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Research on the Deprivation of Liberty from Criminal Suspects: Focusing on Pre-trial Criminal Procedure in China

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이 래 경

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Focusing on Pre-trial Criminal Procedure in China

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Abstract

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The criminal procedure law of China sets out five pre-trial compulsory measures. Arrest and detention deprive individual liberty while the other three measures only restrict it. In 1996 and 2012, the National People's Congress passed a comprehensive set of amendments to the criminal procedure law of China. In China, criminal law and criminal procedure law have long been recognized as a weapon to fight the waves of criminal behavior. Following the inquisitorial model of European, defendants in China as well as criminal suspects, have long been recognized as mere objects of trial and punishment, not as independent actors fighting against the prosecutor as in the adversarial model. Pre-trial investigation tends to depend largely on dossiers or investigation documents, with the dominant authorities being the prosecuting party and court.

The author presents the research question as to how appropriately the new criminal procedure law of China protects the rights of those arrested or detained in pre-trial stages of criminal procedure. The reform efforts of the

Chinese government will be assessed as part of the journey to balance crime-control and the due process model of criminal procedures. The research explores the changes in criminal procedure law of China particularly regarding pre-trial arrest and detention. Legal grounds, conditions, duration of the arrest and detention will be reviewed along with noteworthy amendments to relevant articles. In addition, the rights of those arrested or detained will be categorized into three phases of the proceeding: (a) preventive legal devices to deter arbitrary detention, (b) procedural rights of detained suspects, (c) remedies for the violation of rights. In addition, major changes and the background of each amendment to the Chinese criminal procedure law will be reviewed in the next chapter.

Finally, the author concludes that despite extensive reform efforts in 1996 and 2012, the rights protected by the newest law fall short of international standards represented by the International Covenant on Civil and Political Rights or when compared to the U.S. or Korean institutions. Moreover, the effective implementation of the 2012 Criminal Procedure Law is still in question due to systematic limitations such as the dominating nature of crime-control, the inquisitorial model and the lack of independence of the judiciary from the Chinese Communist Party.

Keywords: Chinese criminal procedure law, arbitrary arrest and detention, deprivation of liberty, pre-trial detention, rights of criminal suspects

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I. Introduction

1. Research Question and Background

The Criminal Procedure Law (CPL) revision was finally adopted by the 11th National People's Congress (NPC) of China at its 5th Plenary Session on March 14, 2012 (Chen 2013, 4). It was the second comprehensive revision of the Chinese CPL since its enactment in 1979; it was first amended in 1996. One of the most remarkable changes was demonstrated in Article 2 which underlines "to respect and protect human rights" as one of the purposes of the CPL. This was not included in previous laws:

> "The objectives of the CPL of the People's Republic of China are to ensure that the facts of crimes are determined correctly and promptly, laws are applied properly, criminals are punished, and innocent people are protected from being pursued for criminal liability; to educate citizens to abide by the law and to fight actively against criminal activities, so as to uphold the socialist legal system, *to respect and protect human rights*, to protect citizens' personal rights, property rights, democratic rights and other rights, and to safeguard the smooth progress of the course of socialist construction."[1]

According to Wang, Zhaoguo, the vice chairman of the Standing Committee of the NPC, "considering that the system of criminal justice

[1] 2012 CPL, article [hereinafter art.] 2

involves citizens' fundamental rights such as personal freedom, explicitly writing 'respect and safeguard human rights'[2] into the CPL not only helps better reflect the socialist nature of the judicial system of our country, but also helps judicial organs observe and implement this constitutional principle in criminal proceedings" (Deng 2012). Recently revised and added articles indeed strengthen procedural justice in terms of investigation, trial, and execution of punishment. While investigative organs are not happy about the reform, scholars in and out of China recognize the progress in human rights protection and look forward to its effect.

Criminal procedures usually begin with police investigation which is accompanied by identification, interrogation, and, if necessary, continued detention. Modern constitutions and codes of criminal proceedings require that police investigations be primarily based on non-compulsory measures, such as voluntary attendance or submission of evidence to authorities. However, they allow compulsory measures only in exceptional circumstances that must be precisely stated in the constitution and law.

