate aim of the reform concerning establishment of an effective judicial review system. A special section of the court for judicial review

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<sup>298</sup> See *Harkmann v. Estonia*, Chap3, 3.7, p.157.

<sup>299</sup> See *Schiesser v Switzerland* *Salov v Ukraine* *Niedbala v Poland*, Chap3,3.5.4, p.135-137; 3.6.2, p.148; also see *Kulomin v Hungary*, Chap2, 5.3, p.57.

<sup>300</sup> See e.g. Changyong Sun, *op.cit.*, fn 293, p.79.

should be set up and authorized to implement judicial review in the course of investigation. It may offer the benefit of neutralizing the advantages enjoyed by the prosecution through the use of an impartial adjudicator and an adversarial hearing. For doing this, the court definitely needs sufficient power and status to remain unaffected by the procuratorate. In order to change the approach and channel the majority of pre-trial procedural issues to the province of the courts, at this stage, the earlier judicial involvement can be introduced into the criminal justice. Such a provision may be added: if a suspect raises an objection to the procuratorial organ's approval of arrest, he may apply to the court for reviewing the approval of arrest and if the court after hearing holds that the arrest is improper, the court has the right to rule to release the suspect. In addition, there has to be an efficient mechanism to enforce and monitor prompt compliance with the court's orders so as to remedy the procedural violations efficiently and to create proper deterrence for future violations.

#### **4.4.3 The way to implement Judicial Review in China**

There are two ways of judicial examination that may be used in the judicial review of compulsory measures, written review and oral review. Zhang Kun regards that the advantage of the written review is its high efficiency because the judge does not need to spend much time hearing the statements of the investigative organs, the suspect, and the lawyer.<sup>301</sup> But at the same time, comparing to the written review, oral review can provide more reasonable access to human rights protection in the course of investigation through presenting oral argument at the hearing. Certainly, more time and judicial resources are needed for the oral review, which may delay the investigation to some extent and burden the whole judicial organs. As discussed above, in the current legal system, the authority of approving arrest is exercised by the procuratorates with the use of written examination in China.<sup>302</sup>

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<sup>301</sup> See Kun Zhang, "A Comparative Study between Europe and China of the Judicial Review Systems concerning Detention and Arrest", Research Partnership 1/2004, The Danish Institute for Human Rights, [http://www.humanrights.dk/upload/application/03e15211/kun\\_zhang\\_-\\_judicial\\_review.pdf](http://www.humanrights.dk/upload/application/03e15211/kun_zhang_-_judicial_review.pdf).

<sup>302</sup> See 3.4.2.2, pp.309-314.

If written review keeps being widely implemented in China, since the legal culture changes slowly, the current situation concerning lack of effective judicial review will not possibly be changed. It seems to be a better choice to use oral review in the course of approval of a warrant of arrest, and also to use for all the judicial review of the holding suspects in custody in Chinese criminal procedure, in order to expand the space for the suspect to seek the legal protection for their right to liberty. But if the oral review is adopted, there will be some repetition of procedures in the judicial review system. Before the arrest, the investigative organ will take the suspect to court to participate in the hearing about whether or not to arrest. After the suspect is arrested, within 24 hours, the suspect will be brought to court again to decide on the lawfulness of the arrest and whether or not to hold the suspect in custody for a certain period of time. It can be expected that this needs a huge amount of judicial resources. In addition, judges would have to review hundreds of thousands of decisions as to administrative detention. Judges and others in the criminal justice system already complain that they lack the resources to handle the ever increasing number of criminal cases, at least in some jurisdictions. Therefore, from a fundamental basis, there are some economic questions whether it makes much sense to devote so much of China's limited legal resources to formalizing a process in which the vast majority of the cases involve a minor offense and in which the facts and law are likely to be clear.

Thus as to the judicial review procedure itself, in principle the judicial review after arrest should be held by oral review in order to completely satisfy Article 9(4) of ICCPR. If detainees are to be provided more procedural protections, it seems more reasonable to stipulate that the arrest warrant can be signed by a judge after written review of the material on the case submitted by the investigative organ. Also it should be combined with some form of summary procedures for those who admitted their guilt. The UN working group on Arbitrary Detention has suggested that review



by a single judge according to a simplified procedure could be acceptable.<sup>303</sup> In response to the rising number of criminal cases and the heavy burden imposed on criminal judges, the SPC, SPP, and the MOJ jointly issued regulations in early 2003 that provide for summary procedures and streamline the process in regular criminal cases.<sup>304</sup> At the same time, the SPC, SPP, and MOJ jointly issue regulations that streamline the procedures in ordinary criminal cases.<sup>305</sup> These two regulations attempt to address efficiency problems without going so far as to accept an American-style plea bargaining system.

## 5. Conclusion

From the above discussion, some positive changes to the current regulation of the pre-trial detention powers. The gap between international human rights law requirements for pre-trial compulsory measures and the current law and practice in China is getting narrow. Yet this gap is still not to be underestimated. The revised rules and relevant practice concerning pre-trial compulsory measures in China still have not been up to international standards, mainly according to Article 9 of ICCPR and Article 5 of ECHR as discussed in this chapter. Most notably, contradict to Article 9(1) and (3) of ICCPR, detention remains as not the exception but general rule in practice. As suggested in Chapter Four, significant reasons for the abuse of pre-trial compulsory measure are the prevalence of crime-control oriented values, the neglect of right protection for the individuals and the ignorance of the due process in China. Beyond these, the direct cause of the enormous latitude of the authorities to detain people for as long as they see fit is the extensive loopholes contained in the CCPL itself and in the interpretations issued by the law implementation organs. As illustrated above, this reflects the vagueness of the provisions and the lack of certain procedural rights required by international standards, which is not compatible with

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<sup>303</sup> See Report on the Visit to the PRC, UN Doc. E/CN.4/1998/44/Add.2, 22/12/97; Chen, Weidong, A Research on the Problems in the Implementation of the Chinese Criminal Procedure Law, (Beijing: China Fangzheng Press, 2001), p.231.

<sup>304</sup> Several Opinions of Supreme People's Court on Applying Summary Procedures to Try Cases of Public Prosecution, 14/03/03.

<sup>305</sup> Several Opinions of Supreme People's Court on Applying Ordinary Procedure to Try Cases in Which the Defendant Pleaded Guilty, 14/03/03.

Article 9(1) of ICCPR.

The misuse and abuse of the pre-trial compulsory measure is also exacerbated by the malfunction of checks and balances in the criminal judicial system. This core deficiency leads to a unilateral investigation implemented by the investigative organs solely, which is directed against the suspect. Detention exceeding stipulated time limits merits serious attention. The requirement to immediately informing the suspect about the reasons for arrest or detention and their rights and to notify detainees' families of their whereabouts as required by Article 9(2) of ICCPR can be easily waived if, in the view of the police, this might hinder their investigation. Article 9(3) and (4) of ICCPR are not qualified, since periods of pre-trial detention without judicial approval are long and subject to extension at the discretion of police and prosecutors. Detainees have no right of *habeas corpus* and no right to bail. Of the five forms of pre-trial compulsory measures authorized under the CCPL, the only one subject to external check is arrest, which must be approved by the prosecutor. The status of the public prosecutor called to approve arrest pending investigation does not fulfil the requirement towards the independence of an officer authorized by law to exercise judicial power within the meaning of Article 9(4) of the ICCPR. The Chinese courts play no role in issuing or reviewing detention orders. Even if suspects and their lawyers apply for obtaining a guarantor pending trial, they have no way of forwarding the application to courts. There is no actual judicial review system or authorizing system implemented by impartial and independent judicial organs now in China. A breach of Article 9(5) of ICCPR is found on the basis that there are only limited remedies to the detainees if their detention exceeds the legal time periods. Also officials in charge of the crime investigations have yet to suffer any legal consequences for holding people beyond the legally mandated time limits.

Therefore the reform of the pre-trial compulsory measures under the CCPL at present certainly is not enough to arrive at the aim of controlling and decreasing the amount of compulsory measures being taken and the holding of suspects in custody, and the

realization of right to liberty and fair trial as guaranteed by ICCPR. Many relevant systems should be perfected in order to address and coordinate the whole criminal investigative procedure to reach the ICCPR standard, including those presented above as clarification of the scope of offenses subject to compulsory measures, the application of bail during the course of investigation, and the establishment of an independent and impartial judicial review system in the investigative procedure. Also arguably, during the time of detention, suspects ought to be entitled with the full set of procedural rights as required by the ICCPR, which some of these rights would be addressed specifically in relevant chapters later.

However, the reform to provide more safeguards to the suspects being detained before trial in China is controversial, with wide variations in legal systems. Also, as having been seen, even the existing rights provided under the CCPL of 1996 have not been of much use in practice due to the crime control approach of criminal procedure and the misunderstanding of the law. While those new procedural rights should not be expected to produce a dramatic reduction in the number of people being detained or released after investigation immediately, they are still obviously important for those who would be released. Ironically, under the influence of the crime control ideology, the impact of providing these additional rights is likely to be limited and may actually make it easier to persuade the MOJ, SPP, and MPS to accept such changes. Once they review the empirical studies of their impact on criminal investigation and conviction rates elsewhere, the opponents of greater rights for the accused may not feel so threatened.

Meanwhile the reform of the judicial system should keep promoting, particularly the system of the courts. It should manage to take practical measures to establish an independent and impartial judicial mechanism to strictly guard the legality of a criminal pre-trial compulsory measure. At present, like the procuratorate and the police organs, the court as it operates within china's current legal system is also an instrument for crime control based on the traditional thoughts and the party's policy

that social stability overwhelms everything.<sup>306</sup> Cooperation in the fight against crime is over emphasized to the detriment of rights safeguards. Moreover, neither the judicial organs nor the judicial personnel can exert their authorities based on full independence and impartial as international standard required.<sup>307</sup> Particularly, the courts are all controlled by the corresponding level administrative authorities while they have to recognise the leadership role of the CCP in all facets of government and society. As Sun Changyong suggested, the interference with the independence of justice practice poses a great obstacle for the operation of the check and balance in the pre-trial process in China.<sup>308</sup> Therefore in order to achieve the international minimum judicial independence standard, the future judicial reform of the system of the court should be on the basis of the realities in China to ensure the overall independence of the court and the individual independence of the judge. Above all, at this stage, reduction of the abuse of pre-trial compulsory measures will entail the clarification of the legal conditions for pre-trial compulsory measures, the gradual establishment of a proper judicial review system, and thereby the achievement of gradual dominant ideological change on the implementation of the compulsory measures before trial.

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<sup>306</sup> See, e.g. “Strengthen People’s Judicial Work, Consolidate the People’s Democratic Dictatorship”, *People’s Daily*, 30/10/51; Xiaoping Deng, *Selections of Deng Xiaoping* (vol.3), (Beijing: People’s Press, 1993), p.284.

<sup>307</sup> The detail discussion about this issue See e.g. Yao Li, “Analysis on Present Situation and Reconstruction of Judge System”, (2003) 9 *Law Science*, pp.18-27; Wang Qun, “On the Basic Connotation of Judicial Independence and the Constitutional Safeguard”, (2006) 11 *Journal of Socialist Theory Guide*, p.102; Jonathan Hecht, *op.cit.*, fn 88.

<sup>308</sup> See Changyong Sun, *op.cit.*, fn 290, p.79.

## **Chapter Six**

# **Prohibition of Torture and Ill-treatment to Obtain Evidence in CCPL and Movement towards Meeting ICCPR Standards**

### **1. Introduction**

Whether to reinforce the law and implement the rule of law, or to recognize and strengthen human rights protection, it is imperative to fight against and prevent all forms of torture and other acts of ill-treatment in modern China today. Apart from the signing of ICCPR in 1998, China signed and ratified the UN CAT and other related international documents as early as 1988, and the Chinese domestic law strictly prohibits torture and acts of torture of all kinds.<sup>1</sup> That is to say, China has the obligation to implement the Convention's provision against torture. However, nowadays, extorting confessions by torture during the pre-trial phase is the most prevalent manifestation of torture in China, and it still exists to a serious extent.<sup>2</sup> This has led to great unfairness in the protection of the rights of suspects. Therefore, the main focus of this chapter is on the prevention of torture and ill-treatment to obtain evidence in the CCPL according to the international standard, particularly Articles 7 and 14 of ICCPR.<sup>3</sup>

This chapter will first illustrate the situation that torture continues to be a tool used in China's criminal investigations to extract "confessions" under the CCPL of 1996

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<sup>1</sup> However, China has not yet acceded to the Optional Protocol to the Convention, adopted by the UN General Assembly on 18/12/02, which allows for regular visits of inspection to places of detention by national and international bodies.

<sup>2</sup> See Human Rights Watch, "Country Summary—China", 01/05; "Minister Jia Chunwang's speech to the Dalian conference on building the Public Security corps", 12/06/98, in *Theory and Practice on Standardizing Construction of the Public Security Corps*, (Beijing: China People's Public Security University Press, 1998); see also "China's detention system urged to reform to curb police violence", Xinhua News, 18/03/09, [http://news.xinhuanet.com/english/2009-03/18/content\\_11030449.htm](http://news.xinhuanet.com/english/2009-03/18/content_11030449.htm); "China investigates 38,754 for malfeasance, right infringement in nearly 5 years", 28/10/09, [http://news.xinhuanet.com/english/2009-10/28/content\\_12350545.htm](http://news.xinhuanet.com/english/2009-10/28/content_12350545.htm).

<sup>3</sup> See Article 7 of ICCPR, Chap2, 4.1, pp35-36; Article 3 of ECHR, Chap3, 2.1, p.85.

through presenting a typical torture case in China and also some important official and NGO figures. In order to better understand what is so special about the Chinese situation on prohibition of torture and ill-treatment in criminal justice, the chapter is going to explore the roots of the frequent occurrence of torture and illegally obtained evidence in China. This will be based on an assessment of traditional Chinese legal culture. The chapter will also investigate and highlight several aspects of the current criminal procedure law which fail to adhere to the ICCPR and ECHR standards. Recent steps in the legal and regulatory framework in China, which were intended to prevent the use of torture to extract confessions, will be explored and evaluated. Reflecting upon the existing problems, the paper will present recommendations to China for what needs to be done to further prevent the use of torture during criminal procedure and thus facilitate China gradually, but sufficiently, to meet its obligations under the ICCPR with regard to the human rights protection for suspects under its own special situation of the country.

### **1.1 The Case of SHE Xianglin**

In October 1994, SHE Xianglin was sentenced to death by the Jingzhou Intermediate People's Court for murdering his wife Zhang Zaiyu who had disappeared from their home in January 1994. He appealed to the Higher People's Court of Hubei Province, which found the evidence insufficient and the facts unclear and sent the case back to be retried. In June 1998, the Jingshan County People's Court in the province subsequently convicted SHE of murder and sentenced him to 15 years in prison. On April 13, 2005, SHE appeared in court in Jingshan, Hubei Province, for the third time on charges of murdering his wife.<sup>4</sup> Unlike the previous two trials 11 years before, the purpose of this one was to pronounce SHE not guilty and immediately release him from jail. The reason was that the wife, SHE had allegedly murdered had shown up alive in his hometown on March 28, 2005. Obviously, SHE had been

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<sup>4</sup> For detailed information about this case see Liu Li, "Wrongly Jailed Man Freed after 11 years", China Daily 14/04/05, [http://www.chinadaily.com.cn/english/doc/2005-04/14/content\\_434020.htm](http://www.chinadaily.com.cn/english/doc/2005-04/14/content_434020.htm); Xiaodong Wang, "The controversy of She Xianglin case put the rule of law in question," Beijing Youth Daily, 10/04/05, <http://bjyouth.yynet.com/article.jsp?oid=5047572>.

falsely convicted. The key evidence that linked SHE to the crime was a female corpse that no family members had viewed, but which the police declared to be SHE's missing wife, based on body height and a state of decay matching the time of her disappearance. There were no DNA tests or even blood tests. Though Zhang's family subsequently asked for a further examination; either, the police did not take the use of a forensic examination seriously, or, as the police replied to the family, they did not have the funds to do so. As a result, the reliability of the evidence was greatly in doubt.

The other vital piece of evidence was SHE's confession that he had murdered his wife. What made him confess? SHE subsequently claimed that police had extracted it from him after repeatedly beating him and denying him sleep and water for 10 consecutive days. His legs were seriously injured and his fingers and toes were broken. It is difficult to prove that he was tortured by the police after so many years. Nevertheless, there is a strong reason to believe that torture was the main cause of his confession as, clearly, a person would not normally confess to something that he had not done.<sup>5</sup> The lower court convicted SHE of murder based on his oral testimony and the investigation report of the police. On appeal, the higher court found the initial conviction questionable and remanded the case to the trial court for further fact-finding. On remand, after mediation by the Communist Party's Political and Legal Committee, the lower court affirmed SHE's guilt but reduced the sentence to 15 years imprisonment in light of three unresolved queries raised by the higher court. Further appeal by SHE was denied. After exhausting all channels of appeal, SHE's family members began petitioning the government, attempting to rectify the injustice. As a result of the family's incessant petitioning, the authorities detained SHE's mother for several months, and she died shortly after release; SHE's brother was also detained for 40 days and was warned by the authorities against further petition attempts. Had SHE's wife not reappeared, SHE would have had to serve out his

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<sup>5</sup> See generally, Cesare Beccaria, *On crimes and punishments, and other writings*, edited by Richard Bellamy and translated by Richard Davies with Virginia Cox and Richard Bellamy, (Cambridge: Cambridge University Press, 1995), Chapter XVI, p39-44.

sentence for a crime that he not only did not commit, but which never even took place.

This SHE case is, sadly enough, not unique but typical in the Chinese criminal proceedings. It exhibits certain characteristics that are common to many torture cases in China, which will be discussed below. It was published in the media and triggered a debate on miscarriages of justice, which continues with more and more vigor until the present day, as observed below. Prompted in part by public outrage over the famous SHE Xianglin wrongful conviction case, the Chinese news media and scholars also published reports indicating that the widespread coerced confessions by torture and other ill-treatment continue, highlighting individual cases of torture and abuse, and trying to examine the roots of the torture problem.<sup>6</sup>

## **1.2 Torture Exists in the Chinese Criminal Procedure**

For obvious reasons it is not possible to judge the extent of the problem. According to China's official statistics, the fourth report from the Chinese government to the Committee Against Torture states that concerning extortion of confessions, the number of sentences fell from 143 cases convicting 178 persons in 1999, to 53 cases convicting 82 persons in 2004.<sup>7</sup> However, even considering the narrow definition of torture currently adopted by the Chinese law, and comparing it with that in Article 1 of CAT as examined below, the official figures probably represented only the tip of the iceberg. Most torture cases had not been reported or prosecuted until some of them resulted in death or other serious consequences. This analysis was supported by at least one authoritative source, which indicated that in 1988, the procuratorates received 1,048 complaints about torture to coerce a statement, but only 170 were

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<sup>6</sup> See e.g. Weihai Yang, "The Warning from She Xianglin Case, Supreme People's Procuratorates Required National Procuratorial Authorities should Learn the Lesson from the Case", Xinhua News, 28/07/05, [http://news.xinhuanet.com/legal/2005-07/28/content\\_3280669.htm](http://news.xinhuanet.com/legal/2005-07/28/content_3280669.htm); Wenjing Zhang, "On the Flaws in the Judicial Procedure of She Xianglin's Case", (2005) 7 Justice of China, pp22-25; Bo Ren, "Suffering from the System behind the Torture to Extract Confession", 31/03/09, Time Weekly, <http://www.p5w.net/news/xwpl/200903/t2257451.htm>.

<sup>7</sup> See Fourth Periodic Reports of States Parties Due in 2004: China, CAT/C/CHN/4, 27/06/07, pp.36-40.



filed for investigations.<sup>8</sup> Recently published statistics from the SPP on criminal cases of confessions obtained through torture in 2006 has shown that there were 110 cases filed for investigations. But it also indicates that there are 598 torture-related cases which are in need of redress.<sup>9</sup> Also, there are some cases in which families believe that persons who died in custody were tortured to death, but such cases were seldom filed for investigations.

The international communities, or the key institutions within, have long observed and documented the situation of torture in China. The UN Special Rapporteur (SR) on torture and other cruel, inhuman or degrading treatment or punishment report was published 10 March 2006, with the conclusion that torture has remained widespread in China.<sup>10</sup> At the same time, the report took notice of the willingness of the government to address the problem and undertake measures to combat torture and ill-treatment while expressed the opinion that the use of torture has declined in recent years. The 2006 report from Amnesty International said that torture and ill-treatment continued to be reported in a wide variety of state institutions and other international organizations, and an unacceptably high rate of miscarriages of justice in the Chinese legal system was also pointed out by the academic research, especially with the aim of extracting confessions.<sup>11</sup> In general, a big gap between law and practice still exists in Chinese society.<sup>12</sup>

## **2. The Reasons in Traditional Legal Culture for the Frequent Occurrence of Torture and Ill-treatment to Obtain Evidence in Current China**

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<sup>8</sup> See *1988 Yearbook of China's Procuratorate*, (Beijing: People's Procuratorate Press, 1989), p.410; Earlier and later editions of the yearbook did not include the number of complaints of torture.

<sup>9</sup> See The SPP Work Report of 2007, 13/03/07.

<sup>10</sup> See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to China, [hereafter Manfred Nowak Report 2006], 10/03/06, E/CN.4/2006/6/Add.6, p.2.

<sup>11</sup> Amnesty International Report 2006, p.90; see <http://www.web.amnesty.org/report2006/chn-summary-eng#8>;

<sup>12</sup> N.J. Diamant eds, *Engaging the Law in China: State, Society, and Possibilities for Justice*, (Stanford, California: Stanford University Press, 2005), p.18.

There are many reasons for the frequent occurrence of torture and other cruel, inhuman or degrading treatment or punishment to obtain evidence in China today. From Marc Galanter to Hong Lu, socio-legal scholars have long recognized that legal decisions and outcomes are affected and shaped by the prevailing legal structure and cultural context in which they take place.<sup>13</sup> It is a historically inevitable result of the composite effects of new conflicts and problems on a number of social, institutional, and legal factors in a transforming society, as discussed in Chapter Four and some of which are to be illustrated below. But it is obvious that this phenomenon of the frequent occurrence of using torture and ill-treatment in the criminal justice is in themselves unreasonable. Today in China, not only the national legislative body and other government officers, especially the judiciary, but also the public of the whole country have begun to vehemently oppose such phenomena and, as a united front, have sought to abolish them.

## **2.1 Remorse and Cooperation**

Confession in China is more likely to be interpreted and expected as the offenders' morals awaken, i.e. their readiness to submit to legal authorities, to cooperate with social groups, and to seek reconciliation with the victim and the larger community.<sup>14</sup> As noted in Chapter Four, there is little tradition of respect for individual rights in China, and suspects were viewed as guilty.<sup>15</sup> Thus, the strong inclination in the Chinese society towards submission to authorities by individuals, rather than insistence on one's rights, may lie in the Confucian cultural influence that stressed a group-oriented, hierarchically, and morally ordered society.<sup>16</sup> Braithwaite considers that the high levels of social integration in communitarian societies allow legal responses to wrongdoing to be more re-integrative, rather than stigmatizing, in regard

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<sup>13</sup> See Hong Lu and Terance D. Miethe, "Confessions and Criminal Case Disposition in China", (2003) 37 Law & Society Review, No. 3, pp.549-578; Marc Galanter, "Reading the Landscape of Disputes", (1983) 31 UCLA Law Review, pp.4-71.

<sup>14</sup> See Hong Lu, *op.cit.*, fn 13, p551; also see Hualin Fu, "Re-education through Labour in Historical Perspective", *The China Quarterly*, 2005, p.811-830.

<sup>15</sup> See Chap4, 2.1.1, pp.213-216.

<sup>16</sup> See Hong Lu, *op.cit.*, fn 13, p.572.

to their social condemnation.<sup>17</sup> By viewing a criminal as a “whole person” who may be reintegrated back into the community, criminal punishments in China may be more responsive to the degree of contrition. A genuine, non-coerced confession with sincere remorse in Chinese society is not only the best confirmation that the party is in fact guilty, but demonstrates the criminal’s awareness and acknowledgement of wrongdoing, and arguably their willingness to be rehabilitated into the society.<sup>18</sup>

Therefore, traditionally, both the legal structure and the wider Chinese culture have actively encouraged defendants to confess to criminal wrongdoings. Confessors of criminal wrongdoing in communitarian societies who exhibit remorse for their actions would be treated with greater leniency. For example, the Tang code specified the timing of a legal confession and recognized that offenders who confessed to victims should receive the same legal benefits as those who confessed to authorities. Also, influenced by the above legal tradition, suspects do not formally have the right to silence according to the CCPL of 1996.<sup>19</sup> The stress on coercion and transformation of the individuals lends legitimacy to a culture of violence conducive to torture, as Manfred Nowak also points out in his report summary.<sup>20</sup> The report refers to political prisoners, but in the view of Nowak, the analysis applies just as much for other suspects and convicts.<sup>21</sup>

## **2.2 Maintaining the Investigative Capability to Anti-crime**

Confession coerced by torture is a product of deeply held values which unilaterally emphasize the importance of social stability and the need to strike hard at crime. As mentioned in Chapter Four, the political ideology has had a profound effect on legal principles, and the law is often used as a tool to achieve political ends in China.<sup>22</sup> In ancient China, to solidify the emperor’s ruling position, he would issue severe laws

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<sup>17</sup> See, generally, John Braithwaite, “Crime, Shame and Reintegration”, 2<sup>nd</sup> ed., (Cambridge: Cambridge University Press, 1999).

<sup>18</sup> See also Chap4, 2.1 3 pp.219-220.

<sup>19</sup> CCPL 1996, Article 93; see discussion on the right to silence, 3.3, pp.362-375.

<sup>20</sup> See Manfred Nowak Report 2006, op.cit., fn 10.

<sup>21</sup> Ibid., p.2.

<sup>22</sup> See Chap4, 2.1.3, pp.220-221

to restrict the people's behaviors and maintain social order.<sup>23</sup> The highly-centralized political and social management systems in China have less tolerance with the idea of putting an individual's interest above the state's need to punish crimes. One important principle of traditional Chinese criminal justice was that a person could not be convicted of a crime without a confession. The collection of physical evidence, especially forensic evidence, were not taken seriously or were even been neglected, as shown in the case SHE.<sup>24</sup> Once a suspect gave an oral confession, his confession would be adopted and believed either true or false. In part, this reflects the traditional concern for substantive justice, rehabilitation, and restoration of social harmony as explained in Chapter Four.<sup>25</sup> Confession is, of course, extremely functional for increasing the efficiency of criminal processing. The judges therefore relied heavily on the questioning of the accused.<sup>26</sup> In order to obtain the confession, the person on a criminal charge could even be sacrificed to cruel interrogation by torture.

Today, when the political leadership and social stability is threatened by some kinds of criminal activities which are so rampant, police are under pressure to solve crimes, and the general public is willing to turn a blind eye to coercive interrogation tactics if it allows police to crack cases and lock up criminals, as illustrated in Chapter Four.<sup>27</sup> This suggests that the absolute and non-derogable nature of the prohibition of any forms of torture and ill-treatment, as well-adopted by international treaties such as Article 7 of ICCPR and Article 3 of ECHR, is commonly not recognized in China.<sup>28</sup> For example, during periodic "Strike Hard" anti-crime campaigns, police are encouraged to use every means possible to show quick results in cracking down on specific crimes, which contrasts with the decision made in *Soering v UK*.<sup>29</sup> Lu Hong observes that certain clauses within the substantive and procedural criminal laws in

<sup>23</sup> Zhiping Liang, *The pursuit of Harmony in Natural Order*, pp.35-61.

<sup>24</sup> See 1.1 pp334-336; also see "Interview with the Criminal Police in She Xianglin Case: Regret for Not Having DNA Test", New Express Daily, 14/04/05, [http://news.xinhuanet.com/legal/2005-04/14/content\\_2827140.htm](http://news.xinhuanet.com/legal/2005-04/14/content_2827140.htm).

<sup>25</sup> See Chap4, 2.1.2, pp. 216-218.

<sup>26</sup> See Tungtsu Chu, *Local Government in China under the Ching*, p116-129; Miyazaki, "The Administration of Justice During the Sung (Song) Dynasty", in J.Cohen, R. Edwards and F. Chen eds., *Essays on China's Legal Tradition* (Princeton: Princeton University Press, 1980) 56, pp.59-62;

<sup>27</sup> See Chap4, 4.1.1, pp.247-248.

<sup>28</sup> See Chap2, 4.1, p35; *Tomasi v France* and *Chahal v UK* Chap3, 2.2, pp. 86-87.

<sup>29</sup> See *Soering v UK*, Chap3, 2.2, pp. 88-89.

China may be suspended, and offenders were given major incentives, beyond the stipulation of the law, to voluntarily confess to the authorities allowing them to accommodate the need of suppressing these criminal activities.<sup>30</sup> It is considered even more intolerable for suspects, who have already been restrained by state power, to be able to challenge or escape from the state power. This frequently leads to the increased use of torture and an upsurge in violence. Obviously these concepts and ideologies are contrary to that demonstrated in *Soering* and *Chahal*, which require an absolute guarantee for the individual's freedom from torture and ill-treatment, even during a state of immense disorder or emergency.<sup>31</sup> The problem is exacerbated by the widely spread discriminatory beliefs that migrant workers and criminals are socially inferior, as mentioned in Chapter Five.<sup>32</sup>

After the 1996 reform of the CCPL, the greater cultural acceptance of individuals' human rights, the growth in legal protections for defendants, and the increased legal formalism may have produced a socio-legal context in which a confession may be less prevalent and less influential on legal decisions.<sup>33</sup> However, because of those conflicting social conditions, the basic concepts on the fair trial principles, particularly the principle of presumption of innocence, contained in international standards are not yet ingrained in the minds of either the legal personnel or the general public at large in China, as examined in Chapter Four.<sup>34</sup> Therefore little change in the nature and consequences of confessions in the last decades has occurred under the impact of social and legal changes. On the contrary, old values that encourage confessions have persisted as strong cultural imperatives in China. The legal reform may be more indicative of symbolic reform than actual formal changes in legal culture and law in criminal justice.

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<sup>30</sup> Hong Lu, *op.cit.*, fn 13, p 553; also Weidong Huang, "Fighting Corruption Amidst Economic Reform", in Laurence J. Brahm, ed., *China's Century: The Awakening of the Next Economic Powerhouse*, (New York: John Wiley & Sons, 2001), pp.39-55.

<sup>31</sup> See *Soering v UK and Chahal v UK*, Chap3, 2.2, pp.87 and 88.

<sup>32</sup> See Chap5, 3.2.2 pp.294-295.

<sup>33</sup> Hong Lu, *op.cit.* fn 13, p.550;

<sup>34</sup> See Chap4, 4.1.2, pp.249-254.

The legislative, executive and judicial authorities have not responded to the new ideology promptly. Instead, they have continuously harboured ambitions of limiting and stepping on individual rights with the intention to keep their own interests.<sup>35</sup> Therefore, whether consciously or unconsciously, the law enforcers employ measures aimed at dealing with a small number of actual criminals who acted against the interests of the vast majority of the general public. In this sense every suspect is presumed guilty and torture is taken as a form of punishment for criminals.<sup>36</sup> Police officers who torture suspects believe that people will tell the truth when they are tortured. In order to avoid greater suffering in the interrogations, the suspects usually make groundless confessions. However, what is more likely to occur is that in the midst of their pain, suspects admit to doing whatever the interrogators want, even confessing to a crime that they did not commit, as in SHE's case and many other cases in which torture has led to false convictions.<sup>37</sup> As a result the facts cannot be clarified and a fair judgment cannot be reached. This shows that the notion of the presumption of innocence guaranteed under Article 14(2) of ICCPR is still weak among the law enforcers as evaluated in Chapter Four.<sup>38</sup>

At the same time, the funding, facilities and training of police officers to conduct forensic investigations has not been able to keep-up with the new situation of social security in China. Therefore, this situation reinforces the use of torture to obtain evidence. From the socio-economical perspective, it must be understood that the Chinese investigative institutions are understaffed and facing budget constraints. Police receive low pay and bear strong working pressures. Despite efforts on improvement, overall, police, prosecutors and judges remain poorly trained. Also, police lack the resources and sophisticated forensic tools such as national computer systems, electronic tracking and monitoring devices, and DNA analysis labs which are available to their counterparts in more economically advanced countries. The lack

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<sup>35</sup> See Chap4, 2.1.1, pp.215-216; 2.1.3, pp.220-221; 4.1.1, p.248.

<sup>36</sup> See Chap4, 2.1.1, p214.

<sup>37</sup> See 1.1, p.335; also see Wenjing Zhang, *op.cit.*, fn 6, p.22; Cesare Beccaria, *op.cit.*, fn 5, p.41.

<sup>38</sup> See Chap4, 4.1.2.2, pp.251-252.

of real monitoring mechanisms adds to the possibilities of torturing persons in custody and getting away with it, as discussed below. Therefore the police commonly use dictatorial measures on anyone who resists them. During the process of the criminal justice reform, the police surely seek for wider discretion on the means of social control and hinder the reform to protect its own interests.

### **3. A Weak Legal Framework against Torture to Force Confessions**

Besides these traditional factors which are against safeguarding the rights of suspects, China lacks specific legislation to ban the use of torture during the criminal procedure. The role of the defence party in the criminal procedure is also still rather weak. At the beginning of 1999, in order to prevent abuses, including the use of torture to obtain confessions, the SPP issued implementation rules stating that prosecutors should routinely read suspects under interrogation their rights.<sup>39</sup> However, these rules are too simple and impractical. They do not spell out, either what specific kind of warning is required, or the legal consequences, if any, of interrogating a suspect without such a warning. Thus, a reading of rights may not explain very much to the suspects, which breaches Article 9(2) of ICCPR as suggested in Chapter Five and Article 14(3)(b) as will also be discussed in Chapter Seven.<sup>40</sup> The lack of a presumption of innocence and relevant guaranteed procedures further devalues any warning prior to interrogation, as discussed below. The CCPL of 1996 effectively puts suspects at a greater risk of torture and ill-treatment to extract confessions.

#### **3.1 A Narrow Concept of Torture**

The first factor concerns the concept of torture. Legally, China has passed the legislation to prohibit torture in criminal justice. However, Chinese text rarely refer to “torture” in discussions of the domestic context.<sup>41</sup> The CCL of 1997 contains the

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<sup>39</sup> See Detailed Implementation Rules on the “Publicity of Prosecutorial Affairs” of People’s Procuratorates, 04/01/99, Sections 7 and 8.

<sup>40</sup> See Chap5, 3.4.1, pp.305-306; Chap7, 4.2.1, p.443.

<sup>41</sup> To reflect this practice, the text in this thesis translates “刑讯逼供” literally as coercion of confession, rather

offence and punishment of torture in the special provisions, Article 247 and 248, on “infringing upon the rights of the person”.<sup>42</sup> Article 247 is directed against the general situation of torture and other inhuman treatment and states that any justice or law-enforcement personnel who extort a confession or evidence from a criminal suspect or a defendant by torture or violent force shall be sentenced to fixed-term imprisonment of not more than three years of criminal detention.<sup>43</sup> If the offender causes injury and disability or death to a person, he shall be given a heavier punishment according to the provisions of Articles 232 and 234.<sup>44</sup> Additionally, Article 248 particularly stipulates the punishment for violence against prisoners or detainees. Article 43 of the 1996 CCPL regulated the process of collecting evidence by the law-enforcement personnel, stating that “extorting confessions by torture” is strictly forbidden, and “threat, enticement, deceit or other unlawful means” are not permitted. The same provision can be found in the *SPP’s Rules on Implementation of the Criminal Procedure Law*. There are works regarding the prevention of torture as basically being equivalent to the prohibition of physical torture or extortion of confession by means of torture.<sup>45</sup> Therefore, in understanding Article 7 of ICCPR, some scholars believe that Article 274 and 248 in the CCL of 1997 have already sufficiently prohibited torture and other cruel, inhuman or degrading treatment or punishment.<sup>46</sup> However, an argument could be raised that China might have set the threshold for torture too low and it is not sufficient to prohibit torture or make it a crime for the following reasons.

### 3.1.1 Restricted Perpetrator

The current narrow definition as to the perpetrators is incompatible with the state responsibilities in Article 7 of ICCPR. This is because China fails to set up a

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than extrapolating with the word “torture”.

<sup>42</sup> See Criminal Law 1997, Article 247 and Article 248.

<sup>43</sup> See *ibid.*, Article 247.

<sup>44</sup> See Criminal Law 1997, Article 234: crime of intentional injury; Article 232: crime of intentional homicide.

<sup>45</sup> See generally, e.g. Yunsheng Chen, *Anti-torture: Rule of Law and Human Rights Protection in Contemporary China*, (Beijing: Social Sciences Academic Press, 2000), pp.3-7.

<sup>46</sup> See e.g. Xiumei Wang, “ON Savage Torture”, (2001) 2 *Modern Law Science*, p85; Ping Wang, “Prohibition of Torture: Analysis of Article 7 of International Covenant of Civil and Political Right”, (2002) 2 *Chinese Criminal Science*, p.118; Guangxian Wang, “The Evolution and Definition of the Meaning of Torture”, at Wei Zhou, ed, *Shanghai Jiaotong University Human Right Law Review*, Vol.1, (Beijing: Peking University Press, 2005), p.73.



framework that enables both public officials and private parties to be punished for treatment.<sup>47</sup> In China, according to Article 247 and Article 248 of CCL of 1997, torture is either perpetrated by certain particular authorities, which are courts, prosecutions and the public security agencies, or specific individuals who work as judges, prosecutors and investigators, and implement these acts on behalf of those authorities. That means only these specific groups are responsible and should face the corresponding legal consequences. Any other kind of harm inflicted on citizens or individuals by non-particular state agencies or civil servants whose duties and responsibilities are not related to state criminal judicial activities, is not normally called torture. Even physical or mental harm or suffering inflicted upon citizens or individuals by state judicial agencies and judicial personnel can not be regarded as “torture” when not committed in connection with a criminal case. In practice, certain kinds of torture outside the regular judicial process, such as torture in administrative detention and in non-custodial situations, have usually been committed with complete impunity. It would appear that the authorities have not taken adequate measures to prevent torture and ill-treatment, or any disciplinary measures following such incidents, as confirmed in *Ireland v UK* and *Cyprus v Turkey*.<sup>48</sup>

### **3.1.2 Limited Scope and Forms**

As discussed above, specific criminal investigations or trial activities and procedures used to be regarded as a necessary precondition for torture and ill-treatment, whether according to the law or the concept of the public. Of course, this is only one of the narrow understandings of torture and ill-treatment, since torture and ill-treatment involve a wide range of acts and situations according to international standards.<sup>49</sup> Many acts of torture and ill-treatment remain unacknowledged and many perpetrators unpunished. However, even within the criminal justice system, compared with the standards set in CAT and Article 7 of ICCPR, the scope and forms of torture under Chinese domestic law continues to fall short of the

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<sup>47</sup> See Chap2, 4.4, pp.40-43; Chap3, 2.3, pp.90-99.

<sup>48</sup> See *Ireland v UK and Cyprus v Turkey*, Chap3, 2.3.1, pp.90-91.

<sup>49</sup> See Chap2, 4.2, pp.36.

international definition in the following points.<sup>50</sup> Thus the domestic courts in China are not able to provide sufficient protections for the people who are in the risk of Article 7 treatment.<sup>51</sup>

Firstly, in Chinese law or corresponding judicial interpretations made with respect to the amendments of relevant Chinese laws, there is no clear mention of psychological torture contained in Article 7 of ICCPR and Article 1 of CAT.<sup>52</sup> Torture under Article 274 and 248 tends to be regarded in China as a short term for a cruel punishment and an extreme or special form of penalty implemented to the body, which causes great physical agony. This may exclude certain cases of torture that do not result in serious physical injury. The construct of torture is, in reality, based on the degree of physical pain or suffering.<sup>53</sup> There is no doubt about this, given the definition of torture in such a limited manner, torture and ill-treatment is rarely prosecuted in China. In particular, physical or psychological torture that leaves no physical trace is nearly impossible to punish with the appropriate penalties. Nowadays, particularly in those developed provinces in China, the enforcers of law during the interrogation will try to avoid using those classic physical torture methods. However, special forms of unbearable mental persecution have been implemented instead to force the suspects to confess. These tactics include deprivation of food, noise and sleep, continuous interrogations, stress positions, threatening to hurt family members, as well as all kinds of psychological manipulations. Such practices might violate the freedom from torture and ill-treatment, as in *Ireland v UK* and *Bati and Others v. Turkey*, since they may cause permanent or severe injuries, death or other serious consequences at the end of the interrogations.<sup>54</sup> Needless to say, situations such as property damage during the investigation or the threat of extreme violence risked a violation, similar to *Selcuk and Asker v Turkey* and *Thompson and Venables v News Group Newspapers*, have never been counted, or been proposal to be

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<sup>50</sup> See Chap2, 4.2 and 4.3, pp.36-40; Chap3, 2.4.1, pp.99-104.

<sup>51</sup> See Chap2, 4.4, p.41; *Soering v UK*, Chap3, 2.3.1, pp.91-92.

<sup>52</sup> See Chap2, 4.1, pp36-37; Chap3, 2.4.1, pp.101-102.

<sup>53</sup> See *Aydin v Turkey*, Chap3, 2.4.1, p.101.

<sup>54</sup> See *Bati and Others v. Turkey*, Chap3, 2.4.1, p.102; *Ireland v UK*, Chap3, 2.4.3, pp.108-109.

considered, as a violation belonging to the protection of torture and ill-treatment in China.<sup>55</sup> The family members of the detainees, like SHE's mother and brother, have also never been taken into consideration as the victims of Article 7 treatment as in case *Quinteros v Uruguay* by the Chinese law.<sup>56</sup> While providing impunity for officials who use ill-treatment as discussed below, this reality effectively encourages many law enforcement officials to rely on confession, rather than on proper investigative techniques, to break cases.

Secondly, torture is still solely an intentional act of punishment in China according to Article 247 and 248. It means that the perpetrator is fully aware of the consequences of a cruel act committed with a purpose to inflict physical pain upon persons accused or suspected of a criminal offence, or persons under surveillance. In practice, as to general acts of violence directed at the human body, the victims of violence are occasionally injured unexpectedly to a serious extent. These results are sometimes completely unintentional and are purely accidental. These kinds of acts do not belong to the sphere of prohibition of torture according to the understanding of the current law. However, torture can be distinguished by the severity of suffering and the purpose for which the suffering was inflicted, as confirmed in *Bati and Others v. Turkey*.<sup>57</sup> The scope of torture defined in China appears be much narrower than that of Article 7 of ICCPR and Article 3 of ECHR, for what constitutes torture and ill-treatment depends on all the circumstances of the case, as reiterated in *Ireland v UK* and *Wainwright v. the UK*.<sup>58</sup> Furthermore, as emphasized in many cases, to be prohibited, an ill-treatment must primarily attain a minimum level of severity rather than purpose.<sup>59</sup> Therefore it is suggested that such limited scope of torture and ill-treatment still leaves a great deal of leeway for the Chinese officers, during the criminal investigation activities or in the course of a criminal trial, to use those

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<sup>55</sup> See *Selcuk and Asker v Turkey*, Chap3, 2.3.4, p.99; *Thompson and Venables v News Group Newspapers*, Chap3, 2.3.1, p.92.

<sup>56</sup> See *Quinteros v Uruguay*, Chap2, 4.3, p.39.

<sup>57</sup> See Chap2, 4.2, pp.36-37; *Bati and Others v. Turkey*, Chap3, 2.4.1, p.102.

<sup>58</sup> See *Ireland v. UK* and *Wainwright v. UK*, Chap3, 2.4.1, pp.103-104; also see the observation on *Wainwright v the Home Office*, Chap3, 2.4.1, p.105.

<sup>59</sup> See *Rojas Garcia v Colombia*, Chap2, 4.3, pp38; *Ireland v UK*, Chap3, 2.4.1, p.101.

measures which could reach the level of severity regarded as torture or ill-treatment.

Thirdly, it is difficult to know exactly what constitutes a degree of severity according to the Chinese domestic law in the assessment of torture and ill-treatment. There is no corresponding Chinese law that protects those suffering from an act which fails to reach the severity of torture but would still engage in cruel, inhuman and degrading treatment or punishment established in CAT and Article 7 of ICCPR.<sup>60</sup> In determining the degree of severity, people, authorities, and areas may differ greatly in China. The perpetrator of torture and ill-treatment may well find a pretext or an excuse for his behaviour. The Chinese authorities would then fail to adhere to their obligations under the ICCPR and CAT, which requires States parties to take measures for the prevention of torture and to punish every act of torture with appropriate serious penalties.<sup>61</sup>

### **3.2 Evidence Obtained Through Torture Still Admissible at Trial**

#### **3.2.1 Lack of Exclusionary Rules**

The second factor concerns the evidence. On close examination of the provisions of the current CCPL, it leaves open the issue of the admissibility of illegal evidence. None of these Chinese domestic laws expressly prohibits the use of confessions obtained by torture from being admitted as evidence in court.<sup>62</sup> This sheds some light on the limited effectiveness in eliminating the practice of coercing confessions. Many scholars agree that the lack of an exclusionary rule is one of the principal reasons for the prevalence of torture in China.<sup>63</sup> For example, Article 43 of the CCPL of 1996 only states that the use of torture to coerce statements and the gathering of evidence by threats, enticement, deception, or other unlawful methods is strictly prohibited. However, according to Cui Ming, using very large amounts of

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<sup>60</sup> See Chap2, 4.3, pp.37-40; the Greek case, Chap3, 2.4.1, p.102.

<sup>61</sup> See Chap2, 4.5, pp. 43-45; *Soering v UK* and *Thompson and Venables v News Group Newspapers*, Chap3, 2.3.1, pp.91-92.

<sup>62</sup> The latest evidence rules issued by the SPC in 2002 are only applicable in civil cases.

<sup>63</sup> See e.g. Guojun Zhou, "Discussion of Several Issues on the Prohibition of the Use of Torture to Extract Statements", (1999) 1 *Politics And Law Forum*, p.93.

evidence derived from torture and other illegal means, especially the accused person's confession, remains a principal basis for proving cases as before.<sup>64</sup> As long as illegally-obtained evidence is admissible, the clause "extorting confessions by torture is strictly forbidden" essentially exists only in name.<sup>65</sup>

Also the provisions used in those departmental rules on the interpretation of the CCPL have not clearly and expressly excluded the evidence obtained through torture from admission at trial. According to Article 61 of *Interpretation of the Supreme People's Court on several Issues about the Implementation of the Criminal Procedure Law of the People's Republic of China of 1998* (SPC Interpretation 1998), collecting evidence through illegal means is strictly prohibited. If statements from witnesses or victims, or confessions from defendants are proved to have been obtained through tortures, threats, inducements or deceptions, such statements shall not be used as a basis for convictions.<sup>66</sup> *Supreme People's Procuratorate Rules on the Criminal Process for People's Procuratorates* (SPP Rules 1999) has similar provisions.<sup>67</sup> According to the *Rules (Trial) of Supreme People's Procuratorate for Implementation of the Criminal Procedure Law* enacted in 1997, "physical or documentary evidence, if verified as being able to prove the truth of a case, may be used as legal evidence to prosecute a crime".<sup>68</sup> SPP Rules 1999, which is a replacement for the 1997 Trial Rules, leaves out this paragraph, but it continually, leaves the door open for illegal evidence. Regulation of Ministry of Public Security on the Procedures of Handling Criminal Cases by Public Security Agencies of 2007 (MPS Regulations 2007) on the issue concerning evidence admission are even vaguer than the SPP Rules 1999.<sup>69</sup> It remains silent on the validity of illegally

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<sup>64</sup> See Min Cui, *New Progress in China's Criminal Procedure Law: A Comprehensive Look Back at Research and Discussions of China's Criminal Procedure Law*, (Beijing: China People's Public Security University Press, 1996), p.216; See also Chongyi Fan, *Studies on Evidence*, 3<sup>rd</sup> ed., (Beijing: Law Press, 2005), Chapter 5(2), it is a law textbook of 21 Century Series of Legal Study for institutions of higher education; See also Guozhong Wang, "Thoughts on Constructing a Rule Excluding Illegal Evidence in our Country", (1999) 10 People's Procuratorate, pp.18-21.

<sup>65</sup> See Min Cui, *op.cit.*, fn 64, p.216.

<sup>66</sup> SPC Interpretation 1998, Article 61.

<sup>67</sup> SPP Rules 1999, Articles 160 and 265.

<sup>68</sup> Rules (Trial) of Supreme People's Procuratorate for Implementation of the Criminal Procedure Law 1997 (Repealed), Article 233

<sup>69</sup> MPS Regulations 2007, Article 51.

obtained confessions and other evidence, only generally prohibiting the use of torture in the course of collecting evidence.<sup>70</sup>

Additionally, while both the SPC and SPP interpretations officially ban the use of tortured confession or statements, the tortured confession or statement may be legally “recollected” as evidence at trial.<sup>71</sup> Once a confession has been extracted through torture, the law enforcement officer can request that the suspect repeat his or her statement, this time without the use of torture, and if the suspect complies, the confession may be admissible.<sup>72</sup> These judicial interpretations also failed to spell out under what circumstances the authorities may reinvestigate and recollect statements, and thereby cure the illegality. Moreover, evidence derived from the tortured confession or statement is admissible, creating a situation where the “fruit of the poisonous tree” is deemed *bona fide* evidence in the Chinese judicial system. The CCPL stipulates that there are seven categories of evidence.<sup>73</sup> The Chinese judiciary divides those types of evidence into two general categories: statements and other evidence. The term “illegally obtained evidence” includes extortion of confessions by torture, but also search without a warrant, etc. However, Article 43 of the CCPL and Article 247 of the CCL of 1997 address only the tortured confession, not other kinds of evidence obtained through torture. The judicial interpretations, such as Article 61 of the SPC Interpretation 1998, are also only applicable to oral evidence, not other forms of evidence. As for the documentary, material evidence and audio-visual materials collected by police and prosecutors, though obtained through means such as illegal search detention and even eavesdropping, the court cannot refuse to take it as the basis for deciding case. Furthermore, it can be seen that the judicial interpretations only aim at collecting evidence by illegal means such as extorting confession by torture which gravely infringes upon the personal right of the citizen. However, they do not mention too much about the evidence obtained through

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<sup>70</sup> *Ibid.*, Articles 51 and 189.