Arrest and detention, which places an individual completely under the control of the state and consequently involves the deprivation of the right to personal liberty, is undoubtedly of a coercive nature. It is "an extreme measure which places the individual wholly under the control of the state, not as punishment for a proven transgression of the law, but rather as a precautionary measure based on a presumption of actual or future criminal conduct or an administrative assessment that the individual may pose a threat to himself or to society. Detainees under such control are in an especially vulnerable position, particularly in the early stages of detention, and it is

[2] Id. art.2

hardly surprising that many serious human rights abuses occur during periods of preventive detention." (Cook 1992, 1)

Seemingly, major changes in the 2012 revision have brought Chinese legislation closer to international standards represented in this thesis' research by the International Covenant on Civil and Political Rights (ICCPR): requirements for detention request are provided more specifically [3]; compulsory and voluntary interrogation for the examination of detention request at the people's procuratorate[4]; strengthened supervision by the people's procuratorate after detention approval especially on its necessity[5]; specified circumstances under which incommunicado detention is allowed[6]; rights to counsel becomes available as early as from the investigative stage [7]. Furthermore, a general and preventive rule against extra-judicial investigation, the exclusionary rule has been adopted.

Despite expected progress in formality, effective implementation in reality is largely doubted due to remaining loopholes that are likely to lead to arbitrariness. The author would like to examine the deprivation of liberty allowed to and enforced by the public security organs in China focusing on arrest and detention procedures under the latest criminal procedure law. The research will address the following questions: did amendments to the CPL in China contribute to further protect the rights of those deprived of liberty for the purpose of investigation? What was the background and major amendments to the Law in 1996 and 2012?

[3] 1996 CPL, art. 60; 2012 CPL, art. 79
[4] 2012 CPL, art. 86
[5] 2012 CPL, art. 93
[6] 1996 CPL, art. 64; 2012 CPL, art. 83
[7] 1996 CPL, art. 96; 2012 CPL, art. 33

The scope of the research is limited to pre-trial investigative stages. Detailed descriptions of comparisons between the adversarial and inquisitorial processes will not be addressed. Neither are administrative detentions[8] frequently imposed as punishments for minor offenses covered in the research.

2. Literature Review

The literature review identified that there has been significant research in this area. Western and Chinese scholars have constantly expressed concerns of human rights violations in criminal proceedings of China.

Cohen (1968) illustrated the development and operation of criminal procedures in China from 1949 through 1963. Clarke and Feinerman (1995) examined various procedural protections in the Chinese CPL with respect to international human rights laws. They concluded that the arbitrary exercise of power by public security had hardly been lessened for decades, due to the resistance to change in criminal justice among political leaders.

Belkin (2000) contributed to a comprehensive understanding of Chinese criminal justice system by providing historical context, current practices, and obstacles to future reforms of the criminal justice system in China. Rosenzweig et al. (2012) assessed the limited impact of the latest revision to the CPL on key elements of the law, such as compulsory measures, rules of evidence, criminal reconciliation, the death penalty review procedure and the impact of the legislation on criminal defense lawyers.

[8] Administrative detentions are penalties stated in administrative regulations and administered and executed by administrative organs (qtd. in Chen 2008, 306-307).

Gelatt (1982) focused on the presumption of innocence in the Chinese legal literature with comparative references to the Soviet and West European. He also reviewed historical, ideological, conceptual and practical discussions among Chinese jurists, and associated subject with procedural rights of suspects, such as the right to defense and the right to remain silent. Rosenzweig (2013), on the other hand, points out the problem of "secret arrest" and enforced disappearance of suspects. He argued that despite the growing public consciousness of individual rights combined with the recent CPL reform, broader concerns of "the fundamental problem of insufficient checks on police detention" and unwillingness of the Chinese Communists Party (CCP) to come forward on political reform, remain as challenges.

Liu and Situ (2001) assessed the revision of 1996 and its practices through a comprehensive literature review and interviews with legal personnel including judges, procurators and defense attorneys. They confirmed the 1996 CPL had effectively incorporated adversarial factors in the previous inquisitorial model while the leadership and control of the Chinese Communist Party (CCP) still plays a significant role in criminal proceedings.

Empirical studies by Liang (2008) and Lu and Miethe (2002) confirmed the weak legal representation in Chinese criminal trials. They pointed out defendants who dared claim their innocence were usually rejected by the judges and put to heavier punishment while those who cooperatively confessed received favorable decision. Chu (2000) analyzed changes in the 1996 revision adopting more justifiable criminal procedures were strategies of the CCP to gain political legitimacy, leaving the gap between the law and the practice growing wider. Woo (1999) observed that due to the socio-political structure in China, the government seems to prioritize justice or a crime

control over due process model while others increasingly choose the latter (qtd. in Zhong, Hu and Liang 2011, 194).

Chen, Spronken and Chai (2012) conducted research on the role of the exclusionary rule and relevant procedural rights of suspects in preventing torture by law enforcement in China. They focused on the recent revisions of the Chinese CPL and compared those with European legislation and international standards.

This thesis pays attention exclusively to arrest and detention rather than a comprehensive overview of the Chinese CPL in most research reviewed so far. The author employs comparative review of the U.S. and Korean systems to understand accomplishments and limitations of protection of procedural rights of detained suspects in China.

3. Research Methodology

In order to answer the research question above, the author would like to explore current arrest and detention procedures in China and assess implications and limitations of changes through two sets of amendments. In the process, right to liberty and security of a person in the international law context and how a structure of criminal procedure, inquisitorial or adversarial, affects degree of deprivation of liberty at investigation stages. The U.S. and Korean legislation will be presented as well to facilitate assessment of the Chinese reform efforts. The U.S. criminal procedure has Anglo-American adversarial tradition while Korean system is based on European Continental inquisitorial background increasingly topped with adversarial elements (Lee

2012, 43). While the U.S. model provides opposite example, Korean model shares the similar challenge, how to adopt due process principles which go along with that China might be faced with recently. The author reviews arrest and detention of three countries focused on (a) conditions and period of arrest and detention and (b) procedural rights of arrested or detained suspects. Legal safeguards for suspects in custody are categorized into preventive, procedural and remedial measures.

II. Deprivation of Liberty in Pre-trial Investigation

1. Competing Models of Criminal Procedure: Crime Control vs. Due Process

Packer (1964) described two competing value systems competing for priority in the operation of the criminal process: the due process model and the crime control model. Each model seeks to guarantee social freedom, but the crime control version does so by emphasizing the efficient processing of wrongdoers, whereas the due process model emphasizes restrictions on government invasion into citizens' lives (Reichel 2005, 164).

"The value system underlying the crime control model assumes that repression of criminal behavior is the most important function performed by the criminal justice process" (Reichel 2005, 88). The emphasis is on speedy and efficient process of screening suspects, determining guilt, and appropriately sanctioning those convicted. "The presumption of guilt allows the crime control model to deal efficiently with large numbers" (Packer 1964, 11). Such belief does not assume a hostile attitude of law enforcement from the early stage of investigation against whomever is suspected to have committed crimes. The presumption of guilt is rather based on the confidence in the fact-finding process used by police and prosecutors to release the "probably innocent" suspects or sustain action against the "probably guilty" ones. Therefore, once the investigative organs determine sufficient evidence of guilt to permit further action, “all subsequent activity directed toward

suspects is based on the view that they are probably guilty (Packer 1964, 11). In the crime control model, emphasis is of the fact-finding stages, and the subsequent procedure of adjudication is as abbreviated as possible to ensure speedy and final determination of guilt (Reichel 2005, 90).

The due process model, on the other hand, insists on the primacy of the individual and the limitation of government power for fear of possible abuse. It is distinguished from the crime control model by its emphasis on the procedure, or how a law enforcement official may invade a person's life, instead of on its outcome. Police and prosecutors are seen as threats to individual liberty although it does not imply that the model is not interested in repressing criminal behaviors. "One is emphasized at the expense of the other, but neither can be identified as qualitatively better" (Reichel 2005, 94) The difficulty of balancing due process and crime control has always been one of the biggest questions of each state when deciding rules of criminal proceedings.