<sup>71</sup> SPC Interpretation 1998, Article 61; SPP Rules 1999, Article 265.

<sup>72</sup> See Guoqing Chen, *Application and Interpretation of the Rules of the Peoples' Procuratorates on Criminal Procedure*, (Beijing: Police Officer Education Press, 1999), p.278.

<sup>73</sup> CCPL 1996 Article, 42.

means of violating the right to privacy of the citizens, as protected by Article 8 of ECHR.<sup>74</sup>

China obviously has not established formal and effective exclusionary rules.<sup>75</sup> Scholars have seriously criticized the intentional omission on the admissibility of illegally-obtained confessions and other evidence by the CCPL of 1996 and these judicial interpretations and have suggested that the ambiguity of the interpretations on this question may result in inconsistencies while handling illegal evidence between different branches of the law implementation apparatus.<sup>76</sup> Also, such interpretations would arguably encourage some law enforcement officers to use torture as a means to extract clues about evidence, since they have been given an impression that they may not be able to rely on the oral evidence, but admission of the derivative evidence at trial will be secured.<sup>77</sup> Indeed, many individuals have been convicted of heinous crimes based on “confessions” obtained through torture, coercion or the use of force, as vividly demonstrated in the SHE case. This practice certainly amounts to Article 7 of ICCPR acts and breaches Article 15 of UN CAT and 14(3)(g) of ICCPR which excludes the evidence elicited as a result of torture or other coercion by the accused, as also well-presented in *A and others v Secretary of State for the Home Department (No.2)* and *Soering v UK*.<sup>78</sup>

There has been a heated debate on whether evidence gathered through illegal means, including coerced confessions, statements, documents and physical evidence, should be admissible at trial, in particular, when the use of the illegal-obtained evidence are supported by other prosecution evidence such as physical evidence or evidence of

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<sup>74</sup> See *Ireland v the UK*, Chap3, 2.4.1, p.103.

<sup>75</sup> See Xifen Lin, “Debate on the Exclusionary Rules of Illegally Obtained Evidence in Chinese Context – Critical Reflection on the Local Discourse Resources”, (2008) 2 Northern Legal Science, p.127.

<sup>76</sup> See Weidong Chen and Lei Fu, “Reflection and Perfection of Evidential Competency System in China”, (2008) 1 Evidence Science, p.12; Yong Wang, “Discussion on the Exclusionary Rules in China’s Criminal Justice System”, (2007) 2 Legal System and Society, p170; Jingjian Wang, “On Establishing Chinese Criminal Unlawful Evidence Exclusionary Rules”, (2006) 4 Journal of Jiangnan Social University, pp62-63; Kuanzhi Fu, “Research on the Exclusionary and Prevention of the Illegal Evidence”, (1997) 1 Cass Journal of Foreign Law, pp.60-61.

<sup>77</sup> See Kuanzhi Fu, “Research on the Exclusionary and Prevention of the Illegal Evidence”, (1997) 1 Cass Journal of Foreign Law, pp60-61; Jingjian Wang, *op.cit.*, fn 76, p.63.

<sup>78</sup> See *Jalloh v. Germany* and *A and others v Secretary of State for the Home Department (No.2)*, Chapter 3, 4.5, pp. 190-194.

another confession.<sup>79</sup> Opinions among legal scholars on the matter can be divided into five camps.<sup>80</sup> Firstly, there were some legal scholars insisting that any evidence, either legally or illegally collected, may be measured and used at trial as long as it can be verified as true.<sup>81</sup> Secondly, some scholars in China believe in the primacy of legal evidence and argue that all types of illegal evidence should be banned no matter how crucial they are for the case.<sup>82</sup> Thirdly, there are works which suggest that illegally obtained evidence may be admitted in trial after being legally gathered again or it may be used as a clue to attain other admitting evidence.<sup>83</sup> Fourthly, there are works with an opinion that all illegally-obtained verbal evidence should be banned while physical evidence may be measured and used at trial as long as it can be verified as true.<sup>84</sup> A recent authoritative book written by a senior prosecutor, Chen Guoqing, also expressly claims that physical evidence, if verified as being able to prove the truth of a case, may be used for prosecuting crimes. Since the physical evidence is irreplaceable and irreproducible and it will not be changed or caused to change in character or composition by the way and procedure of collection, as a method of fighting crime, it should not be excluded simply because those evidence were obtained through illegal means.<sup>85</sup> Fifthly, there is a group of scholars maintain that all illegal evidence, regardless of illegally-obtained confession or physical evidence, should be banned with a number of exceptions under which a compelling

<sup>79</sup> See e.g. Xiong QiuHong, "Prohibition of Torture and Exclusion of Illegally Obtained Evidence", in M. Kjaerum eds, *How to Eradicate Torture, A Sino-Danish Joint Research on the Prevention of Torture*, (Beijing: Social Sciences Documentation Publishing House, 2003), pp.792-807; Xuekuan Li, Haiyan Wang and Xiaoling Zhang, "Discussion on the Admission of Illegally Obtained Evidence in the Criminal Justice", (2000) 1 *Tribune of Political Science and Law*, pp.77-79.

<sup>80</sup> See generally, Xifen Lin, *op.cit.*, fn 75, pp.127-128.

<sup>81</sup> See Guangzhong Chen et al, *United Nations Standards of Criminal Justice and China's Criminal Justice System*, (Beijing: Law Press, 1998), pp.61-62; Shuai Ma and Hao Cheng, "Question on the Exclusionary Rules of Illegal Evidence and Its Countermeasures", (2008) 7 *Law Application*, pp.79-83.

<sup>82</sup> See e.g. Yong Wang, *op.cit.*, fn 76, p.171; Guiyong Zhang, "On Elimination Of illegal Evidence", (1995) 6 *Journal of Renmin University of China*, pp.58-59; Yusu Wu, *Evidence*, (Beijing: Masses Press, 1983), p.70.

<sup>83</sup> See e.g. Hai Zhang and Shaohua Chen, "Discussion on the Exclusionary Clauses in Criminal Evidence Rules", (1996) 40 *Law Review*, p.40; Dehao Fan, "On Several Legislative Issues on Evidence in the Criminal Process", (2000) 9 *Law Application*, p.45.

<sup>84</sup> See e.g. Jingjian Wang, *op.cit.*, fn 76, p.64; Weidong Chen and Lei Fu Li, *op.cit.*, fn 76, pp.14-15; Jia and Huagen Li, "Discussion on the Application of the "fruit of the poisonous tree" Theory in China", (2008) 12 *Legal System and Society*, p.388; Xuekuan Li, Haiyan Wang and Xiaoling Zhang, *op.cit.*, fn 79, pp.80-81.

<sup>85</sup> See Guoqing Chen, *op.cit.* fn 72, pp.277-278; also see, 30 May 2010, two new sets of rules by China's five main law enforcement institutions the SPC, SPP, MPS, MSS & MOJ have been adopted the "Regulations on Several Questions Concerning the Investigation and Judgment of Evidence in Handling Captical Cases" and "Regulations on Several Questions Concerning the Exculsion of Illegal Evidence in Handling Criminal Cases" set out new procedural standards aimed at preventing criminal cases from being decided on the basic of illegal obtained evidence, especially evidence obtained through physical torture.



public interest necessitates the use of the evidence in question.<sup>86</sup> These scholars, such as Sun Xiaofu, cited other legal systems, such as the Public Safety exception under the Miranda Rule of the United States, to justify such exceptions.<sup>87</sup>

Obviously, there is a major concern on the issue of crime control in the majority of works, no matter which are trying to propose or against exclusionary rules for the criminal justice system in China. Owing to the poor capability of many prosecutors and the police, the confession and statement is still the main source of the evidence in criminal procedure, or, at least, it is the main technique of proof. While giving a confession, a suspect can help investigation agencies to develop and obtain additional case evidence of his role in the crime that corroborates his conviction. Conversely, if a suspect's account is wrong about crime scene facts that should have been known by the perpetrator, the suspect is revealing the kind of lack of knowledge that would be consistent with a false confession. Therefore those academics and practitioners who are against exclusionary rule have insisted that tortured confessions could be a necessary weapon in the fight against crime in practice. For example, a police investigation scholar argued that an exclusionary rule is impractical and inappropriate for China, since it would permit too many criminals to escape legal sanctions and hamper efforts to crack down on crime.<sup>88</sup> As a result of four years of research and study on criminal investigation work, Du Jingji believes that in contemporary judicial practice, the number of real crimes solved through the illegal criminal practice of tortured confession is far greater than the number of false cases it creates.<sup>89</sup> This may be objective for true confessions that the facts the suspects

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<sup>86</sup> See e.g. Ruihua Chen, "Research on the Exclusionary Rules of the Illegally-obtained Evidence in the Criminal Justice System", (2003) 6 *Law Science*, pp.48-49; Henan Xu, "Discussion on the Exclusionary Rules of Illegally-obtained Criminal Evidence", (2006) 3 *Tribune of Political Science and Law*, pp.26-39; Jiancheng Wang, "What Kind of Exclusion Rule of Evidence Illegally Obtained Do We Need in Chinese Criminal Procedure?", (2006) 5 *Global Law Review*, p.552.

<sup>87</sup> See Xiaofu Sun, "On the Effectiveness of Illegal Evidence from the Perspective of Illegality of the Evidence Collection Process: The Outlook for Establishing an Exclusionary Rule in Our Country", (1997) 5 *Studies in Law And Commerce*, pp.68-69; For details on US evidentiary rules and theories, see Joseph G. Cook and Paul Marcus, *Criminal Procedure* 3<sup>rd</sup> ed., (New York: Matthew Bender & Company, 1992), pp.416-456. Also see Jiancheng Wang, *op.cit.*, fn 86, pp.553-554.

<sup>88</sup> See Jia and Huagen Li, *op.cit.*, fn 84, p.388; Weidong Chen and Lei Fu Li, *op.cit.*, fn 76, p.15.

<sup>89</sup> See Jingji Du, "A Superficial Discussion of the Sources of Tortured Confession and Policies to Deal with It", in Huaixu Wang, ed., *Research and Practice of Investigation and Interrogation*, (Beijing: China People's Public Security University Press, 1998), p.374.

contributed are accurate and matches the objective evidence of the crime.

However, these arguments may not justify the use of evidence obtained by torture or ill-treatment in criminal proceedings, since the absolute character of prohibition of torture and ill-treatment enshrines one of the fundamental values of democratic societies. The right not to be tortured and ill-treatment cannot be suspended or weighed against competing interests even in the event of a public emergency threatening the life of the nation, as emphasized in many cases such as *Khan v UK* and *Jalloh v. Germany*.<sup>90</sup> This situation might also raises serious issues as to the right to a fair trial, as there is no doubt in mind that torture easily leads to false information. It might be incompatible with the requirement to the State to avoid creating the risk of an unfair trial as a whole by admitting a evidence has been extracted by torture, regardless of any consideration, as the situation and findings reiterated *Harutyunyan v Armenia*.<sup>91</sup>

### **3.2.2 Lack of the Duty to Investigate the Allegations of Torture in Detention**

Current CCPL and relevant departmental rules set up a further hurdle for those alleging torture during detention. The law and the practice have undermined the spirit of “absolute guarantee” in Article 7 of ICCPR in China. For example, the SPC Interpretations set up that the suspects must prove both that the torture occurred and that the confession was a result of the torture. This standard of proof required by the court in practice appears much stricter than the one under the European Court, which is “beyond reasonable doubt”, as presented in *Martinez Sala and Others v Spain*.<sup>92</sup> As mentioned above, due to the influence of the traditional ideological “presumption of guilty”, in practice many judges and prosecutors in China regard a claim of torture to be an excuse to withdraw a confession.<sup>93</sup> The authorities in China have no specific legal responsibility to provide a satisfactory and convincing explanation on

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<sup>90</sup> See *Khan v UK and Jalloh v. Germany*, Chap3, 4.5, pp.186-188.

<sup>91</sup> See *Jalloh v. Germany* and *Harutyunyan v Armenia*, Chap3, 4.5, pp.188-189.

<sup>92</sup> See *Martinez Sala and Others v Spain*, Chap3, 2.3.3 pp.96-97.

<sup>93</sup> See 2.1 pp.334-335.

how the accused's suffering was not caused by their actions, as required in *Kmetty v Hungary*.<sup>94</sup> Unless the defence and his lawyer can bring the evidence, such as, in the form of medical reports of injuries and witness statements, to prove that the victim has severe and visible physical injuries or other grievous consequences, the domestic judicial authorities may deny the suspects a reasonable opportunity to establish the matters of which they complained without a good explanation. However, it is often difficult for the suspects to prove that they were victims of Article 7 treatment, since the violation might take place long ago and the wounds of torture have already been healed.<sup>95</sup>

Moreover, it is difficult or even unrealistic to gather the evidence for the alleged torture and ill-treatment by the lawyers of the accused. This is because the investigative agencies are given huge powers without impartial judicial review, as discussed in Chapter Five, to completely block a suspect's access to legal counsel and family in the pre-trial stage for investigation.<sup>96</sup> Such a vulnerable condition in itself is being seen as a breach of Article 7 treatment as HRC stated.<sup>97</sup> Moreover, as the suspects normally experience a long period of detention in police custody, a greater chance of suspects is being tortured, as shown in *Aksoy v Turkey*.<sup>98</sup> This practice clearly violates Article 7 in conjunction with Article 9 of ICCPR.<sup>99</sup> Article 14(3)(b) of ICCPR could also be considered in this issue, which deals with issues such as the lawyer's right to properly defence which will be discussed in detail in Chapter Seven. With only their word against that of the prosecution, torture victims are unlikely to have their claims accepted while evidence are almost never rendered inadmissible based on such a claim.

All these shortcomings in the proceedings deprived the accused of any opportunity to

<sup>94</sup> See *Kmetty v Hungary*, Chap3, 2.3.2, p.93.

<sup>95</sup> See 1.1, p335; also see "Four Suspense Left behind She Xianglin Case, Police Denied Using Torture to Extract Confession", Chongqing Evening News, 10/04/05, [http://news.xinhuanet.com/legal/2005-04/10/content\\_2808893.htm](http://news.xinhuanet.com/legal/2005-04/10/content_2808893.htm).

<sup>96</sup> See Chap5, 3.4.1 pp.305-306; *Ramirez Sanchez v France*, Chap3, 2.4.2 pp.106-107.

<sup>97</sup> See Chap2, 5.8, pp.67-70; Chap3, 2.4.2, pp.106-108; Chap5, 3.3, pp.299-302.

<sup>98</sup> See Chap5, 3.2.2.2, pp.296-299; *Aksoy v Turkey* 2.3.3 Chap3, p.97; Chap3, 3.5.5.2 p.145.

<sup>99</sup> See Chap2, 4.3, p.42; *Conteris v Uruguay*, Chap2, 5.8, p.69.

challenge the version of the events from the alleged torture perpetrators. Commonly, only when brought to court for trial does a suspect have an opportunity to tell the judges about the torture they have experienced in detention. However, without specific evidence law and clear criminal evidence rules, as discussed above, the judge in fact freely undertakes the task of evaluating the evidence produced by the suspects, whether the torture indeed existed and whether it was sufficiently serious to reach the threshold of severity. As considered in *Kmetty v Hungary* and *Aksoy v Turkey*, a violation of Article 7 might occur.<sup>100</sup> It is arguable that the Chinese authorities reacted ineffectively to the complaints and the investigation appears to commence too late. It is both inappropriate and unreasonable to place the burden of proof on the accused to produce solid evidence of torture without having visible physical injuries, as shown in *Khudoyorov v Russia* and *Salman v Turkey*, when the accused is completely within the control of the police in custody.<sup>101</sup> Once the detainee has shown that he was free of the injury or harm in question before arrest, the State will then bear the burden of providing a plausible explanation which is consistent with the evidence. Strong presumptions of fact on the use of torture will arise in respect of any injury or hurt occurring during such detention.<sup>102</sup> As a result, although China has laws prohibiting torture, such as Articles 247 and 248 of the CCL of 1997, they cannot be implemented effectively. China has not fulfilled the duty to pass and enforce the effective legislation to prohibit the torture and ill-treatment under Article 7 of ICCPR.

### 3.3 Debate on the Right to Silence in China

As concluded from Chapter Four, CCPL contains no clear provision that fully recognizes the presumption of innocence as stated in Article 14(2) of ICCPR.<sup>103</sup> Indeed, the principles of presumption of innocence are undermined by some provisions of CCPL contrary to the international standard, Article 93 particularly.

<sup>100</sup> See Chap2, 4.4, p.41; *Kmetty v Hungary* and *Aksoy v Turkey*, Chap3, 2.3.2, pp.93 and 95.

<sup>101</sup> See *Khudoyorov v Russia*, *Salman v Turkey*, Chap3, 2.3.3, p.98.

<sup>102</sup> See *Rehbock, v Slovenia*, 2.3.3 Chap3, pp.97-98.

<sup>103</sup> See Chap4, 4.1.2.1, pp.249-251.

This facilitates the use of tortured confessions by requiring the criminal suspect to answer the investigator's questions that are truthfully relevant to the case. The Chinese legislature established the law in this way to serve the objective stipulated in Article 2 of CCPL, namely to guarantee the accurate and timely clarification of the facts of crimes, to apply the law correctly, and to punish criminal elements to safeguard innocent people from criminal prosecution. According to Article 93, suspects do not formally have the right to silence, but may only decline to answer questions unrelated to the case.<sup>104</sup> Some officials defend the current system, saying that it does not require a subject to answer all the questions but instead requires only that any response to be truthful. However, if the responsibility is placed on the prosecution to prove the guilt of a person, it follows that the accused should not be forced to assist the prosecution by being forced to speak according to the law. Consideration of the judgment in *Saunders v UK* reveals that this view may completely infringe the presumption of innocence and the right to freedom from self-incrimination.<sup>105</sup>

Moreover, the argument that the suspect is not required to answer all the questions under Article 93 is not consistent with the practice of criminal justice in China. This is because reasons for the suspect to refuse answering questions are not clearly stated in the law. In fact, the suspect may never know what is truly irrelevant during an interrogation. But the police could define what is relevant to the case. It means that the suspect is forced to help the prosecutor in proving the charges against him and a conflict with principle of presumption of innocence would arise.<sup>106</sup> Noticeably, Article 93 of CCPL requires that before interrogation, the police must give the suspect an opportunity to make a statement regarding his or her guilt or innocence. It might argue that the procedure is designed to prevent the police from proceeding on the premise that the suspect is guilty of the suspected crime. Despite the good intentions of the legislation, it indicates that the police often ignore the procedural

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<sup>104</sup> CCPL 1996, Article 98; also see 4.4.3 Chap3, pp173-184.

<sup>105</sup> See *Saunders v UK*, Chap3, 4.4.3, p178-179.

<sup>106</sup> Ibid. also see Chap2, 4.5, pp. 43-45.

requirement in practice. Not only that they do not allow suspects to make a statement to profess their guilt or innocence, the police, in many cases, also apply psychological pressures to make suspects confess or force them to explain away their alleged involvement in a crime. An often-used improper tactic is to tell the suspect that the officer has solid evidence against him or her and that it would be in his or her best interest to confess under Article 20 and 37 of CCL of 1997 and the policy of “lenient punishment for confessions” (坦白从宽).<sup>107</sup>

In light of the traditional background explained above, Article 93 of the CCPL comes as no surprise.<sup>108</sup> This legal duty to honestly answer questions during the interrogations is originated from the traditional concepts as mentioned above, “leniency towards those who would acknowledge their crimes while severely punishes those who stubbornly refuse to do so” (坦白从宽，抗拒从严), which developed as a well-known criminal justice policy in modern China.<sup>109</sup> Though no legal penalty stated in law is imposed if the suspects refuse to answer questions, this impressive policy is still stressed to all suspects. Based on this traditional policy, the CCL of 1997 also provides that whether the suspect confesses guilt or not, his or her attitude towards the accusation will be regarded as an important circumstance in the process of conviction. It stipulates a possibly lighter sentence and/or a mitigated sentence within the sentence range for voluntary confessions.<sup>110</sup> Although judges and juries cannot draw the conclusion of guilty only on the basis that the suspect remains silent when questioned during the investigation in any case, the investigator will file the attitude towards the investigation with the suspect’s record.

These provisions in the CCL of 1997 only specify that persons who confess with sincere remorse, or before the police detect the crime, will be given a more lenient sentence. However, the degree or amount of leniency is not explicitly defined.

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<sup>107</sup> See 2.1, p345.

<sup>108</sup> See 2.1 pp343-349; Chap4, 2.1.3, pp218-221; Chap4, 4.1.1, p246.

<sup>109</sup> See, generally, Genju Liu, “The Right to Silence and Lenient Punishment for Confessions, Severe Punishment for Resistance”, (2000) 4 Journal of Central Leadership Institute of Politics and Law, pp.43-46.

<sup>110</sup> Criminal Law 1997, Article 63 and 67.

Neither is there such explicit provision in the CCPL of 1996. Apparently, the rule of truthful statement is only taken as an obligation which does not bear absolute legal responsibility, and confession in most cases does not, in fact, guarantee a concession. In practice, however, a suspect who does not perform this obligation will be under heavy psychological pressure and face the danger of being punished severely. This is because, if the court has convicted the defendant after hearing the case, the fact that the suspect refused to confess guilt but gave a false statement or remained silent in the record before trial, will be directly taken as the basis of facts for the court to give a more severe penalty to the suspect. Therefore, suspects are forced to answer questions due to the threat of being punished for remaining silent.<sup>111</sup> Thus the law and the policy with regard to the truthful statement will not only deprive the suspect of their right to defence, but also make them lose their right to free choice.<sup>112</sup> Most suspects in the criminal proceedings will, at least in the period of investigation, actively make a confession of guilt instead of defending their innocence. It may be concluded that Article 93 of CCPL and its practice contradicts with Article 12 of the 1996 CCPL to force the suspect to answer questions and incriminate himself due to the threatened imposition of a penalty for remaining silent.<sup>113</sup> This provision and its practice clearly contravenes not only the fairness of a trial, but it also appears to easily cause Article 7 treatment when law enforcement officials have not obtained satisfied evidence.<sup>114</sup>

With China's documented participation in international covenants and commissions on human rights and fair trial, and preliminary recognition of the principle of presumption of innocence, the CCPL, however, still delays acceptance of the extension of legal rules guaranteeing the right to fair trial to a right to silence. Such a "natural extension" in many other countries and under Article 14 of ICCPR as well

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<sup>111</sup> See *Condron v UK*, Chap3, 4.4.3, pp177-178.

<sup>112</sup> See Ruihua Chen, "The Rules of Criminal Evidence in China", Conference Proceedings on Conference "Criminal Justice in UK and China", (Beijing: Law Press, 2000), p.177; Jianfeng Liu, "Confession is Cruel?!", China Economic Times, 28/10/00, p2.

<sup>113</sup> See Chap2, 4.5, p43-45; Chap2, 6.2, p.72; *Murray v UK*, Chap3, 4.4.3, p177.

<sup>114</sup> See Chap3, 2.4.3, pp108-109; also see Xiangpeng Liu, "Discussion on the Origin of Torture to Extract Confession and the Control Measures", (2008) 4 Legal System and Society, p126.

as Article 6 of ECHR may not be as natural when viewed through the Chinese perspective. A number of cultural barriers in relation to the adoption of a right against torture and also a right to silence were discussed earlier in this chapter. There may be other factors to look at, which may be less culturally specific and more easily understood. These can be theoretical arguments familiar to scholars, but there are also realistic arguments that make sense to everyone. Scholars remain divided on whether China should establish the right to remain silent. Both sides have considered appropriate measures to help eliminate forced confessions.

### 3.3.1 Opinions from the Opposition

There are a number of arguments that have been used to resist the right to silence in China.<sup>115</sup> It should be noted that these arguments are aware of the many special social and legal situations in China, and overcome the unrealistically high expectation to the right of silence. Many of these arguments believe that the requirement for suspects to answer questions is suitable for China's national special circumstances.<sup>116</sup> A review of these arguments leads to a better understanding where the difficulties lie and where opposition to change may come from.

Firstly, one of the main arguments to resist the right to silence in China is that a silent suspect in a criminal investigation is a hindrance to effective detective work. The rate of solving cases will drop substantially and the cost of the criminal process will be significantly increased. This is an obvious worry, as He Jiahong observed, that will exist at least until the process of retraining investigators, prosecutors and judges is complete.<sup>117</sup> As is the case in many nations, there are concerns about rising

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<sup>115</sup> See Yunjiang Ye, Weijun Cui, "A Brief Discussion Concerning The Evidential Status of Oral Evidence and Right to Silence in Chinese Criminal Procedure", (2007) 2 Forward Position, p.123; Tao Ma, "Right to Silence: On the Boundary between Dream and Reality – Summary of Conference on 'Criminal Justice and Right to Silence'", (1999) 12 People's Procuratorate, pp.16-20; See also Lei Mao, "Is Silence Golden: Various Opinions on Right to Remain Silent", *People's Daily*, 15/12/99, p. 10.

<sup>116</sup> See Changyong Sun, "The Right to Remain Silent and the Criminal Process in China", (2000) 4 Modern Law Science, p20-21; Yong Yang, "The Right to Silence Should be Postpone in China", (2009) 4 Legal and Society, pp.32-33; Boyang Wei and Lili Ma, "Reflection on System of the Right to Silence", (2007) Legal and Society, p53.

<sup>117</sup> See e.g. Jiahong He, "On the Right of Silence and the Adopted Value of Criminal Justice", (2000) 8 Journal of National Procurators College, No.4, p.42; Ronghe Zhou, "Discussion on the Division of Clues for Investigation", (2000) 2 Public Security Science Journal, p.15; Xiaoqing Zhu, "Discussion on the System of the Right to Remain



crime rates and the ability of the national instruments in place to control crime not being able to cope with such increases. If a right to silence is introduced into an existing system that relies on interrogations and confessions, the existing criminal and punitive systems will not be able to cope with the expected upswing in crime. Some scholars also maintain that the confession is the “king of all evidence”.<sup>118</sup> It is argued that the right to silence when questioned by police is exploited by guilty suspects.<sup>119</sup> By remaining silent, the suspects impede the investigations, the prosecutions and even convictions, particularly in relation to crimes which heavily rely on admissions of the confessions to prove all the necessary elements, such as possession offences and sexual offences.

Therefore, to force a confession from a person, the investigation officers often intentionally use torture, such as in the case SHE. As Lin Zhaohui regarded, confession through torture can enhance the efficiency of crime control in a certain sense.<sup>120</sup> He further illustrated that in most cases, the consumption of time and resources for crime investigation can be significantly reduced by extracting confessions through torture and forcing some real criminals to confess what really happened when they committed crimes. Sometimes, it is impossible to crack cases without confessions.<sup>121</sup> Moreover, scholars argue that criminal interrogation not only cracks down on crime, but it provides valuable information on analyzing a crime, preventing it, and in the reformation of criminals.<sup>122</sup> A right to silence it is argued would be counter to the understanding of “the mind of the criminals” by effectively cutting off an important source of information: the criminal suspect’s confession.

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Silent”, (2004) 1 Chinese Criminal Science, pp.75-77.

<sup>118</sup> See Rongtao Cui, “The Establishment of The Right to Silence Should Be Suspended in China”, <http://www.chinacourt.org/public/detail.php?id=149552>, Website of Supreme People’s Court, 04/04/05; Li Zhang, “On the Rules Governing Evidentiary Statements”, (1999) 1 Politics And Law Forum, p.42; Guojun Zhou, *op.cit.*, fn 63, p.85.

<sup>119</sup> See Min Cui, “Examining and Rethinking on the Privilege of Silence and the Police Privilege of Inquiry”, (2001) 6 Journal of Chinese People’s Public Security University, pp.53-54; Xiaoqing Zhu, *op.cit.*, fn 117, pp.74-75.

<sup>120</sup> See Zhaohui Lin, “The Practice of Extracting Confessions through Torture and Restrictions on it”, People’s Procuratorate, 11 (1998), p20-21; Also see Zhan Zhang, “Challenges and Response: Rebirth of the Confession System--With Comments on the Influence of the Law on Lawyers on Criminal Investigation”, (2008) 5 Evidence Science, p.591.

<sup>121</sup> See Zhaohui Lin, *op.cit.*, fn 120, pp20-21; Xiaoqing Zhu, *op.cit.*, fn 117, p.74.

<sup>122</sup> See Ling Ge, “Rational Consideration of the Value of Confession”, (2008) 2 Evidence Science, pp.190-191.

The goals that are promoted in these arguments are the study of crime and re-education of criminals, done through the information that flows directly from information that is gained through criminal interrogation. So confession should still be a key factor for deciding criminal punishment in a Chinese criminal court, if not the most important piece.<sup>123</sup>

The presumption here is that the effective and complete investigation outweighs the concern for the rights of the suspects. However, this view might be contrasted with the decision in *Heaney and McGuinness v Ireland*.<sup>124</sup> Some real criminals might escape punishment after application of the presumption of innocence and right to silence, but that is the price the judicial system will have to pay in protection of innocent people in the legal reform and social transition period. Public interest concerns cannot justify measures, which extinguish the very essence of an individual's defence rights, even in the situation of striking terrorism. Practically, the available empirical data suggests that reliance on the right to silence does not reduce the likelihood of charges being laid against suspects, the likelihood of suspects pleading not guilty, or acquittal at trial.<sup>125</sup> Those suspects who exercise the right to silence are more likely to be charged than other suspects, or if not, are as other suspects to be found guilty in court.<sup>126</sup> Some research studies suggest that the likelihood of a suspect being charged and convicted increases where the suspect exercises the right to silence.<sup>127</sup> It has been contended that, for the minority of criminals who could be classed as "professional" and who exercise silence in a calculating manner, changes in the law would be unlikely to alter their practice,

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<sup>123</sup> See Zhan Zhang, *op.cit.*, fn 120, p.592.

<sup>124</sup> See *Heaney and McGuinness v Ireland*, Chap3, 4.4.3, p.179-180.

<sup>125</sup> See e.g. David Brown, *PACE Ten Years on: A Review of the Research* (London: Home Office, 1997), pp.171-175; M. Yeo, "Diminishing the Right to Silence: The Singapore Experience" [1983] *Criminal Law Review* p.88; A. Tan, "Adverse Inferences and the Right to Silence: Re-Examining the Singapore Experience" [1997] *Criminal Law Review* 471 p.473;

<sup>126</sup> See Tome Bucke, Robert Street and David Brown, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994*, Home Office Research Study NO. 199, (London: Home Office); Phillips, C. and Brown, D., with the assistance of Goodrich, P. and James, Z. (1998). *Entry into the Criminal Justice System: a survey of police arrests and their outcomes*, Home Office Research Study No. 185, (London: Home Office, 1998);

<sup>127</sup> See e.g. D Brown, *PACE Ten Years on: A Review of the Research* (Home Office, London, 1997), pp.181-184; D Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press, Oxford, 1997), p.230 and p.233.

especially the case relying upon the confessions. For them, the benefits of remaining silent would be likely to continue to outweigh the possible disadvantages.<sup>128</sup>

The lack or the under-development of sciences and technologies in investigations to attain evidence, other than confessions, should not be an excuse to prevent the right protections for the suspects. On the contrary, to “revolutionise” police investigations for the better human rights protection has required the development of science and technology. A research shows that instead of improving the ability of obtaining different kinds of evidence in the last twenty years, although there is change of the structure of the physical evidence, the ratio of the quantity of the confession to the quantity of the physical evidence has no obvious change in the criminal case.<sup>129</sup> Therefore, this means that the law enforcement officials still heavily rely on the confession for the crime investigation.<sup>130</sup> The right to silence developed in the western countries at a time when the investigation technologies and facilities were far behind of that in China today. The police will then have two alternatives to the use of the right to silence. Either they can do nothing and allow crimes to go unsolved, or they will be forced to develop new investigative techniques and skills to solve crime and keep the crime rates down. Not only relying on the confessions, but upgrading the police equipments and improving the investigation technologies also need to play a vanguard role and to become a strategic priority in cracking crime. The use of modern scientific evidence has therefore become indispensable for proof. So the efficiency of police investigations should and would be improved by the approval of the right to silence.

Secondly, there are some arguments that the right to silence would be able to resolve current problems in judicial practice entirely. For example, the reasons for extorting confessions by torture are certainly complicated. Therefore some scholars, such as

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<sup>128</sup> See e.g. Michael Zander, “Abolition of the Right of Silence 1972–1994”, in Morgan, D. and Stephenson, G.S. (Eds), *Suspicion and Silence*, (London: Blackwell, 1994), pp.141-155.

<sup>129</sup> See Fangquan Liu, “Confession and Evidence in the Case – from the perspective of Positive Study”, (2007) 6, *Journal of Chinese People’s Public Security University*, pp140-149.

<sup>130</sup> *Ibid.*, p145.

Xiong Xiaosong and He Jiahong, argued that the system of right to silence should not be brought in carelessly because it is not the only way to eliminate the use of torture to extract confession.<sup>131</sup> There is no doubt that the key measure to prevent the extortion of confessions by torture should be the exclusion rules of illegally-obtained evidence.<sup>132</sup> It can be imagined that if the admissibility of illegally obtained confessions, illegally-obtained or adverse comments at trial on silence during the investigation and in court were permitted, or if there were no related evidence rules to regulate the collection of the evidence, then the right to silence will become an empty promise even if it is set up explicitly in law.

However, as an obligation under Article 7 of ICCPR, the authorities must enhance and promote enough effective human rights protection systems for the suspect to ensure that confessions are made by free will.<sup>133</sup> The right to silence has both symbolic and practical importance. Symbolically, it defines the nature of the relationship between the individual and the state. It is universally recognized that the right to silence reflects the respect for the human beings' dignity and spiritual freedom. In practice, the right to silence application is obviously believed to be included as one of the most important and efficient measures for the vulnerable not to be compelled to provide self-incriminating evidence and prevent wrongful convictions. If the accused has the right to keep silent, oral confessions and verdicts would have lost their assumed connection. There is no incentive or purpose to use torture or other illegal methods to extract confessions in criminal investigations. It, therefore, reduces cases of unjust charge.

The importance of the right to silence in China is that it ensures an efficient and thorough investigation into a crime before initiating a prosecution, rather than only

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<sup>131</sup> See e.g. Xiaosong Xiong, "Discuss the Right to Silence and The Inquisition by Torture", (2003) 12 Guangxi Social Science, p101; Jiahong He, *op.cit.*, fn 117, p.42; Shuaiwei Qie, "Legal Structural Reason and Countermeasure on Extortion of Confession by Torture", (2009) 3 Criminal Research, pp16-17.

<sup>132</sup> See 2.2 above; Also see Genju Liu, "The Right of Silence and the Prohibition of Torture", (2000) 4 Law Science, p121.

<sup>133</sup> See Chap2, 4.5, p.44.

relying on confession evidence. Currently, Article 93 forces the suspects to act as the witnesses for the prosecution and to explain his innocence, especially when the evidence for the prosecution was extremely weak. The burden of proof is therefore shifted from the prosecution to the defence.<sup>134</sup> Therefore the suspects fail to receive a fair trial, giving rise to a violation of Article 14(3)(g) read with Article 14(2).<sup>135</sup> Bearing *Murray*, *Telfne* and *Condron* in mind, failing to guarantee the right not to incriminate oneself could be of relevance if the general burden of proof has not remained with the prosecution who has to establish a *prima facie* case before the inference.<sup>136</sup> The principles of evidence that a person should be charged only if the prosecution has sufficient evidence to ensure a conviction, and that the burden of proving the guilt of suspects rests on the prosecution, are so fundamental to the criminal justice system, as set out in the classic English decision in *Woolmington v. DPP* and confirmed in number of cases.<sup>137</sup> Otherwise there will be frivolous charges in the hope that perhaps the accused will incriminate himself or herself, and give true or false confession by torture. If merely because a charge is filed and the accused has to reveal his defence, the police and prosecutors will take more chances with their cases, instead of respecting the principle of the presumption of innocence. Then the concept and culture of presumption of guilt will remain unchanged in China.

It must also be noted that in the social circumstances of China, the opportunities for the accused to get effective legal advice, or any legal advice at all, before making a defence, still fail to achieve the requirement of Article 14(3)(d) of ICCPR as which is to be discussed in Chapter Seven.<sup>138</sup> Both poverty and ignorance obstruct such opportunities. Through fear and other reasons an accused may put forward what he thinks is a better defence than the truth. Then the prosecutors can demolish the defence and expose the person as a liar. Given the complex nature of human responses when faced with fear of strong state agencies, personal insecurity of life

<sup>134</sup> See *Minelli v. Switzerland*, Chap3, 4.4, p168; also see Chap4, 4.1.2.3, pp253-254

<sup>135</sup> See Chap2, 4.5, pp.44-45.

<sup>136</sup> See *Murray v UK*, *Telfner v Austria*, *Condron v UK* Chapter 3, 4.4.3, pp.177-181.

<sup>137</sup> See *Woolmington v. DPP*, Chap3, 4.4.1, p.172.

<sup>138</sup> See Chap7, 4, pp.440-474.

and liberty and potential punishments, it is very dangerous to demand a person to give a precise defence without any legal advice at the initial stages of police interrogation, as suggested in *Magee v UK* and *Averill v UK*.<sup>139</sup>

Thirdly, it is argued that the side effects of the right to silence are many. There are a number of debates and modifications of the right to silence in countries which the right to silence had set up.<sup>140</sup> Therefore China should not act rashly. As discussed in Chapters Two and Three, in 1966, at the time the ICCPR was drafted, the right to silence was not explicitly mentioned in any international instrument. However, recent developments on the issue of right to silence, including the jurisprudence from the ICCPR, ECHR and the Rome Statute of the International Criminal Court, appear to have firmly established this right as an international standard.<sup>141</sup> For example, the most recent articulation of this right in the Rome Statute provides for a broad interpretation in that silence may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent. Similarly, while not being explicit in the ECHR, the European Court also interprets Article 6 that the right to silence was an inherent element of a fair trial and that the right to a fair trial would be violated if the defendant were convicted solely or mainly on the basis of his exercise of the right to silence, as the value attached in *Condron v UK*.<sup>142</sup> The majority of countries have firmly implemented the system of the right to silence.

From examining the international and regional human rights and instruments and the implementation practice in various domestic jurisdictions, it would appear that the question is not whether there is a right to silence, but rather what is the precise nature of this right. For example, the European Court accepted that the right to silence was

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<sup>139</sup> See *Magee v UK* and *Averill v UK*, Chap3, 4.6.2.2, p.200.

<sup>140</sup> See e.g. Yinli Yan, "Value Evaluation of the Right to Remain Silence and Improvement of its System", (2008) 6 Legal and Society, p8; Jiahong He, "Establishing the Right of Silence and the Adopted Value of the Criminal Justice on the Condition of China" (2000) 6 Law Journal of Shanghai Administrative Cadre Institute of Politics and Law, pp41-45; Xiaoqing Zhu, op.cit., fn 117, pp67-70.

<sup>141</sup> See Chap2, 4.5, pp.44-45; *Murray v UK*, Chap3, 4.4.3, p177.

<sup>142</sup> See *Condron v UK*, Chap3, 4.4.3, pp.177-178.

not an absolute right. In a number of cases, it has been used as the starting point for analysing the affirmation of the implicit right to silence in the convention.<sup>143</sup> Adverse inference could be drawn if certain safeguards were in place, including the right to counsel, providing a caution in clear terms and ensuring that the accused understood the possible consequences of their decision, as rested in *Murray v UK*.<sup>144</sup> However, with careful emphasis on the fact that it was dealing with the particular facts of each case, the European Court constantly stressed in different situations that the right to silence is fundamental to the principle of presumption of innocence. It is for the prosecution to prove the guilt of the accused person beyond a reasonable doubt, and due to this obligation, an accused person must be free to remain silent.<sup>145</sup>

The legislative modifications of the right are in constant debate in both domestic Member state courts and the ECHR. In the UK, for example, there have been a number of reviews by various Committees and Royal Commissions dating back to 1968 on whether to abolish, retain or modify the right to silence.<sup>146</sup> However, the majority of these reviews recommended retaining the right to silence, as it was defined in Halsbury.<sup>147</sup> The UK jurisdictions have insisted on recognizing the right to silence both at trial and during investigation. These debates depend upon the importance placed on this right while balancing the use of drawing adverse inferences with the presumption of silence and the right not to be compelled to testify against oneself.<sup>148</sup> Also, in 1995, the HRC reviewed the fourth periodic report of the UK and found that the modification of the right to remain silent in allowing the judge

<sup>143</sup> See e.g. *Heaney and McGuinness v Ireland*, *Murray v UK*, *O'halloran and Francis v UK*, Chap3, 4.4.3, pp179-180, pp180-181; pp183-184.

<sup>144</sup> See *Murray v UK*, Chap3, 4.4.3, pp180-181.

<sup>145</sup> See *Condron v. UK* and *Saunders v the UK*, Chap3, 4.4.3, pp177-178.

<sup>146</sup> See Chap3, 4.4.3, pp181-183. In 1968, the Justice Evidence Committee proposed to retain the right to silence at trial but recommended that the prosecution be permitted to comment to the jury on the failure of the accused to give evidence at trial. The Criminal Law Revision Committee issued a report in 1972, where the majority of the Committee recommended that adverse inferences could be drawn from both pre-trial and at-trial silence "as appear roper" and such could be the subject of comment by the judge and prosecutor. Due to strong opposition to this report, no implementation took place at that time. The Royal Commission on Criminal Procudure in 1981 proposed the existing law to be retained and introduced a number of reforms including the duty solicitor scheme and substantive rights to legal aid during police questioning.

<sup>147</sup> See Halsbury's Laws of England, 4<sup>th</sup> ed., (London: Butterworths, 1990), Vol.11(2), para 937-938.

<sup>148</sup> See e.g. *Brown v Stott*, *R v Beckles*, Chap3, 4.4.3, p182-183; also see Anthony Jennings, "Silence and Safety: The Impact of Human Rights Law", 2000 Criminal Law Review, p879; Scrutiny of Acts and Regulations Committee, "The Right to Silence: An Examination of the Issues", in Chapter 6: The Right to Silence in the UK, [www.parliament.vic.gov.au](http://www.parliament.vic.gov.au).

and jury to draw adverse inferences in certain situations violates various provisions of Article 14 of the Covenant, despite a range of safeguards built into the legislation and the rules enacted thereunder.<sup>149</sup> Recent cases of the European Court give further indication of how the English courts should apply the right to silence and balance drawing adverse inferences, as in *O'halloran and Francis v UK*.<sup>150</sup> However, no questions were raised about the retention of the right of silence. The right to silence is now being accepted as an international human right associated with a fair criminal proceeding, with nations around the world increasingly agreeing that state power should not be used to compel self-incrimination.<sup>151</sup>

### 3.3.2 Opinions from the Supporters

On the other hand, the advocates recommended that the right of silence should be incorporated in the soon-to-come revisions of the CCPL.<sup>152</sup> The real problem for establishing the right to silence in China may be best described as one of the presumption of innocence versus the suspicion of guilt. As discussed above, the right to silence can release the suspect from the obligation of making confession, and rids them of the disadvantageous position of being targets of inquisition or litigation objects. Instead the right to silence makes it possible for them to become litigation subjects who can actively exercise their defence functions, which is helpful for realizing the equal adversary between prosecution and defence.<sup>153</sup> The right to silence is one of basic rights for the suspects as defined in international law as discussed above. Its establishment into the CCPL will further recognise the principle of presumption of innocence in Chinese criminal justice since 1996 and bring the

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<sup>149</sup> See United Kingdom of Great Britain and Northern Ireland (1995), CCPR/C/79/Add 55, 27 July 1995, para 17.

<sup>150</sup> See *O'halloran and Francis v UK*, Chap3, 4.4.3, pp183-184.

<sup>151</sup> See *Funke v. France, Saunders v UK*, Chap3, 4.4.3, p.176 and 178.

<sup>152</sup> Also see e.g. Guangzhong Chen, *Study on The Implementation of Criminal Procedure Law*, (Beijing: China Legal Publishing House, 2000), p148; Ruihua Chen, *The Principle of Criminal Trial*, (Beijing: Beijing University Press, 1997), pp275-278; Chongyi Fan, "The Right to Remain Silent and Criminal Policy in Our Country", (2001) 3 Legal Forum pp 78-82; MY Wang, "Right to Silence and Prohibition of Extorting Confession by Torture", in M. Kjaerum eds, *How to Eradicate Torture, A Sino-Danish Joint Research on the Prevention of Torture*, (Beijing: Social Sciences Documentation Publishing House, 2003), pp.781-791.

<sup>153</sup> See Xiaochuan Ye and Xinxin Bao, "The Construction of the Right to Remain Silent in Our Country from the Perspective of Jurisprudence, (2008) 3 Public Security Science Journal, pp52-53.



Chinese legal system into compliance with ICCPR.<sup>154</sup> The Chinese general public and government have called for close studies on human rights issues and they are learning to think of everything from the angle of human rights and are taking actions in line with fair trial and anti-torture practice and conception universally applied in the world. China should also abide by and implement the various standards that were endorsed by the member states of the UN.

As Koh regarded, most nations observe most principles of international law and most their obligations in most of the time.<sup>155</sup> It has been said that the right to silence consists of a cluster of procedural rules that protect against self-incrimination.<sup>156</sup> In reality, it presents more questions than answers. As mentioned above, however, for the fundamental differences in the legal evolution of such concepts as a right to silence in China, there may be bigger hurdles to overcome. But if China is going to establish the right, what mode should be used? Attempting to force *Miranda*-like rules into a thoroughly different cultural system of laws could be likened to trying to force the proverbial square peg into a round hole. An international law model may or may not be more effective in China. However, that does not mean that looking, for example, to UK domestic law for some form of guidance in this area is unacceptable. On the contrary, it may be possible to borrow from, or refer to, UK experiences on the construction of the right to silence in order to reform the existing Chinese legal system.

### **3.4 Lack of Independent Monitoring Mechanisms to Prevent Torture**

Besides the weaknesses in criminal procedures and a tradition of coercion, the lack of effective monitoring mechanisms adds to the possibilities of torture taking place unchecked during criminal procedure. The state obligation under Article 7 and the

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<sup>154</sup> Also see Chap4, 4.1.2, pp249-254.

<sup>155</sup> Cited from Harold Koh, "Why Do Nations Obey International Law?", (1996-1997) 106 YALE L.J. Issue. 8, p.2599.

<sup>156</sup> See Michael, J. and Emmerson, B. "Current Topic: The Right to Silence", (1995), 1 European Human Rights Law Review 4, p6; Yanyou Yi, "On the Privilege Against Self-incrimination", (1999) 2 Studies in Comparative Legal Science, pp.273-282

safeguards of Article 9 and 14 of ICCPR are unlikely to be guaranteed under China's criminal justice system, as discussed in detail below.

### **3.4.1 Lack of a Proper Supervisory Body to Deal with Complaints**

At the intermediary level, the ruling party CPP, different national executive bodies of supervision such as Ministry of Supervision, Supervision Bureau and Discipline Inspection Group, the Chinese People's Political Consultative Conference, the police agencies, the procuratorial and judicial agencies, together with the general public, the social organizations and the media, all play an important role, in varying degrees, in the supervision of the execution of powers and the prevention of torture and other cruel, inhuman and degrading treatment or punishment. It should be acknowledged that a great deal of work has been done in investigating and dealing with the cases and handing them over to the relevant judicial agencies. However, as discussed in Chapter Five, there are no independent and impartial authorities to which people are able to make complaints against the police at the pre-trial stage.<sup>157</sup> For instance, presently the court does not play any role in supervising the practices of the police during their criminal investigations. It can also be argued that the state obligation fails to comply with Article 7 of ICCPR since the effective supervision and methods to prevent torture are lacking as shown in the following aspects.

#### **3.4.1.1 A Superficial External Supervision**

As discussed in Chapter Five, the function of the procuratorial supervision is very limited.<sup>158</sup> Generally, the supervision from the prosecution agencies will begin from the application for the approval of arrest by the police, but not from the beginning of the case filed by the police for investigation. In addition, prosecutors only check the files of the cases and they do not usually interview the suspects, which limits the supervision to paperwork only without any practical sense.<sup>159</sup> There is no clear procedure stipulated in CCPL to be followed by the police and the procuratorate as to

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<sup>157</sup> See Chap5, 3.4, pp.302-317.

<sup>158</sup> See Chap5, 3.4.2.2, pp.308-313.

<sup>159</sup> See *Assenov v Bulgaria*, Chap3, 2.3.2, p.94.

how the supervision should be carried out.<sup>160</sup> Before the investigation is complete, malpractice by the police is rarely found. Therefore the current prosecution supervision on the police investigation work can hardly reduce torture and inhuman treatment cases significantly from its roots. For example, in SHE's case, the procuratorate obviously did not fulfill its duties to its fullest extent. The China authorities appeared to have failed on adhering to their obligation to protect the individuals and exposed the suspects to a real risk of being subjected to inhuman or degrading treatment, as the value found in the ruling of *Soering v UK*.<sup>161</sup> Article 7 of ICCPR has been breached.