According to Packer (1964), both models align more with the adversarial system based on the U.S. perspective of criminal process. It is of interest that the process of adjudication is typically categorized into two systems: adversarial (also called accusatorial) and inquisitorial. Both systems have the discovery of truth as the fundamental aim, and each is guided by the principle that the guilty should be punished and the innocent left alone (Jörg, Field & Brants 1995, 42). The differences between the two lie in their answers as to what is the best way to find or *decide* the truth. Adversarial or inquisitorial systems are fundamentally distinguished in terms of the structure or assumptions of court proceedings. The adversarial system regards criminal trials as "rivalry between two parties" which is presented before a judge

serving as a passive and neutral arbitrator, often in the presence of a jury. This is from the belief that the truth is discovered when two equal parties, the prosecution and the defense, undergo active debate and persuasion to lead the court proceedings. Within adversarial culture, the fairness of procedure is believed to correspond with the truth-finding aim of criminal proceedings. Thus, procedural rules that can ensure equality between two parties are easily adopted. However, the inquisitorial assumption is that the truth should be discovered in the investigative stages. Substantive truth is then traced by involving the prosecutor and the impartial judge as active investigators (Chu 2000, 159-160) while the suspect or defendant party remains as a mere object of investigation or trials. In order to deter the obstruction of fact-finding by suspects and defense party, the inquisitorial system grants more power to investigative and prosecuting organs that are trusted to stay impartial (Jörg, Field and Brants 1995, 43). Defense lawyers can rarely participate in investigations, and the privilege of the right to remain silent basically does not fit into inquisitorial system (Chu 2000, 161).

2. Dilemma of Chinese Ideology in Criminal Proceedings

"Law was almost totally identified as an instrument for social control throughout the history of the PRC. There has been frequent expression of the need for more laws and a strong legal system to maintain "political stability and good social order" (qtd. in Lubman 1996, 10). The instrumental use of the criminal procedure law, as well is demonstrated by reluctance in protection of fundamental rights to those accused.

Where Chinese criminal proceedings inherit the Continental European inquisitorial system, they regard extensive investigations as natural and therefore the rights of the accused are not considered as a major issue. "Fundamentally, many important due process principles, such as presumption of innocence, judicial independence and adequate right to legal counsel, were absent from the [1979] CPL" (Chen 2008, 300) compared to minimum requirements proposed by the Universal Declaration of Human Rights (1948), the ICCPR (1966) and many other elaborations in UN Conventions and documents.[9]

From the earliest CPL, investigative and prosecuting authorities have been expected to make facts of crime "clear (*qingchu*)" and to have "reliable (*queshi*) and sufficient (*chongfen*) evidence" during investigation and examination for prosecution, respectively (Chen 2008, 304). Those articles have been barely changed to maintain such requirements:

> "When a public security organ has concluded it investigation of a case, the facts of a crime should be made clear and the evidence should be reliable and sufficient."[10]

> "When the people's procuratorate is of the opinion that the facts of a crime have been made clear and the evidence is reliable and sufficient, criminal prosecution should be conducted in accordance to the law."[11]

[9]Chen (2008) provides examples such as General Comments made by the UN Human Rights Committee under the ICCPR, the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, GA Resolution 43/179 (1988) (Chen 2008, 300)

[10] 1996 CPL, art. 129; 2012 CPL, art. 160

[11] 1979 CPL, art. 100; 1996 CPL, art. 141; 2012 CPL, art. 172,

In order to accomplish such thorough investigation before trials, CPLs have provided generous time limits for arrest and detention that are two principal acts of pre-trial investigation. Articles on lengthy time limits and extensions will be elaborated in Chapter IV.

3. Right to Liberty and Security in the International Covenant of Civil and Political Rights

Bassiouni (1993) points out individual human rights are most susceptible to abuse during the criminal process. Therefore, a series of protective measures that should ensure the criminal process is not abused or manipulated to curtail individual liberties. Arrest and pre-trial detention involves the right to personal liberty, one of the most fundamental rights.

International human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the ICCPR establish internationally recognized standards to protect individuals from arbitrary detention. Bassiouni (1993) listed eleven different rights[12] associated with the protections afforded an individual in the criminal process. "Each of these rights has been found to be basic to fairness in the criminal process. Without these rights, the criminal process can be abused and manipulated to curtail individual liberties" (Bassiouni 1993, 253). Each of these rights has been found to exist in a number of international instruments and national constitutions (Bassiouni 1993, 254).