The involvement of the prosecution supervision is mandated by its internal documents issued by the SPC. As a result, police officers are sometimes unwilling to accept prosecutors' involvements because there is no similar instruction given by the MPS. Therefore as a routine practice, involvements of the prosecution supervision in criminal investigation shall start after cases are moved to the prosecution service for arrest approvals. After that, the case will be moved back once again to police, then the prosecution service will know nothing about its progress until the investigation finishes and is transferred to the prosecution service to examine whether or not to prosecute. The prosecution supervision has hardly any control during the investigation process. Procuratorates' supervision can only be realized when they successfully persuade the police on the grounds that both sides are jointly responsible for providing admissible evidence for court trials, therefore, they need to cooperate to make sure that evidence are collected properly. While the police has been supervised by the prosecution according to law, how to deal with torture and inhuman treatment with respect to cases under jurisdiction of the prosecution service remains an issue, even though the number of reported violation cases of the procuratorates is not as big as that of the police. Nonetheless, cases of malpractice occur from time to time. This leads to the following discussion.

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<sup>160</sup> See *Ribitsch v Austria*, Chap3, 2.3.2, p92; Chap2, 4.4, p.41.

<sup>161</sup> See *Soering v UK*, *Thompson and Venables v News Group Newspapers*, Chap3, 2.3.1, pp.91-92.

### 3.4.1.2 A Weak Internal Check

A conflict with Article 7 of ICCPR might arise, since there is also no effective mechanism of inter-checks or other similar supervisory systems to monitor the police behaviors during the investigation at present in China, as indicated in Chapter Five.<sup>162</sup> It appears that China has not taken appropriate actions to discipline those officers responsible or to ensure there is no repetition of those ill-treatment, as required in *Cyprus v Turkey*.<sup>163</sup> As Chen Yunsheng observed, for a long time, some aspects of China's fight against torture and the related theories have become a substitute for the practical work and the theoretical study of the CCP's disciplinary inspection department and the State administrative supervision agency.<sup>164</sup> The Chinese People's Political Consultative Conference and the relevant political organizations are becoming increasingly important in supervising the national judicial agencies and judicial officers. Some serious cases that had been concealed from investigation were brought to trial by those political forces. Many public officials of all kinds of state agencies at all levels, especially some of the administrative senior officials, are Party members. Most chief public officials usually hold concurrent posts in the Party and the state agency, even though the Party's discipline inspection organizations are separated from the State administrative supervision organizations. Because of China's special political system, any behaviour which violates the Party's discipline and the state administrative discipline will also be dealt with through the Party's discipline inspection department and the state administrative supervision agency in the name of the Party's discipline and state administrative discipline.

Therefore, in China, if the Party cadres of the leading organizations of the Party or the state agencies of all kinds and at all levels, or party public officials or non-Party public officials happen to violate discipline or the law, the procedure is such that the

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<sup>162</sup> See Chap5, 3.4.1, pp.304-306; 3.4.3, pp.313-315.

<sup>163</sup> See *Cyprus v Turkey*, Chap3, 2.3.1, p.91.

<sup>164</sup> See Yunsheng Chen, *An End to Torture in Modern China*, (Beijing: Social Science Article Press, 2000), p.9.

cases will first be jointly dealt with by the Party's discipline inspection organizations and the State administrative supervision organizations to request an explanation of the matter involved at the stipulated time and place.<sup>165</sup> Corresponding Party disciplinary sanctions or state political disciplinary sanctions will be imposed either separately or combined depending on the specific circumstances and its seriousness. The investigation and prosecution of cases of torture in China are applied to these discipline inspections and administrative proceedings. If the circumstances of a case do not cause serious consequences under the judgement of the investigators, the perpetrators are punished by the ruling party's discipline inspection department and/or the state administrative supervision agency. Thus the case is settled in the form of the party's discipline and/or the state administrative discipline agency. Cases involving circumstances serious enough as to violation of the criminal law will be transferred to the state judicial department and punished through trial proceedings. Therefore, almost all the related cases of torture, whether serious or not, which require punishment according to the Party's discipline or the state authority, will be placed on file for investigation and judged by the discipline inspection department or the state administrative inspection agency of the CCP, before being transferred to procuratorial authorities.

A prompt response by the authorities in effectively investigating the alleged torture or ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. Attempts have been made to improve these internal supervisions and their effectiveness. However, this kind of so called Chinese quasi-judicial proceedings would not qualify with the demand of conducting a prompt and impartial investigation of all allegations of torture, as required by Article 7 read with Article 2 of ICCPR.<sup>166</sup> Strictly speaking, they are not legal conducts. Such intervention leaves people with the impression that it is the function and duty of

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<sup>165</sup> Chinese Communist Party's Regulation on Dealing with Cases of Party Discipline Violations, 25/03/94, Article 28.

<sup>166</sup> See *Herrera Rubio v Colombia*, Chap2, 4.4, pp.41-42; *Martinez Sala and Others v Spain*, Chap3, 2.3.2, p94.

the ruling party's discipline inspection department and state administrative supervision agency to investigate and prosecute cases of torture and other related bodily harm and to formulate and implement corresponding policies and regulations, instead of judicial authorities. There are no other authorities that could participate in the handling of the cases at such stage. This has already conflicted with the China's Constitution, which sets forth that no organization or individual is privileged to be beyond the Constitution or the law.<sup>167</sup> If a person's behaviour constitutes a crime, such as torture to obtain evidence, they should be dealt with according to relevant criminal laws. If a person does not violate the law, he should not be deprived of freedom and be forced to make a confession at a stipulated time and place.

Under this supervision system, the investigative authorities are enabled to have the absolute power to operate the investigation and the power to decide whether to deal with a subject leniently or with severe punishment according to their will, without due process. For example, the duration of these investigations depends on the need for disciplinary supervision work and will last until the subject explains the problem clearly.<sup>168</sup> A situation exacerbated that persons acting in an official capacity who tortured and ill-treated others in violation of the international standard generally did so with impunity, as the government has failed to establish effective investigation to hold them accountable and prevent such abuse. Therefore none of these investigations is compatible with *Ognyanova and Choban v Bulgaria*, which assert that the complaints of torture must be processed or forwarded to the impartial authorities promptly.<sup>169</sup> Also the authorities have not taken reasonable steps available to the potential victims to secure the evidence concerning the incident, including eyewitness testimony and an objective analysis of clinical findings, as considered in *Kmetty v Hungary*.<sup>170</sup> Any of these deficiencies within the investigation of alleged torture or ill-treatment will undermine its ability to identify

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<sup>167</sup> See The Constitution 1982, Article 5.

<sup>168</sup> see, e.g. Regulations to Enhance the Case-handling of Guangdong Provincial Dicipinary Inspection Committee and the Department of Supervision(trail version), Article 11

<sup>169</sup> see *Ognyanova and Choban v Bulgaria*, Chap3,2.3.2, p.95.

<sup>170</sup> see *Kmetty v Hungary*, Chap3, 2.3.2, p93.

and punish those responsible. The jurisdiction and operation procedure of the supervisory system have severely lacked clear and explicit standards. Furthermore, there are new infringements of citizen's rights and violation of ICCPR under this supervisory system, including arbitrary deprivation of liberty and the possibility of new torture and ill-treatment. Article 7, 9 and 14 arguments are likely to be raised in any case under the current internal supervision system.

Therefore, there is a lack of mandatory power of law, and no clear legal procedure established to deal with complaints concerning torture. While the “oversight” system (监督制度) has recently been set up and strengthened, ostensibly to oversee the conduct of police officials, it is unclear whether the mandate of this new mechanism covers cases of torture and ill-treatment, and if so, in what status and procedure it can deal with those cases. There is no actual measure provided on how detainees may access the oversight police. The campaign in China against torture and other cruel, inhuman or degrading treatment or punishment has tended to focus excessively on the means of internal supervision, while little has been done in terms of researching other aspects of the problem and making the necessary changes to the system. This may be another reason why torture and other cruel, inhuman or degrading treatment or punishment persists in China.

### **3.4.2 Limited Media Monitor**

Public opinion and the media have also become increasingly useful in a supervisory context, since the Chinese government is permitting more reporting on torture, and publicly exposing more torture-related cases. Media coverage today is much more varied and dynamic than before. This has been particularly apparent since reform and opening in China in 1978. The state and society have gradually changed the ideology and values and a more tolerant attitude towards all kinds of criticisms appears to be adopted by the government and the whole Chinese community. In recent years, when a case which someone wanted to conceal would be disclosed to the public by the media, the local government or the central department involved in the case would

immediately publicize its attitude that the case should be investigated and dealt with strictly and thoroughly to satisfy the masses.

But still there is no true freedom of expression in China. Restrictions on the publication of information about cases involving torture mean that reports of cases may frequently be suppressed when the authorities, whether local or national, so choose. Under the Chinese traditional principle of benevolence and the concept of harmony and social stability as discussed in Chapter Four, the rulers in China always try to hide the discussions or criticisms of those social malpractices and dark aspects from the public.<sup>171</sup> Since ancient times, numerous records in Chinese history have revealed that civilians, scholars and officials were slaughtered as a result of pointing out these kinds of problems in their society. For instance, during the disastrous Cultural Revolution innumerable innocent scholars and officials were inhumanly persecuted, imprisoned or killed, simply because of some words or deeds that were regarded as anti-Party, anti-socialist and counter-revolutionary. Many people, especially intellectuals and the media, find it hard to avoid the mentality of fear, especially when it comes to tackling current sensitive issues as it is difficult to tell if they are courting trouble.

Torture and other inhuman forms of treatment or punishment are surely prominent expressions of the negative and corrupt phenomena among some state authorities, especially some law enforcement and judicial authorities and personnel. Some authorities and public officials, due to their own departmental or personal interests such as concerns for reputation or promotion, are not ready to reveal to the outside world, details of events concerning torture or other cruel, inhuman or degrading treatment or punishment. Even if a special investigation is conducted, it is done only perfunctorily, or is even rejected. Problems can be brought to light and can also, in

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<sup>171</sup> See e.g. Nianguai Li, "Serving as a Royal and Faithful Mouthpiece of the Party and the Mass", Xinhua News, 18/11/09, [http://www.hb.xinhuanet.com/zhibo/2009-11/18/content\\_18267970.htm](http://www.hb.xinhuanet.com/zhibo/2009-11/18/content_18267970.htm); Hanzhang Dou, "Google has to Obey China's Law", Xinhua News, 14/03/10, [http://news.xinhuanet.com/comments/2010-03/14/content\\_13170336.htm](http://news.xinhuanet.com/comments/2010-03/14/content_13170336.htm).



special instances lead to policy changes, but the norm is that in the end the government decides what people shall know and what they shall not be told. Cases reported in the domestic media appear to be selected to show that the authorities are taking a strong line on halting and punishing police misbehavior. However, data on the actual situation where these problems occurred were difficult to obtain. This is also one of the main reasons why it is difficult to study practical problems like torture, thoroughly and comprehensively.

Therefore in fact, as a result of local or departmental protectionism, the use of torture and ill-treatment may be covered up and the situation is more serious than the official statistics have revealed. Some officials in the criminal proceedings view it as quite common to extort confessions using torture. This might be because the severe harm that is caused by extortion has not been fully understood as indicated above. There is even a mistaken belief that it is part of the job to extort a confession. If a mistake occurs, then it is considered an unfortunate part of the job for it is done with good intentions. Even if the results are serious and violate the law, it is done in the line of duty. The perpetrators try all sorts of means to absolve themselves from guilt or blame. Therefore only a small number of cases that have already caused serious consequences or other exceptional cases of extortion are ever placed on file by the legal procuratorial agencies. For example, SHE's case has created such a strong public reaction and has shown that the entire criminal procedure system concealed a whole range of abusive and corruptive practices.

### **3.4.3 Lack of Other Valid Methods of Complaining**

The availability of effective complaint mechanisms will have wide implications for the prevention and punishment of torture as well as for remedies and reparation, since the complaint is a trigger for the competent authorities to begin an investigation into the alleged acts with a view to holding the perpetrators accountable as part of

criminal proceedings.<sup>172</sup> Besides lodging complaints to the judicial authorities, there are other existing ways of complaining of torture or ill-treatment in China.<sup>173</sup> For example, all public institutions, such as universities, local Political and Legal Affairs Commission and some social organizations, like the Women's Federation and registered Trade Union, have the so-called Complaint Letters and Request Handling Office (信访办公室), where everyone can go and lodge a complaint.<sup>174</sup> Cases could be reported to the police for prosecution through this mechanism. Regulations of Legal Aid from 2003 oblige local governments to set up local legal aid centers where poor people can be advised for free and even get a defence lawyer in a criminal case if they meet certain criteria.<sup>175</sup>

However, this mechanism appears to be ineffective while resources and funds are scarce. The Complaint Letters and Request Handling Office only receive complaints and have the mandate to forward complaints to the relevant state agencies, but without having the power to conduct independent investigations or the ability to follow up on the cases.<sup>176</sup> The legal aid centres are not well known to the general public, the criteria for getting a case accepted are strict and limited, and the lawyers on duty there are not guaranteed to be competent.<sup>177</sup> The basic problem is, on the one hand, the government invests too little, both money and political muscle, in establishing effective mechanisms to report torture cases and obtain remedies. On the other hand, reporting and monitoring of the cases are normally restricted for political reasons or for reasons that are grounded in local protectionism and the officers or

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<sup>172</sup> See *Veznedaroglu v. Turkey*, Chap3, 2.3.3, p.96.

<sup>173</sup> See Chap5, 3.4.4, p315-317.

<sup>174</sup> See Regulations of Letters and Visit, 01/05/05; Constitution 1982, Article 41(1) and (2) and Article 27(2). See generally, Zhe Lin, "The Function, Characteristic and Development of the System of Complaining Letter and Visit", (2009) 1, Journal of the Party School of the Central Committee of the C.P.C., pp.89-90; Laifan Lin and Jingzhi Yu, "The Right of Letters and Visits & the System of Letters and Visits", (2008) 3 Journal of Zhejiang University( Humanities and Social Sciences), pp.26-33.

<sup>175</sup> Regulations of Legal Aid 2003, 16/07/03, Article 5

<sup>176</sup> See generally, Wenzhan Ban, "Effectiveness of Remedy Function of the "Correspondence and Visit" System", (2009) 1, Journal of the Party School of the Central Committee of the C.P.C., pp.90-91; Chuiwei Luo, "Reform of the System of Complaining Letter and Visit", (2009) 1 Theory Research, pp.64-66; Ruixing Ren, "On China's Path of Litigation-involved Complaint Letters and Visits and the Rule of Law", (2009) 4 Northern Legal Science, pp.71-75.

<sup>177</sup> See e.g. Chap7, 4.2.2, pp.444-450.

department's own interests as mentioned above.<sup>178</sup> Therefore, the effectiveness of these complaining methods is uncertain, hence the obligation to investigate the alleged torture or ill-treatment might be affected. A breach of Article 7 read in connection with Article 2(3) of ICCPR would not be satisfied.<sup>179</sup>

#### **4. Great Efforts Made against the Use of Torture to Obtain Evidence**

In order to meet the UN standards, China has adopted a series of important measures to ban and eliminate all kinds of torture and ill-treatment during the criminal proceedings, and has achieved tremendous progress during the past two decades. Some important and relevant areas of this topic will be analysed in the following section, to look at how far these reforms still need to move in order to accommodate the requirements of ICCPR.

##### **4.1 Strengthen the Cooperation and Dialogue with International Society**

China has adopted an active and voluntary attitude in step with the international society, manifesting in particular by having signed a series of relevant international conventions, and by its strengthened cooperation with the international society in the common fight against all forms of torture and other cruel, inhuman or degrading treatment or punishment. China delivered its fourth periodic report under the CAT in Feb 2006. The various periodic reports enumerate legislative and educational measures taken against the practice of torture and demonstrate how the number of cases of forced confessions has allegedly declined. From 1993 the SR on torture has repeatedly requested an invitation from the Chinese government to visit China in subsequent years. In November 2005, Professor Manfred Nowak visited China with an agreement by the Chinese government as the first SR on torture to do so. China has also carried out exchanges and cooperation with UN human rights agencies, foreign human rights organizations and specialists through discussions, seminars, projects and training courses on torture prevention. For example the European Union

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<sup>178</sup> Also see Chap7, 4.4.3, pp.469-474.

<sup>179</sup> See *Zelaya Blanco v. Nicaragua*, Chap2, 4.4, pp.41-42.

funded a three-year program with the aim of collecting data on the overall situation of forced confessions and exploring practical models of torture prevention in China.<sup>180</sup> These actions mean that China has shown a will to fulfill its commitment to the eradication of torture, and its attitude in this respect has been positive and firm on the whole.

#### **4.2 Improvement on Relevant Domestic Legislation**

China has also constantly improved domestic legislations, stressing human rights protections and the prohibition of torture in order to comply with its duty under Article 7 of ICCPR. The current Chinese Constitution includes a specific chapter on *Fundamental Rights and Duties of Citizens* in which the prohibition of torture is expressed or implied in some of the articles.<sup>181</sup> For example, Article 38 states that the personal dignity of citizens of the PRC is inviolable. Insult, libel, false accusation or false incrimination directed against citizens by any means is prohibited.<sup>182</sup> These rules laid the foundation for China's fundamental laws on the protection of human rights and the prohibition of torture. Torture is explicitly forbidden, though not well-defined as mentioned above.<sup>183</sup> Faced with the current reality of extorting confessions by torture as the main form of torture in China, specific articles to regulate and prohibit this problem have been included in the CCL of 1997.<sup>184</sup>

There is a particular emphasis on the prohibition of torture in separate laws for the judicial personnel and the state enforcers of the law, including the Judges Law, the Public Procurators Law, and the People's Police Law.<sup>185</sup> The stipulations of the Administrative Procedure Law and the State Compensation Law have shown that the state determines to prohibit the torture and has taken the responsibility for its compensation after the damages. Also, the Law of the People's Republic of China on

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<sup>180</sup> The detail of the project see, <http://www.gbcc.org.uk/detainee-rights.aspx>.

<sup>181</sup> See Constitution 2004, Chapter 2.

<sup>182</sup> Ibid., Article 38.

<sup>183</sup> See Third periodic reports of States parties due in 1997: China, 05/01/2000, CAT/C/39/Add.2, pp.19-20; also see 3.1.2, pp.345-348.

<sup>184</sup> Criminal Law 1997, Article 247 and 248.

<sup>185</sup> See e.g. Law on People's Police of PRC, 25/10/07, Article 22.

Administrative Penalty in 1996 makes it possible to charge the perpetrators.<sup>186</sup> Furthermore, a whole range of administrative regulations, circulars and judicial interpretations have been promulgated to control the behaviour of public security personnel and other involved authorities. Finally, a net of legal aid institutions is under construction within the Ministry of Justice in which victims can get legal counsel free of charge.<sup>187</sup>

#### **4.2.1 Generally Strengthening the Protection for the Suspects' Right to against Torture**

As compared to the CCPL before the 1996 amendment, the reform in 1996 further strengthens the guarantees against torture and other cruel, inhuman or degrading treatment or punishment with regard to suspects in different stages of criminal proceedings through different measures to ensure compliance with international standards. Firstly, for example, as discussed in Chapter Five, the amended CCPL provides the time limit for arrests and detention, which set more restrictive standards for police behaviour since the police are the frequent targets of accusations of torture or ill-treatment.<sup>188</sup> Secondly, as indicated in Chapter Four, the establishment of Article 12 of the revised CCPL means that no suspect or defendant at any stage of criminal proceedings can be treated as a criminal.<sup>189</sup> Thirdly, time frame for lawyers' involvement in criminal proceedings is brought forward to an earlier stage, which safeguards the right to defence for the suspects and defendants. Especially the early intervention of a lawyer in the criminal trial is trying to be confirmed.<sup>190</sup> This issue will be discussed in detail in Chapter Seven.<sup>191</sup> Fourthly, the procedures of criminal adjudication have been reformed, replacing those characterized by interrogations by judges with means of hearing prosecution and defence arguments.<sup>192</sup> This reform has

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<sup>186</sup> Article 59 and 60 of the Law of the People's Republic of China on Administrative Penalty, 01/10/96.

<sup>187</sup> See generally, Zhen Gao, "New Developments of Legal Aid after the 16th CPC Central Committee", (2009) 9 Justice of China, pp.81-83.

<sup>188</sup> See Chap5, 2.3 and 2.4, pp.274-278.

<sup>189</sup> See Chap4, 3.1, pp.236-242.

<sup>190</sup> CCPL 1996, Article 33.

<sup>191</sup> See Chap7, 3, pp.429-438.

<sup>192</sup> CCPL 1996, Article 150. For detail discussion on the court system reform see Jun Zhang and Yinzong Hao, *Research on the Mode of Criminal Trial Procedure*, (Beijing: China Renmin University Press, 2005), pp.81-130;

the effect of making a trial more open and more just, which also tends to elevate the position of the accused in a trial and lessen the likelihood of physical abuse.<sup>193</sup>

#### 4.2.2 Evidence Rules Reform

As emphasized in Chapter Four, in the criminal proceedings, the relationship of punishment of crimes and protection of human rights form the unity of opposites, and these two aims are mutually conditional and neither will work without taking consideration of each other.<sup>194</sup> Some Chinese scholars, such as Hu Xiqing, regard that the key question to the unity of effectively punishing crimes and protecting human rights proved by the judicial experience of China is to persist in accuracy in the criminal proceedings.<sup>195</sup> This includes ascertaining facts about a crime, collecting evidence and cognizing suspects in an accurate manner. Both sides of the principle, which are basing on facts and taking law as the criterion, should always be mutually related with and interdependent on each other as discussed in Chapter Four.<sup>196</sup> Therefore, it is a top priority to uphold the principle of emphasizing on evidence, investigations and studies, not simply relying on confessions. The arbitrary arrests, over-reliance on extracting confession, evidence through torture and ill-treatment, and the wrongful conviction cases were, in part, the product of poor and inadequate investigations and interview skills. Responding to criticisms, the MPS reportedly launched a nationwide campaign to improve investigative capacity.<sup>197</sup> The requirement for proving the case in China's criminal proceeding is that the facts about the case should be clear, and the evidence should be true, reliable and sufficient. The conclusion based on the evidence should be affirmative, sole and exclusive. Noticeably, in August 24 2006, the MPS promulgated the *Procedural Regulations on the Processing of Administrative Cases by Public Security Authorities*,

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Ruihua Chen, "From 'Flow Manufacture' to 'Jurisdiction at the Centre'", (2000) 3 Law Science, pp.24-34; Jianlin Bian and Jingjing Li, "Seeing the improvement of the criminal trial structure from China's criminal courtroom arrangements (tribunal design)", (2006) 2 Frontiers of Law in China. pp.164-184.

<sup>193</sup> See 3.2.2, pp.360-362.

<sup>194</sup> See Chap4, 5.1, pp258-262.

<sup>195</sup> See e.g. Xiqing Hu, "The Realisation of Unity of Criminal Punishment and Protection of Human Rights", Conference Proceedings on Conference "Criminal Justice in UK and China", (Beijing: Law Press, 2000), p249.

<sup>196</sup> See Chap4, 5.2, pp262-265.

<sup>197</sup> See, <http://www.mps.gov.cn> e.g. "Appraisalment of Law Enforcement by the Public Security Organs", 18/04/06.

which specifically provides that evidence obtained through torture to coerce confession during the detention cannot be used as basis for the determination of cases.<sup>198</sup>

Also the government at different levels is taking steps to enact an exclusionary rule barring all evidence obtained through torture from use at trial to address the problem. For example, on April 12 2005, the Sichuan Province High Court, Procuratorate and Public Security Bureau issued a joint opinion entitled, *Certain Opinions on Standardizing Criminal Evidence Work to be Implemented on A Trial Basis*, which clearly stipulates that confessions obtained through coercion may not be used as evidence, and details other circumstances under which confessions and statements are inadmissible as evidence. This joint opinion was implemented on trial basis as of May 1 2005. According to reports, this is the first time that a Chinese provincial public security agency, procuratorial agency and court have jointly issued a regulation standardizing criminal evidence work. Professor Long Zongzhi believes that this joint opinion sums up practical experiences, is based on expert opinion and lays equal stress on combating crimes and safeguarding human rights as well as on substantive correctness and procedural fairness.<sup>199</sup> Also, this regulation keeps pace with advancements in the administration of criminal justice, plays a significant role in standardizing and raising the quality of case-handling procedures, and has a positive impact on China's evidentiary legislation and judicial practice.

For example, the joint opinion stipulates where a defendant changes his confession or statement during the stage of trial because investigative agencies have extracted a confession through torture or used threats, enticement, fraud or other illegal means to collect evidence, a confession or statement made before the hearing may not by itself be used as evidence to prove that the charge has been established, provided several

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<sup>198</sup> Procedural Regulations on the Processing of Administrative Cases by Public Security Authorities, 29/03/06, Article 24.

<sup>199</sup> See Dehua Liu and Jing Wang, "Confessions Extracted Through Torture May No Be Used as Evidence: On May 1, Sichuan Province Experiments With 'Several Opinions Regarding the Standardization of Criminal Evidence Work' ", Procuratorate Daily, 13/04/05, <http://review.jcrb.com/zyw/n574/ca363760.htm>.

circumstances is applicable. These circumstances include that investigative agencies cannot provide a reasonable explanation for the concrete facts of illegal evidence collection raised by the defendant or witness; the procuratorates or public security agencies are unable to rule out the possibility of illegal evidence collection because they refuse to investigate and verify it. Before this joint opinion, the judiciary had the discretion to dismiss evidence that was suspected of having been obtained through torture. However, that was not written formally into law while this latest judicial interpretation provides a legal basis for supporting those defendants who withdraw a confession obtained through coercion.

The joint opinion also stipulates that in situations where evidence is insufficient to determine guilt or innocence or the extent of culpability, the defendant should be presumed innocent or less culpable. Where evidence clearly indicates innocence or reduced culpability, but public security and procuratorial agencies have no way of verifying the evidence or refuse to produce the results of their investigations, the remaining circumstances of the overall case can be synthesized into a presumption in favor of the defendant. This provision applies the legal principle of giving the accused the benefit of the doubt. In the past, due to budgetary and resource constraints, public security and procuratorial agencies tended to focus on evidence that incriminated suspects in a criminal investigation, and to attach insufficient importance to extenuating evidence or evidence that supported a suspect's innocence. Thus, there was obviously insufficient protection of the rights of the accused. The joint opinion stipulates that if public security agencies and the procuratorate make several appraisals prior to trial and reach different conclusions, all of the conclusions must be submitted to the court with the reasons behind them. At the same time, a judicial appraisal can only express an opinion regarding a technical question related to a case while inferences about the facts of a case or legal applicability cannot be used as evidence.

#### **4.2.3 “Zero Confession” System**



Despite some opposition as described above, a majority of legal scholars now believe that China should incorporate the right to remain silent into law basing their views on the ICCPR, which requires a suspect not be compelled to confess being guilty.<sup>200</sup> Scholars have cited that the international instruments such as the Beijing Rules, a set of standards on juvenile justice adopted by the UN in 1985,<sup>201</sup> to justify adopting the right to remain silent.<sup>202</sup> The government is also taking important steps to combat the old concepts held by the vast majority of the officers performing the criminal investigation, which is that confessions obtained by torture are a legitimate and necessary weapon in the fight against crime.<sup>203</sup> Some specific actions have been taken to further combat ill-treatment in the criminal justice and to incorporate the right for suspects to remain silent into China's criminal procedure law.

Noticeably, during recent years, several local jurisdictions have been experimenting with a general right to remain silent or an absence of confession in the conviction of crimes to echo public concerns. It is intended to eliminate reliance upon confessions in criminal investigations and requires the investigators to search for other evidence. For example, in 1999 police in Qingshan district, Wuhan removed the policy slogan, "leniency toward those who acknowledge their crimes but severe punishment of those who stubbornly refuse to do so" from every interrogation room to demonstrate their commitment to the right to silence.<sup>204</sup> In 2000 police in Dalian and Shenyang, Liaoning province introduced a notification system to promote the right to silence. The public was told that "if you have not first been informed of your rights, you have

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<sup>200</sup> See Changyong Sun, *op.cit.*, fn.116, p19; Yuanfei Liu, "The Legal Significance of the Right to Remain Silent and its Implementation", (2005) 5 *Exploration*, p.59; Xiangde Ji, "Acquisition of Oral Confession and Protection of Human Rights", (2006) 6 *Hebei Law Science*, pp.59-60; Chongyi Fan, *op.cit.*, fn 152, pp.78-79.

<sup>201</sup> See *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*, General Assembly resolution 40/33, 29/11/85, General Principles 7(1), Part One. According to the Beijing Rules, juvenile offenders shall have "the right to remain silent." Also see 4.5 Chap2, p42-43.

<sup>202</sup> See Guangzhong Chen and Jianwei Zhang, "International Standards on Criminal Justice and Criminal Justice Reform in Our Country", ed. Chongyi Fan, et al, *A Study on Criminal Procedure Law*, (Beijing: China Fangzheng Press, 1998), p.24; Xiaohu Yin and Baoguo Fang, "Right to Silence should be Set up Clearly in Our Constitution", (2001) 2 *Legal Forum*, pp16-17; Xiaochuan Ye and Xinxin Bao, *op.cit.*, fn 153, pp51-52.

<sup>203</sup> See Jingji Du, "A Superficial Discussion of the Sources of Tortured Confession and Policies to Deal with It", in Wang Huaixu, ed., *Research and Practice of Investigation and Interrogation*, (Beijing: China People's Public Security University Press, 1998), p374.

<sup>204</sup> See e.g. Li Cui, "Lenient Punishment for Confessions, Severe Punishment for Resistance No Longer Exist in The Beijing Municipality Haidian District People's Procuratorate", 19/11/03, *China Youth Daily*, <http://www.chinacourt.org/public/detail.php?id=91365>;

the right to remain silent”. Also Shuncheng District Procuratorate in Fushun, Liaoning province, first issued a detailed rule in August 2000.<sup>205</sup> Suspects are allowed to keep silent when interrogated by prosecutors according to this rule.<sup>206</sup> Under this very limited rule, which did not apply to cases of manslaughter, murder, corruption, or those where there were no witnesses to the crime, a defendant’s confession of guilt is not a considered evidence, but the prosecutor may include a defendant’s defence in his/her file.<sup>207</sup> This rule essentially renders confessions irrelevant in determining whether or not to prosecute a particular crime. This practice was called “zero statement rule” (零口供) and characterized as a rule for prosecutors, directing them not to depend on confessions to a greater extent than other forms of evidence. It was also hailed by academic and media as the first step in establishing the right to remain silent.<sup>208</sup>

There has been debate as to whether a rule from a small area in China could prove to be a driving force for change in the nation as a whole.<sup>209</sup> However, in the eyes of reformers, for better or worse, the momentum for change has been slight to non-existent.<sup>210</sup> Subsequently, many cases have been cited from different presses as the first examples of an absence of confession case. For example, Beijing Evening News reported that the former director of the science and technology department of the bank’s Beijing branch, Mengjie Wen, was sentenced to death by Beijing High People’s Court for accepting bribes and embezzling public funds. All the primary evidence in this case, which was one of the biggest bribery cases in Beijing, was

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<sup>205</sup> See Xue Jiang and Zhen Qin, “Liaoning: Judiciary Shocked by the Rules on Zero Confession in the Cases Handled by Chief Prosecutors”, September 6, 2000, <http://news.sina.com.cn/china/2000-09-16/127590.html>.

<sup>206</sup> People’s Procuratorate of Fucheng District of Fushun City of Liaoning Province Rules on Zero Statement when Prosecutor Handling Cases, Article 5, 08/00.

<sup>207</sup> Ibid., Article 3.

<sup>208</sup> See e.g. Kunyu Han, “Torture to Obtain Confession, Zero Statement Rule and Right to Silence”, (2004) 4 Supplement To The Journal of Sun Yatsen University, pp152-153; Xinchao Yu and Jun Wang, “You have the Right to Remain Silence – Introduction of the Right to Remain Silence into Chinese Judicial System”, Xinhua News, 07/12/00, <http://news.sina.com.cn/c/155525.html>; Kai-shing Wong, “China: The Right to Silence: The Zero Statement Rule”, (2000) November, Vol. 10, Asian Human Rights Commission – Human Rights Solidarity, No.11, <http://www.hrsolidarity.net/mainfile.php/2000vol10no11/754/>.

<sup>209</sup> See Hong Cai, “Zero Confession and the Right to Remain Silent”, (2001) 1 Law Review, p.160.

<sup>210</sup> See Zhi Chen, “Analysis of the Rationality and Legitimacy of Zero Confession Rule”, (2008) 2 Legal System and Society, p.161; Peng Zhang, “Can you Keep Silence? – Right to Remain Silent in China”, Beijing Evening News, 13/09/00, <http://news.sina.com.cn/china/2000-09-13/126763.html>.

obtained without suspect's confession.<sup>211</sup> Unfortunately, the extensive reporting of this experiment reflected "the hopes of scholars and the media", according to Antony Kuhn, rather than a real shift in official thinking.<sup>212</sup>

Despite official endorsement of the right to silence in these local jurisdictions, it appears that the police, prosecution and the courts were not given training and suspects were not warned of any implications of remaining silent during interrogation. Reviews of those cases in which the suspect has asserted his right to silence indicates that the courts view the defendant's silence during interrogations as an admission of guilt, and that reluctance to speak is taken to demonstrate a negative attitude to repent and likely to result in a harsher punishment. The right to silence and the absence of confession are not interchangeable concepts and on their own in the short term can hardly challenge traditional Chinese criminal practice. Also it seems that the police did not rush to adopt the "zero statement rule". An interesting reason for the delay of acceptance is the debate over whether it is the role of the police to adopt such a rule, or it technically bind only the prosecutor in a role separate from police criminal investigation. A more concrete reason is that the officer enforcing this law would naturally dislike this rule, as it may take away the powerful tool of confession in a criminal trial, thus they would have strong incentives to stop its appliance. Some scholars also questioned the legality of "Zero Statement," arguing that it violated the CCPL by excluding the voluntary confessions the law allow, not to mention the interests of victims.<sup>213</sup> The "Zero Statement" rule was eventually withdrawn because higher authorities were "dissatisfied", according to a Shuncheng prosecutor.<sup>214</sup>

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<sup>211</sup> See Meng Yun, "Disclosure of the Investigation of the No.1 Bribery Case in Beijing: Corruption was dug out without Confession", 03/08/06, [http://news.xinhuanet.com/legal/2006-08/03/content\\_4914890.htm](http://news.xinhuanet.com/legal/2006-08/03/content_4914890.htm).

<sup>212</sup> See Antony Kuhn, "China Balks at the 'Right to Remain Silent'," *Los Angeles Times*, 21/01/01.

<sup>213</sup> See Jiahong He, "Zero Confession and The Right to Remain Silent", (2001) 4 *People's Procuratorial Monthly*, p.27.

<sup>214</sup> See Qie Guan and Tieshan Liu, "China has not Introduced the Right to Remain Silent Yet, Zero Confession Rule has been Re-defined", *Liaoshen Evening News*, 30/03/01, <http://news.eastday.com/epublish/gb/paper148/20010330/class014800018/hwz349243.htm>; Antony Kuhn, *op.cit.*, fn 210.

All these national laws and regulations will be conducive to further ensuring the legitimate rights of suspects and defendants and reducing the incidence of torture. Thus, on paper, many safeguards exist and even comply with the international obligations under relevant treaties, as it is also reflected in the periodic state reports. In reality, however, suspects in China are often without effective protections against abuse of power, most often at the hands of police officers. The issue concerning prevention of torture and right to remain silence were always listed as discussion topic in different conferences.<sup>215</sup> Many scholars and lawyers are pressing for a change in criminal procedure law to give criminal suspects the right to silence during questioning, a rule similar as the *Miranda* Rule in the United States that obliges the police to read suspects their rights and provides for the right against self-incrimination and for suspects to be represented by a lawyer after their arrest, in the hope of promoting human rights and improving openness and fairness in the judicial process through the adoption of such a rule. This may be a singular effort however, as there is no evidence of a widespread push for such a rule.

#### **4.3 Strengthen the Supervision of Law Enforcement Agencies**

Law enforcement agencies claim to address the torture issue through increasing transparency of law enforcements, strengthening the investigative training, and improving mechanism of supervision.<sup>216</sup> In practice, the occurrence of torture is for the most attributable to the individual behaviour and illegal doings of the judicial personnel and the law enforcers. Various forms of internal disciplinary agencies have been set up in different national authorities to regulate and bind the conduct of judicial agencies and officials. Through self-investigating and self-correcting, such internal systems play an important role for the prohibition of torture in China today,

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<sup>215</sup> See e.g. Jiancheng Wang and Youbiao Li, ed., "Discussion of Jurisdiction at the Turn of Century, (2001) 3 Chinese Lawyer, p31.

<sup>216</sup> For law enforcement emphasis on supervision, see e.g., "China Exclusive: All 3,000 Police Chiefs to Hold Face-to-Face Meetings With Petitioners," Xinhua News, 18/05/05, [http://english.peopledaily.com.cn/200505/19/eng20050519\\_185707.html](http://english.peopledaily.com.cn/200505/19/eng20050519_185707.html); SPP Work Report of 2010; Qingfeng Guan and Zhuo Zhao, "Supreme People's Procuratorate: 8 High Ranking Government Officials at the provincial and ministerial level were Investigated", Beijing Youth Daily, 12/03/10, <http://bjyouth.yynet.com/article.jsp?oid=63995580>; Xinyou Wang, "Further Strengthen Legal Supervision over Litigations to Ensure Fair and Honest Law Enforcement", 21/01/10, Procuratorial Daily, [http://news.xinhuanet.com/legal/2010-01/21/content\\_12848702.htm](http://news.xinhuanet.com/legal/2010-01/21/content_12848702.htm).

particularly when there is still no formal judicial supervision.<sup>217</sup> Since 2005, in order to clarify and fulfil the individual responsibility in law enforcement, the State Council has promoted nation-wide administrative law enforcement responsibility system.<sup>218</sup> Particularly, the discipline inspection agencies of the CCP in cooperation with the administrative supervision agencies of the State keep dealing with party cadres and state personnel who have committed torture according to their rank as discussed above.<sup>219</sup> As mentioned in Chapter Five, the procuratorial agencies established their agencies in many detention facilities, through which detainees have the chance to make face-to-face meeting to raise complaints.<sup>220</sup> Public security agencies continue the practice of law enforcement evaluation and use the method of “veto with one vote” in annual evaluation in cases of death or serious injury caused by torture, beating, physical punishment, maltreatment, and misuse of firearms.<sup>221</sup> If a public security agency receives such a veto in its annual evaluation, this means that its performance is below standard; if it gets voted twice, its leader shall resign or be removed from the post.<sup>222</sup> The large scale of self-check and self rectify campaigns carried out during these years among all levels, and all kinds of judicial agencies and law enforcement agencies have also produced great results.<sup>223</sup>

Since August 2003, the MPS has issued a set of unified regulations on the standardization of law enforcement procedures for public security institutions entitled *Regulations on the Procedures for Handling Administrative Cases*.<sup>224</sup> This

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<sup>217</sup> See, generally, e.g. Introductory Statement by H.E. Ambassador Libaodong, Head of Chinese Delegation, at the Consideration of the Committee Against Torture on China's 4<sup>th</sup> and 5<sup>th</sup> Periodic Reports, 25/11/08.

<sup>218</sup> See Several Opinions of the State Council on Pushing Forward the Administrative Law Enforcement Responsibility System, 08/09/05; Also see Jing Wu, “From Power-oriented Approach to Duty-oriented Approach: Achievement of the Administrative Law Enforcement Responsibility System”, People's Daily, 28/07/06, <http://politics.people.com.cn/GB/1026/4640143.html>.

<sup>219</sup> Also see 3.4.1.2, pp.378-381.

<sup>220</sup> See Chap5, 2.5, pp.280-281.

<sup>221</sup> Rules on Evaluation and Appraisal of Public Security Organs' Law Enforcement Quality, 14/09/01, Article 16; Also see Na Meng and Lin Qiu, “Ministry of Public Security Emphasised Promotion of Law Enforcement Evaluation System and Prohibition of Extortion of a Confession from Torture”, Xinhua News, 18/04/06, [http://news.xinhuanet.com/newscenter/2006-04/18/content\\_4441883.htm](http://news.xinhuanet.com/newscenter/2006-04/18/content_4441883.htm).

<sup>222</sup> Ibid., Article 22.

<sup>223</sup> See, e.g. MPS Press Conference, “Press Release: Ministry of Public Security Report on the Situation of Law Enforcement Evaluation in the Public Security Agencies of the Whole Country and Local Law Enforcement Evaluation Service of Legal System Department”, 18/04/06, <http://www.mps.gov.cn/n16/n1252/n1852/n2647/126681.html>.

<sup>224</sup> Also see Chap5, 2.3, p274.

regulation include procedures defining police powers in respect of time limits for confiscation of property, legal means for gathering evidence, time limits on investigation and examination of suspects, etc. In 2004, the MPS issued regulations prohibiting the use of torture and threats to gain confessions and initiated a nationwide campaign to improve policemen's criminal investigation capacity.<sup>225</sup> Since 2006, the MPS has enhanced the nation-wide system of full audio and video coverage of interrogation of murder cases and those involving underworld organizations step by step.<sup>226</sup> The SPP launched a nationwide campaign to crack down on officials who abuse their powers in 2004. Later, the SPP announced in May 2005 that eliminating interrogation through torture was a priority of its work agenda and has instructed procurators that confessions obtained as a result of torture cannot form a basis for the formal approval of arrests and that prosecutors must work to eliminate illegally obtained evidence.<sup>227</sup> It officially reported the prosecution of 930 officials for torture, illegal detention, and other violations of human rights in 2006.<sup>228</sup> The SPP rolled out a piloting system of audio and video recording in interrogation rooms in 2005 and issued two regulations in 2006 on how to videotape the suspects in job-related criminal cases when they are interrogated. Until 2007, 2171 procuratorial agencies were implemented this system.<sup>229</sup>

The various levels of law enforcement and judicial agencies increased their efforts in dealing with the torture cases by experimenting with pilot projects equivalent to the right to silence. For example, in April 2005, Sichuan province prohibited the use of evidence acquired through illegal means and introduced an experimental program

<sup>225</sup> See, e.g. MPS Press Conference, "Press Release: Ministry of Public Security Report on the Situation of the Investigation of Homicide Cases", 16/05/06, [http://www.gov.cn/xwfb/2006-05/16/content\\_281558.htm](http://www.gov.cn/xwfb/2006-05/16/content_281558.htm).

<sup>226</sup> See Shu Wang, "Ministry of Public Security Emphasised that Commitment to Close All Homicides Cases Will not Induce Confession Obtained by Torture, Audio and Video Taping will be used in the Interrogation", Beijing News, 17/05/06, [http://news.xinhuanet.com/newscenter/2006-05/17/content\\_4555555.htm](http://news.xinhuanet.com/newscenter/2006-05/17/content_4555555.htm).

<sup>227</sup> See Ridan Xu, "Supreme People's Procuratorate: Emphasis on the Correction of Extortion of Confession by torture, Collection of Evidence by Violence and Illegal Detention", Procuratorate Daily, 24/06/09, [http://news.xinhuanet.com/legal/2009-06/24/content\\_11591880.htm](http://news.xinhuanet.com/legal/2009-06/24/content_11591880.htm); Meng Du, "Supreme People's Procuratorate Confirms Emphasis on Investigative Supervision This Year", Legal Daily, 17/05/05; Xinyou Wang, op.cit., fn 216.

<sup>228</sup> See SPP Work Report 2007 and 2010.

<sup>229</sup> Ibid.; also see Ting Yuan and Xuesong Gao, "Prosecution Authorities Promoted Implementation of Synchronized Audio and Video Taping During Interrogation in Full Strength", Democracy and Law Times, 08/03/10, <http://www.mzyfz.com/news/times/2/20100308/141706.shtml>.

that requires interrogations in “major cases” to be taped. Under the new rule, courts must exclude coerced statements and confessions unless police provide a reasonable explanation for the alleged coercion or agree to investigate allegations of abuse.<sup>230</sup> In May 2005, Chinese news media reported that three district public security bureaus in Beijing, Gansu and Henan were taking part in an experimental program under which suspects may request either the presence of a lawyer during interrogation or the taping of the interrogation.<sup>231</sup> Following the UN SR’s December 2005 visit, the SR learned that the Hebei provincial procuratorate, high court, and public security bureau issued a joint opinion prohibiting the use of torture to obtain evidence against a criminal suspect.<sup>232</sup>

#### **4.4 Strengthen the Supervision by the General Public**

Also, in recent years the mass media have greatly increased their supervisory role and have continuously published reports about vile situations and torture cases with particularly serious consequences in the newspapers and on television. This has provoked a considerable public reaction and attracted the attention of the relevant authorities and departments. Those responsible for committing torture and similar acts have been severely dealt with and there has been an overall educational effect on society at large. The supervisory role of the general public and public opinion in these kinds of cases have had a great impact and are welcomed by the people, and the state leaders have encouraged the mass media to increase their supervisory role in this area, as this kind of reports is good for stability of the society.

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<sup>230</sup> See Several Opinions of SeeSichuan Higher People’s Court, the Sichuan People’s Procuratorate, and the Sichuan Department of Public Security Regarding the Standardization of Criminal Evidence Work, 01/05/05; Also see Dehua Liu and Jing Wang, *op.cit.*, fn 199.

<sup>231</sup> Scholars from the Procedural Research Center at the Chinese University of Politics and Law in Beijing designed the project and chose Haidian district, Beijing; Baiyin district, Gansu; and Jiaozhu city, Henan, as the three pilot districts. Dehua Liu and Jing Wang, *op.cit.*, fn 199; Rong Hu, “Police’s New Method to Prevent Extortion of Confession by Torture in Haidian District of Beijing: Audio or Videotaping during the Interrogation”, People’s Daily, 01/06/05, <http://legal.people.com.cn/GB/42735/3432404.html>; Lei Chen, “Experimental Reform of Interrogation System in Our Country, Extortion of Confession by Torture Has been the Most Unjust of the Litigation”, Oriental Outlook Weekly, 25/05/05, <http://news.sina.com.cn/c/2005-05-26/13076756336.shtml>.

<sup>232</sup> See Manfred Nowak Report 2006, *op.cit.*, fn 10, p.17; Also see The “Guiding Opinion Regarding Prevention of Extorting Confessions Under Torture During Criminal Case Activity” went into effect in Hebei province on January 1, 2006.

## 5. Further Reform to Curb the Use of Torture

Several of the local experiments described above correspond to proposed amendments to the CCPL, suggesting that the government is testing reforms at a local level before implementing them nationwide. However, some Chinese legal scholars have expressed concern that the rules set in those experiments did not go far enough, and there are still a lot of problems in this process.<sup>233</sup> As shown above, some Chinese legal experts stressed that to prevent torture and ill-treatment during the stage of investigations in practice, reforms should include enhanced the rights for defence lawyers, a right to remain silent, an evidence exclusion rule that would bar all illegally obtained evidence from criminal trials, and more vigorous prosecution of officials who resort to torture. At the same time, reports and comments in the media or conferences on the resistance to the local experiments from some public securities indicated that the scholarly expectations appears to be too “idealistic”, law enforcement agencies may habitually resist broad rights enhancement for suspects. Indeed, in reality the Chinese general public’s legal awareness is still weak, and thus both the local protectionism and departmental protectionism still exist. The measures that China has taken are still vague, unspecific and are not effective to combat torture in criminal proceedings, lacking either concrete implementation procedures altogether or detailed legal consequences if the measures fail to be carried on that diminish their utility. Moreover, the great majority of miscarriage of justice in Chinese judicial practice was concluded to be dependent on evidence obtained from inquisition by torture. This observable occurrence has helped further forging a consensus among scholars and officials in making the prevention of torture a priority in upcoming amendments to the CCPL.<sup>234</sup> In order to continue preventing torture in

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<sup>233</sup> See e.g. Baoguo Fang, “The Fact is There – On Local Rules of Criminal Evidence in China”, (2007) 3 *Tribune of Political Science and Law*, pp46-48; Qin Ping, “How Local Criminal Evidence Standards Guarantee Implementation of the Criminal Procedure Law”, *Legal Daily*, 22/04/05; Wentao Wang, “Deputy to the National People’s Congress Called for Legislation on the Criminal Evidence”, *Xinhua News*, 25/02/08, [http://news.china.com/zh\\_cn/focus/20081h/gdxw/11066463/20080225/14691188.html](http://news.china.com/zh_cn/focus/20081h/gdxw/11066463/20080225/14691188.html).

<sup>234</sup> See Aijun Hao and Bo Zhong, “New Trends of Criminal Justice Reform Observed from National Human Rights Action Plan of China (2009-2010)”, (2009) 4 *Human Rights*, p53; See Weihua Liao, “Criminal Procedure Law is in Hope of Amendment by National People’s Congress Next Year, Emphasis is on the Prevention of Coonfession Obtained by Torture”, *Beijing News*, 13/07/05, [http://news.xinhuanet.com/legal/2005-07/13/content\\_3212099.htm](http://news.xinhuanet.com/legal/2005-07/13/content_3212099.htm).



China, the further revision of the CCPL should systematically address the issue of inquisition by torture to bring them into compliance with the International Standard, and the following aspects should be considered.

### **5.1 Strengthening the Enforcement of the Law on Suppression of Torture**

After setting up the legal basis on suppression of torture, strict enforcement of the law is the most important guarantee for decreasing and eliminating torture. China should make more efforts in this aspect. Currently in China, the existence of torture cannot be only attributed to an incomplete legal structure or legal basis of the country, neither can it be said that the Party in power, the state authorities and the public are not willing to oppose torture. The cause also lies in the enforcement of the law, which does not strictly abide the law. Therefore in order to prevent and eliminate Article 7 treatment, a principle must be upheld that every law must be adhered to. Violations of the law must be punished and the enforcements of law must be strict in the whole country and society. This is especially important for the judicial and law enforcement agencies. If the judicial personnel and the law enforcers cannot recognise the concept of rule of law and principles of human rights protections with fairness and justice as the core value of their work, it will not only be impossible to punish all crimes effectively, including the crimes of extorting a confession by torture, illegal imprisonment and other crimes which seriously violate the citizens' personal rights and rights of reputation. However, it will also have a very negative impact on legal authorities in the Chinese society. Other government officials, social groups, and even the public will have this negative impression that they do not need to respect the law and act according to law because the judicial agency cannot comply with the law.

For the same reason, local and departmental protectionism are quite harmful rather than being helpful to maintain the reputations of judicial agency, officials and the social stability and harmony. What these law enforcement departments or local authorities protect is a small number of offenders of torture. But it is precisely the

conduct of these offenders impairing the reputation of the law enforcement and judicial officials. People will also misunderstand that such conduct is tacitly permitted by the leaders, or that no disciplinary will be taken against torture. China has put a great deal of effort into constructing a system of rule of law. It is irrational and unreasonable to provide protection to such perpetrators of torture. Therefore those perpetrators of torture and other cruel, inhuman or degrading treatment or punishment must shoulder the relevant legal responsibilities. Not only should the offenders themselves be punished and educated, but other judicial officials should also be reminded not to follow the example of such offenders. This would be very important and helpful for the prohibition and punishment of Article 7 treatment.

Because of the low regard the Chinese have traditionally held for law, promulgation of laws alone is not enough to bring the police operation within the purview of the law. Therefore China needs to attach great efforts to improve the professionalism of the law enforcement enforcers. In the perspective of the overall criminal justice work in China, one of the reasons for low efficiency and existence of unjust or wrong cases is that many officials are not qualified and do not receive strict and systematic, or even fundamental, education and training before taking up their posts. The occurrence of torture is partially or mainly caused by this fact. It is observed that torture tends to happen at the basic level authorities. The basic law enforcement authorities and officials are to be found throughout urban and rural areas. They are engaged in strenuous judicial work such as maintaining the local social order, keeping the public safety, and inspecting and punishing illegal conduct and crimes. They have made great contributions to the crime control and protection of the rights and interests of the country and the people. But of those who receive special legal training and high education in law only few would be sent to work at the basic level law enforcement and judicial authorities. Also many judicial officials lack the necessary knowledge and understanding in the regard of protection of human right and against torture.

Therefore it should become a principle in China that law enforcers and judicial personnel should be well trained and qualified before starting work. Adequate resources, specialized trainings and educations for all levels of the law enforcement officials are a basic condition for ensuring the effective implementations of the safeguards against torture and ill-treatment during the criminal procedure. Raising levels of professionalism requires law enforcers and the judicial personnel's training should always be based on human rights standards and aimed at ensuring the highest standards of professional conduct. The current out-dated and unpractical contents of all the courses and trainings should be up-to-date contents, especially contents that concern human rights protection and prohibition of torture. In order to avoid reliance upon the confession, the officials should develop a capacity to build a case in an efficient manner by professional training on collection, analysis and preservation of evidence, techniques of interviewing and taking statements from suspects and witnesses, and other aspects of the investigation of alleged crimes. More resources should be allocated for forensic facilities and training police to use it in investigations. Police officers, particularly at senior level, should raise these issues with their administrative superiors at both the local and national level, to ensure that the criminal justice is provided with the necessary resources to carry out its works in a professional manner and in line with international human rights standards.

After China's entries into a series of international conventions and agreements, the Chinese government and people should accept the relevant international standard and responsibilities for protecting human rights, including prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Therefore adding such contents to the relevant courses and providing systematic and formal educations on the requirements of the international human rights standards against torture are crucial steps for the judicial officials to develop a proper understanding and attitude about the problem of torture and the human rights protection. For example, in the course of training, particular attentions should be given to the principle that the prohibition of torture is absolute and police officers have a duty to disobey orders

from a superior to commit torture. The level of awareness and capacity of law enforcement officials should be raised in terms of civilized and standardized enforcement and protection of citizens' legitimate rights and interests.

## **5.2 Perfecting the Legal System against Torture and the Use of Illegal Evidence**

Apart from educating officers about the importance of enforcing the law within the bounds of laws, detailed and clear legal provisions of the CCPL are also needed. One of the major reasons of the continuation of the use of torture and the abuse of illegal evidence in criminal justice is the lack of key safeguards to prevent it. In order to ensure that the prohibition against torture is respected, it is essential that China formally recognises presumption of innocence and grants suspects the protection against self-incrimination. It urges the authorities to introduce series safeguards without delay, in line with China's obligation as a state party to the UN ICCPR and CAT. These safeguards should be part of a comprehensive framework of effective legislative, judicial and other measures to prevent torture.

### **5.2.1 Define the Concept of Torture under International Standards**

To reduce torture and to wipe it out eventually, the law should broaden the current interpretation of means of inquisition by torture. First of all, it should make a definition of torture according to the provision of Article 1, the UN Convention against Torture. The provision on inquisition by torture in the existing CCPL is in fact only limited to the body. Pursuant to Article 1(1) of the UN CAT, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. Namely, inquisition by torture means not only violence inflicted on the body but also mental anguish of a person. Next, it is necessary to add special regulations regarding a number of concrete actions with a way of listing in the CCPL for the prohibition of torture. Particularly, with regard to the other cruel or ill-treatment acts that do not amount to torture yet violated Article 7 of ICCPR, the CCPL should also be stipulated. This illustration of the basic and most common kinds of torture and ill-treatment and their form of manifestation in China

will make the law more clear and predictable as required by Article 7 of ICCPR. Therefore, it will be effective to investigate and punish the perpetrators of torture according to the law. Meanwhile, the status of the perpetrator of torture should be provided definitely. The CCL should also be revised to incorporate the crime of torture as defined in the CAT, including explicitly recognizing that all persons acting in an official capacity may be subject to prosecution for this crime, incorporating the concept of mental torture, and establishing clear standards for prosecution and punishment of torture cases that recognize the severity of this crime.

### **5.2.2 Unity of Criminal Punishment and Human Rights Protection by Establishing the Exclusionary Rule of Illegally Obtained Evidence**

There are growing calls in China to revise the legal provisions in the CCPL to include a clear exclusionary rule barring the admission of all illegally-obtained evidence at trial, including evidence arising out of tortured confessions. Commentators argued that, without it, efforts to eradicate torture would have little hope of lasting success while real justice cannot ultimately be achieved.<sup>235</sup> The majority of countries not only rule out evidence obtained by torture, but also exclude the evidence obtained indirectly in illegal ways. Most countries adopt the exclusionary rule of illegally obtained evidence to strike a balance between finding the truth and protecting the due process.<sup>236</sup> For example, in the UK, a comparative exclusionary principle has been adopted, i.e. not all evidence obtained in ways that constitute general misdemeanors is excluded, while evidence obtained through torture is excluded with exception. At present stage, the exception rule of the exclusionary rule shall be set up on the basis of taking into account of certain special circumstances. In this regard, some major issues should be involved in the further revisions of the CCPL this time.

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<sup>235</sup> See Haijian Ma and Bingtao Li, "Procedural Instrumentalism and the Use of Torture to Extract Statements", (1999) 3 Law Journal Of Shanghai Administrative Cadre Institute Of Politics & Law, pp. 63-65. Guojun Zhou, *op.cit.*, fn 63, p.85.

<sup>236</sup> See Guangzhong Chen, "Outlook of Revision of Criminal Procedural Law of China", (2005) August China Law, p.59.

Firstly, Article 42 of the 1996 CCPL should confirm that the facts of an offense shall not be established in the absence of evidence. Evidence shall be relevant to the facts of a case and tend to prove the facts of a case. Evidence of the defendant's infamous character and previous conduct similar to the present offence charged are not admissible as evidence to prove that he or she is guilty. Article 46 should also states firmly that confession of an accused, or a co-offender, shall not be used as the sole basis of conviction and other necessary evidence shall still be investigated to see if the confession is consistent with facts. Where an accused has made no confession nor has there been any evidence, his guilt shall not be presumed merely because of his refusal to make a statement or remaining silent.

Secondly, Article 43 of the 1996 CCPL should be revised. All evidence, no matter whether it is affidavit or material evidence, obtained by torture should be excluded in general. That means it is strictly forbidden to collect statements of a suspect, defendant, or victim and witness testimony with the following means: torture or other means by which severe pain may be inflicted on the person; intimidating or cheating; keeping the person suffering from fatigue, hunger or thirst; using medicine or hypnosis; and other cruel, inhuman or degrading means. Evidence obtained with the illegal means mentioned above shall not be accepted as evidence to initiate a public prosecution and to convict. Also it should be strictly forbidden to collect material evidence, documentary evidence, and audio-visual materials with the means of illegal search, seizure and illegal entering citizen's house or other unlawful means. It is strictly forbidden to inquest and inspect in violation of the statutory procedure. The admission of the evidence obtained with illegal means mentioned above is on discretion of the court according to the degree of illegal means and other circumstances of the case. Many commentators strongly suggested that chopping down the "poisonous tree" to get rid of the use of its "fruit" as evidence in court.<sup>237</sup> But there should be some exceptions provided by law for the exclusion of the evidence for those criminal actions that seriously endanger the state security and the

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<sup>237</sup> See Guojun Zhou, *op.cit.*, fn 63, p.93.

social public interests. In principle, the reason for eliminating illegal evidence is to ensure the litigation participant's right, to restrict the action of obtaining evidence via illegal channel and to establish the image of judicial justice. Therefore the elimination of exception is based on the consideration of balancing value between the protection of human rights and the preservation of public interests.

Thirdly, on the burden of proof and standard of proof of evidence illegally obtained, the defending party should first present reasonable clue of torture, then, the burden of proof is shifted to the prosecuting party. This means that if the suspect raises concerns over the possibility that his confession was extracted by improper means, his confession shall be investigated prior to the investigation of other evidence; if the said confession is presented by the public prosecutor, the court shall order the public prosecutor to indicate the method to prove that the confession is obtained under the free will of the suspects, otherwise the evidence will be excluded. The UN SR on Torture has recommended that where allegations of torture are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confessions was not obtained by unlawful means, including torture and ill-treatment.<sup>238</sup> There should also be a fair and transparent procedure established in the CCPL for accused persons to apply to have such evidence excluded, and provisions should be made for appropriately trained doctors to gather appropriate medical evidence. The establishment of such a system of burden of proof bears great influence on curbing the practice of extortion of confessions by torture and Article 7 and Article 14(2) of ICCPR might be satisfied.

### **5.2.3 Entitle the Right to Silence for Suspects**

It is the time for China's judicial system to officially adopt right to silence for suspects, marking the country's progress in protection of human rights and freedom of the people. With those debates of the relevance of the right to silence, the system

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<sup>238</sup> See Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/56/156, 03/07/01, para 39 (j).

cannot be just copied from the mode of other countries on the right to silence. But it must be well designed for China. The advantages of the right to silence are able to continuously improve such as different procedural and evidential rules, the investigation technology and the professional qualities of the judicial personnel. On contrary, these factors will also provide more favorable conditions for the setup and implementation of the right to silence in China. Some local courts or procuratorates continue to experiment with devices allowing a limited right to remain silent for suspects. Three principles are necessary in order to set up the right to silence in China. Firstly, the legislations should concentrate on the setup of the right to silence as it is fundamental to a fair trial and protection of human dignity.<sup>239</sup> Secondly, the legislations should balance the individual rights and the public interests.<sup>240</sup> According to the complicated public situation in China, the conditions for the obligation to tell the truth have to be clearly defined. Thirdly, the law should be regulated at least according to the basic international standard. According to the present situation of China, the system can be designed as below.

First, Article 93 should be revised. The CCPL should guarantee the people's right to keep silence and entitle suspects to defend himself against accusations or keep silence during a criminal interrogation. Therefore, the requirement that the suspect shall truthfully answer the questions raised by the investigation personnel should be deleted. Once there is concrete evidence indicating that a suspect is likely to have been involved in a crime, the suspect becomes an accused person, and the police are required to inform a person of his or her right to silence and counsel as soon as the person becomes an accused person, regardless of whether he or she is taken into police custody. A suspect must be informed of his or her rights when he or she is questioned for the first time at different stages of the criminal process. Specific provisions should be contained in the CCPL as to when the caution on the rights to silence and counsel must be repeated, such as after every break during the course of

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<sup>239</sup> See *Saunders v UK*, Chap3, 4.4.3, pp.178-179.

<sup>240</sup> See *Murray v UK*, Chap3, 4.4.3, p177.



interrogation. But the suspect cannot end the interrogation. The person must also be given an opportunity to explain any suspicion against him or her. If the charge is changed after a suspect has been informed of the offence charged, he or she shall be informed of such change. The suspect should be informed that he or she has the right to demand the police and the prosecutor to take exonerating evidence. Interference with a suspect's effort to seek legal advice may lead to exclusion of the confession obtained. The scope of the right to counsel, however, differs depending on whether he or she is questioned by a police officer or by a judge or a prosecutor. This issue will be discussed in the coming chapters.

Second, the principle of privilege against self-incrimination should be stated in the CCPL according to the language in the ICCPR as well.<sup>241</sup> Article 139 and Article 155 of the 1996 CCPL should be revised. The requirements in Article 139 stated that when examining a case, the procuratorate shall interrogate the suspect should be changed as follows: the procuratorate shall hear the suspect's opinions and the suspect may refuse to answer questions or testify at trial. Similarly in Article 155 the right for the procuratorate to interrogate the suspect in trial should be abolished. The procuratorate shall question the suspect if he or she is willing to answer. If the suspect refuses to answer the questions, the procuratorate should present the evidence of the suspected crime to court for the prosecution. To harmonize the traditional culture, the policy that grants leniency to those who confess their crimes and severity to those who refuse to shall change into leniency to those who confess their crimes but not severity to those who refuse to. The adverse comments or inferences should not be drawn from the complete silence of the accused in any stage of the criminal proceedings. However, it may allow to draw conclusions if the accused remains silent only to certain questions about the same crime.<sup>242</sup>

Third, a separate regime for the investigations and prosecutions of serious and

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<sup>241</sup> See Chap2, 4.5, pp.43-45.

<sup>242</sup> See Chap3, 4.4.3, pp.179-185.

complex offences should be operated. The special regime is empowered to investigate any suspected offence which can be reasonably believed to involve serious or complex offence such as terrorism, serious fraud and serious organized crimes.<sup>243</sup> Anyone under investigation or any person that are reasonably believed to have information relevant to an investigation can be compelled to answer questions. Non-compliance is an offence unless the person has a reasonable excuse.<sup>244</sup> However, witnesses are protected by an immunity which provides that their answers may only be used in evidence, if they are charged with making a false statement during an investigation, or if they are charged with an offence and give evidence at trial which is inconsistent with the answer given to investigative officer.

#### **5.2.4 Establish Effective and Independent Mechanisms for Discovering, Receiving Complaints and Investigating and Prosecuting Torture Cases**

The prevention of torture and ultimate improvement of justice and human rights protection during the criminal investigation period also depends on bettering the channel for complaints by those affected parties. Firstly, strengthening the supervision of judicial agency and officials plays a key role in prevention. China has established an elementary supervision system against torture as mentioned above.<sup>245</sup> However, it still does not function effectively to prevent and punish torture due to the lack of an independent judicial system of checking power, relevant enforcement mechanisms and specified working procedures. If the prosecution service and police combine their investigation functions together to handle all criminal cases, courts should be empowered to hear cases concerning any possible malpractice of these two institutions. As observed in Chapter Five, an effective judicial review system is essential for effective protection of human rights in China.<sup>246</sup> Moreover, media should be offered proper freedom to carry out reporting on cases and issues relating to torture and ill-treatment in China. The public condemnation of torture can have a

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<sup>243</sup> See *Heaney and McGuinness v Ireland*, Chap3, 4.4.3, pp.179-180.

<sup>244</sup> See *R v Beckles, O'halloran & Francis v UK*, Chap3, 4.4.3, pp.182-184.

<sup>245</sup> See 3.4, pp.375-384.

<sup>246</sup> See Chap5, 4.4, pp.329-334.

significant preventative impact.<sup>247</sup> Secondly, it is, therefore, vital to take concrete procedural measures to ensure that all torture victims are able to exercise their rights to complain without fear of retaliation. Every case of torture may be impartially investigated and tried, and perpetrators of Article 7 treatment receive penalties according with the seriousness of their crimes, as well as every victims may receive proper compensation and rehabilitations. These measures for the coming reforms can be as follow.

First, the whole course of interrogation of a suspect should be visual or audio recorded. This idea originated in the UK, and later was adopted in the Chinese Hong Kong region and some states in the US. Under such system, the duties of detention and delivery of suspects for interrogation are carried out by two different departments. Two copies of the tapes and videotapes are made, with one given to the suspects. The police are required to keep a record of all interviews with the suspects. Recording interviews starts once the suspects are examined and continued non-stop throughout the process, and if necessary, shall be videotaped. Provided that in case of an emergency, after clearly stated in the record, the rule may not be followed. Except for the circumstances prescribed in the Proviso of the preceding section of aforementioned measure, if there is an inconsistency between the content of the record and that of the audio or video record regarding the statements made by the accused, the said portion of the statement shall not be used as evidence.

In consideration of China's vast territory and imbalance of economic growth, at the progressive practice of the system, if the lack of funding, the investigative authorities may first audio record the whole course. The scope of the locations for usual interviews should be well defined and the police are advised to interview a suspect at such locations whenever possible. The rules to deal with the tape recording of the interviews with suspects and to govern the means of preservation of the record should be prescribed in a strict and detail manner. At the end of interrogation, the

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<sup>247</sup> See op.cit., fn 238, pp.3-4.

person being interviewed must be shown the record and given an opportunity to comment on it. Failure to comply with the recording requirements may lead to exclusion of the confession obtained if the record-keeping deficiencies make it hard for the police to establish the reliability of the confession. It is of great significance for ensuring the transparency of interrogation and protecting the legal rights and interests of suspects.

Second, the standards for treatment of detainees contained in China's laws and regulations and in international human rights instruments, including providing adequate foods, medical care and living conditions to all those in custody should be strictly enforced. As discussed in Chapter Five, the current CCPL does not provide for detainees a right to be brought before a judge promptly after they are taken in custody, and in most cases detainees do not have access to a judge until their trial, which may be months, or even years in some cases, after detention.<sup>248</sup> Allowing early access would give judges the chances to take action about allegations of torture at an early stage of the criminal process. The authorities should also consider introducing a pre-trial procedure for assessing claims that confessions and other statements have been obtained through torture or ill-treatment, so that evidence obtained through illegal means does not come before the court to make a final determination of guilt or innocence. This would constitute an important step in the prevention of torture. During this stage, the experience of many countries shows that guaranteed access to lawyers and legal representative is one of the strongest protections against torture for any detainee. Lawyers must be present when the investigative agencies interrogate the suspect. Oral confessions obtained without a lawyer present can be viewed as illegal evidence and ruled out by the courts. This issue related to the system of earlier participation of lawyers in the criminal proceedings would be discussed specifically in Chapter Seven.

### **5.3 Strengthening the Construction of Legal Culture against Torture**

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<sup>248</sup> See Chap5, 3.4, pp.302-315.

Because of the traditional culture and history of the nation, many people in China lack consciousness of “international law” and protection of “human rights”, and do not know that torture is an international crime. In order to raise public awareness of this matter, the Chinese government may take all kinds medias, including newspaper, broadcast, television and Internet, to promote legal consciousness of suppression of torture and human rights protection on the suspects. Also by strengthening the public legal education on the problem of torture and international and regional norms involving the combating torture and ill-treatment and, the happening of torture can be better monitored and prevented. Moreover, the academics should be encouraged to continue researching on the problem of torture and figure out the effective countermeasures for China to implement the international obligations.

In particular, improving the culture of policing is crucial. The Chinese officers in criminal justice primarily face the challenge of establishing a culture of respect for the law and the consciousness of prevention and suppression of torture. Indeed, as Moore regarded, probably the biggest obstacle facing anyone who would implement a new strategy of policing is the difficulty of changing the ongoing culture of policing.<sup>249</sup> In order to eradicate the common tradition of extorting confessions by torture during criminal investigation, the government has taken various kinds of measures, including laws or regulations. Today there is no doubt that the attempts to change the ill-culture of policing have made great progress. But the culture is deeply entrenched in the minds and souls of people doing the work.<sup>250</sup> So it is impossible for the government to uproot the problem of obtaining evidence through torture and ill-treatment within a short time. However, it may feasible to change it as soon as possible, provided that China stands firm and makes sustained efforts to oppose torture. Therefore, apart from the legal measures, the Chinese government should continue to reinforce its endeavour in the culture educations, social policies and promoting human rights consciousness in a view to make new progress in its efforts

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<sup>249</sup> See Mark Harrison Moore, “Problem-Solving and Community Policing”, *Crime and Justice*, Vol. 15, Modern Policing (1992), p150.

<sup>250</sup> Ibid..

against torture.

## **6. Conclusion**

The root causes for the high number of torture instances in the Chinese legal system can be found in a blend of various historical, ideological and systemic causes. Basically the traditional belief that tortured confessions are necessary in crime control and maintaining social stability still has strong influence on the current criminal justice. But in this regard, it must be emphasized again that such acts are neither rational nor legal in China. The reform policy initiated from the beginning of the 1980s necessitated a legal system compatible with the rest of the world. According to what has been discussed above, the CCPL of 1996 and relevant legislations have been trying hard to prevent torture and the use of illegally evidence in criminal justice, at least showing from the reform of the relative legislations and mechanisms. But lack of concrete provision of laws to implement the procedures diminishes its effectiveness. The legal deficiencies that were examined above, such as the narrow concept of torture, lack of effective complaints procedures, the absence of an exclusionary rule barring the admission of evidence obtained through illegal means, the lack of an unambiguous presumption of innocence, a right to remain silent, barriers to access to legal counsel, and lack of independent monitoring, all undermine China's compliance with the international obligations under Article 7 of ICCPR and CAT. Again there is virtually no information about how complaints procedures or mechanisms for gaining redress may be accessed, and to what extent victims of torture or ill-treatment actually make use of such procedures or mechanisms.

Moreover, China lacks anti-torture education and the Convention on Torture has not been known among either law enforcement officials or ordinary citizens. Funding for

re-education of legal professionals will be needed, and time will also be needed for both the political and legal communities, as well as the general public, to accept the new norms. Once the general rules regarding the ban against torture to extract confessions are more strictly enforced, investigators will have to be retrained to adapt to the new legal environment. Therefore, it will be possible to better the legal culture in China for the suppression of torture and strengthen the reforms against torture during criminal procedure to gradually adapt international standards under the country's own situation with the modern rule of law and the ideology of human rights protection as a point of departure, and by changing and adjusting the conception of torture, by further efficient and stronger measures to fight torture to perfect the legal system for implement the ICCPR and CAT more effectively, and by adopting the same or adjusted actions against torture as the international society. The burden is heavy and the road is long until the new principles and concepts are integrated into the minds of Chinese citizens and the structures of Chinese society.

## Chapter Seven

# The Right to Defence by a Lawyer in the Chinese Pre-trial Proceedings and Movement towards Meeting ICCPR Standards

### 1. Introduction

Justice demands that individuals accused of criminal activity have the right to defend themselves before the law. The right to defence is contained in the Chinese Constitution, the CCPL and the Law of PRC on Lawyers, which openly states that “the suspect has the right to defence”.<sup>1</sup> Since the revisions of the criminal procedure law are intended to offer more protections for the rights of the suspects, lawyers therefore are expected to play a more active and meaningful role in criminal defence under the CCPL of 1996.<sup>2</sup> However, as described in Chapter One, one of the deficiencies of the CCPL of 1996 is that lawyers continue to experience difficulties in preparing a proper defence.<sup>3</sup> On particular, the early involvement of defence lawyers in the charging process has not translated into effective trial preparations during this period. Without adequate preparation on the defence before trial, it is possible to greatly affect the right to defence and whole fairness of the trial. It seems likely that the gap between the general situation of the right to defence in China and the relevant international standards has actually grown wider. The aim of this paper is to analyze different aspects of the revised law in order to support this claim and to offer comments about changes to the criminal justice system that would help to bring the Chinese defence system up to international standards. Its main focus is directed at observations on the position of lawyers in China, its aim to implement the right to

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<sup>1</sup> Constitution 1982, Article 125.

<sup>2</sup> See comments e.g. Yongzhong Gu, “Re-amendment of the Criminal Procedure Law: The Inevitability of Improving Advocacy System”, (2007) 4 Jurists Review, p.29; Ruihua Chen, “Balance of Due Process and Crime Control: Observe the Revised Criminal Procedure Law with International Standard of Criminal Justice”, (1997) 4 Chinese Lawyer, p.41.

<sup>3</sup> See Chap1, 1.2, p.7; also see Chongyi Fan, *Studies of Problems and Strategies regarding Criminal Procedure Law Application*, (Beijing: People’s Police University Press, 2001), p.100.



defence in the coming amendment of the CCPL in line with the ICCPR standard, mainly Article 14(1) and (3) of ICCPR.<sup>4</sup>

Therefore this chapter will start by reviewing the impact of legal tradition on the role of lawyers in China to provide a useful perspective on the historical and national conditions to facilitate a better understanding of the development and the reforms of the right to defence in China, which varies a great deal from country to country. Then the general situation regarding the right to defence by a defence lawyer, and the characteristics of the status and functions of defence lawyers in the Chinese pre-trial criminal proceedings will be examined by a comparative analysis with international standards. It will also address the critical issues of the lawyer's difficulties and risks in handling a criminal case after the revision of the CCPL and the relevant domestic law. Finally, it is necessary to discuss concrete measures and actions which could be undertaken in order to enhance lawyer defence in the pre-trial proceedings and further facilitate the promotion of the human rights protection for the suspects in the pre-trial proceedings in China. In doing this, it may be possible to achieve the most favourable outcome in the implementation of the laws and to bring the Chinese legal system into compliance with internationally recognized standards.

To what extent the person charged with a criminal offence actually has the right to defence varies between countries. But the basic conditions and requirements for effective defence to which the suspect is entitled has been ascertained in Article 14 (3)(b) and (d) of the ICCPR, and Article 6 (3)(b) and (d) of the ECHR reaffirmed these rights, as explained in Chapter 2 and 3.<sup>5</sup> *The Basic Principles on the Role of Lawyers* adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990, has detailed provisions for such rights. Thereupon an integrated minimum international standard on criminal defence systems came into

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<sup>4</sup> See discussion on Article 14(1) of ICCPR at Chap2, 6.1, pp.71-72; also see discussion on Article 6(1) of ECHR Chap3, 4.2, pp. 159-161.

<sup>5</sup> See discussion on Article 14(3) of ICCPR at Chap2, 6.3, pp.74-81; also see Article 6(3) of ECHR Chap3, 4.6, pp.194-206.

being. Of all these guarantees on criminal defence systems, ensuring assistance from a lawyer before trial is the most important, as the person charged with the penal offence is in a disadvantaged position and condition, when facing the power of the state public powers. This is also because modern litigation is a very complicated process, requiring specialized knowledge and skills. Therefore, because of the lawyer's specialist knowledge and skills, the regulation on professional ethics, and the unique right to carry out the investigation, collect evidence and take part in litigation, a lawyer is essential and the best defence for a person charged with a penal offense to exercise fully his right to defence on "an equal footing" with those placing the charges.<sup>6</sup> This is why international human rights documents put on a par the right to defence and the help of lawyers. To recognise and ensure the lawyer's right to carry out the investigation and collect evidence, and ensure that the judge will pay full attention to the defence in the litigation process, may lead to a final judgment based on listening to both sides and thus the right to have a fair trial will be better secured.

## **2. The Impact of Legal Tradition on the Criminal Defence and the Role of Defence Lawyers in China**

In his famous quote, John Wigmore said to the effect that the adversarial system, or the right of cross examination, seems to be "by far the greatest legal engine ever invented for the discovery of truth".<sup>7</sup> But this system needs application in China. Before entirely understanding the fundamental ideologies dominating criminal defence in criminal proceedings in China, the significance of some changes to the technical rules of the system of criminal defence by lawyers before trial should not be overestimated. The defence phenomenon has existed in China from ancient times.<sup>8</sup> However, when issues concerning the right to defence and lawyers have been

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<sup>6</sup> See Chap3, 4.3, p. 161; 4.6, pp.194-195; also read Stephanos Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments*, (London: Martinus Nijhoff Publishers, 1992), pp.201-202.

<sup>7</sup> See John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, in Vol. 5, James H. Chadbourn rev. ed., (Boston: Little Brown, 1974), p.32.

<sup>8</sup> See relevant discussions: e.g. Honglie Yang, *A History of the Development of Chinese Law*, (Shanghai:

considered, ideologies such as human rights protection, procedural justice from a spiritual perspective are undoubtedly logical and have often been mentioned as supporting materials for some related opinions or proposals. These are deeply rooted in Western political culture and the construction of the modern legal system. China treats the establishment of a rule-by-law country as the aim of the development of society during the process of constructing a modernized socialism at the current stage. However, it is undeniable that these “western” ideologies have not touched the core of traditional concepts and ideologies of criminal justice in China.<sup>9</sup> The role of lawyers, the functions of criminal defence for the suspects and the criminal defence structure in China are, as all other issues considered in the development, decided and continue to be strongly influenced by the traditional values in the criminal justice system. The following brief study of the concept of “criminal defence” from the viewpoint of historical development will also provide a comparatively clear picture of the status and the functions of lawyers in criminal proceedings in China.

## 2.1 Traditional Concept of Criminal Defence

The traditional concept of “criminal defence” is viewed in a narrow sense, compared with the modern meaning according to international norms.<sup>10</sup> The phrase “defence” (辩护), in Chinese, has as its original meaning that the utilization of the method of “debate” (辩论) is to fulfil the aim of “fending” (守护). From this understanding, in criminal proceedings, the implication of defence is usually limited to substantive defence and procedural defence is ignored. Therefore the typical “defence” only takes place at the trial stage. With regard to the participation of lawyers in the pre-trial proceedings, it was mainly for purpose of preparation for the genuine “defence” at trial. In addition, the lawyer does not confront his legal opponent face to face in the pre-trial stage. Therefore the legal consultations, representation to file petitions and complaints, investigations and acquisition of evidence, reference to

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Shanghai Bookstore Publishing House, 1990), p.35; Guohua Zhang and Xinxian Rao, ed., *A History of Chinese Legal Thoughts*, (Lanzhou: GanSu People Publishing House, 1984), p.75.

<sup>9</sup> See Chap4, 2.1, pp.212-221.

<sup>10</sup> See Chap2, 6.3, p.74.

files and other activities conducted by lawyers in the pre-trial proceedings do not have the nature of a typical “defence”.

In contrast, the English word “defence” can be translated into Chinese as “defence” or “defend”. If the function of the prosecution is viewed aggressive, the function of the defence is defensive. All the activities of the lawyer in criminal procedures including the lawyer’s representation to file petitions and complaints, to arrange pre-trial bail, to meet with suspects and witnesses, to carry out presentations on site, acquisition of evidence, objections and so on in the pre-trial proceedings can all be viewed as a defence against the aggression of the prosecution and for the purpose of exercising the defence functions. This is true in trial proceedings and there is no exception in the pre-trial proceedings. As discussed in previous Chapters Two and Three, it is a universally recognized principle of law that the person on a criminal charge also has the right to defence during the pre-trial stage.<sup>11</sup> The defence principle requires not only legal affirmation of the right to defence, but even more importantly to provide necessary conditions for the effective use of this right, as required by Article 14(3)(b) of ICCPR.<sup>12</sup>

To understand the phrase “defence” in its narrow sense in Chinese, it is not difficult to understand that the narrow concept, “the right to defence specifically refers to the right to rebut and plead against the charge and to obtain the help of a defender in criminal procedures”, has commonly existed in China until now.<sup>13</sup> This has been the fundamental concept of “defence” for the general public and in Chinese legal culture. It means the right to defence has only been embodied through the right to make a statement, to present evidence, raise questions, debate, acquire the assistance of defence lawyers, etc during the stage of criminal trial. From the analysis below, compared with the requirement of international standards, the right to defence in

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<sup>11</sup> See Chap2, 5.7, p.67; *Imbrioscia v Switzerland*, Chap3, 4.6.2.2, p.199.

<sup>12</sup> See Chap2, 6.3.1, pp.75-78; 6.3.2, p.79; *Öcalan v. Turkey*, Chap3, 4.6, pp. 196 and 198.

<sup>13</sup> See, e.g. Zhonglin Zhang, *A New Theory of Criminal Procedure Law*, (Beijing: China Renmin University Press, 1993), p.196; Qiuhong Xiong, *Criminal Defense*, (Beijing: Law Press China, 1998), pp.26-71.

China lacks the protection of the legal rights to a full defence of the person on a criminal charge incorporating the right to have adequate time and facilities to prepare the defence, the right to have a lawyer present in the interrogation, the right to petition, etc.<sup>14</sup> Therefore, the role of lawyers is not included in the establishment and operation of an effective legal framework to prevent arbitrary detention and torture of suspects. Under the narrow definition of the right to defence, as Long considered, the issue of the lawyer's status and role in the pre-trial proceedings is confused in China.<sup>15</sup> A breach of Article 14(3)(b) and (d) of ICCPR is most likely to occur.

The title of this chapter, "the right to defence in the pre-trial proceedings" presents the view that the basic definition and the functions of the right to defence and the procedural status of the defence lawyers should not be different because of the separation between the pre-trial and trial proceedings. To understand the role of the lawyers in the pre-trial proceedings based on the operation of defence functions under the requirements of international norms, it would not difficult to conclude that the status of the lawyers in the pre-trial proceedings is still as a defender, as found in *Imbrioscia v Switzerland*.<sup>16</sup> As a defender in the pre-trial proceedings, the role of the lawyer is also to protect the legal rights of the suspects.<sup>17</sup> Actually in recent and modern history, the expansion of the right to defence in Chinese criminal procedure is clearly reflected in the constant increase and volume of application for pre-trial procedural rights, such as the right for lawyers to meet clients and the right to apply for investigation and acquisition of evidence. However, one of the prominent issues existing in current criminal procedure in China is that it is more difficult for lawyers to defend in pre-trial proceedings than before under the CCPL of 1979, as illustrated below. It is necessary to improve the relevant legal cultural environment to tighten up the rights of defence lawyers in pre-trial proceedings. The differences in character

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<sup>14</sup> See *Gridin v Russian Federation* and *Wright v Madagascar* Chap2, 6.3.1, p.76; *Murray v UK* Chap3, 4.6.2.2, pp.199-200.

<sup>15</sup> See Zongzhi Long, *Wondering between Tradition and Contemporary: A research on the Re-amendment of the Chinese Criminal Procedure Law*, (Beijing: Law Press, 2005), p.63.

<sup>16</sup> See *Imbrioscia v Switzerland*, Chap3, 4.6.2.2, p.199.

<sup>17</sup> See Weidong Chen, *A Research on the Problems in the Implementation of the Chinese Criminal Procedure Law*, (Beijing: Fangzheng Press, 2001), p.218.

between the roles of defence lawyers in the pre-trial proceedings and during the trial in terms of particulars and methods should be taken into account. Therefore, to further confirm and expand the lawyer's status as a defender status for the lawyer is the starting point for better protection of the legal rights of the suspect.

## **2.2 Traditional Ideologies regarding Criminal Defence**

Not only differences in the actual concept of the right to defence exist across various legal systems, but also differences in fundamental legal ideology also exist between the western legal system and the Chinese system.<sup>18</sup> The right to defence is seen as the core of due process rights in the modern western legal system as it protects individual rights against the arbitrary powers of the state. In contrast, as mentioned in Chapter Four, a high premium on sovereign interest, hierarchical obedience, and unanimous consent in a society that has been stamped by Confucian thought for centuries is still prevalent in China.<sup>19</sup> There was some recognition of the legitimate need for legal services, in particular in view of the high rates of illiteracy in Chinese society in ancient times.<sup>20</sup> However, dominated by traditional ideologies, the traditional criminal procedures in inquisitorial mode, in keeping with Chinese traditional legal ideologies, usually pay more attention to the supremacy of authority, the prevention of crime and the educative effects of the defendant's remorse, rather than the challenge to the state by the individual through criminal defence.<sup>21</sup>

Naturally, this lack of ideology in the balance between the power of the state and the individual's rights has a far-reaching influence on the right to defence through lawyers in current China, as demonstrated below. In a modern legal system, lawyers at the national level, and their professional associations, should have a vital role to play in ensuring transparency in institutions and in strengthening the capacity of

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<sup>18</sup> For a detailed discussion on the ideological difference, see e.g. Yuxuan Zhang, "Analysis on the Barriers in the Implementation of the Lawyer System in the Chinese Feudal Society", (2003) 9 Forward Position, p.106; Yifei Wang, "A Study on the Barriers to Criminal Defense System from the Perspective of Concepts", (2008) 1 Journal of Political Science and Law, pp.22-26.

<sup>19</sup> See Chap4, 2.1.3, pp.218-221.

<sup>20</sup> See Youping Xie, "Differences and Reasons: The 'Bianhushi' & 'Songshi' in Ancient China vs. Professional Lawyers in Modern Society", Journal of Comparative Law, 2003 (2), pp.89-90.

<sup>21</sup> Also see Chap4, 2.1.1, pp.215-216; Chap5, 3.1, pp.284-289; Chap6, 2, pp.342-348.

national, regional and even international agencies.<sup>22</sup> However, from the perspective of legal culture, an independent lawyer in China who confronts the state prosecutor is alien to the Chinese tradition. Because almost all the dominant ancient Chinese philosophies applauded harmony and disdained formal disputes, legal systems in imperial China discouraged litigation and restricted the knowledge of law to the social and political elite.<sup>23</sup> Legal defence in the context of the traditional Chinese community reflected badly on an individual as it signified one's refusal to take responsibility for one's action.<sup>24</sup> This has resulted in it being impossible for lawyers to be independent of the government in criminal defence and to feel secure in their peaceful confrontation with state power. This is because the person on a criminal charge is the object of the proceedings and in the feudalistic interrogatory mode of criminal justice he had no procedural rights at all.<sup>25</sup> As a primitive legal profession, not only were lawyers never established as major players in the society, but they were often suppressed and divided by the government and were hence afforded very low prestige in traditional China.<sup>26</sup> For example, lawyers were openly denounced by different commentaries and even legal codes in ancient China for entrapping people for the sake of profit and deserving of bitter detestation.<sup>27</sup>

Due to this traditional ideology of non-adversary mode in legal proceedings, the law enforcer and the judicial officers have been commonly hostile towards defence lawyers until now. The power structure of the Chinese state in the criminal process is therefore unbalanced. As indicated in Chapter Five and Six, a just criminal process

<sup>22</sup> See the Association for the Prevention of Torture, "The Role of Lawyers in the Prevention of Torture", 01/08.

<sup>23</sup> see *The Analects of Confucius: Yan Yuan* (论语·颜渊); Chapter 3 in Lao Zi of Laozi (老子); and Liu Fan in Hanfeizi of Hanfei (六反·韩非子); for a detailed discussion on the concept of non-adverseness in ancient China see generally, Xiong Qihong, *Criminal Justice: the Value of Diversification and the Structure of System*, (Beijing: the People's Court Press, 2003).

<sup>24</sup> Also see Chap6, 2.1, pp.343-344.

<sup>25</sup> See Chap4, 2.1.1, pp.214-215; 2.1.2, pp.216-218.

<sup>26</sup> See Ping Yu, "Glittery Promise vs. Dismal Reality: The Role of a Criminal Lawyer in the People's Republic of China after the 1996 Revision of the Criminal Procedure Law", (2002) *Vanderbilt Journal of Transnational Law*, Vol.35, p828; Jingliang Chen, "Songshi and Lawyer: Difference between Chinese and Western Judicial Tradition", (2001) 3 *Chinese Legal Science*, p.154.

<sup>27</sup> See generally, e.g. Zhiping Liang, *The Pursuit of Harmony in Natural Orders*, p225; Zhiping Liang, *Legal Principle and Human Sentiment*, (Beijing: China Legal Publishing House, 2004), p271; Derk Bodde, and Clarence Morris, *Law in Imperial China*, p.180, 190 and 413.

indeed relies upon a judicial structure with a check and balance system.<sup>28</sup> However, the three judicial agencies, the MPS, the SPP, and the SPC, are more powerful agents in both legislative and administrative affairs than the MOJ, which regulates the legal profession, particularly lawyers, in the country. During the legislative process, such as in the 1996 CCPL amendment, the three judicial agencies have used the opportunity to consolidate and expand the scope of their power. By contrast, the rights of defence lawyers are often swept aside as the MOJ has been in a weak position compared with the other players. The low status of lawyers in the criminal process is further undermined by the fact that all the lawyers, the All China Lawyers Association (ACLA) and local lawyers associations are subject to the regulation of the MOJ and the local Bureaus of Justice.<sup>29</sup> The Secretary General is usually also the deputy director of the division in charge of lawyers and notaries public in the MOJ. All three current deputy secretaries worked in the MOJ before they became ACLA members. The *Law of the People's Republic of China on Lawyers* of 2007 gives authority to the judicial administration departments of the MOJ to “supervise and guide lawyers, law firms and lawyers’ associations”.<sup>30</sup> Lawyers thus enjoy very limited professional autonomy, which will be discussed further below. In addition, according to Article 7 of the 1996 CCPL, the police, procuratorate and judicial authorities regard themselves as an integrated system fighting crime in China, and officials in these three agencies control the state power and make final decisions in cases.<sup>31</sup> So the law enforcers and the judicial officers often have a strong sense of superiority in status regarding lawyers.

In such a situation, lawyers have to be very careful faced with the law enforcers, and

<sup>28</sup> See Chap5, 3.4, pp.302-317; Chap6, 3.4, pp.374-384.

<sup>29</sup> All China Lawyers Association (ACLA), founded in July of 1986, is a social organization as a legal person and a self-disciplined professional body for lawyers at national level which by law carries out professional administration over lawyers. All lawyers of China are members of ACLA and the local lawyers associations are group members of ACLA. See Interim Regulation of Lawyers of the People's Republic of China of 1980 (expired), 26/08/80, Article 19 and 20; Law of the People's Republic of China on Lawyers (2007 Revision), 28/10/07, (hereinafter as Law on Lawyers 2007), Article 44 and 45; Also see Sanzhu Zhu, “Reforming State Institutions: Privatising the Lawyers’ System”, in *Governance in China*, ed. Jude Howell (Oxford and Lanham: Rowman & Littlefield, 2004), pp.58-76.

<sup>30</sup> Law on Lawyers 2007, Article 4; also see Charter of All-China Lawyers Association 1999, Article 4.

<sup>31</sup> CCPL1996, Article 7.



there is no system to guarantee their independent defence as discussed below. It frequently happens that the judge directly uses the coercive power of the state to drive the lawyer out of the courtroom or charge them with crimes. Polices and procurators use the state coercive power more directly and frequently, and their tough behaviour towards lawyers is sometimes even worse than the behaviour of judges. In addition, the traditional criminal policy of leniency to those who confess their crimes and severity to those who refuse to, as mentioned in Chapter Six, also declares publicly that being obedient is better than mounting a challenge.<sup>32</sup> The right to silence and the right to refuse to make a statement are rooted in the individualist culture that strives to challenge and resist the state's undue interference with individual freedom, something which has not yet been completely accommodated in Chinese criminal proceedings.<sup>33</sup> Therefore the purpose of the defence lawyer has been considered well-served if he could help the court to render a just verdict. The suspects and their defence lawyers have generally been obedient to the will of the authorities in the stages of investigations and trials. In order to create a harmonious atmosphere with the prosecutors, the defending sides often express common grounds with the prosecution before rebutting the criminal charges and presenting their defence opinions.<sup>34</sup> Their defence was often confined to pleading for leniency without exercising their rights, such as cross-examining government witnesses and calling witnesses of their own, as provided by the law. The confrontation in court may be a performance only. This practice reflects an oriental value that seeks the obedience of the individual to the state and emphasizes the harmony between the two as explained in Chapter Four.<sup>35</sup>

### **2.3 The Political Ideologies on Criminal Defence**

The Western type of professional lawyer was first introduced to China at the end of

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<sup>32</sup> See Chap6, 2.1, p.344.

<sup>33</sup> See Chap6, 3.3, pp.361-363.

<sup>34</sup> See e.g., Gang Li, "Lawyer Offered a Defence of 'Heavy Punishment'", Beijing Youth Daily, 02/07/08, <http://bjyouth.yinet.com/article.jsp?oid=41338679>; also see generally, Jianwei Zhang, *Criminal Justice, the Value of Diversification and the Structure of System*, (Beijing: The People's Court Press, 2003).

<sup>35</sup> See Chap4, 2.1.3, pp.218-221.

the Qing Dynasty.<sup>36</sup> However, as indicated in Chapter Four, these initiatives emanated mostly from the government, and the divisiveness of wars and internal conflicts in China never permitted a full flowering of the seeds planted by republican reformers.<sup>37</sup> The real values of lawyers and criminal defence work as western transplants therefore were also not fully appreciated or demanded by the Chinese people as other western legal norms.<sup>38</sup> Therefore, from its very inception in China, rather than serving the interests of the people, the legal profession served mostly as an instrument for the government, much like the traditional Chinese view of law as an instrument of control for the ruling class.<sup>39</sup> After the communist take-over in 1949, great efforts were made to suppress the practice of former lawyers.<sup>40</sup> The purpose of the rehabilitation was to eliminate the so-called “litigation tricksters” (讼棍) from the Nationalist period and to establish a new system of lawyers based on the Soviet model.<sup>41</sup> As mentioned in Chapter Four, the Marxist theory of antinomy and unification has been regarded as the most important theoretical basis for the establishment of criminal defence system.<sup>42</sup> Under this ideology, prosecution and defence are the two opposite sides in complicated criminal procedures, but they exist in a contradictory unity. The debating process between prosecution and defence is a progression through which the truth of the case gradually comes out, and also a course in which people deepen their awareness of the case. Therefore the law stated that the accused has the right to retain a defender and the defendant may retain a lawyer to conduct his defence.<sup>43</sup>

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<sup>36</sup> See generally, e.g. Yuezhi Xiong, *Institutional Civilisation and the Chinese Society: The Dissemination of Western Institution*, (Changchun: Chang Chun Press, 2006), Chapter 7; Chen Ruihua, *Frontier Questions in Criminal Procedure*, (Beijing: China People’s University Press, 2000), pp.3-10.

<sup>37</sup> See Chap 4, 2.2.1, pp.220-222.

<sup>38</sup> For more detail discussion, see e.g. Yi Sheng, “A Promise Unfulfilled: The Impact of China’s 1996 Criminal-Procedure Reform on China’s Criminal Defense Lawyers’ Role at the Pretrial Stage (Part 2)”, (2004) 1 Perspectives, Vol. 5, p13; Xingliang Chen, “Defense for Right to Defense – A Right to Defense from the Perspective of Criminal Justice”, (2004) 1 Legal Science, p.6.

<sup>39</sup> See Chap4, 2.1.3, pp.222-224.

<sup>40</sup> For the detailed history of lawyers in China, see Geng Zhang, *A Landmark in the Development Chinese Lawyer System*, (Beijing: Law Press, 1997); Jerome Alan Cohen, “The Impact of Tradition upon Chinese Communist Criminal Procedure: A Note on the Right to Counsel”, (Nov., 1968 - Feb., 1969) Vol. 3, *Law & Society Review*, No. 2/3, pp.409-410.

<sup>41</sup> See Ruihua Chen, *Frontier Questions in Criminal Procedure*, (Beijing: China People’s University Press, 2000), pp.27-29.

<sup>42</sup> See Chap4, 2.2.2, pp.225-226.

<sup>43</sup> See Constitution Law 1954, Article 75; Organic Law 1954, Article 7.

The law of unity of opposites requires the co-existence and struggle of the prosecution and defence in criminal procedure and that they unite with each other on the basis of respecting the facts and the law. China has, over an extended period, under extremist influences, been inclined to adopt a one-way approach to punishing crime: protection of people, and safeguarding social security, as shown in Chapter Four.<sup>44</sup> With this approach, suspects were the targets of the administration of authorities, and their rights had to be restricted or even ignored. Lawyers are hired by suspects and are regarded as opponents of the investigating authority. Their early involvement is especially detrimental to the work of cracking down on the enemy and protecting the people, as Wang Longtian pointed out.<sup>45</sup> Therefore the status of defence lawyers under Mao continued to be low, due to the view that criminals were enemies of the state because of their assistance to mercenary exploiters of the general public, a continuation of traditional ideology on criminal defence. Furthermore, the hallmark of this socialist legal system is also the educative effect of enemies and defendants' remorse and confession rather than their challenge to the state through criminal defence. The profession of lawyer suddenly had no more reason to justify its very existence. In the two decades between 1959 and 1980, there was neither lawyer nor advocate in criminal proceedings in China, nor did China have any viable laws to be practised by lawyers.<sup>46</sup> Public trials occur only where officialdom expected them to have educational value.<sup>47</sup>

Along with the introduction of the market economy, a modern legal system has been initiated by the Chinese Communist Party. Lawyers, as an essential component of a modern legal system, have played an increasingly important role initially in the

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<sup>44</sup> See Chap4, 2.2.3.1, pp.227-229.

<sup>45</sup> See Longtian Wang, "Thoughts on the Refusal of Crime Investigation Authorities to Permit the Involvement of Lawyers in Crime Investigation Activities," (1998) 2 Journal of Public Security University, pp.82-83; Also see Tongshan Ge, "On Criminal Defense Right as A Public Right", (2009) 3 Law Science Magazine p.34.

<sup>46</sup> See Tong Chen, "Historical Thoughts on the Short period in the 1950s When the Lawyer System was Carried out in China", (2009) 13 Historical Review, (Serial No1113), pp.32-40; Jing Nie, "The Establishment and Development of the Lawyer's System in New China: Interview with Mr Jia Wuguang, Deputy Director-generals of the Department of Guiding the Service of Lawyers and Notaries, the Ministry of Justice", Procuratorial Daily, July 3, 1999; Yang Wang, "30 Years Development of Chinese Lawyer", (2008) 12 Legal Information, p.58.

<sup>47</sup> Also see Chap4, 2.2.3.2, pp.229-231.

commercial area and then in all aspects of society.<sup>48</sup> Criminal defence was resumed in China's criminal justice system in the early 1980s. That the accused has the right to defence was officially stated in the Chinese Constitution of 1982 and this principle is also included in Article 26 of the 1979 CCPL, after it had been completely suspended in Cultural Revolution.<sup>49</sup> According to the law, the defendant not only had the right to self-defence, but also to retain a lawyer to defend him.<sup>50</sup> In Addition, the introduction of the Interim Regulations on Lawyers enacted by the NPC Standing Committee on August 26, 1980 began the rehabilitation of the lawyer, his function, rights, qualifications and professional status. Under this law, Chinese lawyers were characterized as "state legal workers" (国家的法律工作者).<sup>51</sup> The definition of state legal workers actually attempted to put a lawyer into a place equal to that of the prosecutor and the judge who therefore accepted a lawyer as an insider instead of an outsider, which gave respect to the rights of the lawyer. This has been a positive step in changing the traditional attitude to the profession of lawyers, and assisting a lawyer in carrying out his duties and protecting his due rights in the Chinese legal system.<sup>52</sup> This was because, within the unsound legal system, a lawyer, when defined as a legal specialist for the country, was invested with authority.<sup>53</sup>

However, the ideology that saw a lawyer as a representative of the public interests also led the legislators to place the lawyer under the name of state legal worker. A lawyer under the definition of state functionary is supposed to safeguard the interests of the state and the public when he serves his individual clients. Sometimes the lawyers even have to act as instructed by the authorities. The activities of defence lawyers in the criminal proceedings are of minor significance. There was in both Party and the public a conscious or subconscious suspicion of the legal profession. In the absence of incriminating evidence from other sources, confession remained

<sup>48</sup> The very good summary about the role of lawyer in a society See *Bruce A. Green*, "Foreword in Symposium The Lawyer's Role in a Contemporary Democracy", (2009) 77 *Fordham Law Review*, pp.1229-1243.

<sup>49</sup> Also see Chap4, 2.2.3, pp.226-227.

<sup>50</sup> CCPL 1979, Article 26.

<sup>51</sup> Interim Regulations on Lawyers of 1980, Article 1; also see Jinxi Wang, "China's Lawyer Law Act Evolution and Their Future", (2008) 4 *Western Law Review*, pp.30-31.

<sup>52</sup> See Weidong Chen, *A Study of Chinese Lawyers*, (Beijing: People's University Press, 1990), pp.52-53.

<sup>53</sup> See Jinxi Wang, *op.cit.*, fn 51, p.31.

crucial to the strength of the Procuratorate's case as shown in the analysis in Chapter Six.<sup>54</sup> Lawyers were still regarded as a profession who would use loopholes to destroy the prosecution's case and hinder the investigating authorities from acquiring crucial evidence from the suspects' confessions.<sup>55</sup> Such a concept has not been fundamentally changed, as it is deep-rooted, even until now.<sup>56</sup> In 1979, when setting up the new criminal procedure law, China obviously followed the traditional ideology in laying stress on social order and stability, prioritising the interests of the country above all.<sup>57</sup> There were few procedural requirements within the criminal process, and few protective measures to defend the rights of a suspect. So the lawyers' rights during the criminal defence are rather limited. Alongside economic development came the increase in crime rates and in the incidence of corruption. In practice, it has erroneously implied that defence lawyers have aligned themselves with the criminal elements of Chinese society.<sup>58</sup> The criminal defence lawyer is still a particularly difficult concept for the general public to accept and welcome. Obviously the law enforcers have naturally also underplayed the emphasis on criminal defence.

In practice, the role of the lawyer is therefore to cooperate or reach a compromise with the judges and prosecutors, instead of being an adversary.<sup>59</sup> It comes about that on the one hand, a lawyer is entrusted with and enters into a commercial agreement on a case with the suspect. Therefore lawyers should act on their clients' behalf and guarantee their legal interests. On the other hand, to ensure the implementation of

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<sup>54</sup> See Chap6, 2.2, pp.346-347; 3.2.1, p359-360; 3.3.1, pp.366-368.

<sup>55</sup> See Ying Zhao, "The Position of Defence Lawyers in Criminal Litigation", in Ministry of Justice ed. *Theory and Practice of Judicial Administration in China*, (Beijing: Ministry of Justice, 1992), p.1361; also see Huanqiang Jiang, "The Probe on the Reasons of the Criminal Defense Function Weaken in China", (2006) 10 Hebei Law Science, p130; Haining Zhao, "Conference Summary on 'Functions of Lawyers in the Pre-trial Procedure'", (2007) 1 Human Rights, p.60.

<sup>56</sup> See Jianlin Bian, Tao Cheng and Liqiang Feng, "Multi-Perspective on the Protection of Lawyer's Right – A Survey Report on Current Situation of Lawyer's Practice", (2009) 00 Criminal Justice Forum, pp.127.

<sup>57</sup> See Chap4, 2.2.3.1, pp227-229.

<sup>58</sup> See Longtian Wang, "Thoughts on the Refusal of Criminal Investigation Authorities to Permit the Involvement of Lawyers in Criminal Investigation Activities", (1998) 2 Journal of Public Security University, pp.82-83; Guangwei Sui and Xiaofeng Sun, "Lawyers' Obligations and Duty Lawyers in Criminal Procedure", (2004) 8 Justice of China, p.40.

<sup>59</sup> See e.g. Ministry of Justice, "Notice on Making Full Use of Lawyers in Severely Striking Down on Crimes", 14/10/83.

state policies, the loyalty of a lawyer to his client is subject to the remote consideration of the interests of the country, which displaces the interests of a citizen when they are contradictory.<sup>60</sup> It is hard to tell whether or not the participation of a lawyer moderates the imbalance between the prosecutor and the suspects, although he is supposed to help produce the balance.<sup>61</sup> The recognition of the rights of suspects may well be incidental in the conflict, negotiation and compromise among the powerful institutions in China. Not surprisingly, the great majority of defendants have remained non represented by lawyers and, for those who did get legal representation, the lawyers' pleas of innocence were rarely accepted and greatly restricted by the government under the CCPL of 1979.<sup>62</sup> The 1996 amendment gave some indication of procedure designs of justice awareness. But as the detailed analysis of the law shows below, substantive changes did not ensue to transform the old ideology on criminal defence.

The right to defence is the indispensable requirement for a fair trial and presumption of innocence.<sup>63</sup> If the principle of presumption of innocence were not firmly established, it would be impossible to realize the right to defence.<sup>64</sup> As discussed in Chapter Four, compared with Article 14(2) of ICCPR, the CCPL of 1996 has not yet completely recognized and implemented the principle of presumption of innocence.<sup>65</sup> Therefore, despite the fact that the last 30 years of legal reforms were intended to transform China into a country under rule of law and to strengthen the role of defence lawyers in the criminal justice process, the effectiveness of defence lawyers in China has improved little, as demonstrated below. The gap with international standards with regard to lawyers is inevitable, or cannot be avoided at the present stage. It is feared that in a system like the Chinese one, where judicial independence

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<sup>60</sup> See Mirjan Damaska, *Faces of Justice and State Authority*, (New Haven and London: Yale University, 1986), pp.80-180.

<sup>61</sup> See Huanqiang Jiang, op.cit., fn 55, p.127; Xuguang Zhao, "Responsibilities, Confidential Obligation and Refusal Right to Testify", Essay Collection of Sino-US Seminar on Lawyer's Defense Role and Judicial Justice, p.331.

<sup>62</sup> See e.g. SPC Work Report 1998.

<sup>63</sup> See *Imbrioscia v Switzerland*, Chap3, 4.6.2.2, pp.199.

<sup>64</sup> See Chap3, 4.4.1, pp.169-173.

<sup>65</sup> See Chap4, 4.1.2, pp.249-254; Chap5, 3.1 pp.284-285; Chap6, 2.2, pp.345-346.

and legal professionalism have not been fully established, and the rule of law and the principle of presumed innocence have not been fully integrated, the over-emphasis on the right to legal representation may not be to the advantage of suspects. It might become a liability rather than an asset for the defendant, as the stronger the defence, the more severe the punishment that is likely to result.<sup>66</sup> It makes it harder for defence lawyers to get a public hearing for the important values that they represent.

### 3. Progress under the 1996 Amendment

Although there was a right to defence for suspects under the CCPL of 1979 based on a small number of regulations, the role of criminal defence lawyers was extremely limited under the influence of the traditionally hostile attitude towards criminal defence, which led to the poor quality of legal representation for suspects at trial. Efforts have also been made by legal scholars, lawyers, and reform-minded officials on various occasions to voice their concerns and urge improvements. Information emerging from many conferences with regard to criminal defence lawyers provides a very positive prospect. While lawyers openly criticized the prosecutors and public security personnel for creating obstacles for lawyers to participate in criminal defence, the prosecutors attending the conference have frankly admitted such difficulties, expressed their sympathies, and vowed to improve, in spite of criticism.<sup>67</sup> There are indeed some detailed initiatives that have been taken by different authorities in various areas, such as on-going drafting of the law of evidence by the Standing Committee of NPC, which would certainly improve the chance for defence lawyers to cross-examine witnesses at trial.<sup>68</sup> The substantive changes in the law and the symbolic values contained in the reform of 1996 demonstrate China's efforts to

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<sup>66</sup> See Chap6, 3.3, pp.363-364.

<sup>67</sup> Criticism from lawyers see e.g. Zhipeng Tan and Qing Ye, "Lawyer's Rights: Law Only Is Not Enough – Consideration on the Implementation of the New Law on Lawyers from the Perspective of Criminal Justice", (2008) 6 Chinese Lawyer, pp.29-32; Wenchang Tian and Hanji Zhou, "The Confusion faced by the Criminal Defence Lawyers in China", Justice of China, 2002(2), p30-31; also see Official Speech e.g. Zhengkun Duan, "Work Hard in order to Move toward Judicial Justice and Rule of Law: A Speech at the All China Lawyers Association Conference on Criminal Procedure Law (Abstract)"; (2000) 1 Chinese Lawyer, pp.20-21; Zengyi Xie, "Summary of the Third 'Legal Profession Summit' International Seminar", (2008) 4 Justice of China, p.106

<sup>68</sup> See e.g. Wei Jiang, *The Consultation Draft of Evidence Law and its Annotations*, (Beijing: China Renmin University Press, 2004); or Guangzhong Chen, *Criminal Evidence Law of People's Republic of China: Expert's Draft with Articles, Annotations and Demonstration*, (Beijing: China Legal Publishing House, 2004).

bring the Chinese criminal proceedings closer to internationally recognized standards. International society and the human rights watchdogs have warmly welcomed these reforms.<sup>69</sup>

### 3.1 Timeframe Forward

One of the most important innovations of the amendments in 1996 was to allow earlier and more extensive involvement of defence lawyers in criminal proceedings. This revision has attempted to bring China into compliance with the requirement in Article 14 (3)(d) of ICCPR regarding the right to a lawyer during the initial stages of police investigation.<sup>70</sup> It had been commonly recognized that before the 1996 reform, in practice, no legal representation for the suspects was permitted until a week before the trial. The original CCPL stated that the defendant should be notified of being entitled to a lawyer only 7 days before the court decides to open the trial and he shall be informed that he may appoint a defender or, when necessary, designate a defender for himself.<sup>71</sup> In other words, there was no legal basis for a defence lawyer to demand to review case files, obtain information or meet and correspond with the suspect in the course of investigation before a trial. This practice had obviously breached the requirement in Article 14(3)(b) of ICCPR.<sup>72</sup> Also the absence of legal representation at this stage could in certain circumstances affect the fairness of the proceedings as a whole, as *Twalib v Greece* illustrated, and therefore give rise to a violation of the principle of fair trial taken together with the right to defence.<sup>73</sup>

Moreover, this seven-day rule effectively limited the suspects' ability to realize his right to defence fully at the investigation and prosecution stages of a criminal case. Without legal representation during the investigation and prosecution stages, the police and procurators might, as happened frequently and as discussed in Chapter Five and 6, force or falsify confession, or record only those statements favourable to

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<sup>69</sup> See e.g. Jonathan Hecht, *Opening to Reform?*, p.76.

<sup>70</sup> See Chap2, 5.7, p.67 and 6.3.2, pp.78-79; Chap3, 4.6.2.2, pp.199-202.

<sup>71</sup> CCPL 1979 Article 110.

<sup>72</sup> See Chap2, 6.3.1, pp.76-77; Chap3, 4.6.2, pp.198-199.

<sup>73</sup> See *Twalib v Greece*, Chap3, 4.6.1, pp.195-196.



the prosecution's case, or illegally detain the suspect. In the vast majority of cases, there were only 1 or 2 days available for a lawyer to prepare a defence. In most instances, cases were already at trial when the lawyer received the notice. Given so little time to prepare, the defence counsel actually played virtually no role in the trial proceedings. As established in the *Öcalan v. Turkey* case, this was inconsistent with the requirement of the right to adequate facilities to prepare a defence.<sup>74</sup> A Joint Notice issued by SPC, SPP, MPS and MOJ in 1981 provided that where a case was complicated and there was not sufficient time for preparing a defence, the defence lawyer might ask the court to delay the trial, and the court should consider the application if the delay would not affect the trial of the case within the limits provided by law.<sup>75</sup> In practice, however, such extensions were rarely granted. And this limited protection was later even abolished for some offences and the right to adequate time and facilities to prepare a defence was completely neglected under the policy of crime control. According to the 1983 Decisions of the Standing Committee of the NPC, the seven-day time limit may be overstepped for defendants who cause explosions, commit murder, rape, robbery or other crimes seriously endangering public security, and who are liable to the death penalty, where the main facts of the crimes are clear, the evidence is conclusive and popular indignation is very great.<sup>76</sup>

Therefore before the 1996 reform of the CCPL, there had been a consensus among academics and many decision makers in China that the right to defence should be expanded and defence lawyers should be available to a suspect at an earlier stage.<sup>77</sup> Therefore, significantly, Article 96 of the 1996 CCPL provides that after the suspect has been interrogated by an investigation authority for the first time or from the day on which compulsory measures are adopted against him, he may appoint a lawyer to

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<sup>74</sup> See *Öcalan v. Turkey*, Chap3, 4.6.1, p.196.

<sup>75</sup> See Joint Notice on Several Detailed Regulations on Lawyers' Participation in Litigation, 27/04/81, Regulation 4(2).

<sup>76</sup> See Decisions Regarding the Procedure for Prompt Adjudication of Cases Involving Criminals Who Seriously Endanger Public Order, 02/09/83, Decision 1.

<sup>77</sup> See Chongyi Fan, ed., *A General Description and Appraisal of Research in Criminal Procedure Law*, (Beijing: China University of Politics and Law Press, 1991), p.102; For good summaries of the different points of view regarding the timing of lawyers' participation in the criminal process, see Hualing Fu, "Criminal Defence in China: The possible Impact of the 1996 Criminal Procedure Law Reform", (Mar. 1998) No. 153 *The China Quarterly*, pp.40-43.

provide him with legal advice and to file petitions and complaints on his behalf. This change broke the barriers to the completely helpless position of the suspect at the stage of investigation, increased his defence ability, and to a great extent prevented the police from infringing the legal rights of the suspect. Compared to the old provision, it represents a step forward to consistency with Article 14 (d) of ICCPR.<sup>78</sup> The CCPL of 1996 also provides that from the prosecution stage, a defendant has the right to entrust a lawyer with his defence at trial.<sup>79</sup> The procuratorate shall, within 3 days from the date of receiving the file record of a case transferred for examination before prosecution, inform the suspect and his family that he has the right to entrust a person with the task of being his defender.<sup>80</sup> The Court shall, within 3 days from the date of accepting a case for private prosecution, inform the defendant that he has the right to entrust a person to be his defender.<sup>81</sup> Suspects are supposed to be able to have a minimum of 10 days to prepare a defence before the beginning of trial.<sup>82</sup> Together with changes in the trial system, by providing a longer time to prepare the defence, this amendment is an attempt to strengthen the ability of a lawyer to challenge the prosecution's allegations and to prepare a better defence for suspects in the coming trial.<sup>83</sup> Also, the distance from the standard in Article 14(3)(b) of ICCPR has been narrowed.<sup>84</sup>

Concerning the investigation of sensitive cases, China has also made some efforts to guarantee the right to access to legal advice in pre-trial stage as the Article 14(3)(d) of ICCPR requires in judicial interpretations. For example, Regulation 11 of *The 1998 Joint regulation on several Issues in the Implementation of the Criminal Procedure Law made by the Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of National Security, Ministry of*

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<sup>78</sup> See *Magee v UK*, Chap3, 4.6.2.2, p.200.

<sup>79</sup> CCPL 1996, Article 33.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> CCPL 1996, Article 151(2).

<sup>83</sup> Detailed introduction of changes in trial mode see: Zhang Jun and Hao Yinchuan, *On the Selection of the Mode of Criminal Procedure*, (Beijing: China Ren Min University Press, 2005), pp.81-130. Also see Chap6, 4.2.1, p386.

<sup>84</sup> See *Gridin v Russian Federation* Chap2, 6.3.1, p.76; *Murray v UK*, Chap3, 4.6.2.2, pp.199-200.

*Justice, the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China (Joint Regulation 1998)* prescribes that, except for some special circumstances such as state secret involvement, the lawyer's application to meet the suspect should be arranged within 48 hours, or within 5 days if the lawyer requests for meeting the suspect in a serious and complicated case in which two or more individuals have jointly committed crimes such as forming, leading or taking part in organizations of the nature of a criminal syndicate, or forming, leading or participating in a terrorist organization, or smuggling, or drug dealing, or embezzlement and bribery, etc.<sup>85</sup> It also confers upon the family the right to select a lawyer on behalf of the suspect, so that a lawyer chosen by the suspect or his family is recognized as having a right to be involved in the case and meet with the suspect.<sup>86</sup>

### **3.2 The Function of Lawyers Improved in Pre-trial Proceedings**

The defence position has been extended not only in the timing of the involvement of lawyers in criminal proceedings, but also in the legal procedures to ensure that the lawyers are on an equal footing with the procuratorate in preparing for the trial with the suspects, in harmony with the international standards in Article 14(1) and Article 14(3)(b) and (d) of ICCPR.<sup>87</sup> Furthermore, the more extensive involvement of the lawyer may strengthen the legal framework to effectively prevent the investigator from disregarding the legitimate rights of suspects by their unique expertise and abilities in every stage of the criminal proceedings. This progress has mainly been in the following respects.

Firstly, the current phase of the legal reform of the system of lawyers aims at professionalizing and formalizing the system of legal representation. *Law of the People's Republic of China on Lawyers* (hereinafter as Law on Lawyers 2007), which was amended in 2007 and is currently in force was a historical turning point

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<sup>85</sup> Joint Regulation 1998, Regulation 11.

<sup>86</sup> Regulation 10, *ibid*.

<sup>87</sup> See Chap2, 6.3.1, pp.75-78; Chap3, 4.6, p.194-195.

for the legal profession. Under Article 2 of this law, the status of lawyers is dramatically changed to a professional, who provides society with legal services for the public and safeguard the lawful rights and interests of parties in order to ensure the correct implementation of the law.<sup>88</sup> It specifically provides systematic rules on the conditions for a lawyer's practice, the law firm, businesses of the lawyer, the rights and obligations of the licensed lawyer, legal aid, the association of lawyers, legal liabilities of the lawyer, etc. Therefore the lawyer was an agent of the client rather than the representative on behalf of the public interest. The lawyers' association is described as a self-managed, independent social group rather than an arm of the justice department as it had been in the past.<sup>89</sup> These definitions are more rational than that of a legal specialist for the country, the change constituting historic progress in terms of the profession of lawyer. These changes are expected to enable lawyers to work more independently and to provide legal services more effectively. They bring an equal and reasonable opportunity for the suspects to put up a rigorous defense in the criminal trials as required in *Dowsett v. UK*.<sup>90</sup> Lawyer's practice has therefore been provided a legal guarantee in a psychological and arguably a material sense. The legal profession has been expected to become prosperity.

Secondly, some procedural safeguards for the right to defence through legal assistance before trial under ICCPR were introduced. According to Article 10 of the 1996 CCPL, a suspect may engage a lawyer by himself or may have his relatives represent him to arrange such engagement.<sup>91</sup> In order to fully protect the right to defence for the detainee, the SPP in its departmental rules states that after the suspect is interrogated for the first time or from the day on which compulsory measures are adopted against him, he should be notified that he has the right to appoint a lawyer to provide him with legal advice and to file petitions and complaints on his behalf. And this notification should be recorded.<sup>92</sup> The MPS also issued a regulation requiring

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<sup>88</sup> Law on Lawyers 2007, Article 2.

<sup>89</sup> Article 43, *ibid.* also see 2.3 pp.415-416.

<sup>90</sup> See *Dowsett v. UK*, Chap3, 4.3, pp.161-162.

<sup>91</sup> Joint Regulation 1998, Article 10.

<sup>92</sup> SPP Rules 1999, Article 145.

the police to inform suspects of their right to counsel after the completion of the first interrogation.<sup>93</sup> These provisions are closely linked to Article 9 and Article 14(3)(d) of ICCPR regarding the notification of the right to legal counsel for the accused, which is an effective mechanism to guarantee the effective execution of criminal suspects' right to defence.<sup>94</sup>

Moreover, the SPP rules also state that if a suspect in custody wishes to appoint a specific lawyer, the custodial organ shall without delay pass the request to the investigation organ concerned, which shall then transfer the request to the appointed person or the law firm where he works. If the suspect only has a request to have a lawyer, but does not name a particular person, the investigating organ shall convey promptly the request to the local lawyer's association or the local judicial administrative organization for their recommendation of a lawyer.<sup>95</sup> This requirement may be viewed as intended to ensure that Article 14(3)(d) of ICCPR is not infringed.<sup>96</sup> Furthermore, the SPC in its Judicial Interpretations stated that if the accused deserves an appointed defender as mentioned above but has refused the court appointed defender and has proper reason for this, this shall be allowed.<sup>97</sup> This kind of provision shows respect for the accused's choice of lawyer, as implied in *Croissant v Germany*.<sup>98</sup> However, he has to entrust his case to another defender, or the court can appoint another defender. In other words, there must be a defender, such as a lawyer, for this kind of case so that a trial can take place. It has the utmost significance for protecting the rights of the sight-impaired, hearing-impaired and speech-impaired, minors, and those who risk being sentenced to death.<sup>99</sup> This complies with Article 14(3)(d) of ICCPR which requires that suspects have to be provided with legal assistance in the interest of justice, as implied in *Correia de*

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<sup>93</sup> See Notice on Implementation of System for Handling Case Openly, 26/07/05, Section 3.

<sup>94</sup> See Chap2, 5.7, pp.67; also see Chap5, 3.4.1, pp.305-306, and 4.3, p.328.

<sup>95</sup> See SPP Rules 1999, Article 147.

<sup>96</sup> See *Aliboeva v. Tajikistan*, Chap2, 6.3.2, p79.

<sup>97</sup> SPC Interpretation 1998, Article 38.

<sup>98</sup> See *Croissant v Germany*, Chap3, 4.6.3 p.205.

<sup>99</sup> CCPL 1996, Article 34.

Thirdly, the CCPL also moved to comply with Article 14(1) and Article 14(3)(b) of ICCPR by extending the defence rights of lawyers to a broader degree, particularly in the prosecution proceedings. At the stage of investigation, with the exception of a case involving state secrets, lawyers need not obtain the approval of the investigation organ to carry out legal consultancy. According to Article 96 of the CCPL, the rights of lawyers begin with their having the right to be informed by the investigation organs about the charges, the right to meet with their clients and maintain communication with them in the presence of the investigation organs, in light of the necessary situations, at this stage.<sup>101</sup> This reform aims at compatibility with the requirement ensuring a detainee's right to communicate and consult with his legal counsel from an early stage in criminal proceedings, as emphasized in *Murray v UK*.<sup>102</sup> In the investigation stage, communication between the suspect and a lawyer can provide the suspect with psychological support and prevent police violence. It is a crucial component in safeguarding the effectiveness of complaints procedures and the fact that torture will be promptly reported and prosecuted as discussed in Chapter Six.<sup>103</sup> Significantly, at the stage of examination by the prosecution, according to Article 33 of the 1996 CCPL, there are no restrictions on the suspect having recourse to a lawyer, and on the lawyer meeting with his client and reading and copying case files.<sup>104</sup> There is no need for lawyers to obtain approval from the prosecuting agency. The quality of legal representation before and during a trial needs to be improved and adequate for the suspects by giving them proper access to information regarding the case, following *Öcalan v. Turkey*.<sup>105</sup>

Noticeably, with cases involving state secrets, the fact is that the suspect still needs

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<sup>100</sup> See *Correia de Matos v. Portugal*, Chap2, 6.3.2, pp.80-81.

<sup>101</sup> CCPL 1996, Article 36 and 96.

<sup>102</sup> See *Magee v UK and Brennan v UK, Murray v UK*, Chap3, 4.6.2.2, pp.200-203; *Gridin v Russian Federation*, Chap2, 6.3.1, p.76.

<sup>103</sup> See Chap2, 5.8, pp.69-70; also see Chap6, 3.2.2, pp.359-361.

<sup>104</sup> CCPL 1996, Article 33.

<sup>105</sup> See *Öcalan v. Turkey*, Chap3, 4.6.2, pp.196 and 198; Chap2, 6.3.1, pp.75-76.

the approval of the investigating organ to have access to a lawyer, as mentioned above.<sup>106</sup> However, China has shown a willingness to make the right to legal counsel genuine by trying to minimize the scope of this kind of case. For example, the Joint Regulation of 1998 legislatively declares that the so-called state secret-related case is one in which its criminal circumstances or its nature are involved with state secrets. A case cannot be regarded as a case involving state secrets just because relevant materials and opinions on the issues during the investigation process need to be confidential.<sup>107</sup> According to the regulation, there does not need to be approval for a lawyer to meet with the suspect if the case itself does not involve state secrets according to the law. The fact that the process of investigation is secret and the case therefore is state-secret-related is not reason to prevent the meeting between the lawyer and the suspect from being approved. China has begun to take notice of the requirement in international norms that the right to see a lawyer in the early stage of a police investigation can be restricted only if there is a good reason, as shown in *Murray v UK* and *S v Switzerland*.<sup>108</sup> It is worth mentioning that the Law on Lawyers of 2007 also makes an effort to guarantee and to facilitate more effective relationships between client and lawyer in criminal cases. Under this new law, the previous restrictions on face-to-face meetings with clients have been eased. Lawyers will be able to meet their clients after police interrogation without applying for permission, and there is no exception for state-secret-cases. Moreover, the state is prohibited from conducting surveillance of the defendants meeting their lawyers. Presumably, this should represent a turning point in the ability of defence lawyers to prepare their cases well. It is a positive signal towards the further amendment of the CCPL in full compliance with ICCPR standards, particularly Article 14(1) and Article 14(3)(b) of ICCPR, completely.

Also on the way to compliance with Article 14(3)(b) of ICCPR, the right to the appropriate information relating to the case is explicitly added into the revised CCPL

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<sup>106</sup> Also see Joint Regulation 1998, Article 9.

<sup>107</sup> Ibid.

<sup>108</sup> See *S v Switzerland* and *Murray v UK*, Chap3, 4.6.2.2, pp.203.

for suspects and their lawyers. This should help suspects prepare their cases adequately, following in *Harward v Norway*.<sup>109</sup> Article 36 of the CCPL specifies that at the pre-trial stage, from the date on which the Procuratorate begins to examine a case for prosecution, defence lawyers may consult, extract and duplicate the judicial documents pertaining to the current case and the technical verification material. From the date on which the court accepts a case, defence lawyers may consult, extract and duplicate the factual material concerning the crime involved in the current case.<sup>110</sup> Also Article 37 of the CCPL provides that defence lawyers may, with the consent of the witnesses or other relevant units and individuals, collect information pertaining to the current case from them and they may also apply to the Procuratorate for collection and obtaining of the evidence; with the permission of the Procuratorate and with the consent of the victim, his near relatives or the witnesses provided by the victim, defence lawyers may collect information from them pertaining to the current case.<sup>111</sup> Furthermore, under the new provisions of the Law on Lawyers of 2007, defence lawyers will also benefit from increased access to court documents and case files and more flexibility in gathering and collecting evidence independently.<sup>112</sup> Also, the Meeting with suspects shall not be monitored.<sup>113</sup> From the time an investigative case is commenced against a suspect, his lawyer will have the right to inspect and make copies of documentation of the proceedings and the case files supporting the allegations against the client.<sup>114</sup> This significant step signals China's willingness to fully accept the standard set in Article 14(3)(b) of ICCPR into its domestic criminal procedures.

Fourthly, the lawyers can now request bail or challenge the legality of the compulsory measures for their clients as their role has been extended into the pre-trial stage.<sup>115</sup> Lawyers can either serve as a guarantor or ask for monetary

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<sup>109</sup> See *Harward v Norway* Chap2, 6.3.1, pp.75-76; *Öcalan v. Turkey*, Chap3, 4.6.2.1, p.198.

<sup>110</sup> CCPL 1996, Article 36.

<sup>111</sup> *Ibid.*, Article 37.

<sup>112</sup> Law on Lawyers 2007, Article 33.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> Also see Chap5, 2.3, pp.276-277.



guarantees for their client, even though the police are under no obligation to approve such a request due to imprecise provisions.<sup>116</sup> Also when the investigation authority adopts compulsory measures exceeding the time limit prescribed by law, the lawyer or the other defender instructed by the suspect has a right to demand cancellation of the compulsory measures or the adopting of different compulsory measures according to the law.<sup>117</sup>

### **3.3 The Scope of Legal Aid broadened**

The revised CCPL also broadens the scope of legal aid, which comes closer to the requirement of Article 14(3)(d) of the ICCPR concerning the right to have defence lawyers assigned whenever the interests of justice so require.<sup>118</sup> In the CCPL of 1979, Article 27 stated that if a prosecutor appeared in court to conduct a public prosecution and the defendant had not instructed anyone to be his defender, the court might designate a defender for him. If the defendant was hearing-impaired or speech-impaired, or he was a minor, and thus had not entrusted anyone to be his defender, the court should designate a defender for him. In practice, this might fail to satisfy Article 14(3)(d) of ICCPR, since it was incumbent only on the court to decide whether it would designate a lawyer for the defendant.<sup>119</sup> In contrast, the Article 34 of the CCPL in 1996 stated that a defender shall be designated a lawyer in the following situations:<sup>120</sup> firstly, in cases of public prosecution with the public prosecutor appearing in court where the accused has not instructed a defender due to financial difficulties or other reasons. Secondly, when the accused is sight-impaired, hearing-impaired or speech-impaired, or is a minor who has not instructed a defender. Thirdly, when the accused may be sentenced to death, yet has not instructed any defender. With regard to the first situation, the court may designate a lawyer who is obliged to provide legal aid and serve as a defender. With regard to the last two situations the courts is required to do so. It has been clearly shown that the grounds

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<sup>116</sup> CCPL 1996, Article 52, 96(2) and 53.

<sup>117</sup> Ibid., Article 75.

<sup>118</sup> See Chap2, 6.3.2,p.79; Chap3, 4.6.3, p.205.

<sup>119</sup> See *Aliboeva v. Tajikistan*, Chap2, 6.3.2, p.79.

<sup>120</sup> CCPL 1996, Article 34.

for the optional appointment of a lawyer in China have extended to physical and psychological difficulties by adding “financial difficulties” among these reasons. The defender appointed by a court should be a lawyer. The lawyer is obliged to provide legal aid and serve entirely as a defender for the interest of justice as required in *R. D. v Poland*.<sup>121</sup> The law has emphasized the requirements of full legal aid to be provided by a lawyer, representing a major step forward towards compliance the general ICCPR approach.<sup>122</sup>

China’s first Legal Aid Centre was launched in Guangzhou in 1995. The introduction of Rules on Legal Aid, in September 2003, has gone further towards ensuring that suspects who cannot afford legal representation have access to legal assistance. In the Rules on Legal Aid, the criminal legal aid procedure is not limited to the defendant in the trial stage, but extended to criminal suspects in the investigation and prosecution stage and to the injured party in a public prosecution.<sup>123</sup> Chinese official statistics state that about 3% of all cases heard by courts in 2005 involved some measure of legal aid.<sup>124</sup> Moreover, due to insufficient legal resources in China, suspects can be represented by a wide variety of people. The Lawyer’s Law of 2007 states that a lawyer must undertake the duty of legal aid in accordance with state regulations and provides the recipient with legal services in fulfilment of their duty and responsibility.<sup>125</sup> Their licenses will not be renewed if they do not comply. The CCPL stipulates that suspects can be represented by a professional defence lawyer, relative, or other specified person.<sup>126</sup> These include not only lawyers but often relatives, friends and work colleagues of the suspects. It has helped to solve the difficulty in finding a defender or lawyer for a suspect, and is conducive to protecting the right to defence. It has taken the Chinese practical situation into consideration, and solved the problem which has long existed in China, with suspects

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<sup>121</sup> See *R. D. v Poland*, Chap3, 4.6.3, p.204.

<sup>122</sup> See *Brown v. Jamaica, Chan v. Guyana*, Chap2, 6.3.2, pp.80.

<sup>123</sup> Regulations on Legal Aid, 16/07/03, Article 11.

<sup>124</sup> Congressional-Executive Commission on China, 2005 Annual Report 30-31 (2005), <http://www.cecc.gov/pages/annualRpt/annualRpt05/CECCannRpt2005.pdf>;

<sup>125</sup> Lawyer’s Law 2007, Article 42 and also Article 47 (5).

<sup>126</sup> CCPL 1996, Article 32

not having access to legal services due to their financial difficulties or limitation in number and power of the lawyers.

#### **4. A New Round of Control**

From the discussion above, it can be seen that the CCPL of 1996 has made a number of efforts to comply with international standards in order to greatly strengthen the protection of suspects' right to defence. Given these new developments, it is reasonable to assume that the presence of defence lawyers will provide more legal services at an earlier stage of criminal proceedings and this will have a positive impact on the right to protection of suspects. Nevertheless, due to special historical, cultural and political constraints in the Chinese criminal justice system as mentioned above, it is also possible that the positive legal changes to allow the early involvement of lawyers in theory will not have a transforming effect in practice.<sup>127</sup> According to research from various academics, the number of criminal cases represented by a defence lawyer dropped sharply nationwide after the CCPL of 1996 took effect, a phenomenon that aroused public concern.<sup>128</sup> At the same time, suspects felt less and less confidence in defence lawyers and the public tended to consider the role of criminal defence more and more negligible.<sup>129</sup> Therefore the purpose of the reform might well be frustrated and the right to defence has even been substantially limited and grossly distorted, both because of inconsistencies or inadequacies in the laws themselves or obstacles occurring during actual implementation which do now allow the exercise of the proper legal rights. Article 14(3)(b) and (d) of ICCPR could be cited in a variety of contexts. Therefore, despite all the progress, there is still a large gap to bridge in respect of the right to defence for suspects in criminal proceedings, compared with the ICCPR rules and practices.

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<sup>127</sup> See 2 pp.406-418; also see Jianlin Bian, Tao Cheng and Liqiang Feng, *op.cit.*, fn 56, pp.126-130.

<sup>128</sup> Research from Academic See, e.g. Xingliang Chen, *op.cit.*, fn 38, p.17; Yequn Sun, "How Hard to Be a Criminal Defending Lawyer – Re-election on Issues Regarding Lawyers' Participation in Criminal Litigation", (2003) 4 Chinese Lawyer, p.69; Report from Research Office of the Ministry of Justice, see, e.g. Report on the Investigation regarding to the Dropping Rate of the Lawyer's Criminal Defence and the Problems of the Environment for the Lawyer's Professional Practice, 10/02.

<sup>129</sup> See Xiangde Ji, "An Observation of Criminal Defense in China", EU-China Seminar 2004, Beijing; Huanqiang Jiang, *op.cit.*, fn 55, p127.

These main difficulties will be demonstrated below.

#### 4.1 The Deficient Status of the Lawyer in the Pre-trial Proceedings

Objections could be raised regarding the inadequate right to defence applied in the pre-trial stage under Article 14(3)(d) of ICCPR, since the status of the defence lawyer in litigation during the period of investigation is not explicitly set out in the CCPL of 1996.<sup>130</sup> The 1996 CPL differentiates between the scope of legal representation before and after the beginning of the prosecution. When mentioning the term lawyer in the pre-trial proceedings, Articles 96 and 33 of the 1996 of CCPL use different wording. Article 96 of the CCPL provides that the suspect may appoint a “lawyer” to provide him with legal advice and some legal assistance in the investigative stage. However, Article 33 of the CCPL provides that a suspect may instruct persons as his “defenders” at the examination stage of prosecution.<sup>131</sup> Under these different definitions, a lawyer appointed by a suspect appears not to have the status of a “defender” during the investigation period.<sup>132</sup> The function of counsel has basically been reduced to a mere advisory role at this stage.<sup>133</sup> A lawyer is not allowed to carry out investigations, consult the case materials or be present during interrogation, according to the aforementioned statutory rights in Article 36 and Article 37. In other word, the defence function of a lawyer to prepare the case does not start until the lawyer becomes a “defender” at the beginning of the prosecution stage. Contrary to the expectation of the revised CCPL, this flaw in the legislation means that a lawyer’s capability in the early stage of criminal investigation has been generally impaired and restricted in form and substance. It might be argued that such an application of the law does not appear to accord with the requirement on the right to be given adequate time and facilities to prepare a defence, as interpreted in *Öcalan v. Turkey*.<sup>134</sup> This application has therefore largely failed to live up to its initial

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<sup>130</sup> See *Murray v UK, Magee v UK*, Chap3, 4.6.2.2, pp.199-201.

<sup>131</sup> CCPL 1996, Article 33.

<sup>132</sup> See QiuHong Xiong, *Criminal Defence*, (Beijing: Law Press, 1998), p.236.

<sup>133</sup> See Zhen Zhen, *Research Review on the Study of Criminal Procedure Law*, (Beijing: Law Press, 1998), p.88; Xuguang Zhao, “Differentiation Between Defense and Help——An Exploration into the Status and the Function of Lawyers in Investigation”, (2009) 2 Journal of Liaoning Normal University(Social Science Edition), p.29.

<sup>134</sup> See *Öcalan v. Turkey*, Chap3, 4.6.2.1. pp.198.

promise to help ensure a proper exercise of the rights of defence for suspects.

These changes in the definition of lawyers in the Law on Lawyers of 1996 also brought about a numbers of negative consequences. The implementation of the CCPL has indicated that defence lawyers have still not been a major social force in affecting case outcomes, as this chapter has demonstrated. The considerable resistance to legal reform from the judiciary and law enforcement officers is particularly evident regarding certain aspects of the suspect's and defendant's rights in the process. Since the amendment of 1996, lawyers are no longer "state legal workers" as defined in the old law any longer.<sup>135</sup> Consequently they have been regarded as outsiders and a nuisance in criminal proceedings by the police, prosecutor and judges, particularly the first two, of which there are a great number in the criminal justice system. A lawyer is an intermediary who is not publicly recognized and who is believed by the public to be the same as a private business owner.<sup>136</sup> Meanwhile, a large proportion of the criminal defence lawyers are at present newly established and inexperienced.<sup>137</sup> It is undoubtedly so that the inconsistent quality of criminal lawyers is one of the most significant reasons for the current dilemma. Correspondingly, procuratorates and courts have more chance to complain about the inferior service of lawyers handling criminal cases, service of the designated defenders in particular, especially when lawyers are required to give reasonable defence opinions, highlighting key points.

#### **4.2 The Inadequacy of a Defence Lawyer's Right to Meet a Suspect**

The meeting of lawyers with detainees remains an area of police resistance, often with substantial public support under the traditional legal ideology as mentioned

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<sup>135</sup> Law of People's Republic of China on Lawyers, 15/05/96, Article 2; also see Jinxi Wang, *op.cit.*, fn 51, pp.31-32.

<sup>136</sup> See Yang Wang, *op.cit.*, fn 46, p.60; Jianlin Bian, Tao Cheng and Liqiang Feng, *op.cit.*, fn 56, pp.117-118.

<sup>137</sup> See Xiangde Ji and Chunguang Wang, "Establishing the Criminal Defense Admittance System and Improving the Professionalism of CriminalDefense", (2009) 2 Justice of China, p.6; Zengyi Xie, *op.cit.*, fn 67, pp.106-107; Wenjing Zhang and Ruiqing Yang, "General Review on the Second High Level Forum of Legal Profession – Seminar on "Construction of a Hamonious Society and Reform in the System of Legal Service", (2007) 7 Justice of China, pp.102-106.

above.<sup>138</sup> Despite the fact that there has been some progress in the CCPL and subsequent regulations, the measures provided by the CCPL are not enough to guarantee the right of the defence lawyer to meet the suspect in detention, compared with international norms on the right to defence.<sup>139</sup> In practice, the individual officers regard the performance of their duties having been unduly interfered with by retractions of confessions which presented utterly unwarranted complications.<sup>140</sup> Therefore individual officers dealing with investigations have independently denied lawyers access to their clients, which surely violates the obligation in Article 14(3)(b) and (d) of ICCPR. Since the right of lawyers to meet suspects provided in the 1996 revision is vague and general, the prevailing rather cynical view is that the lawyer's earlier intervention is more superficial than substantive.<sup>141</sup> This is also a reflection of the prevalence of police misconduct during the investigation process, along with the use of torture, prolonged detention, and other unlawful means of extracting confessions as discussed in previous chapters.

#### **4.2.1 No Duty to Inform Suspects of the Right to Counsel**

It is also not clear whether the limited legal counsel service will actually be available to these defendants prior to the trial stage, since the vast majority of suspects are still detained *incommunicado* prior to trial, as discussed in Chapter Five and Six.<sup>142</sup> There is basically no stipulation in the CCPL of 1996 on the investigation agency's duty to inform the suspect of the right to counsel on completion of the first police interrogation or the adoption of the first compulsory measure according to Article 96. Although there are some departmental rules imposing the obligation to notify the suspect of the right to legal counsel to remedy the situation mentioned above, in practice the obligation in itself is not officially compulsory in the CCPL.<sup>143</sup> With the

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<sup>138</sup> See 2.3, pp.423-429.

<sup>139</sup> See Chap2, 6.3.1, pp.75-78; Chap3, 4.6 pp. 194-195.

<sup>140</sup> See Yifei Wang, *op.cit.*, fn 18, p.24.also see Chap3, 4.6.2.2, *S v Switzerland*, p.201.

<sup>141</sup> See. e.g. Hualing Fu, "Criminal Defense in China: The Possible Impact of the 1996 Criminal Procedure Law Reform", (1998) No.153, *The China Quarterly*, p.45; Ping Yu, *op.cit.*, fn 26, pp.834-835; Lewei Jian and Wenjing Zhang, "Establishing the Criminal Defense Admittance System and Improving the Quality of Criminal Defense", (2009) 2 *Justice of China*, pp.10-11.

<sup>142</sup> See Chap5, 3.4.1, pp.305-306; Chap6, 3.2.2, p.360.

<sup>143</sup> See Xiaoyan Hou, Xiufang Liu and Yi Zhang, "Empirical Research on the Right to Have Lawyer Assist in the

rules on pre-trial detention in Article 64 of CCPL, the obligation is easily ignored by the investigators.<sup>144</sup> Arguably, these ambiguous rules in the CCPL of 1996 will affect the right to defence by a lawyer and appears not to accord with the requirements under Article 9 and 14(3) of ICCPR, which implies that every person who is arrested, detained or charged must be informed of their right to have the assistance of legal counsel at the initial stage of the criminal proceedings.<sup>145</sup> Even several years after the promulgation of the amended law, few suspects, especially those detained in the custody, requested counsel because the right was unknown to most of them. Combined with the absence of a right to silence in the CCPL of 1996, as analyzed in Chapter Six, there continues to be a significant risk of obtaining confessions through Article 7 treatment.<sup>146</sup>

#### 4.2.2 Lawyers Need Approval to Meet Clients

While defence lawyers may officially meet their clients in custody, they normally need the investigatory authorities' permission before they can meet with their client without legal requirements in practice. Lawyers are frequently and widely denied the opportunity of meeting with their clients. For example, in one province, during the period from January 1, 1997, the date the CCPL entered into force, to the beginning of 1998, the authorities granted only four requests from lawyers who wished to meet with their clients.<sup>147</sup> A survey carried out by the Committee on Lawyers Rights of the Beijing Lawyers Association in 2006, indicates that 90% of the respondents must repeatedly apply before getting approval for a visit, and most of the time cannot see their client within the 48 hour limit.<sup>148</sup> The situation demonstrates a conflict with Article 14(3)(b) and (d), or in conjunction with Article 14(1) or other provisions of

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Pre-trial Procedure – Survey of 200 Detainees in the Detention Centre of Haidian District in Beijing”, Essay Collection of Sino-US Seminar on Lawyer’s Defense Role and Judicial Justice 2003, pp.147-167.

<sup>144</sup> CCPL 1996, Article 64; also see Chap5, 3.4.1, p.305-306.

<sup>145</sup> See *Campbell v Jamaica*, Chap2, 5.7, p.67; *Gridin v Russian Federation*, Chap2, 6.3.1, p.76; *Imbrioscia v Switzerland*, Chap3, 4.6.2.2, p.199.

<sup>146</sup> See Chap6, 3.3, pp.361-365; also see *Conteris v Uruguay*, Chap2, 5.8, p.69; Chap3, 2.4.2, pp.106-108.

<sup>147</sup> See Min Cui, “Problems and Suggestions That Have Occurred in Implementation of the Criminal Procedure Law”, (1998) 1 Modern Jurisprudence, p.19; also see HRIC, “Abusing Rights According to Law,” *China Rights Forum*, Winter 1999-2000.

<sup>148</sup> See Shenbo Li and Mengjuan Li, “Problems in lawyers accessing clients in detention awaits resolution,” Democracy and Law, 04/04/07, [http://news.xinhuanet.com/legal/2007-04/16/content\\_5982885.htm](http://news.xinhuanet.com/legal/2007-04/16/content_5982885.htm);

ICCPR might arise.<sup>149</sup> One tactic that the authorities usually used was to broaden the exception that exists in the law and regulations concerning “state secrets”. The rules issued by public security departments and prosecutors even set up extra restrictions on lawyers meeting with their clients. Delay is another tactic, as lawyers’ right to meet clients is often restricted instance by instance.

#### **4.2.2.1 Denial of Requests to Meet on “State Secrets” Grounds**

Many lawyers were denied meetings with their clients on the grounds that the case involved “state secrets”. Article 96 of CCPL specifies that if a case involves state secrets, the suspect must obtain the approval of the investigating agencies to consult a lawyer. Where permission is given, the lawyer may not meet or correspond with his client without further permission of the investigative body.<sup>150</sup> However, this restriction tends to raise issues concerning the restriction of the right of access to a lawyer without good reason, as implied in many ECHR cases.<sup>151</sup> In practice, the concept of state secrets is broadly and arbitrarily applied in China, leaving a wide margin of discretion over its interpretation.

Both Article 8 (6) of the *Law on the Protection of State Secrets of the People’s Republic of China* and Article 2(3) to 8 in the 1995 Notice issued by the MPS and the National Administration for the Protection of State Secrets, entitled *Regulation on State Secrets and the Scope of Each Level of Classification in Public Security Work* consider details of any criminal case currently under investigation with regard to state secrets.<sup>152</sup> Moreover, Article 11 of the Law on the Protection of State Secrecy also empowers the state entities that produce these secrets to classify them accordingly.<sup>153</sup> Under these provisions, almost all criminal cases under investigation could be construed as involving state secrets, and therefore advance approval for

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<sup>149</sup> See *Phillip v Trinidad and Tobago* Chap2, 6.3.1, pp.78; *Imbrioscia v Switzerland*, Chap3, 4.6.2.2, p.199.

<sup>150</sup> CCPL 1996, Article 96

<sup>151</sup> See *Brennan v UK and Murray v. the UK*, Chap3, 4.6.2.2, pp.202-203.

<sup>152</sup> Law on the Protection of State Secrets of the People’s Republic of China, 5/09/88, [hereafter Law on the Protection of State Secrets], Article 8 (6); Regulation on State Secrets and the Scope of Each Level of Classification in Public Security Work, 28/03/95, Article 2(3) to Article 8.

<sup>153</sup> Law on the Protection of State Secrets, 05/09/88, Article 11.



meetings between lawyers and their clients in official custody can be required. After the 1996 reform, the CCPL itself basically does not define the concept of “state secret” in Article 96. Other regulations, even the Joint Regulation of 1998, also fail to provide a concrete and clear definition of “state secrets”.<sup>154</sup> Interviews with Chinese lawyers and scholars reveal a concern that some local police forces have tended to follow the old rules and arbitrarily extend the scope of “state secret” to all details concerning the investigation of crimes in order to reject the application for the lawyer’s meeting with his client during the investigation phase.<sup>155</sup> Everything depends on the judgment of the investigation authorities, typically the police, without any balancing and supervision mechanism as discussed in Chapter Five.<sup>156</sup> On at least one occasion, officials admitted that some public security departments were denying all requests from lawyers for meetings with their clients on the basis of “state secrets”.<sup>157</sup> In some cities, the percentage of such cases in which access was denied under the “state secrets” clause was close to 90% of all criminal cases.<sup>158</sup> As a consequence, criminal defence lawyers are vulnerable to accusations of leaking state secrets.<sup>159</sup>

It should be emphasised that the CCPL does not require a lawyer to show the detaining authority a copy of the detention notice in order to get access to the case and the client. Yet in practice police and prosecutors frequently use their positions to make this requirement, and defence lawyers themselves will often reluctantly tell a potential client that they cannot, and more often are unwilling, to even accept the case, unless a copy of the detention notice is provided for them, especially in a

<sup>154</sup> See *S v Switzerland*, Chap3, 4.6.2.2, p.203.

<sup>155</sup> See Ping Yu, *op.cit.*, fn 26, p.837; Wenchang Tian and Hanji Zhou, *op.cit.*, fn.67, p30; Huanqiang Jiang, *op.cit.*, fn 55, p.129.

<sup>156</sup> See Chap5, 3.4, pp.302-304.

<sup>157</sup> See Guanghai Guo, “The Ministry of Public Security Requests that All Public Security Departments Strictly Guarantee Lawyers’ Early Involvement in Criminal Cases”, (1999) 4 Peoples Public Security, p10; Guojun Zhou, “Correctly Appreciating the Relationship between Lawyers and the Accused and Guaranteeing Lawyer’s Rights to Participate in Legal Action”, (1997) 5 Politics and Law Forum, p.66.

<sup>158</sup> See Report: new Practice of Jiangsu Province for Lawyers’ Participation in Criminal Litigation, (1997) 17 People’s Public security, p15; Chongyi Fan, “Study on the Obstacles and Confusions of Criminal Defence”, (2001) 3 Journal of Henan Administrative Institute of Politics and Law, p.11.

<sup>159</sup> See e.g. Jianzhang Wen and Minquan Liu, “Lawyer Access to Case Materials for His Client, Leaking State Secrets?”, (2002) 8 Law and Life, pp.29-31; also see Discussion on the inadequate protection for the defence lawyers’ rights of person 4.4, pp. 451-477.

politically sensitive case. The reaction of the lawyers becomes an added incentive for the authorities to violate the notification requirement under international standards. This has put the suspect into an extremely vulnerable situation, for it even denies the family and employer of the detainee their legally-guaranteed access to counsel at the initial stage of a case.<sup>160</sup> As shown in *Magee v UK* and *Averill v UK*, the stage of preliminary investigation is a crucial time affecting the fairness of the trial.<sup>161</sup> At this stage, the ordinary citizen without professional legal knowledge urgently needs the help of a criminal lawyer, who has the professional knowledge and ability to enable them to locate the detainee, so that the rights conferred by the CCPL upon suspects, family and defence counsel can all begin to be implemented. However, the freedom of the authorities to handle the practicalities of visits by lawyers was left largely unchanged in any judicial interpretation.

As mentioned above, lawyers are able to meet with their client, unsupervised, after police interrogation, without applying for permission under the amendment of the Law on Lawyers in 2007. Though it opens the way for a later CCPL's amendment, the implementation of the new provisions regarding the meeting between suspect and their lawyers might not be so positive. One of the main reasons is that this significant change is worded very vaguely and conflicts with the stipulation in the CCPL.<sup>162</sup> Following the reply of the NPC Standing Committee, if there are inconsistencies between the Criminal Procedure Law and the Law on Lawyers of 2007, according to *Lex posterior derogat priori*, the latter should prevail.<sup>163</sup> However, because of the

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<sup>160</sup> Also see Chap5, 3.4.1, pp.305-306; 3.4.3, p.313.

<sup>161</sup> See Chap3, 4.6.2.2, pp.200-201.

<sup>162</sup> There are different views in academic and practical circles on the issue of Legislative conflict between Law on Lawyers and Criminal Procedure Law, see e.g. East China Justice Research Centre, "The Review of the Conference on the Implementation of the New Law on Lawyers and Its Legislative Conflict", 27/06/08, <http://www.sfyj.org/list.asp?unid=5063>; Anjie Jiang and Zhijun Jia, "The Problem on the Coherence between the New Law on Lawyers and the Criminal Procedure Law 1996", Legal Daily, 25/02/08, <http://law.law-star.com/cac/110013025.htm>; Hongwei Chen, "Chen Guangzhong: Law on Lawyers is not a Lower Level Law of the Criminal Procedure Law", Legal Daily, 09/08/08, [http://news.cupl.edu.cn/news/8107\\_20080809191523.htm](http://news.cupl.edu.cn/news/8107_20080809191523.htm).

<sup>163</sup> See The Reply of the Sub-Committee of Legislative Affairs of the Standing Committee of the National People's Congress on the Request for Interpretation on the No. 1524 Bill (No. 137 in the Legal and Political Issue) of The First Session of the 11th National Committee of the Chinese People's Political Consultative Conference; Also see Jibin Sun, "Inconsistencies between the Criminal Procedure Law and the Law on Lawyers of 2007, Sub-Committee of Legislative Affairs of the Standing Committee of the National People's Congress: Implementation in Practice according to the Law on Lawyers", Legal Daily, 08/03/09,

long-standing imbalance of power in the criminal process, the practice is still biased against defence lawyers and in favour of prosecutors.<sup>164</sup> Under the current situation, the implementation of the new Law on Lawyers is therefore unlikely to be brought forward. In practice, the extent to which the excuse of “legislative conflict with the CCPL of 1996” is being used on a nationwide basis to refuse requests from lawyers for such meetings is unclear.<sup>165</sup> Lawyers have still been required to show the detaining authority a copy of the approval letter from the investigation agencies for the reason that the detaining authority has not received administrative guidance from superior agencies concerning the implementation of the new law. The investigation agencies also refuse to issue the letter of approval when the lawyers apply for it, as the former claim that they now have to follow the stipulations of the new law now. The lawyers are thus driven back and forth between the different law enforcement authorities. After one year of implementation of the new Law on Lawyers of 2007, lawyers complained that they were still denied the opportunity of meeting with their clients in custody.<sup>166</sup> Real improvement in the defence ability is severely undermined by the structural and legal cultural constraints. The compatibility of Article 14(3)(d) of ICCPR apparently continues to be uncertain.

#### **4.2.2.2 Refusal of Meetings for No-Reason at all**

On other occasions, a lawyer’s request to visit his or her client has even been rejected for no reason at all as the lawyer has been in a weak position compared with other players in criminal proceedings.<sup>167</sup> Or the police will delay the meeting using different methods such as saying that the meeting should be reported to the superior first and his reply should be awaited. In a few situations, lawyers were told that

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[http://www.legaldaily.com.cn/misc/2009-03/07/content\\_1049188.htm](http://www.legaldaily.com.cn/misc/2009-03/07/content_1049188.htm).

<sup>164</sup> See Jianlin, Tao Cheng and Liqiang Feng, *op.cit.*, fn 56, p.127.

<sup>165</sup> See e.g. Dingbo Yuan, “Conflict between the Law on Lawyers and Criminal Procedure Law has Become an Excuse for Local Law Enforcement Authorities to Shuffle Their Responsibilities”, Legal Daily, 26/06/09, [http://www.moj.gov.cn/index/content/2009-05/27/content\\_1100287.htm](http://www.moj.gov.cn/index/content/2009-05/27/content_1100287.htm).

<sup>166</sup> See Dingbo Yuan, “70% of People in the Survey Think that It Is Still Difficult for Lawyers to Meet with Clients, Experts Regard that Judicial Reform is the Effective Way to Thoroughly Solve This Problem”, 03/06/09, Legal Daily, <http://www.law-star.com/cacnew/200906/260038524.htm>; Jingfang Lei and Liqian Wang, “Ensuring the Right to Meeting in the Right Way”, (2009) 24, Legal System and Society, p.356.

<sup>167</sup> See Survey from the Beijing Lawyers Association, cited in Cheng Tao, *Research on Procedural Rights of Defence Attorneys*, (Beijing: Chinese People's Public Security University Press, 2006), p.116; Jingfang Lei and Liqian Wang, *ibid.*, p.356.

public security departments were “too busy to make any arrangements” for such meetings.<sup>168</sup> In some cases, lawyers were even informed that suspects did not want to see them and were given no chance to speak with the suspects themselves.<sup>169</sup> If the frustrated criminal lawyer becomes too assertive when reciting the CCPL provisions authorising access to his client, the police seldom hesitate to demonstrate that they are in charge, especially outside the major cities. This situation definitely fails to grant the right to communication with lawyers and it would seem that the fairness of the whole process may be affected, following the rule in *Imbrioscia v Switzerland* and *Murray v the UK*.<sup>170</sup>

#### 4.2.2.3 Insufficient Legal Aid

The development of the legal aid system in China is still at an early stage.<sup>171</sup> The real improvement of defence possibilities is undermined by the absence of actual improvement in legal aid. Firstly, the scope of legal aid remains narrow in terms of the range of recipients of legal aid and the legal aid process. Therefore the coverage of legal aid is still too limited to meet the actual needs. The special groups entitled to legal aid listed in the CCPL of 1996 only count for a small proportion of the population charged with various offences in the courts. The legal aid provided by the CCPL of 1996 is only at the trial stage. In the current situation of arbitrary detention in China, when a suspect in prison intends to apply for legal aid, the prison authorities can easily refuse to transfer his application to the legal aid institution. The provisions on legal aid in the investigation stage under *Regulations on Legal Aid of 2003* exist in name only.<sup>172</sup> Also, there is no provision in the law for the investigation agency being obliged to inform suspects of their right to obtain prompt legal aid. Many suspects do not even know they have the right to apply for legal aid. Obviously there are no other procedures in China to ensure that suspects get effective

<sup>168</sup> Ibid., also see *Öcalan v. Turkey*, Chap3, 4.6.1, p.197.

<sup>169</sup> See Liancai Mu, “Thoughts on the Environment in Which Lawyers Are Practicing Criminal Procedure Law”, (1997) 12 Chinese Lawyer, p.10. *Öcalan v. Turkey*, Chap3, 3.6.2 p.149; 4.6.2.2, *S v. Switzerland*, p.203.

<sup>170</sup> See Chap3, 4.6.2.2, pp.199-200.

<sup>171</sup> See generally, Zhong Zhang, *The Legal Aid for the Vulnerable Group: Research on the Legal Aid Service and its Quality*, (Beijing: Publishing House of the Chinese People's Public Security University, 2008).

<sup>172</sup> See *Regulations on Legal Aid*, 16/07/03, Article 11(1); also see Provisions on the Legal Aid in Criminal Justice, 28/09/05, Article 4.

legal aid in time.<sup>173</sup> Therefore many who are unable to appoint lawyers, especially during the investigation stage, cannot obtain legal aid when they are in most need of a lawyer and therefore they will not benefit from the newly implemented legal rights in criminal defence.<sup>174</sup> Secondly, the *Regulations on Legal aid of 2003* is only an administrative law. There is no separate national law to unify and standardise the structure, operating procedures and sources of funding for the legal aid centres. The operation and quality of legal aid centres varies greatly from place to place. Thirdly, the theoretical right to legal aid in China may vanish without a strong commitment from the government to finance it. As Shenjian Xu stated, the duty to provide effective legal aid is on the government instead of the lawyers.<sup>175</sup> The amount of money needed for the overwhelming majority of legal aids cases has often not been listed in local financial budgets. In most areas, coupled with the lack of personnel, not only are the certified lawyers obliged to undertake legal aid cases without payment, but they also have to shoulder the cost of the case. So the suspects find it rather difficult to get legal aid and a breach of Article 14(3)(d) would have occurred read with Article 14(1) of ICCPR.<sup>176</sup>

#### **4.2.3 Limitation on Number and Duration of Meetings between Lawyers and Clients**

In view of the extreme difficulties that lawyers encounter on entering the investigation stage and meeting the suspects as discussed above, one might think that those who manage to do so might then be allowed to render considerable service. But when lawyers are actually allowed to meet with their clients, various restrictions under the direct supervision of the authorities still severely limit the legal services that lawyers can effectively provide.<sup>177</sup> Prior to the CCPL coming into effect, the MPS drafted implementation rules stating that meetings between lawyers and

<sup>173</sup> See e.g. Leng Xu, "The Practice and Reflection on Reforming and Perfecting Legal Aid for the Prosecuted in Criminal Cases", (2009) 9, Justice of China, pp.85-86.

<sup>174</sup> See *Öçalan v. Turkey*, Chap3, 3.6.2, p.149; *Magee v UK*, Chap3, 4.6.2.2, p.200.

<sup>175</sup> See Tongshan Ge, *op.cit.*, fn 45, p.36; also see Chap3, 4.6.3, *R. D. v Poland*, p.205.

<sup>176</sup> See Chap2, 6.3.2, pp.78-79.

<sup>177</sup> See *Harward v Norway*, Chap2, 6.3.1, pp.75-76.

suspects, if approved, should ordinarily involve a one-off visit lasting no longer than 30 minutes.<sup>178</sup> The rules further specify that such meetings should not be permitted more than twice. The draft MPS Interim rules were widely circulated within the public security system. It was reported that most local public security departments imposed limits on the number and duration of meetings, either by enacting formal detailed rules or through issuing internally circulated notices, even though the formal MPS Trial Rules eliminated the time limits when they were formally issued on December 20, 1996.<sup>179</sup> Although the SPP's Trial Rules did not spell out any limit on the number and duration of lawyers meetings with their clients in custody, most local procuratorates in fact followed exactly the same rules as the public security departments for the sake of their own interests in practice. A defence lawyer who needs to meet with a suspect in detention must first comply with the rules of the local detention centre first. Then, if allowed, lawyers generally get only one brief meeting during the investigation for a period of no more than 30 minutes.<sup>180</sup> This meeting is frequently held in areas which make conversation difficult, and is usually monitored by investigators according to the provision in Article 96 as discussed in detail below, while the investigative process usually lasts for months and sometimes even years before it is concluded.<sup>181</sup> This time restriction on the right to communicate confidentially with a lawyer appears to limit the accused exercising this right to defend himself and therefore deprives him of a fair hearing, as in *Öcalan v. Turkey*.<sup>182</sup> One report revealed that in early 1997, the courts themselves imposed the same type of restrictions on meetings between lawyers and defendants even after cases entered the trial stage, which is in violation of the CCPL.<sup>183</sup> These internal

<sup>178</sup> See Zhijun Liu and Yuhong Song, "The Report on the Symposium on Criminal Defense: Indispensable Pillars for Building a Judicial Justice System", (1998) 1 *Chinese Lawyer*, pp.18-19; Ping Yu, *op.cit.*, fn 26, p.838.

<sup>179</sup> See, e.g. Ministry of Justice in Jiangsu, "the Report on the Environment of the Lawyer in Performing their jobs in Our Province", [2005], No. 38, 29/04/05, [http://www.jssf.gov.cn/xxgk/fggw/sftwj/sftwjlg/200907/t20090701\\_31598.html](http://www.jssf.gov.cn/xxgk/fggw/sftwj/sftwjlg/200907/t20090701_31598.html); Cheng Lei, "The lawyer's right to see his client: made impossible by internal bureaucratic directives?" *China Youth Daily*, 24/03/07, [http://zqb.cyol.com/content/2007-03/24/content\\_1710361.htm](http://zqb.cyol.com/content/2007-03/24/content_1710361.htm).

<sup>180</sup> See Yanyan Wang, "Settlements for the 'Three Difficulties' in Criminal Defence from the Perspective of New Law on Lawyers", (2008) 6, *Journal of Inner Mongolia Agricultural University(Social Science Edition)*, p.43.

<sup>181</sup> See Jerome A. Cohen, "The Plight of China's Criminal Defence Lawyer", (2003) 33 *Hong Kong Law Journal*, p.237; The monitor from the police see discussion 4.2.4, pp.442-446.

<sup>182</sup> See *Öcalan v. Turkey*, Chap3, 4.6.1, pp.196-197.

<sup>183</sup> See Zhijun Liu and Yuhong Song, *op.cit.*, fn 178, p.19.

regulations would seem to directly contradict Article 14(3)(b) and would thus also appear to be incompatible with Article 14(3)(d) and Article 14(1) of ICCPR.<sup>184</sup> Indeed, the regulatory environment in China renders attorney-client meetings virtually meaningless.

#### 4.2.4 Unreasonable Conditions for Meetings with Suspects

While the amendment clearly authorises lawyers to intervene at an earlier stage, the existing CCPL has not provided suspects with the right to the presence of a lawyer in the pre-trial investigation.<sup>185</sup> However, this is one of the basic safeguards for the right to defence, and, as explained in Chapters 2 and 3, both the HRC and the European Court have recognized that the right to a fair trial requires access to a lawyer during detention, interrogation and the preliminary investigations.<sup>186</sup> Song Yinghui suggests that the defence lawyer shall be present when competent agencies are obtaining evidence.<sup>187</sup> The lawyer may be better placed to help the suspect exercise his rights and interests. On the one hand, the presence of the defence lawyer during the pre-trial questioning and other investigations is in fact to supervise the activities carried out by the relevant authorities and effectively prevent Article 7 treatment and prolonged detention for the suspect, as discussed in previous two chapters.<sup>188</sup> On the other hand, due to the professional inclination, it is not easy to draw the prosecutor's attention to evidence proving innocence or the minor nature of the crimes, as discussed in Chapter Six.<sup>189</sup> Under certain circumstances, if a defence lawyer is present in the pre-trial questioning and investigation at the request either of the accused or the lawyer himself, this prejudicial situation could be avoided and

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<sup>184</sup> See Chap2, 6.3.1, pp.77-78; *Chan v. Guyana*, Chap2, 6.3.2, p.80.

<sup>185</sup> A Pilot study on this issue see Chongyi Fan, ed., *Positive Research on Criminal Pre-trial Procedure Reform: Lawyers-on-Site at Interrogationb (Pilot)*, (Beijing: The Publishing House of the Chinese People's Public Security University, 2006).

<sup>186</sup> See Chap2, 5.7 p.67 and *Gridin v Russian Federation*, Chap2, 6.3.1, p.76; and *Murray v UK* and *Magee v UK* Chap3, 4.6.2.2, pp.199-201.

<sup>187</sup> See Yinghui Song and Hongyao Wu, *Research on the Pre-trial Criminal Procedure*, (Beijing: Press of China University of Political Science and Law, 2002), p.398; Rui Wu and Xiujuan Ma, "Preliminary Study on Confession Obtained by Torture and Right to the Presence of Lawyer", (2008) 6 Research on Rule of Law, pp.58-59; Wei Yang, "Lawyers at Interrogations Can Protect Suspect's Rights and Interests, Represents Rule of Law Progress", Beijing Times, 23/05/05, <http://www.xingbian.cn/template/article.jsp?ID=4793&CID=457970942>.

<sup>188</sup> See Chap5, 3.2 and 3.3, pp.289 and 299; Chap6, 3.2.2, pp.359-361 and 3.4.3, pp.382-384.

<sup>189</sup> See Chap6, 2.2, pp.344-348.

thus ensure the fairness of all the proceedings.<sup>190</sup> This is also an opportunity for the defence lawyer to learn about the case and collect evidence, as shown in *Öçalan v. Turkey*.<sup>191</sup>

In fact, however, proper and confidential communication between suspects and lawyers is not easy. But all these arrangements make it easy for officials to monitor conversation and suppress the right to defence of the suspects. Furthermore, Article 96 of the 1996 CCPL equally explicitly authorises the law enforcement officials to monitor and control the meeting between the lawyers and suspects, depending on the circumstances and necessities of the case.<sup>192</sup> The exceptional condition for restricting the right to communicate confidentially with a lawyer appears vague and far-reaching, and there is no other provision protecting the confidentiality of the lawyer-suspect meeting in the CCPL of 1996. Security reasons are arbitrarily invoked by the officers to impede confidential discussion and exchange of documents between lawyers and their clients, in contrast to *Kröcher and Möller v. Switzerland*.<sup>193</sup> In recent years, in many joint regulations agreed by local authorities, the detention centre is required to provide necessary assistance for lawyers to interview their clients, including the provision of proper premises.<sup>194</sup> However, while the authorities take every opportunity to limit the effectiveness of the assistance which the lawyer could provide, the lawyer cannot obtain any assistance from the police except to be informed of the name of the offence the client is suspected to have committed.<sup>195</sup> Moreover, these regulations only required that the normal interview between the lawyers and the detainees shall not be interrupted. They do not require the guards to be absent during the interview.

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<sup>190</sup> See Chap3, 6.4.2.2, *Magee v UK*, p.200; also see Chap6, 3.4.1.1, pp.374-376.

<sup>191</sup> See Chap3, *Öçalan v. Turkey* 3.6.2, p.149.

<sup>192</sup> Also see Provisions on the Procedures for the Participation of Lawyers in Criminal Procedure during Investigation (Expired), 20/12/96, Article 12

<sup>193</sup> See *Kröcher and Möller v. Switzerland*, Chap3, 3.6.2, p.151.

<sup>194</sup> See Notice of and the Judicial Bureau of Beijing Municipality on Printing and Distributing the "Provisions on the Relevant Issues Concerning Lawyers' Meeting with Criminal Suspects and Defendants in Custody (for Trial Implementation)", 26/03/03; Notice of and the Judicial Bureau of Sichuan Province on Printing and Distributing the "Provisions on the Relevant Issues Concerning Lawyers' Meeting with Criminal Suspects and Defendants in Custody (for Trial Implementation)", 15/09/03.

<sup>195</sup> CCPL 1996, Article 66.



However, a more significant question is that during the meeting police officers are not only present at the meeting, but also directly intimidate the suspects and of course greatly influence the nature of the conversation through their official status. The meeting may be seen but not be heard by the tipstaff, as held in *Modarca v. Moldova*.<sup>196</sup> However, the suspect, whether in custody or not, should have enough opportunity and time to meet or negotiate with a defence lawyer immediately and confidentially, and without being wiretapped or inspected.<sup>197</sup> The CCPL and relevant interpretations did not prevent the guards from questioning the suspects during the interview. Some law enforcement officials and scholars even suggest that officials should take advantage of such meetings to crack cases or obtain statements from suspects.<sup>198</sup> In practice, the investigator who is present at the meeting is usually the person in charge of the investigation in question. While Article 96 of the CCPL states that the lawyer can interview the detained suspect in order to understand the circumstances and details related to the case, as soon as the lawyer begins to do so, in practice the investigation officials present at the interview would normally stop it immediately.<sup>199</sup> Instructions from the police department openly prohibit officials from giving any indications that would allow lawyers and suspects to know anything regarding that stage of the investigation, because they are afraid it would facilitate preparation of defence strategies.<sup>200</sup> Some investigating agencies record and videotape the meeting between the defence lawyer and the suspects, even though at the same time the officials always claim that there are not enough resources to monitor the interrogation between the police and suspects in order to prevent torture as discussed in Chapter Six.<sup>201</sup> Based on *Zagaria v Italy*, it is possible that such a

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<sup>196</sup> See *Modarca v. Moldova*, Chap3, 3.6.2, p.150.

<sup>197</sup> See *Zagaria v Italy* and *Brennan v UK*, Chap3, 4.6.2.2, pp.203.

<sup>198</sup> See Xiaobin Guo, "On Reform and Development of Work of Crime Investigation After the New Criminal Procedure Law Took Effect", (1998) 1 Study of Crime Investigation, p.11; Zhibin Hu, "Analysis on the Understanding Deficiencies of Proposal of Lawyer's Presence in the Interrogation", (2008) 3 Policing Studies, p.39.

<sup>199</sup> See Shaolin Chen, "Discussion on Defence Lawyer's Presence", (2000) 5 Law Review, p.71.

<sup>200</sup> See Zhongmin Yuan, "Brief Points on the Public Security Department's Handling of Lawyers at the Stage of Crime Investigation", (1998) 1 Study of Crime Investigation, p.15.

<sup>201</sup> See Jinxi Song, "Observation and Reflection: Right for Legal Assistance in the Stage of Investigation", (2009) 1 Journal of Inner Mongolia Agricultural University(Social Science Edition), p23; Zhibin Hu, *op.cit.*, fn 198, pp.40-41; Ningjiang Wang, "Lawyers Encountering Difficulty with Early Involvement", (1997) 19 Democracy

stance may also become evident, demonstrating interference with the right to confidential meetings with lawyers.<sup>202</sup>

Lawyers and scholars also complain of the official practice of warning, “educating”, and even intimidating suspects in front of their lawyers before the meeting begins. Even worse, to ensure that lawyer-suspect meetings do not jeopardize the official criminal investigation, some officials required the lawyer to submit a written account of what they planned to talk about before holding a conversation with the suspect and they attempt to censor the content in advance.<sup>203</sup> The officials also require that the pre-arranged meeting be carried out exactly according to the written talking points.<sup>204</sup> Until now China has not issued any concrete measures to regulate the behaviour of the investigators during their presence in the meeting. Therefore the stipulations of the present legislation and its implementation seriously hamper the effectiveness of the legal assistance which the lawyer can provide from the meeting, and thus the suspects are deprived of a fair hearing, following *Modarca v. Moldova* and *Brennan v UK*.<sup>205</sup> A serious violation of both Article 14(3)(b) and Article 14(3)(d) read with Article 14(1) of ICCPR has thus occurred.<sup>206</sup>

A further issue arises in respect of adequate facilities to be provided for the lawyer-client meeting in Chinese criminal proceedings. While a defence lawyer may interview a client in police custody, the police will determine the date, time and place of the meeting.<sup>207</sup> However, in some detention centers, there is only one visitors room for legal consultations in a centre with a population of over a thousand detainees.<sup>208</sup> Normally the defence lawyer and client are required to talk through a

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and the Law, p.19; See Chap6, 4.3, p395-396.

<sup>202</sup> See *Zagaria v Italy*, Chap3, 4.6.2.2, p.203.

<sup>203</sup> See Zongzhen Yang and Hongwei Xue, “Thoughts on Several Issues Concerning Lawyers’ Involvement in the Investigation of Crimes,” (1997) 1 People’s Public Security University Journal, p.37.

<sup>204</sup> The Report on the Symposium on Criminal Defense: Indispensable Pillars for building Judicial Justice System, Chinese Law, No.1, (1998), p24; Guojun Zhou, *op.cit.*, fn 157, p69.

<sup>205</sup> See *Modarca v. Moldova*, Chap3, 3.6.2, pp.150-151; *Brennan v UK*, Chap3, 4.6.2.2, pp.202.

<sup>206</sup> See *Conteris v Uruguay*, Chap2, 5.8, p.69; *Wright v Madagascar*, Chap2, 6.3.1 p.76-77.

<sup>207</sup> Provisions on the Procedures for the Participation of Lawyers in Criminal Procedure during Investigation (Expired), 20/12/96, Article 11

<sup>208</sup> See Xiangrui Deng, “Early Involvement: Gearing-Up Time is Over”, (1999) 4 People’s Public Security, p.6.

glass partition by means of microphones that broadcast their every word to the nearby guards for reasons of security. Such a situation appears to coincide with the facts from *Modarca v. Moldova* and therefore, the relevant arguments and ruling based on *Modarca* would be applicable here.<sup>209</sup> In some localities, lawyers met with their clients under even more outrageous conditions. Some meetings are even held in an outside yard or in a metal cage without any chairs.<sup>210</sup> Detention centres generally do not provide sufficient space for lawyers to meet with detainees, and sometimes this shortage results in lawyers queuing to meet with suspects. Therefore, the legal service is delayed. It is common that two meetings are held simultaneously in the same room.<sup>211</sup> Unreasonable fees can be charged for everything from the purchase of application forms to apply for a meeting or for bail, to making photocopies of various documents which is related to the issue concerning the right to collect evidence as discussed below.<sup>212</sup>

#### **4.3 Obstacles in Getting Access to Case Files Collected by the Authorities**

In addition to the meeting constraints, it could be argued that suspects and their lawyers encounter more difficulties in accessing prosecutorial evidence since the CCPL revision. No exchange of information is required between the defence and the procuratorate at the pre-trial stage. The judicial and investigation authorities may thus have failed to fulfil their obligation to make sure that defence lawyers can access all the relative documents, files or records owned by them as required by Article 14(3)(b) read with Article 14(1) of ICCPR.<sup>213</sup> Moreover, the situation might amount to a breach of Article 14 (3)(d) of ICCPR.<sup>214</sup> There were two main limitations on lawyers' review of the files and evidence transferred to the court. First, it is common practice for prosecutors to deliberately withhold evidence from defendants during the prosecution review stage as well as during the trial stage, as a

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<sup>209</sup> See *Modarca v. Moldova*, Chap3, 3.6.2, pp.150-151.

<sup>210</sup> See Ningjiang Wang, *op.cit.*, fn 201.

<sup>211</sup> See Xiangrui Deng, *op.cit.*, fn 208, p.8.

<sup>212</sup> See Lu Xia, "Thirteen Difficulties that Lawyers Encounter in the Course of Criminal Defense and Suggestions to Improve", (1997) 12 Chinese Lawyers, p.6.

<sup>213</sup> See Chap2, 6.3, pp.75-76; also see Chap3, 4.3, pp.161-162; *Öcalan v. Turkey*, 4.6.2.1, p.198.

<sup>214</sup> See *Dowsett v. UK*, Chap3, 4.3, p.160.

loophole in the law itself leaves the authorities with great discretion on the disclosure of evidence. Similar to the situation concerning approval for meeting with the suspects, procuratorates and courts in many regions require lawyers to get approval from them if they want to consult judicial documents. The procuratorates and the courts will usually reject the application to consult from the lawyers with the excuse that the case is involved in “state secrets”.<sup>215</sup> An official SPP commentary expressly prohibits lawyers from accessing any of the evidence relating to a case on the grounds of the public interest.<sup>216</sup> However, the grounds of public interest to withhold certain relevant evidence may not be satisfied by such unilateral decision-making on the part of the prosecution, as shown in *Rowe and Davis v UK* and *Edwards and Lewis v UK*.<sup>217</sup>

Even if the lawyer gets permission to consult the documents, Article 36 of the 1996 CCPL, however, does not clearly define such terms as “judicial documents” or “technical verification documents”.<sup>218</sup> There is also no requirement for prosecutors to provide defence counsel access to all the evidence in their possession, including physical evidence, documentary evidence, crime-scene records, the testimony of witnesses, or the victim’s statement and other evidential material such as crime-scene records and technical records that partially present the case.<sup>219</sup> The ruling in *Harward v Norway* makes it clear that the limits established this interpretation is in principle an infringement of the right set forth in Article 14(3)(b) of ICCPR.<sup>220</sup> Undoubtedly, the judicial interpretation on what constitutes “judicial documents” has further firmly shut out defence lawyers from gaining access to official evidence during the prosecution’s review of the case. For example, the SPP has interpreted the relevant provisions of the new law to require access only to formal documents in the

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<sup>215</sup> See 4.2.2.1 pp.446-449; see also *Nikolov v Bulgaria*, Chap3, 3.6.2, p.151.

<sup>216</sup> See Zhang Qiong et al, *Theory and Practice of Criminal Procedure for People’s Procuratorates* (Beijing: Law Press,1997), pp.84-85.

<sup>217</sup> See *Rowe and Davis v UK*, Chap3, 4.3, pp.162-163; *Edwards and Lewis v UK*, Chap3, 4.3, pp.166.

<sup>218</sup> CCPL 1996, Article 35; also see Law on Lawyers 2007, Article 34.

<sup>219</sup> See Chongyi Fan, op.cit., fn 158, p.12; Yanyan Wang, op.cit., fn 180, p.42.

<sup>220</sup> See *Harward v Norway*, Chap2, 6.3.1, pp.75-76.

file, such as copies of the detention and arrest notices.<sup>221</sup> Also the minutes of the Judicial Committee and the collegial panel could not normally be reviewed. This is a serious limitation, given the fact that the Judicial Committee and collegial panel normally make a decision as to the offence and punishment prior to a trial.<sup>222</sup> An SPC document even once classifies these minutes as “state secrets”. Therefore, in practice, lawyers can only access the technical documents deposited with the courts such as warranties for custody, arrest and search, and the conclusion of the assessment or review.

Moreover, without any measures to balance the power of the prosecution, the CCPL trial reform of 1996 also prevents suspects and their lawyers from preparing a defence at the prosecution review stage and has therefore greatly weakened the defendant’s position at the trial stage. Under the old CCPL, prosecutors had to submit to the courts all evidence and related materials along with the prosecution, whatever evidence supported prosecution of the suspect and defendant. The defence had the right to review these files and evidence. If the prosecutors did not do so, they ran the risk of the court deciding that the case should be dismissed or returned to the procuratorate for supplementary investigation.<sup>223</sup> By contrast, Article 150 of the 1996 CCPL only requires that, after cases are transferred to the court for trial, prosecutors should provide courts with a bill of indictment containing clear facts concerning the alleged crime, a list of the evidence and of the witnesses as well as copies of “important evidence”.<sup>224</sup>

This revision in the CCPL was part of a larger trial process reform that prohibits judges from reviewing the substance of cases before trial, in order to combat a long-standing practice of police, procurators, and judges agreeing on the outcome of a case before it comes to court.<sup>225</sup> Instead, the reform gives judges authority to

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<sup>221</sup> SPP 1999, Article 319.

<sup>222</sup> See *Edwards and Lewis v UK*, Chap3, 4.3, p.167; and Chap3, 4.4.2, pp.173-174

<sup>223</sup> CCPL 1979, Article 108.

<sup>224</sup> CCPL 1996, Article 150.

<sup>225</sup> See Chongyi Fan and Hongyao Wu, “Reform and Its Characters of Chinese Criminal Trial System”, (2000) 1

decide cases based on both sides' presentations and seeks to make the trial an authentic forum. A way of restraining judges from premature decision-making is to restrict the evidence they see until the trial takes place. As a result, the law reforms have led to a thinning of evidence in the files transferred by the prosecutor to the court. Yet two policy goals in the law partially contradict each other. The duplicates of important evidence attached to the case that the procuratorate transfers to the courts is not all the evidence for or against the defendants in their possession under the equality of arms, as emphasized in *Edwards and Lewis v UK*.<sup>226</sup> Noticeably, there is no obligation to disclose the evidence from the judge in the CCPL and the interpretations. In practice, judges were also especially reluctant to share evidence uncovered through their own investigation. They tended to produce that evidence only in court. The barrier set by this reform consciously or unconsciously further weakens the attorney's ability to prepare an effective defence and increases the lack of balance between the prosecutor and the prosecuted, as recalled by the ruling in *Dowsett v. UK*.<sup>227</sup> It actually places the lawyers in a worse situation than before the legislation.

Second, access to case files is also a matter of practicality. After the case is transferred to the court, lawyers may review the files in court and the court has an obligation to provide the necessary assistance, such as providing a room and allowing lawyers to make extracts from the files. However, many courts will not voluntarily provide satisfactory facilities for the defence, which again might mean violation of Article 14(3)(b) of ICCPR as discussed above.<sup>228</sup> The lawyer can be denied the right to consultation merely because the duplicating machine in the office does not work, or the court charges a high price for copying case files, or the court decides not to let lawyers copy case files any more.<sup>229</sup> It means lawyers have no

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Chinese Criminal Science, p.4; also see Zongzhi Long, "Tentative Views on the Reforming Direction and Way of Criminal Adjudication", (2005) 1 Social Science Research, pp.80-84

<sup>226</sup> See *Edwards and Lewis v UK*, Chap3, 4.3, p.165-166.

<sup>227</sup> See *Dowsett v. UK*, Chap3, 4.3, pp.161-162.

<sup>228</sup> Also see 4.2.4 above, pp.456-457.

<sup>229</sup> See Tonghai Liu, "Confusions and Considerations on the Criminal Defence – with Discussion of Revision of Criminal Procedure Law and Law on Lawyers", (2001) 2, Hebei Law Science, p.104.

choice but to take notes from the files in several volumes, even if they have access to them. The result of this situation is that most of the law enforcement officials and judges still regard legal representation at trial as a mere formality.<sup>230</sup> The report of the NPC's investigation on the implementation of the 1996 CCPL in 2000 indicated that despite the stipulation in Article 36(1) of the law, both the time and extent of the defence lawyers' access to case files are greatly restricted in practice.<sup>231</sup>

It has been reported that in some localities an informal pre-trial disclosure procedure has developed in China to increase understanding among the parties. For instance, the People's Procuratorate in Yantai, Taian and Zhucheng in Shandong Province have experimented with this system since 1997 and have allowed defence lawyers to access the prosecution's evidence.<sup>232</sup> People's Procuratorate of Longwan District in Wenzhou, Zhejiang Province, also issued *Rules of Evidence Disclosure* on May 2008.<sup>233</sup> As described in previous Chapters, despite enhanced awareness of human rights protection in China, the Chinese culture is not yet supportive of robust protection for suspects. There were obviously critical of this experiment as the disclosure would inevitably eliminate some of the advantage that the procuratorate are accustomed to and increase the chance of a successful defence. Also there is concern on the possibility of an increased incidence of perjury, as the monitoring and disciplinary mechanisms within China's legal profession are relatively weak.<sup>234</sup>

However, given the overwhelming power of the procuratorate and the serious disadvantages of defence lawyers in China, the advantages of pretrial disclosure of

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<sup>230</sup> See Jianlin Bian, Tao Cheng and Liqiang Feng, op.cit., fn 56, p130; Chongyi Fan, op.cit., fn 158, pp.12-13; also see 2.2 pp.410-413.

<sup>231</sup> See Zongbin Hou, The Report on the Implementation of CCPL 1996.

<sup>232</sup> See People's Procuratorate of Shandong Province Annual Work Report, 24/03/02; also see the news report on the experiments in different Provinces in China, such as Hubei, Gansu and Zhejiang.

<sup>233</sup> See Dongsheng Chen, "First Evidence Disclosure Agreement is signed by Lawyers and People's Procuratorate of Longwan District in Wenzhou, Zhejiang", People's Procuratorate Daily, 02/06/08, [http://news.xinhuanet.com/legal/2008-06/02/content\\_8298145.htm](http://news.xinhuanet.com/legal/2008-06/02/content_8298145.htm).

<sup>234</sup> See Jun Xu, "Jurisprudential Analysis on Construction of System for Disclosure of Evidence II", (2008) 2 The Chinese Procurators, p.11; More concern on the difficulties to establish procedure of disclosure see e.g. Qirui Bao and Quanjian Shao, "Consideration on the Practice of Disclosure of Evidence in China", (2009) 21 Legal System and Society, pp.176-178.

evidence far outweigh the negative impacts that may result.<sup>235</sup> In the national working conference of public prosecution in Shanghai in August 2000, the SPP had firstly proposed that procedures for disclosing evidence before trial in criminal cases need to be tried out in places where conditions permit. As one of the main contents of the prosecutorial reforms in recent years, it was also required by the SPP that a disclosure system in criminal proceedings should be promoted gradually and actively.<sup>236</sup> But without a clear definition of the legal requirements for disclosure in the formal national law, there are only rules set by the local authorities to regulate the procedure. Normally these local rules are general and abstract.<sup>237</sup> Also there is a lack of any legal redress mechanism for the violation of this obligation of disclosure. The framework for disclosure to protect the right of the suspect to receive a fair trial is far from being set up in China.<sup>238</sup> Under these circumstances, the defence mainly consists only of questioning and rebutting the evidence presented by prosecutors. This generally makes for a weak defence and results in inadequate consideration by the courts of the lawyers' efforts.<sup>239</sup>

#### **4.4 Inadequate Protection for the Defence Lawyers' Rights of Person**

The defence lawyers' security is always challenged in China. If a lawyer's performance of his role can be regarded as being devious or giving rise to criminal liability, this will have tremendously adverse effects on the legal profession.<sup>240</sup> Explicitly provided as one of the basic rights in Article 20 of the *Basic Principles on the Role of Lawyers* by the UN, is that the relative speeches made in good faith in written or oral pleads or during a lawyer's professional appearance in court, tribunal

<sup>235</sup> See Chap3, 4.3, pp.160-161; also see Dengfeng Li, "Analysis on the Necessity and Feasibility of Constructing System for Disclosure of Criminal Evidence: in the perspective of the New Law on Lawyers in Effect", (2009) 1 Legal System and Society, pp.177-178.

<sup>236</sup> See Wei Qin and Huipu Wang, "Consideration on the Trial Implementation of System of Disclosure of Evidence before Trial", (2001) 5 Chinese Criminal Science, p.52.

<sup>237</sup> See e.g. The Court, The People's Prosecutor and the Ministry of Justice of Yuhang District, Hangzhou The Rules on Disclosure of Evidence Before Criminal Trial (Experiment), 09/08.

<sup>238</sup> See Guoxiang Zhang, "Pilot Project Shouguang: Exploration on System of Disclosure of Evidence in Criminal Case", People's Court Daily, 24/01/05, B1.

<sup>239</sup> See *Rowe and Davis v UK*, Chap3, 4.3, p.162; *Edwards and Lewis v UK*, Chap3, 4.3, p.166.

<sup>240</sup> See Yu Wang and Caiyou Chen, "Don't Make Lawyers Dancing with Shackles – Series Report V of the Training and Rectification Movement in the Profession of Lawyers, Legal Daily, 08/08/04, p.2, [http://www.legaldaily.com.cn/bm/content/2004-08/08/content\\_123060.htm](http://www.legaldaily.com.cn/bm/content/2004-08/08/content_123060.htm); Chongyi Fan, op.cit., fn 158, p.13; Yifei Wang, op.cit., fn18, p.22; also see fn 128.



or other administrative organs in defence of the accused party shall be exempted from civil and criminal charge. The right of expression immunity here serves as a privilege for a lawyer, in this way protecting the normal provision of services. But Chinese legislation has not clearly identified the right of expression immunity ensuring that defence lawyers' actions and speeches are granted immunity from prosecution according to legal stipulations when the lawyers undertake the case.<sup>241</sup> China also completely lacks detail complementary measures that provide safeguards for lawyers in the performance of their work in criminal defence. These deficiencies can be seen below.

#### **4.4.1 The Hostility of Officials**

The hostility of officials towards lawyers has become a major negative factor affecting the full participation of lawyers in the criminal process.<sup>242</sup> Judicial officers have been unable to adjust from the old concepts to the new ideologies and provisions of the CCPL and the Law on lawyers, concerning the promotion of a more equitable criminal justice system and better human rights protection through an improved defence system. Naturally this is reflected in the actions of the authorities seeking to suppress and intimidate lawyers, who are now more likely to come into conflict with the authorities because the reform allows them to become involved earlier in the legal process and broaden the scope of their work at various stages in the proceedings. In addition, the local judicial authorities exercise more covert controls. Besides, these prosecutors refuse to think of themselves as being on an equal footing with defence lawyers in criminal proceedings, which can bring violation of Article 14(1) and Article 14(3) of ICCPR.<sup>243</sup> As discussed above, the revision of the Law on Lawyers in 1996 somehow contributes to the hostile official attitudes to the lawyer, in redefining the role of lawyers as professionals who provide

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<sup>241</sup> See Law on Lawyers 2007, Article 37, in order to protect lawyers, Article 37 states that the representation or defense opinions presented in court by a lawyer shall not be subject to legal prosecution, however, except speeches compromising the national security, maliciously defaming others or seriously disrupting the court order.

<sup>242</sup> See Human Rights Watch, "Walking on Thin Ice-Control, Intimidation and Harassment of Lawyers in China", April, 2008; Huanqiang Jiang, *op.cit.*, fn 55, p.130; Yifei Wang, *op.cit.*, fn 18, pp.24-25.

<sup>243</sup> See *Maleki v Italy*, Chap2, 6.1, p.72; 6.3, p.74; *Neumeister v Austria* and *Dowsett v. UK*, Chap3, 4.3, pp.161-162.

legal service to society.<sup>244</sup> It is believed that there is no need to protect lawyers, because they are no longer state legal workers.

#### **4.4.2 A Combination of Problematic Provisions in the Law**

Lack of legal protection for the lawyers themselves from arbitrary detention or conviction is one of the predominant reasons for the embarrassment and dilemma of criminal defence.<sup>245</sup> Article 306 of the 1997 CCL, Article 38 of the 1996 CCPL and Article 40(6), and Article 49 (4) of Law on Lawyers 2007 all stipulate that lawyers shall not intentionally destroy, forge evidence and impede witnesses. The purpose of the legislation, to prevent the crime of perjury and fabrication, is reasonable. However, both lawyers and academics consider that all these stipulations potentially leave defence lawyers in serious professional jeopardy.<sup>246</sup> Lawyers may easily be falsely arrested or taken into custody by the procuratorate organs on the grounds of perjury or false testimony. At the same time, the fact that defence lawyers' security is facing a challenge further impairs the public image and the enthusiasm of lawyers for undertaking criminal cases in the light of such accusations. On the one hand, the adverse provisions regarding lawyers are overlapping. Article 306 designates as a crime the fact that the defender or/and legal agent has destroyed, falsified evidence, threatened or lured witnesses to contravene the facts, change their testimony or make false testimony.<sup>247</sup> The actual crime of perjury or assisting perjury which is covered by Article 307 of CCL of 1997 could be committed by anyone involved in the criminal process, including prosecutors or even judges according to the law. Some scholars considered that the original purpose of the law did not contradict to the principle of "equality before the law" due to the special status of the lawyers.<sup>248</sup>

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<sup>244</sup> See 4.1, pp.442-443.

<sup>245</sup> See Xingliang Chen, *Mission of Rule of Law*, (Beijing: Law Press, 2001), p.299; Hu Xiyong and Duanmu Zhengyang, "Chinese Lawyers who Dare not Defence for Criminal Suspects", (2002) 3 Chinese Lawyers; Yingchun Yang, "Why Most Lawyers Give up offering Criminal Defense Service", (2007) 7 China Society Periodical, pp.33-34.

<sup>246</sup> See Xu Lanting, "Existing Problems and Strategy of the Criminal Defence in China", at EU-China Network Seminar "Right to Defence, and Corporate Social Responsibility", <http://www.nuigalway.ie/sites/eu-china-humanrights/seminars/ds0406.php>, Beijing, 28-29 June 2004; Chongyi Fan, *op.cit.*, fn 158, p.13; Yifei Wang, *op.cit.*, fn 18, pp.23; Qiulan Chen, "A Topic of Great Importance: Lawyer's Perjury", (2000) 3 Chinese Lawyer, pp.46-48.

<sup>247</sup> See Criminal Law 1997, Article 306

<sup>248</sup> See Baoyue Li and Hongmei Zhang, Study on Lawyers Right of Criminal Immunity, (2004) 4 The Political

However, critics of Article 306 argue that the stipulations which arbitrarily single out defenders and defence lawyers are dangerously open to abuse.<sup>249</sup> Undeniably, legal practice shows that the lawyers remain hostage to the very powers of the state under the influence of the traditional legal culture as observed above and Article 306 has become a case of clear discrimination against defence lawyers in legislation.

On the other hand, the phrasing and scope of all these stipulations have not been clarified. There are no clear and defined legal interpretations of evidentiary standards to guide the application of perjury and fabrication provisions in criminal proceedings. Article 38 of the CCPL of 1996 is one of the most intimidating provisions against lawyers' personal rights. In Article 38, one clause states that defence lawyers and other defenders are prohibited from assisting suspects or defendants by concealing, destroying, or forging evidence and from helping defendants collude with each other.<sup>250</sup> The other clause states that defence attorneys or other defenders are prohibited from threatening or inducing witnesses to change their testimony or commit perjury.<sup>251</sup> As the terms "collude", "threaten" and "induce" are not clearly defined and standardised, the Article could have the chilling effect of stopping any assertive legal practice. For example, in contrast to the word "induce", the term "leading question" is only a tactic need to question a witness or defendant, and could by no means be interpreted as "induce", as many lawyers argued.<sup>252</sup> There is currently no judicial interpretation that effectively distinguishes "inducement" from a "leading question".

The terms used in Article 306 are also dangerously ambiguous as Article 38 of the 1996 CCPL. It does not stipulate in detail what constitutes the crime of forging

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Science and Law Tribune, p.127-128; Xiumei Guo, "Warning and Exploration of 'It is Better to be Safe than Sorry' – Discussion on the Abolition of Article 306", (2004) 1 The Chinese Procurators, pp.35-37.

<sup>249</sup> See e.g. Yuxiang Zhang and Jinling Men, "Rational Analysis about Article 306 of Criminal Law", (2007) 2 Hebei Law Science, p.30; Xingliang Chen, "Research on Defender's Inducing Act in the Crime of Impairing Testifying – Cutting in from the Case of Zhang Yaoxi", (2004), 5 The Political Science and Law Tribune, p.163;

<sup>250</sup> CCPL 1996, Article 38.

<sup>251</sup> Ibid.

<sup>252</sup> See Zhanying Wu, "A Tentative Study on the Provision about Article 306 of Criminal Law", (2006) 5 Contemporary Law Review, p.147.

evidence or perjury under Article 306, giving prosecutors ample discretion to prosecute lawyers and giving judges enormous opportunity to find them guilty of such an offence. As cases have demonstrated, the prosecution needs only a discrepancy in evidence or in the testimony of one witness to make the charge.<sup>253</sup> Article 306 makes it possible for defence lawyers to face the risk of both imprisonment of up to seven years and the revocation of their licence to practice at any moment when defending suspects or defendants.<sup>254</sup> Even though the procuratorate knows that the prosecution of such alleged offences might not lead to a conviction, Article 306 is often invoked improperly or misused by officials attempting to silence defence lawyers, which affects defence lawyers' ability to provide legal advice.<sup>255</sup> The threat of Article 306 in the CCL of 1997 directly abrogates the rights of lawyers to possess immunity from accusation in criminal proceedings and thus exerts a great deal of pressure on lawyers.

In practice, in Chinese criminal proceedings, suspects and witnesses normally give statements or testimony first to the police. If a suspect or a witness, particularly the witness for the prosecution, changes his testimony after the involvement of the defence lawyer, the alleged crime might be proved unfounded and the accused may be found not guilty because the prosecution had built its case upon the original testimony. Due to the hostile attitude towards lawyers and a lack of challenge in the proceedings, the police and the prosecutors usually first allege that the change in testimony or statements shows that the lawyer induced the witnesses or suspects to lie or present false testimony or statements.<sup>256</sup> The witnesses or the suspects are forced by the threat, of the police or prosecutors to retract their in-court statements on the grounds that it was the lawyer who induced them to do so. As a result, it follows that the lawyer is seen to be obstructing justice. The lawyers may easily be detained on the charge of perjury if they present different evidence from that

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<sup>253</sup> See e.g., Xingliang Chen, *op.cit.*, fn 245, p.160 and 163.

<sup>254</sup> Also see Law on Lawyers 2007, Article 49(8) and (9).

<sup>255</sup> See *S v Switzerland*, Chap3, 4.6.2.2, p.203.

<sup>256</sup> See Longtian Wang, "Thoughts on the Refusal of Crime Investigation Authorities to Permit the Involvement of Lawyers in crime Investigation Activities", (1998) 2 Journal of Public Security University, pp.26-27.

collected by the police and the prosecutors.<sup>257</sup> On some occasions, lawyers have even been held liable for the perjury of defendants.

Crimes of perjury or fabrication require the necessary mental element in order to prove culpability.<sup>258</sup> If the defence lawyer offers an honest representation based on the information he has obtained, even though his statements may not be objectively truthful because of inadequacy of information or flaws in the source of the information or the information itself, the lawyer shall not be held liable because he does not have the requisite mental element, conscious fabrication. However, this distinction is often neglected or purposely ignored when the procuratorate investigates a lawyer's misconduct. China has failed to uphold the guarantee that lawyers "shall not suffer, or be threatened with prosecution or administrative or other sanctions for any action taken in accordance with their recognized professional duties".<sup>259</sup> The opponents of the lawyers, the prosecutors, are the one who have unlimited power to determine whether they are behaving appropriately in conducting their defence. There is often great tension between defence attorneys and prosecutors, but the lawyers lack protection against official abuse.

Dozens of lawyers have been reported as being detained, harassed and prosecuted under Article 306 of the 1997 CCL and Article 38 of the 1996 CCPL.<sup>260</sup> Therefore the criminal defence is not only frustrating but also dangerous for the lawyers. Many lawyers are reluctant to continue their criminal law practice for fear of prosecution. Also the lawyers are extremely conservative in their work, as they know that the authorities are watching them closely and that Article 306 is at their disposal. They may decide not to attempt to obtain evidence by themselves if any resulting changes

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<sup>257</sup> See Qiulan Chen, *op.cit.*, fn 246, p.48; Yuxiang Zhang and Jinling Men, *op.cit.*, fn 249, p.31

<sup>258</sup> See Yingying Yu and Zengtian Zhao, "Analysis of the Keywords of Lawyer's Perjury", (2008) 31 Legal System and Society, p.100; Qiulan Chen, *op.cit.*, fn 246, p.47; Xingliang Chen, *op.cit.*, fn 245, p.159.

<sup>259</sup> Basic Principles on the Role of Lawyers, Article 16 (c).

<sup>260</sup> See Jerome A. Cohen, "The Plight of China's Criminal Defence Lawyer", (2003) 33 Hong Kong Law Journal, p.245; For example, see the widely reported case Chen Guangcheng, "Four Years in Jail for Blind Activist", South China Morning Post, 25/08/06; Jialiang Liu and Yaqiong Zhang, "Consideration on the Challenge System in Criminal Justice – Ma Guangsheng Case of Obstruction of Witnessing as An Example", (2005) 3 Journal of Heilongjiang Administrative Cadre Institute of Politics and Law, pp.95-96; Yuxiang Zhang and Jinling Men, fn 249, p.32.

might render them culpable under Article 306, even when they suspect that testimony was extracted by illegal means and is false. The chilling effect of this practice is particularly troubling in the context of an investigative environment in which coerced confession through torture and ill-treatment are all too common as discussed in Chapter Six. The capacity of the defence representation is greatly jeopardized when it becomes a defence of the lawyer's own personal safety and the quality of the legal defence mechanism will gradually be seriously weakened. This may seriously impair an effective defence and therefore, the interest of justice on the whole as required under the fair trial clause of human rights instruments.<sup>261</sup>

While Article 306 of the CCL of 1997 remains effective, Article 37 of the Law on Lawyers of 2007 constitutes another trap for lawyers, even though it says that lawyers' personal rights shall not be violated in the course of legal practice. There are no detailed and practical regulations on how to protect lawyers' personal rights. Moreover, concerns have been raised about its latter clause, which makes an exception for language that endangers state security, maliciously defames another, or seriously disrupts the order of the court.<sup>262</sup> This Article 37 has been vilified as backward.<sup>263</sup> In fact, cases of disguised retaliation against lawyers in the name of state security are already all too common. As argued above, there are strong reasons for considering that a provision worded like this one can be totally manipulated. It lacks clear boundaries and practicable standards. For example, how is "state security" to be defined in this Article? Under what circumstances would verbal statements be considered to endanger state security? What crime should a public prosecutor be guilty of if he uses "language that endangers state security, maliciously defames another person or seriously disrupts the order of the court"? And which is more important, the security of the state, or the security of the people? There is no

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<sup>261</sup> See *Arutyunyan v. Uzbekistan*, Chap2, 6.3.2, p.79; *R. D. v Poland*, Chap3, 4.6.3, p.205.

<sup>262</sup> See e.g. Zongxin Xu, "Reconsideration on the Crime of Leaking State Secrets by a Lawyer under the Law on Lawyers", 6th East- China Lawyer Symposium, 26/09/08, [http://www.fj.xinhuanet.com/news/2008-09/26/content\\_14512115.htm](http://www.fj.xinhuanet.com/news/2008-09/26/content_14512115.htm).

<sup>263</sup> See e.g. Biao Teng, "New Law on Lawyers: New Trap for Lawyer", China Human Rights Lawyers Concern Group, 01/11/07, <http://www.chrlcg-hk.org/?p=206>.

way to prevent its distortion and abuse by the authorities and officials. There is an ever-increasing danger faced by lawyers defending those “sensitive” cases, of being charged with subversion of state power, inciting subversion of state power, or with disclosure of state secrets or libel.<sup>264</sup> Similar to the situation argued above, there is, however, no concrete legal standard concerning “state secrets” for a court to bar a particular lawyer’s representation in its court.

Tax evasion and corruption are another favourite criminal prosecution initiated against lawyers. For example, lawyers who work for state-owned law firms have been convicted of embezzlement of public funds. Also, to a large extent, under the traditional culture, the judicial system continues to function on a system of a network of relationships, as well as party supervision at every level, making the enforcement of law vulnerable to a web of corruption and official impunity.<sup>265</sup> Judges maintain tight control over the courts and the cases that can be heard. In order to carry on their work, lawyers reportedly often need to bribe law enforcers, including paying file retrieval fees, service fees and fees for referrals from judges. Where bribery is a huge problem, lawyers are easy targets for selective prosecution. They have also sometimes been convicted of criminal defamation for revealing official misconduct. There has often been suspicion that these cases were a form of revenge by legal authorities, because the lawyers had criticized the state officers, annoyed the court by constantly appealing on their clients’ behalf, or had transferred some defence material to the defendant’s family.<sup>266</sup> In these cases the lawyers can be deprived of the right to represent clients in those particular courts or districts for several years or

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<sup>264</sup> See Huijun Zhang, “The First Case in Which a Lawyer was Sentenced for Leaking State Secrets in Our Country”, *Legal Daily*, 14/05/01, <http://www.china-lawyering.com/main/list.asp?unid=146>; See also Jianzhang Yin, “The Crime of Leaking State Secrets: Tale of Adjudication of the First Case of Leaking State Secrets by a Lawyer in Our Country”, (2001) *Chinese Lawyers*, pp.39-42; Jianzhang Wen and Minquan Liu, *op.cit.*, fn159. Qiulan Chen, *op.cit.*, fn 246, p.46

<sup>265</sup> See Young Nam Cho, “Symbiotic Neighbor or Extra-Court Judge? The Supervision over Courts by Chinese Local People’s Congresses”, (2003) 176 *The China Quarterly*, p1068-1083; William P. Alford, “Tasseled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers”, *China Quarterly* 141 (1995), pp.22-28.

<sup>266</sup> See News Report of a very controversial case of Defrauding Money out of Clients by Lawyer Ma Kedong in 2007, e.g. Wei Song and Jiagang Tian, “Ma Kedong Case is shaking up the Circle of Lawyer in China”, *Democracy and Law Times*, 07/10/07, <http://www.chinanews.com.cn/gn/news/2007/10-07/1042279.shtml>; also see Xiaojian Xie, “Discussion on the Revengeful Prosecution against Lawyers”, (2009) 2 *Inner Mongolia Social Sciences*, pp.12-16.

even sentenced to imprisonment. This fact has further complicated the climate in which lawyers are practising criminal law.

#### **4.4.3 Restrictive Administrative Control**

Administrative control over lawyers has been strengthened, particularly during the “Strike-Hard” campaigns. The Law on Lawyers continues giving authority to the judicial administration departments of the MOJ to “supervise and guide lawyers, law firms and lawyers associations”.<sup>267</sup> This means that the MOJ has the authority to require lawyers associations and lawyers to follow their instructions about how the legal profession operates, the range of professional activities lawyers can engage in, and at what level lawyers’ fees are set. The judicial administration departments and their equivalents at the local level have the power to issue warnings or sanctions, or to revoke the licences of lawyers who violate the Law on Lawyers.<sup>268</sup> In practice, these decisions are almost impossible to challenge. Through the annual renewal of lawyers’ licences, the judicial administration departments are able to ensure the compliance of lawyers with their directives.<sup>269</sup> In some cases, defence lawyers are forbidden or informally discouraged from assisting a detainee by the local bureau of the MOJ. Justice departments across the country have issued executive documents regulating legal services provided by lawyers to exercise control over defence lawyers’ conduct in all cases. Most of these documents establish the case reporting system and approval practices that require lawyers and their law firms to report “major or difficult cases” to the local justice department either for filing or approval purposes.

In Beijing, for example, according to rules issued in early 1999, without the advance approval of the Leading Group established by the Municipal Justice Ministry, no defence lawyer may accept a case that involves state security, foreigners or critical

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<sup>267</sup> Law on Lawyers 2007, Article 4.

<sup>268</sup> Ibid., Chapter 6.

<sup>269</sup> Ibid., Article 24.



social influences.<sup>270</sup> Therefore all cases concerning “state security” as well as those involving celebrities or high ranking officials above director level must be reported. Lawyers handling such cases at every stage of the case must report to and abide by decisions which may concern the substantive outcome of a case brought by the Leading Group.<sup>271</sup> If a written report causes the Leading Group to believe that a meeting is necessary with the lawyer handling the case, it can summon him to report relevant circumstances, which include the tactics adopted by the lawyer for handling the case as well as the issues that need to be discussed.<sup>272</sup> The Leading Group can coordinate the work contacts between lawyers and relevant agencies.<sup>273</sup>

Although the ACLA is the organization for all the lawyers in China which should serve to safeguard the rights and interests of lawyers, the efforts of it have been compromised in their autonomy from the MOJ and have become powerless and ineffective to safeguard the legal rights of lawyers. The ACLA passed *Rules on the Committee for Safeguarding Lawyer’s legal Rights while Practising Law* (Safeguarding Rules) to protect the rights of lawyers and ensure that suspects can be adequately represented in criminal trials.<sup>274</sup> According to these Safeguarding Rules, the ACLA and its local subordinates were to formally establish a sub-committee on safeguarding lawyers’ rights in 1998 to deal with cases regarding violations of lawyers’ legal rights and interests. However, as mentioned above, the ACLA’s Secretary-general and three deputy secretaries have strong connections to the MOJ.<sup>275</sup> Such close connections cast doubts on an association that is supposed to be working independently to protect the rights of lawyers. Therefore although the sub-committees were expected to take a strong position on protecting lawyers, it appears that they only publicize cases and exert influence over the local government

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<sup>270</sup> On the System of Asking for Instructions and Reporting When Law Firms Handle Major Legal Matters, 14 January 1999.

<sup>271</sup> Ibid., Article 7.

<sup>272</sup> Ibid., Article 6.

<sup>273</sup> Ibid., Article 2.

<sup>274</sup> Rules on the Committee for Safeguarding Lawyer’s legal Rights while Practising Law, 20/11/97, [hereafter Safeguarding Rules]

<sup>275</sup> See 2.2, pp.421-422.

in order to rescue lawyers in trouble.<sup>276</sup>

So there is further cause for concern that the adoption of *Guiding Opinions on Lawyers Handling Collective Cases* in March 2006 (Guiding Opinions of 2006) led to further extensive restriction on lawyers' work and increasing risks to their persons.<sup>277</sup> Citing the need to maintain social stability as a reason for their promulgation, the Guiding Opinions of 2006 instructs lawyers to seek the "supervision and guidance" of the judicial administration when handling sensitive cases or cases involving more than ten people.<sup>278</sup> The ACLA have the authority to look into how a lawyer is handling a case and to put forward suggestions.<sup>279</sup> Cases involving large numbers of people are generally related to the "class action" challenges made to government policies. Over the past few years, China has seen a sharp increase in public protests, both in rural and urban areas.<sup>280</sup> The ACLA says that the Guiding Opinions of 2006 are aimed at enhancing the ability of lawyers to resolve disputes between citizens and their respective local governments. In fact, the Guiding Opinions of 2006 quash the independence of lawyers significantly and sharply curtail their meaningful role in seeking justice and ensuring the effectiveness of legislative, administrative, judicial or other measures taken to prevent the abuse of state power, for example by police mistreatment.<sup>281</sup>

According to the Guiding Opinions of 2006, only politically qualified lawyers from the Government's perspective are allowed to deal with collective, major and sensitive cases and before accepting those cases, they need the approval of at least three law firm partners.<sup>282</sup> Section II of the Guiding Opinions of 2006 particularly requires a lawyer to communicate promptly and fully with the relevant judicial organs about collective cases as well as to actively pass on information about the dispute to the

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<sup>276</sup> Safeguarding Rules Article 3.

<sup>277</sup> The Guiding Opinions on Lawyers Handling Collective Cases, 20/03/06, (hereafter Guiding Opinions of 2006).

<sup>278</sup> Ibid., I (1) and I (3).

<sup>279</sup> Ibid, I (3) and IV.

<sup>280</sup> See Chap4, 4.1.1, pp.244-247.

<sup>281</sup> See generally, Human Rights Watch, "A Great Danger for Lawyers", Volume 18, No. 15(c), 12/06.

<sup>282</sup> See Guiding Opinions of 2006, I (2) and III (3).

judicial organs, and assist in ascertaining the facts.<sup>283</sup> The new rule also warns lawyers not to encourage their clients to participate or participate themselves in petitions to government offices.<sup>284</sup> If lawyers discover problems that may intensify the dispute, or discover that the dispute may escalate, they must immediately report it to the judicial authorities. Lawyers are also instructed to avoid distortion of the details of the case or false testimonies that create a situation where the popular mood becomes unstable.<sup>285</sup> If this is the case, the lawyer is obliged to report the situation promptly to the relevant government departments. These provisions seriously negate the principle of confidentiality between lawyers and their clients. Lawyers who act for such groups are often those most in need of external assistance, yet the Guidance Opinions of 2006 provides that contact with foreign organizations and the media is expressly discouraged in such cases. Lawyers who violate the rules will be punished by the Association or by judicial departments. The contradiction is particularly acute in cases where one of the parties in the case is precisely the authority to which the lawyer must report.

Several provinces and municipalities have since adopted similar regulations to the Guiding Opinions of 2006, in which lawyers' involvement in major, difficult and sensitive cases is actually even more restricted. For example, in February 2004, the Nantong City Bureau of Justice issued an *Opinion on Further Strengthening the Guidance of Lawyers Handling Major Cases*, which was the first document to provide a definition of major cases.<sup>286</sup> The scope of cases considered "major" was widened, including cases involving national politics and social stability, cases that have an extensive and sensitive influence in society, cases that attract a high degree of attention, cases involving more than ten people, complicated cases and cases involving a plea of not guilty, etc.<sup>287</sup> Locally issued guidance notes placing similar

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<sup>283</sup> Ibid., II (5).

<sup>284</sup> Ibid., II (4).

<sup>285</sup> Ibid., II (1).

<sup>286</sup> See Nantong City Bureau of Justice, Opinion on Further Strengthening the Guidance of Lawyers Handling Major Cases, 28/02/04, <http://www.ntda.gov.cn/wjzxqw/W2580001035.htm>.

<sup>287</sup> Ibid., Article 1.

restrictions on lawyers' independence were also issued by justice bureaus in Guangdong, Shenyang and Shenzhen in 2006.<sup>288</sup> These regulations also seriously restrict lawyers' freedom of expression. Failure to follow the instructions of the judicial bureau, which regulates the local practice of law, can lead to loss of benefits and to administrative sanctions that include suspension of a lawyer's professional licence and even closure of his law firm. Thus, not only the livelihood of the defence lawyer is at stake, but also that of his colleagues, which is undoubtedly why some judicial bureaus require a would-be defender to discuss whether and how to deal with a criminal representation with the other lawyers in his firm before deciding on a course of action. For example, the Several Provisions of Anhui Province on Law Practice issued by the Standing Committee of the People's Congress of Anhui Province states that the decision to defend someone on the basis of a not guilty plea should be discussed collectively within the law firm to which the defence lawyer belongs.<sup>289</sup>

Legal restrictions are necessary for the Socialist legal system, but must have a limit. Proper control can promote the effective functioning of the legal system. Excessive control will cause legal disorder. At the moment in China, things have still gone too far, mainly as to the fundamental rights of lawyers. This even causes the basic rights that lawyers should enjoy to exist in name only. In addition, because laws in this regard are not clear enough, the public security agency, the procuratorate, and the court, when enforcing the new CCPL, all introduce some regulations on its implementation, in some respects to extend and broaden the limitation provisions. This is abnormal interference. In these circumstances, the result is that some suspects have been unable to find a lawyer willing to take their case because of the sensitive nature of the case, leaving them to either not pursue their grievance or to represent

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<sup>288</sup> See e.g. Guangdong Municipal Bureau of Justice and the Guangdong Lawyers Association, Notice on Strengthening Guidance and Supervisory on Lawyers' Work in Handling Major Sensitive and Collective Cases, 10/09/04; Shenzhen Municipal Bureau of Justice, Provisional Regulation on Lawyers' Work in Handling Sensitive and Collective Cases, 26/06/06, <http://www.szlawyers.com/ShowDetail.asp?ArticleId=2346>; Shenyang City Bureau of Justice, Specific Opinions on Reporting and Requesting Instructions by Lawyers When Handling Important, Difficult, or Sensitive Cases, 04/06.

<sup>289</sup> Several Provisions of Anhui Province on Lawyer's Practice, 26/03/99, Article 28.

themselves.<sup>290</sup> This situation clearly damages the interest of suspects and defendants, and also thus the aim of the reformed CCPL to provide more protection of human rights guaranteed under ICCPR and relevant human rights instruments. The combination of these restrictions and controls over lawyers has had a chilling effect on the criminal bar, hindering the number and ability of lawyers handling sensitive cases, and undermining the overall independence, legitimacy, and accountability of the legal system.

## **5. Further Improvement**

Earlier analysis in this chapter has revealed that the environment in which lawyers work remains highly unsatisfactory according to international norms, although the reform of the 1996 CCPL provides for a greater role for lawyers in the criminal process. The problems now existing in the criminal defence by lawyers in China are complicated and multi-faceted. It is an important issue that is worthy of attention in the coming days how to ease the plight of defence lawyers in legislation and practice, and how to further enhance the guarantee of the right to defence on a criminal charge in China with minimum international standards, taking the stipulations of the ICCPR and the Basic Principles on the Role of Lawyers as standards. The development of the criminal defence system is a systematic project which involves legislative amendments, a correct understanding and implementation of the law in judicial practice and further distillation of the traditional legal culture concerning criminal defence.

### **5.1 Methods of Strengthening the Implementation of the Current Law**

As for the above mentioned problems concerning the poor enforcement of the law in practice, the provisions for the criminal defence in current Chinese legislation should

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<sup>290</sup> ACLA Report on Statistics and Analysis of Business Development Data on the Profession of Chinese Lawyers in 2002, 20/08/03; Chinese Government White Paper: The Progress of Human Rights in China 2000-2004; Xinhua News, "China has More Than 143,000 Lawyers", 16/04/08, <http://english.peopledaily.com.cn/90001/90776/90882/6393774.html>. From the official data, the number of lawyers in China has grown steadily: from 100,000 in the year 2000 to 143,000 by April 2008, or roughly one lawyer for every 100,000 people.

be adequately put into effect. No matter how much advice or opinions there are on criminal defence in the coming reform, its function in judicial practice still and always is affected by the current legislation. On the one hand, the judiciary, the police and the institutions of local governments should strictly abide by the stipulation of laws in practice. The introduction of an earlier judicial involvement in pre-trial procedural issues as recommended in Chapter Five may offer an opportunity for the individuals to oppose state authorities effectively and on an equal footing. Officials who obstruct the course of justice should be charged appropriately, according to certain criteria set out clearly in the law. When the relative supreme judicial organs make their own judicial interpretations to the CCPL, the original intention of the legislation of the CCPL and the Law on Lawyers 2007 should be strictly adhered to in order to keep up with the requirement of the minimum standards for the relative international agreements. The local rules and the judicial interpretations of every supreme judicial organ should correspond with each other to apply the laws faithfully, so as to avoid contradiction among them and thus weaken the right to defence of suspects. All the local and administrative rules and regulations should abolish those additional limitations imposed on the rights of lawyers beyond those defined in the national law or regulations.

Related to the discussion in the previous chapters Five and Six, the lack of effectiveness of the defence also derives from the lack of other procedural guarantees that are typically associated with legal representation. The fulfilment of the lawyer's defence function is a closely connected with a series of system designs in the pre-trial proceedings and the degree of perfection in compulsory measures is one of the very important issues. For example, regarding those pre-trial compulsory measures, since the adoption of them lacks strict procedural restriction and safeguards, the investigation authority enjoys rather too much power of discretion, which prevents the suspect from conducting his procedural defence. Without relevant procedural guarantees, it is unlikely to expect defence lawyers to single-handedly reverse the earlier practices of the police, the prosecution and the court. Along with

the contribution of the lawyer, the legal system must also make progress in China.

On the other hand, in the face of the present unfavourable environment in the defence process, defence lawyers must overcome the negative ethos, and continuously consolidate their legal knowledge and practical skills in criminal defence, including investigation of crimes, gathering of evidence and representation and advocacy at trial. In order to enhance the overall image of legal professionals, internal demands for better ethics and discipline should be encouraged. China should improve related systems for managing the legal profession as suggested below, handle ethical problems and illegal conduct within the legal profession strictly, and enhance professional ethics among lawyers. Professional responsibility guidelines and professional disciplines should be set up in detail and comprehensively to channel the conduct of lawyers in the right direction.

## **5.2 Further Reform of the Criminal Defence Legislation based on the Relative ICCPR Standards**

As presented in Chapters Two and Three, the principle of safeguarding the equal, timely and effective access of the accused to the assistance of legal counsel is the guiding ideology observed by the UN and the European Court when formulating international standards for criminal defence. This should also be the target in improving the criminal defence system in China. In the coming amendment of the legislation, some concrete countermeasures should be introduced regarding criminal defence in the pre-trial proceedings, including full status of the defender in the early stage of the case, an adequate legal aid service, an evidence disclosure procedure, a confidential meeting between suspects and lawyers, and a system of immunity for lawyers, so as to consolidate the right to defence of criminal defence lawyers and to restrict the abuse of power by investigation agencies and the prosecution.

### **5.2.1 Confirm Action of Early Participation**

The inconsistent position of the criminal defence at the early stage, in the middle,

and at the end of the entire Chinese criminal proceedings should be totally changed by legislation so as to be compatible with international standards. The law therefore should clearly state that all suspects may retain a defender at any time. The status, timescale and functions of the criminal defence should be defined in detail to accord with the right to a fair trial in Article 14 (3)(b) and 14(3)(d) of ICCPR.<sup>291</sup> In particular, the status of defender and the functions of lawyers who provide legal services in the period of investigation shall be ascertained and strengthened, so that the suspects can protect their legal rights by appointing lawyers in time at the beginning of the criminal proceedings and receiving help from the lawyers to exercise their rights and avoid illegal measures against them such as extortion of confessions by torture.<sup>292</sup>

In order to ensure that the right of access to a lawyer is effective, a rights notification system shall be set up. The law should clearly stipulate that the suspect has the right to be informed both in written and oral form by police officers that he may retain a defence attorney before the first interrogation or when the compulsory measures are taken against him.<sup>293</sup> The procuratorate should, from the date of receiving the file record of a case transferred for examination before the prosecution, inform the suspect in written form that he has the right to appoint persons as his defenders. The court should, from the date of accepting a case, inform the defendant in written form that he has the right to appoint persons as his defenders. The courts, the procuratorates and the public security agencies should keep records for a subsidiary file on whether the suspects have been informed and on whether the suspects have appointed defenders. Where suspects make application for a defender, word should be sent to their relatives or other persons appointed by them within 24 hours. If a criminal suspect, before the first question from the investigation organ or from the date of restraining measures, is financially unable to employ a lawyer, the public security organ and the people's prosecutorial office will be obliged to notify him of

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<sup>291</sup> See Chap2, 6.3, pp.74-81.

<sup>292</sup> See *Öcalan v. Turkey*, Chap3, 3.6.2, pp.149; *Murray v the UK*, Chap3, 4.6.2.2, pp.199-200.

<sup>293</sup> See *Galstyan v Armenia*, Chap3, 4.6.1, pp.197; *Averill v UK*, Chap3, 4.6.2.2, p.201.



his rights to apply for criminal legal aid. Any case in which the public security organ and the prosecutorial office should notify but do not notify suspects of their right shall be defined as a breach of procedural law, and the confessions obtained should be excluded from the evidence. In addition to the apparent lack of rules governing illegally obtained evidence as discussed in Chapter Six, it is extremely doubtful that in practice the Chinese legislature can go so far as to adopt this exclusionary rule for the sake of providing further procedural protection for suspects, especially in the current social climate which put most emphasis on controlling crime.<sup>294</sup>

Also, under current conditions with the imbalance in the judicial system, the right of a lawyer to be present should be absolutely ensured to the greatest extent to protect the cardinal human rights of a citizen. Therefore the coming reform should clearly add provisions to guarantee the right to the presence of a lawyer when the competent organization is investigating to obtain evidence, especially the right to his presence at the time of interrogation of a suspect.<sup>295</sup> The law may add the restriction that in certain particular circumstances the defence lawyer may not be present.<sup>296</sup> But the lawyers should still be notified of the time, date, and place of the interrogation of an accused person or suspect during the investigation. These particular circumstances have to be clearly defined in the law and may include a co-offenders attempt to escape, rescuing a hostage or searching for drugs or dangerous items such as firearms, ammunition, knives, inflammable objects or materials. The police officer, prosecutor, defence attorney, agent of the complainant, or any other person performing his duty under law during the investigation shall not disclose information acquired through the performance of this duty during the investigation, unless otherwise permitted by law, or if it is necessary for the protection of the public interest or any other legitimate interest.

### 5.2.2 The Legal Aid Service

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<sup>294</sup> Also see Chap6, 3.2, pp.353-356.

<sup>295</sup> See *Magee v UK, Averill v UK*, Chap3, 4.6.2.2, pp.200-201.

<sup>296</sup> See *Murray v UK* Chap3, 4.6.2.2, p.203.

Certainly the implementation of the above stipulations needs related systems, especially an improved legal aid system to demonstrate the fairness and justice of the criminal proceedings. Firstly, the Chinese legal aid system must develop in the direction of broadening the scope of eligibility for legal aid, and further its application in the investigation proceedings. Generally, the basic criterion in the granting of criminal legal aid can be risk of imprisonment or the death penalty, especially for a serious crime.<sup>297</sup> Anyone who does not have the financial resources to hire a lawyer and has no other access to legal assistance can apply for legal aid. As to the financial qualification of the potential applicant for legal aid, there should be a relatively fixed standard amount in the law based on the current average living standard. Legal aid should cover every stage of the criminal proceedings.

Secondly, considering its status and force as well as the potentially large numbers of government departments and institutions where legal aid may be involved, it is the National People's Congress or the Standing Committee of National People's Congress that must act soon to establish a law on legal aid. A complete set of concrete mechanisms needs to be set up to ensure the timely and successful implementation of criminal legal aid for those who may need it.<sup>298</sup> Besides the legal aid centres supported by the government, more independent legal aid organisations staffed with trained advisers and qualified lawyers should be established. The organizational structure, operating organization and organization management related to legal aid must be clarified. The legal aid institutions in China should focus on setting up professional legal aid institutions and undertaking the task of encouraging the development of the legal aid system with legal aid case management and monitoring. A long-term legal aid programme supported by the government with the participation of different social authorities to provide legal advice and information, continued training of legal aid centre staff, as well as private lawyers in the substantive issues of legal aid and public legal education can help to ensure the

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<sup>297</sup> See *Aliboeva v. Tajikistan* Chap2, 6.3.2, p.79; *Twalib v. Greece* Chap3, 4.6.3, p.204.

<sup>298</sup> See Chap3, 4.6.3, *R.D. v Poland*, p.205.

quality of legal aid services.

Thirdly, in its financial planning, the government at each level must budget for the minimum amount of funds needed for legal aid and the full amount of these funds should be provided on time each year. If the local government is financially unable to provide the minimum amount of legal aid funding, the central government or local government shall implement financial support policies, through which a transfer payment or the setting up of legal aid funds shall be arranged to solve the financial difficulty based on the minimum funding standard prevailing in the region to be supported. With the current situation in mind, the local government should not just rely on the funds provided by the central government. The funds provided by the central government shall be used primarily to decrease the gap in legal aid funding due to the imbalance in economic development in different regions, thus allowing the citizens in different regions to enjoy some degree of equal treatment.

### **5.2.3 Guaranteeing the Right to Meet Suspects in Private**

To improve defence lawyers' right to meet with suspects, the coming reform of the CCPL should bring the legislation into line with the provisions of the Law on Lawyers of 2007. As for the right to meeting, this can be seen from two angles. On the one hand, the timing of the meeting is a very important issue. In particular, the provision stating that a request for meeting can be denied in cases involving state secrets should be revoked. The law should clearly state that a defence lawyer may interview and correspond with a suspect or an accused person in custody whenever he thinks it is necessary, provided that if sufficient facts exist to justify the apprehension that such a defender may destroy, fabricate, or alter evidence or form a conspiracy with a co-offender or witness, such interviews or correspondence may be limited.<sup>299</sup> Any other defenders, with permission of the court may also meet and correspond with the suspect or defendant in custody. The agencies concerned must arrange the meeting within 48 hours.

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<sup>299</sup> See Chap3, *Öcalan v Turkey*, 3.6.2, p149; 4.6, pp.196-198.

On the other hand, the confidentiality of the meeting is another important human rights issue for suspects.<sup>300</sup> The law should openly state that defence lawyers and other defenders should meet with the suspects without restriction as to duration and frequency and without the presence of a third party and not be subject to any supervision in accordance with the law. Lawyers should enjoy professional privilege. The law should guarantee that lawyers cannot be compelled to disclose what has come to their knowledge in the context of the defence. This means defence lawyers cannot be forced to disclose confidential information in a witness capacity. If a case involves “state secrets”, the defence lawyer and other defenders should have a specific duty to maintain confidentiality. Instead of applying of investigative methods to the communication between defence lawyers and their clients such as interception of telephone conversations, the role of the court and procuratorate, the public security organs and the custody organs should only be to provide the best possible conditions and convenience for lawyers to meet with suspects.

#### **5.2.4 Ensuring Proper Access to Information**

It is essential that the defence should have all the necessary information available to enhance the truth-finding process and ensure a fair trial.<sup>301</sup> Effective disclosure also contributes to a more effective criminal justice system and to earlier resolution of cases. Therefore in the coming reform, China should legislate to strengthen procedures for disclosing evidence in criminal cases. A statutory code of practice should be provided to detail the appropriate disclosure procedures and responsibilities. Firstly, considering that that prosecutors have a disproportionate advantage in collecting evidence and that lawyers are given only a short period of time to prepare their defence in China, it is suggested that a procedure should be established to better protect the right of lawyers to access information. The prosecution must accept the obligation of full disclosure of evidence which weakens

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<sup>300</sup> See Chap3, 4.6.2.2, *Brennan v UK*, pp.201-202.

<sup>301</sup> See Chap2, 6.3.1, p.75; *Öcalan v. Turkey*, Chap3, 4.6.2.1, p.198.

the prosecution case or strengthens that of the suspects.<sup>302</sup> And the procuratorate agencies take the lead in respect of evidence disclosure. The law may specifically require that the defendant's duty of disclosure is not triggered until the prosecuting agencies comply with the defendant's disclosure requests. But for the purpose of guaranteeing justice and efficiency, the lawyer is also obliged to show his evidence in return. The law should be carefully worded as regards the supervision of disclosure and should clearly stipulate the penalty for not fulfilling the evidence disclosure obligation, including violations by the defence party. The power to impose any sanction for failure to comply with a disclosure request should be granted to the court only. Potential methods of sanction include the granting of additional time for preparation to the party who has been disadvantaged by the non-compliance, or the exclusion of a certain type of defence or a certain piece of evidence.

Secondly, there should be legislation to clarify the legal requirements of disclosure, including the specific scope and degree of the information. Generally, all the major evidence related to the case should be included in the category of judicial documents, and therefore be accessible to lawyers. The law should state that defence lawyers have the right to find out from the investigation agency about the suspected crime, and to consult, extract and duplicate all the records of suspects' statement, all the technical verification materials, and all the judicial documents pertaining to the current case. Under the current situation in China, the law should specifically emphasise that lawyers may have access to prosecution evidence which has not been submitted to the courts.<sup>303</sup> As the defendant party only needs to take responsibility for the limited disclosure of evidence, the evidence to be shown by the defendant party to the procurator should include evidence to prove that the defendant was not on the crime scene when the crime was committed, evidence to prove that the defendant was acting in self-defence and avoiding danger in emergency; evidence to prove that when the defendant committed the alleged crimes, he was not criminally

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<sup>302</sup> See *Dowsett v. UK*, Chap3, 4.3, pp.161-162.

<sup>303</sup> See *Rowe and Davis v UK*, Chap3, 4.3, p.162.

liable or had not reached the age of criminal liability and so on.

Thirdly, a mechanism such as public interest immunity hearings should be introduced and established in statute to resolve the conflicts of interest which arise when disclosure of sensitive and confidential information might put witnesses or public security interests at risk.<sup>304</sup> Disputes arising from disclosure should be subject to judicial review. The procedure is likely to be fairer if it is a court rather than an administrative or executive officer is making the decision, provided the court can hear the whole of the evidence and can make a fair decision about whether the subject should be informed of the sensitive information. In order to achieve a balance between protecting sensitive or confidential information and the requirement to disclose, the court may limit the right to access of certain information in some situations, such as if the information, materials and documents are irrelevant to the case, could seriously hamper law enforcement and prosecution efforts or constitute a clearly unwarranted invasion of the personal privacy of a third person. Special counsel can be arranged to represent interest of individuals under this kind of situation.<sup>305</sup> Other defenders, with permission from the court, may also consult, extract and duplicate the above-mentioned materials. The investigation organs, the procuratorates and the Courts should provide adequate facilities and maximum convenience for defenders to consult, extract and duplicate the material pertaining to the current cases. Meanwhile, an adequate witness and victim protection mechanism should be established along with the implementation of the disclosure of evidence obligation in order to protect the personal safety of the witnesses and victims, as well as that of the members of their family.<sup>306</sup> Tremendous resources will be needed to adopt these mechanisms in China and it does not seem very practical to implement this change under the current social situation and in only a short time. Therefore an

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<sup>304</sup> See *Jasper and Fitt v UK and Edwards and Lewis v UK*, Chap3, 4.3, pp.164-167.

<sup>305</sup> See *Edwards and Lewis v. UK*, Chap3, 4.3, pp.161-167.

<sup>306</sup> China's problem with witness cooperation has long been a difficult issue in the criminal justice system. The ultimate solution to witness cooperation lies in the implementation of effective compulsory measures and sufficient protective methods but not in the rejection of pre-trial disclosure. The details of the issue on witness cooperation in China are beyond the scope of this thesis and will be the subject of a separate and comprehensive study.

alternative solution could be to disclose only the content of witness statements but to keep the identities of witnesses secret until trial.<sup>307</sup>

### **5.2.5 Better Protection for Personal Security**

To genuinely ensure the right to legal assistance for suspects and to achieve an “equity of arms” in criminal proceedings, China needs to tighten up the access right of lawyers to the criminal defence by according them an effective guarantee that they will be able to carry out their professional duties without intimidation, hindrance, harassment or improper interference. Firstly, Article 306 of the 1997 CCL should be abolished as soon as possible as many academics have suggested. This would greatly help to improve the status of defence lawyers. However, while a repeal of Article 306 would be a moral victory to show that the problem of lawyer intimidation has been officially recognized, the settlement of the issue concerning harassment of defence lawyers should not rely solely on it. Given the blanket coverage under Article 307 of the 1997 CCL which is a general provision prohibiting evidence tampering and perjury, eliminating Article 306 would have no effect on the prosecutor’s ability to charge the lawyers with evidence tampering or encouraging perjury. Therefore this issue should be considered in the context of a set of broader reforms to address the procedural and institutional problems.

For example, to avoid any possible legal trap, some detailed measures to protect lawyers can be incorporated in the law. Lawyers may obtain testimony by letter or have relevant people present whenever they take evidence from witnesses. The future amendment can state that at least two lawyers should be present during the process of taking evidence from witnesses, which could prevent the authorities from incriminating lawyers later if a witness changes his or her story. The record of the meeting must include the details of all the questions posed by the lawyer and the

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<sup>307</sup> It is obvious that this scheme still leaves open the possibility of retaliation during or after the trial, but it should not become a reason to reject the establishment of pre-trial disclosure because the ultimate solution to witness cooperation lies in the implementation of effective measures but not in the rejection of pre-trial disclosure.

legal advice they provide, and should be signed by the suspects. Also, more precise legal standards on evidence should be defined under the law to guide the application of Article 307. According to the current practice illustrated above, the law should clarify the definition of statutory terms such as “collude”, “threaten” and “induce” to prevent manipulation by the prosecutors and to make it clear to lawyers what behaviour violates the law. More than one piece of evidence should be required by law to demonstrate that a lawyer knowingly engaged or assisted in the perjury or fabrication of evidence.

Secondly, the universal principles that exempt a lawyer from prosecution for the performance of his professional duties should be genuinely and sincerely established in China. In particular, those provisions which make an exception for language that endangers state security, maliciously defames another, or seriously disrupts the order of the court should be removed. The law should clearly demand that in general circumstances, lawyer, who defend the legal rights of suspects, should enjoy complete exemption rights regarding the oral or written statements made and submitted in court. As mentioned above, defence lawyers in China are often threatened by the possibility that if their honest representations are based on faulty information, they will also be subject to criminal prosecution for perjury or fabrication of records. Therefore immunity of lawyers from liability for statement information might reduce the incidence of wrongful or revenge prosecution of defence lawyers and relieve some fears of potential criminal liability for lawyers in criminal defence practice. The law could also contain very detailed provisions to require that lawyers appearing in court should act with courtesy towards the court. In order to carry out their work independently and effectively, in the event that a lawyer uses inappropriate language or behaviour, the presiding judge may issue a warning and correct this in court but should not be allowed to discipline or punish a lawyer.

Thirdly, the ACLA should be strengthened in its disciplinary power and be granted full independence so that it can adequately represent the interest of lawyers, protect



their professional integrity and be responsible for professional discipline. The provisions stipulating that the MOJ should exercise supervision and guidance of the ACLA should be abolished. The law should firmly ensure that the ACLA carries out its functions without external interference. The administrative regulations and similar local regulations that interfere with the ability of lawyers to represent the interests of their clients should be removed. As opposed to criminal prosecution, internal discipline by the ACLA should become the primary means of monitoring lawyers' activities and investigating and punishing conduct which is in violation of professional ethics and discipline. Such a mechanism would most likely require an amendment to Chapter six of the Law on Lawyers 2007 and Articles 38 and 45 of the Criminal Procedure Law 1996, all of which require the MOJ, law enforcement organs and judicial authorities to seek criminal liability in cases of evidence tampering, perjury and related offences. A disciplinary committee within the ACLA should be established for this purpose. There would obviously be concerns about professional ethics and the capacity of the ACLA to properly police its own profession and handle those disciplinary investigations. In order to address this concern, at this stage of the reform, the committee could be composed of members of the ACLA as well as officials representative from the courts, the procuratorate, and the MOJ.

Then the power to investigate and discipline or punish lawyers for inappropriate conducts which does not amount to criminal liability, such as disrespectful behaviour in court, should lie exclusively with the disciplinary committee of the ACLA. The sanctions could range from a warning to suspension or revocation of the lawyer's licence. In serious cases such as evidence perjury and fabrication, upon the recommendation of the relevant procuratorate or public security agencies, the disciplinary committee would investigate the case and refer it back to the relevant procuratorate with jurisdiction over the lawyer in question for criminal prosecution. To avoid conflicts of interest between prosecutors and defence lawyers, such cases should be monitored closely by the Court and the MOJ. Given the problems

described in this chapter, on the one hand, lawyers would be more effectively protected from charges of criminal liability under such a mechanism. On the other hand, in order to improve the image of the legal profession and to prevent the likelihood of interference from the law enforcement authorities, given such responsibility for disciplinary investigation to the law association would create an incentive for them to investigate cases carefully and thoroughly. It would be a positive development for lawyers' associations to improve their professionalism and ethical status, to strengthen their autonomy and to enhance the capacity of self-discipline.

### **5.3 Removing the Ideological Barriers**

As observed in this chapter, the revised law on criminal defence is already effective, but so far real change has been very slow. It has to be enforced by the same police, procurators and judges. Despite the increased awareness of procedural fairness and conscious efforts to improve procedural safeguards within China's criminal justice system, the equality between officials and citizens, between the individual and the state confronting each other in criminal proceedings has not yet taken root in China. Criminal defence is still much preoccupied with substantive criminal law. So apart from the role transformation of roles and legislative amendment as suggested above, the most crucial and deepest problem is how to promote understanding in the whole country of the value of the system to protect human rights in criminal defence. The whole legal system and legal culture in China need to discard the old attitude to criminal defence and treat lawyers fairly. It is necessary to promote and correctly understand and position the legal profession in China's criminal justice system in the public mind, including the notion that the involvement of a lawyer is necessary to protect the legitimate rights of suspects. In particular, it is vital to raise the legal consciousness of the significance of procedural defence, as it is crucial for deterring illegal action by the government and enhancing the human rights of suspects. To do so, an educational program for the public on the right to defence and the right to have a lawyer in criminal proceedings should be established and linked to the legal aid

program. Radical and long-standing political and legal restructuring will be necessary in order to genuinely improve the right to defence for suspects in China.

## **6. Conclusion**

In conclusion, in comparison with the old CCPL, the revised CCPL is notable for the introduction of a more active role for lawyers in criminal proceedings in order to broaden the right of suspects in the criminal justice system. In particular, the right to legal counsel is granted at the police investigation stage which breaks down the long-standing barriers to the involvement of defence lawyers in the pre-trial stage of the criminal process. The right to have a lawyer and the ability of lawyers to represent suspects in China today has advanced considerably, beyond the almost complete absence of such protection in China's long history. There are high expectations that this improvement and its symbolic value will provide a most significant procedural safeguard for suspects set out by Article 14(3)(b) and (d) of ICCPR requiring that all persons facing a criminal charge, including suspects, be adequately represented by legal counsel. However, the foregoing presents a stiff challenge to lawyers and others concerned with the legal profession and legal development in China. The fairness of the pre-trial proceedings and the fairness of the criminal trial have not been integrated in a defence lawyer's representation of the suspects. Judicial practice indicates that lawyers continue to experience difficulties in preparing a proper defence. Therefore the environment in which lawyers work under the CCPL of 1996 remains extremely unsatisfactory according to international standards, particularly regarding Article 14 of ICCPR.

From the brief review above, both the legal culture and the social reality have greatly undermined this critical reform. As also illustrated in previous chapters, the fundamental reason is that during the transition period, reform efforts are being confronted with resistance from old ideologies and institutions. The theoretical basis for the right to defence is not really recognized in Chinese society. There is a lack of

cultural basis for the institution of lawyers and the function of criminal defence but a long standing negative attitude toward criminal defence is embedded in Chinese culture. The role of lawyers in legal defence envisaged in the revised CCPL has also been severely diminished by the deficiency of the law and its implementation measures. The continuing imbalance of power in the criminal justice system has put the lawyers into an unexpectedly absurd situation and caused both embarrassment and difficulties for them. The ability of lawyers in China to represent and participate in the criminal trial is subject to many arbitrary restrictions imposed by judicial institutions and interference from other state authorities. Furthermore, the combination of the adverse provisions for lawyers in the law unfairly discriminates against lawyers and greatly increases the risk involved in engaging in criminal defence work. Particularly in the pre-trial stage, criminal lawyers face immense obstacles in gaining permission to meet suspects in detention confidentially. They are unable to review useful information and evidence from the investigation agencies. Lawyers largely fail to collect evidence on their own initiative, as when they undertake such work they are often harassed and intimidated, and sometimes detained or even convicted of crimes, merely for actively defending the interests of their clients. All of these difficulties greatly weaken their ability to prepare an effective defence for the suspect as required in Article 14(3)(b) of ICCPR and such practice does not accord with the fair trial required by Article 14(1) of ICCPR.

Therefore this chapter has sought to provide some suggestions for the coming reform in the light of the current situation in order to strengthen the right to defence by the lawyer in the pre-trial proceedings. The development and perfecting of the criminal defence system is a systematic project which involves legislative amendments, correct understanding and implementation of law in judicial practice and a further progression in people's awareness of the criminal defence system. To remove the struggles of lawyers in effectively representing suspects as illustrated above and genuinely expand the rights of criminal suspects and defendants, China needs to improve the implementation of its amended law, enhance the current system and

change the perception of the legal profession. To bring to genuine fruition the adversarial system, there must be an ideology of equality between officials and citizens as well as a system of equal adversarial rights between officials and citizens. As regards the transformation of criminal defence and the complications of this problem in social life, the criminal defence system in China can only be reformed by stages.

**A Critique of Human Rights Protection for Suspects in the Chinese  
Criminal Justice System:**

An Examination of the Extent to which There Is and Could in Future Be  
Compatibility between Chinese Law and Practice and International Human  
Rights Norms

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## **Volume III**

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## **Part IV**

### **Conclusion**



## **Chapter Eight**

### **How Far has China come towards Recognition of ICCPR standards in Key Aspects of the Criminal Justice System?**

Although some optimists predict that the newly revised CCPL might appear soon, the magnitude of the task should not be underestimated. This thesis has shown that China has good reason to boast of the tremendous progress made in increasing human rights protection for suspects in the criminal justice system in the last 30 years. On the other hand, compared to international standards, the distance for China to cover in order to achieve complete compliance cannot be disregarded. Suspects have often continued to be denied access to counsel and to endure lengthy pre-trial detention to extract confessions under duress or torture. These difficulties require extensive reforms to the Chinese criminal justice system, as well as the establishment of legal norms and a legal culture that protects individual and group rights, in the light of the international standards. Therefore a multitude of controversial issues awaits the NPC, particularly if the revision of the CCPL is to accompany and implement China's long-awaited ratification of the ICCPR. Ratification of the ICCPR and implementation in accordance with its terms would have a more profound effect on the PRC's political, legal and social systems than the PRC's entry into the World Trade Organization (WTO) has had upon its economy. Also achieving a meaningful reconciliation of the conflicting views of the MPS, the MOJ, the SPC, the SPP, the ACLA, influential academic experts and relevant Party organizations will require enormous legislative skill, time and energy. The challenges have been huge, and are likely to become monumental. Specific recommendations have been offered regarding different issues in the above chapters. Therefore the focus in this conclusion will be to summarise the relevant findings regarding all the research and to show the direction of the next CCPL reform movement.

It is essential to study the standards of the international human rights instruments and correctly and adequately understand them, then to compare the current conditions in China with these and see what can be done to attain these international standards completely. In Part Two, the thesis firstly provided an intensive study of the international standards concerning human rights protection for suspects in Article 7,

9 and 14 of ICCPR in Chapter Two and Article 3, 5 and 6 of ECHR in Chapter Three to show the comparative coverage. This part of the study demonstrates that neither universal nor regional law for the protection of the individual is static, but that they evolve in-step with new human needs that continue to emerge in society. Understanding of the international human rights covenants has inevitably changed over time. Developments in international rights protection for suspects have proceeded at a rapid pace and will most likely continue to do so whilst the international community is struggling with increasing crime and terrorism.<sup>1</sup> Appreciation of that change, as well as of the continued change in understanding, illuminates the general evolution of human rights movements as well as changing perceptions of international law. It is today clear that the international community attributes a very special moral and normative status to the international covenants. These international standards and norms represent a collective vision of how a criminal justice system should be structured and how criminal policy should be further developed to respond to emerging needs.

There are significant challenges in implementing international human rights covenants for China, due to the traditional legal culture and complicated social situation as illustrated later in Part Three, but the values enshrined in such treaties make it well worth the effort. In comparison with European standards and the best practices in some jurisdictions, the ICCPR standards are indeed the minimum standards and have a great potential for improvement in the future. These standards transcend the political and cultural barriers between the various nations in the world. There is a much greater recognition now of the centrality of democracy, rule of law, and respect for human rights to long-term peace, security, and economic and social development. The only way to move forward is if human rights become part of the whole framework for a new principled globalisation which affirms that the common humanity does not stop at national borders. Actually, China signed the ICCPR in 1998 and has ever since been seriously considering the issue of ratification. Ratification of ICCPR with genuine commitment would further facilitate China to make changes in law and practice in the criminal justice area as profound as those changes in economic law and practice required by China's entry into the WTO. Both

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<sup>1</sup> See e.g. discussions in Chap3 on the cases with terrorism issue in the jurisprudence of ECHR.

when considering the ratification and even later at the stage of the actual implementation, it is crucial to interpret and understand the ICCPR correctly and sufficiently. The research in Part Two on the definitions and interpretations of the ICCPR and ECHR clarifies some confusing aspects as to the understanding of the specific objectives, purpose of the instruments and the exact scope and meanings of the requirements set forth in its provisions. And therefore this particular part is the starting point of the whole thesis. It provides a comprehensive, clear and proper knowledge of the international standards with relevant attention to the main theme of this thesis on the issue of what the remaining differences and current problems in Chinese criminal justice are with regard to human rights protection for suspects.

## **1. Findings**

However, how fast, how deep and how comprehensive is the reform process of the criminal justice system in China in meeting with the international standards of human rights protection for suspects? These problems in the current system have been demonstrated and discussed through several controversial issues in Part Three of the thesis. In Part Three, on the one hand the progress China has made in meeting international standards has been identified in four specific areas of human rights protection for suspects, which in the continuing reform of CCPL, include the guiding ideology of the CCPL, pre-trial compulsory measures system, prevention of the use of illegal evidence obtained through torture and the right to legal counsel before trial. On the other hand, compared to the ICCPR and ECHR standards explained in Part Two, a careful analysis of these four key areas of the CCPL reform reveals that the current situation of human rights protection for suspects in the Chinese criminal justice system remains seriously deficient and there is still a great deal of room for improvement with regard to the ICCPR standards, as investigated in Part Three.

### **1.1 Guiding Ideology for the CCPL**

First of all, the international ideology and principle of human rights protection for suspects cannot be applied directly in the real world in China due to its legal tradition and national conditions, as discussed in Chapter Four. Just as the HRC has to realize the fact that the availability of financial resources is not only relevant for the realisation of economic, social and cultural rights, inherent in these procedural guarantees of the ICCPR for human rights protection in criminal justice is a far-

reaching potential for a step-by-step adaptation of the differing national legal systems to a common minimum standard of the “rule of law” in the State party. Owing to its historical background, cultural environment and ideology, China has drifted far away from the concept of the protection of human rights universally accepted by the international society.<sup>2</sup> Its legal tradition has the following features, which are contrary to the concepts of modern law, and which to a great extent, still have a profound influence on the present legal system.<sup>3</sup>

### **1.1.1 The Lack of a Cultural Foundation for Human Rights Protection in the Criminal Justice System**

In order to ensure the obedience of the people, social harmony and stability, the most striking traditional characteristic of Chinese criminal justice was its emphasis on the prevention of crime and the reform of the criminal, but its disregard of due process. Firstly, the traditional law is of the same nature as criminal law. The judicial system of the feudal period in China’s history is commonly characterized by the “presumption of guilt”.<sup>4</sup> Under this ideology, hardly any thought was given to human rights protection for the individual in criminal justice. The criminal justice system holds little respect for individual rights. Secondly, procedural law has basically been adopted as a tool for effecting substantive law and its own special value has not actually been given enough attention.<sup>5</sup> Therefore nobody would view criminal proceedings as an adversarial process between man and the state and it was impossible for suspects to be secure in the confrontation with the state power. Thirdly, the criminal procedure is also viewed as an instrument by which the government controls society and fights against its enemies and criminals.<sup>6</sup> Therefore the emphasis of law is on the protection of government powers and social interests, but is not seen as a bulwark for the individual against the state. The cooperation of suspects with law enforcement agencies in criminal investigations is automatically assumed in China and criminal proceedings are also mainly an educational experience for the public.

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<sup>2</sup> See Chap4, 2.2, pp.221-234.

<sup>3</sup> Ibid., 2.1, pp.212-213.

<sup>4</sup> Ibid., 2.1.1, p.213.

<sup>5</sup> Ibid., 2.1.2, p.216.

<sup>6</sup> Ibid., 2.1.3, p.218.

### **1.1.2 Guiding Principles for the CCPL of 1996**

As discussed in Chapter Four, in order to establish a modern criminal procedural system and research harmony with international standards on human rights protection, China has indeed over recent years begun to readjust its basic ideological approach to criminal justice away from a dominant value based on social control and towards a somewhat greater concern for the human rights protection of the suspects.<sup>7</sup> Essential moves have been made in the direction of establishing the fundamental principle of presumption of innocence; particularly Article 12 of CCPL in 1996 has come close to Article 14 of ICCPR.<sup>8</sup> Along with increasing attention to the independent value and impact of procedural justice in China, the law is also moving from neglecting procedure to emphasising procedural justness. This approach signals a commitment to the requirement of the principle of due process in Article 14(1) of ICCPR.<sup>9</sup> The CCPL of 1996 contributes to narrowing the gap in ideology between the Chinese criminal justice system and international standards and therefore the reform of the CCPL is moving in a positive direction to increase protections for suspects in the development of the Chinese criminal procedural system.

### **1.1.3 Existing Problems faced by the Forthcoming Reform on the Guiding Principles for the CCPL**

The impact and influence of a certain fundamental traditional legal culture persist in the contemporary legal system as to the aspects including how the legal institutions operate the law and social attitudes towards law. As a result of the traditional cultural influence on law, long-term public opinion emphasises that the interests of society as more important than those of the individual. In addition, Chinese society has become more complex and crime rates have been rising along with the high-speed economic development of recent years. Therefore, firstly, China is facing a huge difficulty in balancing the fight against crime and the protection of human rights.<sup>10</sup> The CCPL of 1996 still pays a great deal of attention to the need to fight crime and therefore it has not played a significant part in guaranteeing human rights protection for suspects and regulating law enforcement powers. It does not appear that it is likely to ensure adherence to the principle of presumption of innocence as required in Article 14(2)

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<sup>7</sup> See Chap4, 3, pp.232-233.

<sup>8</sup> Ibid., 3.1, p.236.

<sup>9</sup> Ibid., 3.2, p.242.

<sup>10</sup> Ibid., 4.1, p.244.

of ICCPR as shown in Chapter Four.<sup>11</sup> Also the lack of official recognition for the presumption of innocence in practice has resulted in continued presumption of guilt in the Chinese criminal justice system. Secondly, neglecting procedural justice in order to pursue substantive justice is still prevalent not only in judicial practice but also in CCPL itself.<sup>12</sup> The whole mechanism is still, it is contended, too weak to live up to the requirement of fair trial set out the Article 14(1) of ICCPR. Many provisions in the CCPL of 1996 are still vague and appropriate measures for implementing the new law are lacking as is discussed in the following chapter Five, Six and Seven. The requirements of the law cannot be implemented in practice. Therefore it does not generate confidence to ensure that the judicial powers act in compliance with the law, and the CCPL of 1996 therefore have little impact on safeguards for suspects. Violations of individual's rights often exist to prevent crimes and maintain social stability.

#### **1.1.4 Recommendations regarding the Forthcoming Reform on the Guiding Ideology for the CCPL**

As suggested in Chapter Four, the guiding ideologies and concepts for the CCPL must be kept updated in accordance with the international standards.<sup>13</sup> Crime must be prevented and fought at national and international level with the firmest determination and through the rule of law. At the same time it is the duty of the Chinese government to preserve and promote fundamental rights, freedoms and liberties as well as the rule of law. In the process of the reform of the criminal justice system, with its traditional legal culture and the specific current domestic conditions, the Chinese government should take greater account of individual rights when developing its law.<sup>14</sup> Emphasising the value of human rights protection demands that the CCPL should pay full attention to the protection of the position and dignity of a citizen. Therefore, primarily the principle of presumption of innocence should be firmly established and acknowledged in the next reform of the Chinese criminal justice system. In addition, the aim of criminal proceedings should also seek the appropriate balance between procedural justice and substantive justice. In view of the traditional concept of emphasizing substantive results and despising judicial

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<sup>11</sup> See Chap4, 4.1.2, pp.249-254.

<sup>12</sup> *ibid.*, 4.2, pp.254-257.

<sup>13</sup> *ibid.*, 5, p.257.

<sup>14</sup> *ibid.*, 5.1, pp.257-262.

procedure, which has an unfavorable influence on China's current criminal justice system, the future reform of the CCPL should enhance the value of judicial procedure on the premise of a dynamic emphasis on both procedural justice and substantive justice.<sup>15</sup>

## **1.2 Pre-trial Compulsory Measures**

There is an urgent need for discussions on criminal legislation in China in recent years with a focus on how to control compulsory measures before trial to reduce the widespread use and even abuse of various forms of pre-trial detention or arrest without judicial review and protection of suspects' human rights, as examined in Chapter Five.

### **1.2.1 Progress regarding Pre-trial Compulsory Measures**

Significant revisions to improve the compulsory measures system in the CCPL of 1996 have apparently brought China closer to eliminating arbitrary deprived liberty as required in Article 9 of ICCPR.<sup>16</sup> The removal of the use of the "Shelter and Investigation", a type of indefinite administrative detention, from the practice of criminal investigation was one example of a step in the right direction to getting close to the "prescribed by law" requirement under Article 9(1) of ICCPR.<sup>17</sup> Also, the obligation to define precisely the grounds on which deprivation of liberty is permissible under Article 9(1) has also been better fulfilled by clarifying certain conditions and limits for such detention in the revised CCPL.<sup>18</sup> Moreover, a new time frame for the compulsory measures has indicated a determination to give real efficacy to Article 9(3) of ICCPR.<sup>19</sup> The CCPL imposes restrictions on the police power to arrest, which aims to establish a judicial supervision system to the arrest as required in Article 9(3) and Article 9(4) of ICCPR. This represents a departure from the traditional view that arrest and custodial detention are an unconditional outcome of the investigation in the criminal process.<sup>20</sup> There are moves to fight against illegally prolonged detention, which helps to reduce instances of violation within

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<sup>15</sup> see Chap4, 5.2, pp.262-268.

<sup>16</sup> See Chap5, 2, pp.269-283.

<sup>17</sup> Ibid., 2.1, p.270.

<sup>18</sup> Ibid., 2.2, p.273.

<sup>19</sup> Ibid., 2.3, p.274.

<sup>20</sup> Ibid., 2.4, p.277.

Article 9 of ICCPR.<sup>21</sup> It also suggests a willingness to further accept the principle of presumption of innocence and due process contained in Article 14(1) and (2) of ICCPR.

### **1.2.2 Absence of Safeguards against Arbitrary Pre-trial Compulsory Measures**

However, the pre-trial compulsory measures system currently prescribed and practised in the CCPL still falls far short of recognised international standards.<sup>22</sup> Many factors contribute to the abuse of compulsory measures in China before trial. Beyond the significant reason concerning the crime-control orientation of criminal procedure as indicated in Chapter Four, the direct cause for the abuse has proved to be the prevalence of a misleading understanding and interpretation of the law by the law enforcement agencies and the tendency of the officials to mistakenly apply it in a harsh manner as analysed in Chapter Five.<sup>23</sup> As discussed in Chapter Five, the use of arrest and custodial detention remains the primary form of abuse inflicted by law enforcement.<sup>24</sup> Officials have deliberately detained suspects as punishment without satisfying the requirements prescribed by the CCPL.<sup>25</sup> The Chinese government has also put forward various justifications for the broad granting of discretion to detain. However, compared with the findings of the ECHR, it might have difficulty in arguing that the public security issue is sufficient to support the abuse of the compulsory measures and the detention for lengthy periods in the absence of effective safeguards to guarantee the right to fair trial in China. Non-custodial detention such as “posting bail and awaiting trial” remains the exception rather than the rule, which is clearly incompatible with Article 14(2) and Article 9(3) of ICCPR. The reason for such abuse also lies in problems within the regulations of the system of arrest and custodial detention.<sup>26</sup> Arrest and custodial detention in Chinese criminal justice is an important detection method and its purpose in practice is to facilitate the obtaining of confessions by the authorities. The absence of the need to give reasonable grounds for arrest clearly raises the possibility that incompatibility with Article 9(1) and 14(2) of ICCPR will be found.

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<sup>21</sup> See Chap5, 2.5, pp.278-283.

<sup>22</sup> Ibid., 3, pp.283-317.

<sup>23</sup> Ibid., 3.1, p.284.

<sup>24</sup> Ibid., 3.1.1, pp.285-286.

<sup>25</sup> Ibid., 3.1.2 Chapter 5, p.289.

<sup>26</sup> Ibid., 3.1.2 Chapter 5, p.287-289.



One of the most heavily criticised aspects of the Chinese criminal justice system that hampers efforts to improve human rights for suspects is that the time limits under the CCPL of 1996 with regard to detention before trial are still uncertain.<sup>27</sup> Its weakness mainly lies in the often vague provisions and use of undefined terms containing a great deal of flexibility and providing broad authority to the Chinese law enforcement authorities in criminal proceedings. Firstly, the CCPL of 1996 does not specifically prohibit authorities from using administrative detention and the pre-trial compulsory measures consecutively or in succession, as discussed in Chapter Five, which might undermine the safeguards they are intended to offer, taking Article 9(3) of ICCPR into account.<sup>28</sup> This leads to the practical application of non-custodial detention not being standard and the total period of non-custodial detention can be a severe measure to restrict personal liberty for a long period. A breach of Article 9(3) of ICCPR might be found here. The system of non-custodial detention has changed from a guarantee measure in litigation activity to a measure taken to avoid risks to public security organs and to punish suspects on behalf of victims and the public, as well as to relieve the general public's fear of crime.

Secondly, the new time frame in the CCPL of 1996 has flaws in respect of the custodial detention.<sup>29</sup> Article 9(3) calls into question those provisions, which obviously invest officials with huge discretion to decide when to extend detention in the absence of judicial supervision. Due to ambiguous drafting, the conditions for continued detention may be interpreted many ways. The rules for warrantless detention in China can legally last up to 37 days and so is much longer than the universally-accepted standard.<sup>30</sup> The duration of detention after arrest, which may extend to more than 7 months, is unacceptably long.<sup>31</sup> Thirdly, besides the already uncertain long periods of compulsory measures allowed under the law, detention may, and frequently is, prolonged beyond legal time limits.<sup>32</sup> The quality of Chinese law enforcement officers does not meet the requirement of the new reform, which has drawn sharp criticism. There is still the tendency for law enforcement officers to disregard the law and to follow their own traditional style of working for the

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<sup>27</sup> See Chap5, 3.2, p.289.

<sup>28</sup> Ibid., 3.2.1, pp.289-291.

<sup>29</sup> Ibid, 3.2.2, pp.291-299

<sup>30</sup> Ibid, 3.2.2.1, p.291.

<sup>31</sup> Ibid, 3.2.2.2, pp.296-299.

<sup>32</sup> Ibid, 3.3, pp.299-302.

convenience of law enforcement under the influence of traditional legal ideologies, particularly for obtaining evidence through interrogation of detained suspects as discussed in Chapter Six. This phenomenon severely underscores the difficulty involved in implementing a comprehensive criminal legal system to protect human rights for suspects in China. The extensive loopholes and ambiguities in the law have been further exploited to the full by law enforcement authorities in this situation. Regulations or notices issued by the law enforcement authorities have tried to provide some additional details and to address this long-term concern, but they too were silent or ambiguous on many key issues. Clearly, a conflict with Article 14(2) read with 9(1) and Article 9(3) of ICCPR might arise.

As suggested in Chapter Five, another significant factor to be considered in the arbitrary nature of compulsory measures lies in the checks and balances system within the criminal justice system, which comes directly into conflict with Article 9(3) and Article 9(4) of ICCPR.<sup>33</sup> No other compulsory measure in the CCPL of 1996 except arrest is to be examined and approved by an institution other than the police.<sup>34</sup> The right to notification guaranteed in Article 9(2) of ICCPR might not be satisfied at the time of the possible *incommunicado* detention.<sup>35</sup> The police may still dispense with the requirement to inform the suspect's family or work unit of his detention if it would interfere with the investigation or if there is no way to give notice. The only apparent check on police discretion in determining if such circumstances exist is the general oversight role of the procuratorate, though expanded access to counsel may help to improve the situation to some degree as discussed in Chapter Seven. As far as all the consequences arising from it, Article 7 and Article 14 of ICCPR are also concerned here, as discussed in Article 6. At the same time, the power of examining and deciding an arrest is in fact in the hands of procuratorates by the prosecutor in Chinese criminal proceedings, while arrests decided by the courts rarely occur.<sup>36</sup> But the procuratorate will usually approve an arrest because of its simultaneous task of crime control.<sup>37</sup> Arguably, the procuratorate in the Chinese current judicial system is not authorised by law to exercise judicial

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<sup>33</sup> See Chap5, 3.4, pp.302-304.

<sup>34</sup> Ibid., 3.4.1, p.304.

<sup>35</sup> Ibid., 3.4.1, pp.305-306.

<sup>36</sup> Ibid., 3.4.2.1, pp.307.

<sup>37</sup> Ibid., 3.4.2.1, p.308.

power as required in Article 9(3) of ICCPR, but its review of arrests is normally far from “prompt” which also fails to fulfil Article 9(3) of the ICCPR obligation.<sup>38</sup>

Furthermore, a person subject to detention under the revised CCPL is likewise denied the internationally recognized right to bring a *habeas corpus* proceeding whereby a court can determine the lawfulness of the detention.<sup>39</sup> The detainee only has the right to challenge his detention once the time limit for detention prescribed by law expires. However, the revised CCPL is conspicuously vague on the question of to whom the suspect should direct his or her demand for release, and there is no provision for any judicial role in reviewing the response. Detailed rules on implementing the CCPL issued by the SPC and the SPP contain no procedure for reviewing the legality of time limit extensions either before or after they have been initiated. Such a supervision system might not satisfy the aim of achieving compliance with Article 9(4) of ICCPR, despite the involvement of the procuratorate as a monitoring figure during the entire criminal proceedings. Also, there are virtually no legal or other consequences for law enforcement officials who ignore or misuse the laws regarding pre-trial compulsory measures. The result is that the police continue to have enormous power to detain the suspect for extended periods of time. The extensive loopholes contained in the law itself and in its interpretation used by legal implementation agencies, allow the authorities enormous latitude to detain people for as long as they see fit. The pre-trial legal personal liberty of the suspect cannot be guaranteed at all. Article 9(5) of ICCPR would also be involved where the failure to provide an effective mechanism for the detainee to test the lawfulness of the detention might easily affect his or her enforceable right to compensation.<sup>40</sup>

### **1.2.3 Recommendations regarding Pre-trial Compulsory Measures**

Recognizing some of the current problems affecting pre-trial compulsory measures in Chinese criminal justice with a view to bringing them into line with international human rights standards, Chapter Five discussed the likelihood of the coming CCPL reform. The grounds for various forms of pre-trial compulsory measures under the CCPL should be clearly identified and specified to avoid their arbitrary use, in order

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<sup>38</sup> See Chap5, 3.4.2.2, pp.308-313.

<sup>39</sup> Ibid., 3.4.3, p.313-315.

<sup>40</sup> Ibid., 3.4.4, pp.315-317.

to fulfil the requirement of Article 9(1) of ICCPR.<sup>41</sup> In particular, a formal bail system should be set up and pre-trial detention should remain exceptional to ensure that Article 9(3) of ICCPR is not infringed.<sup>42</sup> It is necessary to prohibit all forms of compulsory measures without prompt examination and approval. In this respect the role of the procuratorate needs to be reconsidered to meet the criteria of independence and impartiality set forth in Article 9(3) of ICCPR in the current stage of reform. China should also consider a more formalized system of information in order to fully respect Article 9(2) of ICCPR.<sup>43</sup> In particular, legally-binding provisions in the law should be established. Moreover, the CCPL should be urged to guarantee that the duration of the various forms of detention meets internationally accepted time limits, including Article 9(3) and Article (4) of ICCPR.<sup>44</sup> Bearing in mind the safeguard in Article 9(4) of ICCPR, there is an impelling need for the CCPL to accept the effective right of the suspect to challenge before a court the lawfulness of every kind of detention or arrest.<sup>45</sup> The legal duties and liabilities of the judicial officers should be evaluated and identified in the law.<sup>46</sup> It is considered desirable that the reconstruction of the procedures concerning detention and arrest before trial is the direction that should be taken in the coming legal reform, including the authority and the method of implementing the judicial review in the course of investigation.<sup>47</sup> Individuals detained in contravention of their legal rights should be offered compensation by the state as required in Article 9(5) of ICCPR.<sup>48</sup>

### **1.3 The Prevention of Torture and Illegally-Obtained Evidence**

Apart from the abuse of pre-trial compulsory measures, an equally salient problem in China's criminal justice system is that acts of torture and other cruel, inhuman or degrading treatment or punishment in breach of Article 7 of ICCPR and Article 3 of ECHR, mainly in the form of extorting a confession through torture, have existed for so long in China as discussed in Chapter Six. The struggle against all kinds of torture and ill-treatment in Chinese criminal justice continues. It has long been recognized that the frequent occurrence of such phenomena as the use of torture to obtain

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<sup>41</sup> See Chap5, 4.1, p.317.

<sup>42</sup> Ibid., 4.1.3, p.322.

<sup>43</sup> Ibid, 4.3, pp.328.

<sup>44</sup> Ibid, 4.2, p.325.

<sup>45</sup> Ibid, 4.4, p.329.

<sup>46</sup> Ibid, 4.4.1, p.330.

<sup>47</sup> Ibid, 4.4.2 and 4.4.3, pp.331-334.

<sup>48</sup> Ibid, 4.4.1, p.330.

evidence must also be influenced by the prevailing legal culture and structure in a Chinese society under transformation.

### **1.3.1 Factors Contributing to the Continuing Use of Evidence Obtained through Torture or Ill-treatment**

The first factor related to this is the traditional legal culture regarding confession.<sup>49</sup> Confession with sincere remorse, rather than insistence on one's rights, is an important aspect of the legal culture of confession in China.<sup>50</sup> Moreover, another aspect of the legal culture of confession, the belief that legal authorities will show greater leniency towards those who confess, greatly encourages the cooperation of the suspects. The general attitude which is unfavorable to silence and challenge from the suspects to the state may be due to this legal culture of confession. Also confession is regarded as the most valuable source of information in solving and prosecuting crimes and torture has been relied upon over centuries in China as a convenient tool for obtaining confession.<sup>51</sup>

Another factor leading to the widespread use of torture and other inhumane treatment against suspects in China is that the criminal legal system fails to adequately protect critical procedural rights for suspects.<sup>52</sup> Firstly, the concept of torture defined and understood in China is rather more general and narrow under the Chinese criminal justice system than the definitions in Article 7 of ICCPR or Article 1 of CAT.<sup>53</sup> A necessary precondition for torture is the involvement of the regular judicial process. The authorities in China might therefore fail to fulfil their responsibilities in Article 7 of the ICCPR obligation to prosecute all perpetrators of torture, regardless of whether they are acting in their official capacity, outside their official capacity or in a private capacity.<sup>54</sup> Also, many aspects of Article 7 related to torture and ill-treatment have never existed in Chinese domestic law.<sup>55</sup> Secondly, illegally-obtained evidence generally continues to be admissible during the trial under the CCPL of 1996.<sup>56</sup> This is primarily because there is no specific mechanism for barring the use of illegally-

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<sup>49</sup> see Chap6, 2, pp.342-348.

<sup>50</sup> Ibid., 2.1, pp.343-344.

<sup>51</sup> Ibid., 2.2, p.344.

<sup>52</sup> Ibid., 3, p.348.

<sup>53</sup> Ibid., 3.1, pp.348-349.

<sup>54</sup> Ibid., 3.1.1, pp.349-350.

<sup>55</sup> Ibid., 3.1.2, p.350-353.

<sup>56</sup> Ibid., 3.2.1, p.353.

obtained evidence in the Chinese criminal justice system.<sup>57</sup> Also lack of the obligation to investigate alleged torture in police custody also fails to make CCPL compatible with Article 7 of ICCPR.<sup>58</sup> These flaws directly encourage the continuation of the use of torture as a means to extract evidence in crime investigation, especially through confession.

Thirdly, the CCPL of 1996 does not recognize the right to silence, which is regarded as contributing to the risks of a confession obtained in breach of Article 7.<sup>59</sup> The question of whether the right to silence should be granted to suspects in China has long been a controversial issue. Opposition to the right to silence is more concerned with the effectiveness of crime control.<sup>60</sup> On the other hand, proponents of this right have argued that the right to silence is internationally recognised as an important aspect inherent in the presumption of innocence and a primary safeguard for vulnerable suspects against police misconduct and wrongful conviction.<sup>61</sup> The burden of proof will be affected and Article 14(2) of ICCPR will not appear to be satisfied, if suspects are obliged to make confessions in order to assist the prosecution in any way to establish their guilt. Fourthly, last but not least, lack of valid supervision mechanisms to investigate police activity also adds to the relative limitation of criminal justice systems that contributes to the torture and ill-treatment of suspects.<sup>62</sup> There is no independent complaint body and effective avenue for people to make complaints about their treatment against Article 7 while being investigated.<sup>63</sup> The procuratorates are in a relatively weak position to supervise the practice of the police during interrogations.<sup>64</sup> The internal check has also failed to address the issue.<sup>65</sup> Moreover, supervision of the implementation of the legislation by the public and the media is not strong enough.<sup>66</sup> Neither is the current administrative supervision system efficient enough and sufficient to handle the allegations of torture and ill-treatment.<sup>67</sup> China therefore has not complied with the obligation under

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<sup>57</sup> See Chap6, 3.2.1, pp.356.

<sup>58</sup> Ibid., 3.2.2, pp.359-361.

<sup>59</sup> Ibid., 3.3, pp.361-365.

<sup>60</sup> Ibid., 3.3.1, pp.365-373.

<sup>61</sup> Ibid., 3.3.2, pp.373.

<sup>62</sup> Ibid., 3.4, p.374.

<sup>63</sup> Ibid., 3.4.1, p.375.

<sup>64</sup> Ibid., 3.4.1.1, pp.375-376.

<sup>65</sup> Ibid., 3.4.1.2, pp.376-380.

<sup>66</sup> Ibid., 3.4.2, pp.380-382.

<sup>67</sup> Ibid., 3.4.3, p.383.

Article 7 of ICCPR to provide effective and adequate methods for the victims to seek redress from the perpetrators.

### **1.3.2 Major Efforts to Prevent Extorting Confessions by Torture**

Acknowledging the extent of torture in China, the Chinese government and the judicial organs have made great efforts in this regard.<sup>68</sup> One of the efforts made was to increase cooperation with international society and the issue of human rights protection has been considered in the anti-torture campaign.<sup>69</sup> Efforts have also been made in the area of legislation.<sup>70</sup> A series of concrete measures have been initiated to ban torture and protect the human rights of the suspects.<sup>71</sup> There has been an effort to reform the standards regarding criminal evidence to exclude confessions extorted by torture and the principle of presumption of innocence is now more widely practised.<sup>72</sup> The so-called “zero statement rule” is being put into practice in the local jurisdictions and signifies a growing recognition of the right of silence in China.<sup>73</sup> Additionally, many new and detailed regulations have been published mainly by SPC, SPP and MPS in order to correctly and efficiently implement existing loosely defined laws against extracting confessions through torture.<sup>74</sup> Governments, courts and procuratorates in their work and law enforcement are all aiming to have wider ranging supervision by the general public and the media in order to better combat Article 7 treatments in criminal proceedings.<sup>75</sup> Due to the measures mentioned above, China has made great progress in legislation and implementation with regards to prohibition against torture.

### **1.3.3 Recommendations regarding the Prohibition of Torture in Criminal Justice**

However, interrogation by torture is still one of the most important causes of injustice nowadays in China. To ensure that Article 7 of ICCPR is respected, the Chinese criminal justice system, CCPL in particular, must be further revised to provide an effective judicial and social mechanism in order to thoroughly eradicate

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<sup>68</sup> see Chap6, 4, pp.384-396.

<sup>69</sup> Ibid., 4.1, p.384.

<sup>70</sup> Ibid., 4.2, p.385.

<sup>71</sup> Ibid., 4.2.1, p.386.

<sup>72</sup> Ibid., 4.2.2, pp.387-389.

<sup>73</sup> Ibid., 4.2.3, pp.390-393.

<sup>74</sup> Ibid., 4.3, pp.393-396.

<sup>75</sup> Ibid., 4.4, p.396.

torture during criminal investigations.<sup>76</sup> Firstly, the prevention of Article 7 treatment lies in better implementation of the law and greater professionalism on the part of law enforcement personnel. Therefore China should continue to intensify efforts to increase strict enforcement of the law. The professional quality and responsibility of different levels of authority among officials in China should be continuously improved by providing different levels of specialized education or systematic training in scientific investigation skills, legal theories and international human rights standards.<sup>77</sup>

Secondly, greater efforts should also be made in China to set in place building up a series of standards and measures in line with the necessary international human rights standards in the domestic legislative and judicial fields to reduce the chance of suspects being tortured during investigations.<sup>78</sup> First, the definition of torture and other ill-treatment should be based on the definition given in Article 1 of CAT and Article 7 of ICCPR.<sup>79</sup> Second, evidence gathered as a result of torture and ill-treatments should be strictly inadmissible as evidence.<sup>80</sup> Concerning the burden of proof in cases of extortion of confessions by torture, the prosecution and the public security organs should be required to produce evidence compatible with Article 7 and Article 14 of ICCPR. Third, the right to silence should be added to the law. Suspects should not be compelled to make a statement against their will and the obligation to give truthful answers prescribed in Article 93 of the CCPL of 1996 should be cancelled.<sup>81</sup> Fourth, an independent complaints system against torture and ill-treatment should be established.<sup>82</sup> The mechanisms of independent judicial supervision should be established. Also comprehensive procedural protection for suspects to prevent torture should be set up and strengthened, such as establishing the system of synchronise sound and videotape recording during interrogations, improving the conditions and procedures of detention and increasing public participation.

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<sup>76</sup> see Chap6, 5, p.397.

<sup>77</sup> Ibid., 5.1, p.398.

<sup>78</sup> Ibid., 5.2, p.401.

<sup>79</sup> Ibid., 5.2.1, p.401.

<sup>80</sup> Ibid., 5.2.2, pp.402-404.

<sup>81</sup> Ibid., 5.2.3, pp.404-407.

<sup>82</sup> Ibid., 5.2.4, pp.407-409.



Thirdly, to achieve the goal of fulfilling international obligations under Article 7 of ICCPR and CAT, construction of a legal culture for the suppression of torture in China must be supported and enhanced through all kinds of public education, academic research, and a series of social policies, so as to raise awareness of the prohibition and prevention of torture in the whole country.<sup>83</sup>

#### **1.4 The Right to Legal Counsel before Trial**

From the discussion on arbitrary pre-trial compulsory measures and the use of torture in criminal proceedings, a further significant fact is that Article 14(3)(b) and Article 14(3)(d) of ICCPR might be breached where persons have been detained *incommunicado* for a long time. The role of the defence team in the criminal procedure is still rather weak, so that they may not adequately serve the interests of suspects, as discussed in Chapter Seven.

##### **1.4.1 Major Changes in the Right to Counsel Introduced by the CCPL of 1996**

Compared with the CCPL of 1979, the CCPL of 1996 further emphasizes the protection for the rights of suspects to defend and there has been significant progress in expanding the nature and role of legal representation in criminal proceedings, especially at the pre-trial stage.<sup>84</sup> Firstly, a suspect may seek legal assistance during the investigation stage.<sup>85</sup> Secondly, procedural improvements have also been made to introduce more functions for lawyers in order to better implement their proper role in protecting the human rights of the suspects at all stages of criminal proceedings.<sup>86</sup> The lawyer can check with the authorities regarding the criminal charges on which their clients are being held in custody or for questioning. They may also meet with suspects in custody. If a criminal suspect is arrested, the lawyer may apply for a bail pending trial for the suspect. In the prosecution stage, the defence lawyer can go to the prosecuting authority and read part of the case material. Thirdly, the revised law has broadened the grounds for the optional grant of legal aid.<sup>87</sup>

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<sup>83</sup> See Chap6, 5.3, pp.409-410.

<sup>84</sup> see Chap7, 3, p.428.

<sup>85</sup> Ibid., 3.1, p.429.

<sup>86</sup> Ibid., 3.2, p.432.

<sup>87</sup> Ibid., 3.3, p.438.

#### **1.4.2 Major Obstacles to the Implementation of the Right to Counsel under the CCPL of 1996**

The problems may undeniably lead to strong resistance from those upholding the traditional legal culture as to the criminal defence and the role of defence lawyers in China.<sup>88</sup> The function of criminal defence in the modern concept would be contradictory to the culture and tradition of ancient China, in which the criminal defence was limited to the procedural activities at the criminal trial stage.<sup>89</sup> The legal cultural difference is also embedded in the Chinese attitude towards criminal defence and the role of lawyers, which lacks the ideology of the individual versus the state in criminal proceedings and the lawyers have no right to mount an independent defence.<sup>90</sup> Moreover, the limited criminal defence and the unequal position of Chinese defence lawyers are the result of political interference from the Communist Party and government.<sup>91</sup>

Therefore, while there has been a great deal of progress from the old laws in allowing earlier access to counsel, the revised CCPL does not actually provide a better environment for criminal defence.<sup>92</sup> In contrast to the rules of international standards on the right to defence, a fair gap still exists and seems to be widening. Lawyers still lack independence and necessary rights and protection in Chinese criminal justice. The deficiency of the criminal defence position has both legislative and judicial aspects. Also, these restrictions effectively deprive suspects of meaningful legal representation. Some of the main limitations of the reform can be found in the following regards. Firstly, it is generally considered that the participation of the lawyers in pre-trial proceedings does not grant them the complete status of defenders, compared with the requirement in Article 14(3)(b) and Article 14(3)(d).<sup>93</sup> Secondly, police concern over security hinders frank meetings between lawyers and their clients, and therefore the right to legal counsel in Article 14(3) of ICCPR and the right to a fair trial on the whole in Article 14(1) of ICCPR for suspects cannot be safeguarded.<sup>94</sup> The CCPL is silent on the obligation to give

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<sup>88</sup> see Chap7, 2, pp.415-416.

<sup>89</sup> Ibid., 2.1, p.416.

<sup>90</sup> Ibid., 2.2, p.419.

<sup>91</sup> Ibid., 2.3, pp.422-428.

<sup>92</sup> Ibid., 4, p.440.

<sup>93</sup> Ibid., 4.1, p.441.

<sup>94</sup> Ibid., 4.2, pp.442-443.

suspects immediate notice of their right to counsel in the investigation stage.<sup>95</sup> The police are also granted great arbitrary power to deny requests for lawyer-suspect meetings.<sup>96</sup> The police block suspects' access to counsel most often by using the expansive definition of "state secret" as justification.<sup>97</sup> No reason will be given to explain the rejection of the application for such meetings.<sup>98</sup> The legal aid service is still far from meeting the demand.<sup>99</sup> Moreover, the duration and the times of the meetings in custody have been greatly limited by the local authorities.<sup>100</sup> Furthermore, while the defence lawyer can not be present at the interrogation, the authorities are permitted to monitor the meeting between the lawyers and suspects. Lawyers have great difficulty in holding private meetings with suspects and learning the details of the whole case.<sup>101</sup>

Thirdly, compared with international standards on what lawyers are allowed to access for criminal defence, the files disclosed to lawyers in China are generally limited during the prosecution review stage as well as during the trial stage.<sup>102</sup> In addition, there are no adequate measures or systems for monitoring the decision as to whether the disclosure of evidence is inappropriate. Fourthly, the lack of independence and effectiveness of defence lawyers also derives from the lack of immunity for criminal defence work.<sup>103</sup> As lawyers have faced hostile attitudes over many years in China, the reform to expand the role of the lawyer in the criminal process in terms of safeguarding suspects' rights has provided more incentives for the investigative organs to use their superior power to thwart such advances by the defence.<sup>104</sup> There are several easily manipulated provisions in the whole criminal justice law which is both too broad by virtue of its vagueness and too narrow by virtue of its application only to lawyers.<sup>105</sup> The combination of all these adverse provisions for lawyers has created an environment that endangers towards the provision of legal counsel or defence services. Lawyers continue to be vulnerable to

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<sup>95</sup> Ibid., 4.2.1, pp.443-444.

<sup>96</sup> Ibid., 4.2.2, p.444-445.

<sup>97</sup> Ibid., 4.2.2.1, p.445.

<sup>98</sup> Ibid., 4.2.2.2, p.448.

<sup>99</sup> Ibid., 4.2.2.3, pp.449-450.

<sup>100</sup> Ibid., 4.2.3, pp.450-452.

<sup>101</sup> Ibid., 4.2.4, p.452-456.

<sup>102</sup> Ibid., 4.3, pp.456-461.

<sup>103</sup> Ibid., 4.4, p.461.

<sup>104</sup> Ibid., 4.4.1, p.462.

<sup>105</sup> Ibid., 4.4.2, pp.463-469.

huge interference from judicial and other state institutions.<sup>106</sup> The disciplinary mechanism within China's legal profession is relatively new and ineffective. The impact of the 1996 reform on the right to defence is mixed and lawyers are thus still left in the dark in their defence preparation during the pre-trial stage in a system where the state traditionally has enormous power, and where law enforcement agencies dominate the judicial process.

#### **1.4.3 Recommendations regarding the Right to Counsel**

An analysis of the difficulties for defence lawyers at the pre-trial stage evidently calls for appropriate measures with the aim of bringing China's criminal defence system into conformity with international standards, particularly the requirement in Article 14(3)(b) and (d) of ICCPR in conjunction with Article 14(1) of ICCPR.<sup>107</sup> Firstly, adequate and effective enforcement of the existing law should be carried out to ensure that lawyers can work more independently and to provide legal services more effectively, particularly in the pre-trial stage.<sup>108</sup> Some steps can be taken during further legislative amendment to alleviate the crisis in China's criminal defence system and to improve lawyers' ability to plead for suspects' rights.<sup>109</sup> It is recommended that the defence lawyer at the investigation stage should enjoy equal status and be given the same roles as those at the prosecution or trial stage.<sup>110</sup> To ensure that people under investigation or accused of crimes have access to legal advice and representation, it is necessary to expand the coverage of legal aid and to standardise an immediate and effective legal aid service in the criminal justice system.<sup>111</sup> The legislation on the right to confidential communication with the accused must be guaranteed by unrestricted access.<sup>112</sup> One method of solving the difficulty for lawyers in gaining access to appropriate and useful information is to establish an evidence disclosure system through legislation.<sup>113</sup> China should ensure the effective protection of lawyers carrying out their duties and functions. It is necessary to consider defining the right to complete immunity from prosecution for

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<sup>106</sup> Ibid., 4.4.3, pp.469-474.

<sup>107</sup> See Chap7, 5, p.474.

<sup>108</sup> Ibid., 5.1, pp.474-476.

<sup>109</sup> Ibid., 5.2, p.476.

<sup>110</sup> Ibid., 5.2.1, pp.477.

<sup>111</sup> Ibid., 5.2.2, pp.479-480.

<sup>112</sup> Ibid., 5.2.3, pp.480-481.

<sup>113</sup> Ibid., 5.2.4, pp.481-484.

words written or spoken during legal representation.<sup>114</sup> In addition to the steps outlined above, full resolution of the problems faced by defence lawyers in China will in the long-term require education and a change in prevailing attitudes toward criminal defence.<sup>115</sup>

## **2. Looking forward**

By accounting for both the positive and the negative aspects of the current CCPL and its practice regarding human rights protection of suspects in the pre-trial stage, earlier analysis in this thesis has revealed that the 1996 revisions failed to bring the CCPL into conformity with the standards of ICCPR. It should be aware that solely amending the CCPL will not make rights for suspects happen. It is fair to observe from Part Three that inconsistencies or inadequacies in the laws themselves and poor enforcement of the laws render the new procedural protection immaterial and frustrate the original intention and the ultimate purpose of the reform. This phenomenon demonstrates that the whole criminal justice system in China is still haunted by the spirits of traditional legal culture and some of the traditional values are the fundamental problem, causing embarrassment and obstacles in the criminal justice system. Social harmony has to be achieved within the state and the public interest outweighs individual rights in China. This conventional value may help justify the belief that legally guaranteed individual rights can be disregarded and sacrificed in the interests of society, particularly in terms of crime control and prevention. In the criminal justice system, as shown in Part Three, a crime-control approach to criminal procedure still prevails in both legislative and legal practice. Even though the Chinese people have been quite deft at adopting the Western style market economy and life style, their concept of law, their lack of tolerance of crimes and criminals and their self-contradictory attitudes towards government bureaucracy have proved to make them rather immune to Western influences. Actions of the court, the procuratorate and police are ultimately motivated by the desire to find the person responsible for the crime and convict the one they believe is the criminal. The significance of procedural safeguards in the ultimate fairness of the trial and human rights protection has not been fully appreciated in China.

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<sup>114</sup> Ibid., 5.2.5, pp.484-487.

<sup>115</sup> Ibid., 5.3, pp.487.

Since the reforms are intended to change ingrained patterns of behaviour by law enforcement officials, it seems that the gaps between the law and the practice of criminal justice, and the domestic law and the international norms will actually grow wider, at least in the short term.<sup>116</sup> China faces a more serious challenge in bridging the gap under the current cultural preference. Therefore, while much could potentially be done to improve the current situation as suggested in the thesis, the reform will be limited in its effectiveness unless accompanied by a change in attitude toward crimes and suspects among the public and those working within the legal system, and by an increase in the political will among state leaders to take human rights seriously. In order to work against arbitrariness and improve the overall environment for greater protection for suspects, an underlying recommendation applying to all aspects evaluated in this thesis is the further development of Chinese legal culture. However, legal cultural changes take an extremely long time to develop. The adoption of many of the modern concepts of criminal justice, e.g. the presumption of innocence, early participation by lawyers, elements of the adversarial system, etc., requires a change in the approach and thinking of the public, judicial personnel and the Chinese leadership.

The sincerity and commitment to reform on the part of the authorities will be particularly called into question. If they continue in the same manner as before, then additional and welcome safeguards for suspects introduced in the coming legal reforms still have little chance of being implemented in practice. The leading institutions need to be conscious of human rights in their operations. Also, the strengthening of the role of defence in criminal proceedings, the limitation of the powers of investigatory organs, and the introduction of the more adversarial trial process demand higher judicial and professional standards. This can be achieved through strengthening the efforts to educate and train the judicial authorities, including the police, prosecutors and judges about the importance of observing the law and the principle of due process, so that they are aware of human rights standards and what is expected of them. Training programs should be a permanent feature and be implemented throughout the system, reflected in long-term and different training plans and resource allocation, from the highest to the lowest

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<sup>116</sup> See Jonathan Hecht, *Opening to Reform?*, p.1.

authorities. Such training should emphasize the role of the law enforcement officials as protectors of human rights and raise awareness of the fact that human rights protection and effective crime control are mutually inclusive goals. And also information regarding the knowledge and understanding of the ICCPR must be included in the training, as well as information about China's obligations under the ICCPR. Moreover, China should reform the old selection system of judges and prosecutors, under which law graduates who pass the uniform judicial qualification examination but who have no prior experience in legal practice are selected to serve as judges and prosecutors. Instead, China should open the channels for lawyers, judges, and prosecutors to change their careers and build a system in which prosecutors and judges are selected from a pool of outstanding lawyers who have a rich and varied experience of litigation.

In order to nurture and popularize a culture respecting the human rights of the most vulnerable groups such as criminal suspects, a national plan for human rights education should be established taking account of the rich cultural heritage and the present social conditions in China. Many Chinese people recognize the problems concerning governmental arbitrariness and lack of protection for individual rights and they also express their desire to change the situation. However, human rights education and public awareness has been a rather abstract issue, given the low educational level of large groups of the population. Accordingly, there should be human rights education targeted at the general public, not only to raise and deepen their awareness but also to improve their understanding of the issues at stake. It should reflect international human rights standards and emphasis the rights provided in the CCPL. The promotion of human rights education should be incorporated in the school curriculum at different levels of education, the training program in different state agencies and in the publicity among broader communities. In order to train professionals in the field of human rights with an international vision, the government should encourage and support the study and research into human rights in institutions of higher learning and social science academies and institutes. It is also important to have constant dialogues, international exchange and cooperation on human rights issues with other countries and international communities through various channels on the basis of equality and mutual respect. The aim of these communications is to establish a genuine platform for open and frank discussion and

therefore enhance mutual understanding on the human rights issue.

In order to reach the widest possible audience, in addition to publishing and distributing books, leaflets and brochures, China should make good use of the media, including radio, television, newspapers, magazines and the Internet, to spread and popularise knowledge of the law and human rights in various forms. As a free media is critical to providing Chinese people with a realistic understanding of the international standards on human rights protection and the challenges facing the rapidly transforming society, the government should lift its strict control of the media. In particular, as the internet records extraordinary growth in services as well as users, the government must try to end all limits on access to any contents that are related to “human rights” issues, such as a number of human rights organizations, but allow its citizens to access the comprehensive and updated information that keeps them informed of their human rights and broadens their understanding of and respect for human rights. As a minimum, the public should be given the basic information about such matters as the legal time limits on compulsory measures, the right to appeal against torture and the right to get help from a lawyer in criminal procedures. It is crucial to ensure that suspects should not only be informed of their rights, but that they have also understood them. Increased publicity about criminal trials could also have positive effects, as a pervasive presumption of guilt is widespread among the public, who are more concerned about fighting crime than about violations of human rights.

It is unrealistic to expect that a revision of the law could bring about the desired changes overnight. Legal reform is certainly an expensive and arduous task, but China has to take steps to meet its international obligations with which it has agreed to comply by ratifying major international human rights instruments. The underlying principles of the international instruments should become embedded in an effective human rights culture and in time reflect how people treat each other in their everyday lives in China. The nearly three decades of reform are only an instant in history and China is undergoing a dramatic transition period. The frustration and confusion connected with the current criminal procedure reform are characteristic of a transition period, during which reform efforts are confronted by resistance from old ideologies and institutions. China presents and will continue to present an unruly and



continuing mix of western concepts of legality with Chinese values and institutions that are sometimes hostile to them.<sup>117</sup> It remains the Chinese government's obligation to address such issues honestly while improving the systematic protection of the criminal justice system and upholding the letter and spirit of the revised CCPL. A greater awareness and appreciation of the important cultural and historical differences between China and the western approach concerning human rights problems may suggest a commitment for China and the world to work together to promote human rights protection rather than to concentrate dangerously on an ideological conflict over the question of respect for basic human rights.

However, the dangers involved with indulging in the emphasis on specific Chinese characteristics limit China's understandings of the genuine concepts and values of human rights and of the worldwide-acquired experience and expertise for effective protection of human rights. Also the increasing relevance of human rights dialogues and cooperation will not be fruitful where there is no willingness to acknowledge common ground. To become further integrated into the world, China must no longer use its particularity and its unique position in the world as a pretext for rejecting criticism and preventing debates from going into the core issues of human rights protection. China should not only integrate its economy into the world economy, but also adopt universally accepted human rights values. In order to achieve a better balance between crime control and human rights protection, the modern concepts of human rights protection in the light of international norms must gradually take root in the field of criminal justice in the country. In this case, the burden will be heavy and time-consuming before the new principles and concepts are integrated into the minds of Chinese citizens and the structures of Chinese society. In this transitional period, the Chinese government and people need to make more effort and have the courage to change the balance of power between the individual and the state. Legislation and amendments need to be based on the demands of modern Chinese society, to actively sublimate its traditional legal culture, and to objectively absorb and transplant international principles on human rights protection to a gradual improvement of the criminal justice system. "We need to safeguard the lawful rights and interests of our people according to law," Wen Jiabao suggested. "We also need

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<sup>117</sup> See Stanley Lubman, "Bird in Cage: Chinese Law Reform After Twenty Years", (2000) NW. J. Int'l L. & BUS 383, p.422.

to educate and properly guide the general public so that they can realize more that their legitimate concerns need to be expressed through lawful and legal channels and in lawful formats.”<sup>118</sup> After all, the aim of this tough reform is not just to make the establishment of the legal system more compatible with well-recognized international standards, but also to transform the lives of the people in China.

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<sup>118</sup> see Wen Jiabao, Press Conference at the Conclusion of the Fourth Session of the 10th National People's Congress, 14/03/06, [http://english.peopledaily.com.cn/200603/15/eng20060315\\_250735.html](http://english.peopledaily.com.cn/200603/15/eng20060315_250735.html).

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