[12] Eleven rights are stated in Appendix II of Bassiouni(1993), 295

The fundamental rights violated by arrest and detention in the investigative process have originated from the right to life, liberty, and security of the person. "The right to liberty is not absolute and can be lawfully and reasonably curtailed. The right to be free from arbitrary arrest and detention seeks to delineate appropriate exceptions to the right of liberty" (qtd. in Bassiouni 1993, 259). Therefore the former one is usually "expressed as a specific exception to the general right to liberty, which is listed as a procedural protection" (Bassiouni 1993, 260). In Article 9 of the ICCPR this right is expressed as a general exception to the right to personal liberty. In case of lawful arrest, a person has the right to be informed of the reasons for his arrest and the following of procedural rights that he or she can afford during consequent stages of criminal proceedings.[13]

These procedural rights are designed to ensure effective protection against judicial control over unlawful deprivation of personal liberty. First, "the presumption of innocence is inextricably linked to fairness in criminal due process and is intrinsically related to the protection of human dignity. It guarantees against abuse of power by those in authority and ensures the preservation of the basic concepts of justice and fairness. The basis of this right lies in the Anglo-Saxon rejection of the inquisitorial mode of criminal procedure in favor of an adversarial mode with the burden of proof placed on the state" (Bassiouni 1993, 266). This presumption provides the basis for the right to freedom from torture and cruel, inhuman, and degrading treatment during pre-trial interrogations. The ICCPR asserts the right not to be

[13] ICCPR, Part III, art. 9(2)

compelled to testify against oneself, which is also called the privilege against self-incrimination, as well as the right not to confess guilt.[14]

Secondly, representation by counsel at every important stage of criminal proceedings is also a fundamental right for a defendant and is paramount to ensure due process. This is based on assumptions that (a) the presence of effective counsel will deter and prevent abuses against the person arrested and (b) it ensures that due process shall be followed (Bassiouni 1993, 280). However, as the right to counsel itself does not guarantee the full enjoyment of the right, the ICCPR requires that an accused be informed of the right to counsel.[15] Article 14(3) of the ICCPR encompasses the right to counsel of one's own choosing, the right to the appointment of counsel in case of indigence, the right to self-representation and the right to the assistance of an interpreter. The ICCPR does not explicitly grant the right to the presence of counsel during all stages of the proceedings, (and neither do any other processes) but "in the determination of any criminal charge against him."[16]

Last but not least, appropriate measures should also be provided that allow a suspect to challenge the legitimacy of his arrest or detention: (a) the rights to be brought promptly before a judge or other judicial authorities and (b) the rights to immediate release when the necessity of further detention no longer exists. The major goal of these rights is to limit prolonged infringements on personal freedom and therefore to guarantee the right to a speedy trial. The ICCPR guarantees the right to be released from detention if the accused is not brought to court within a reasonable time.[17] The United Nations Human Rights Committee has clarified that "delays should not

[14] ICCPR, Part III, art. 14(2)
[15] ICCPR, Part III, art. 14(3)(d)
[16] ICCPR, Part III, art. 14(1)
[17] ICCPR, Part III Art. 9(3)

exceed a few days from the time of arrest; forty-eight hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing."[18] "Specific time limits may be set for each stage or multiple stages. Exceeding the required time limits may result in dismissal of the charges or reversal of the conviction" (Bassiouni 1993, 286). Those arrested or detained have the right to challenge the lawfulness of the arrest or detention before a judge.

[18] Human Rights Committee, General Comments No. 35, art. 9: Liberty and security of person CCPR/C/GC/35 30 Oct 2014

III. Arrest and Pre-trial Detention in the United States and South Korea

1. Relevant Procedure in the United States

In the U.S. "most of the law of criminal procedure comes from the Supreme Court's interpretation of the Constitution, in particular the Fourth, Fifth[19] and Sixth[20] Amendments" (Bradley 2007, 519). The legislature is not expected to or does not consider itself to have jurisdiction over police activities of every state; neither could it produce any standard of criminal procedure followed uniformly all over the nation. Consequently, these amendments were supposed to be applied only to the federal cases (Bradley 2007, 519), and the U.S. law of arrest and pre-trial detention is "a patchwork of the different laws and practices of separate state jurisdictions" (Frankowski and Luepke 1992, 109). However, a series of rulings have recently found that these constitutional rights are applicable also against state police officials (Bradley 2007, 520).

Conditions and Period of Arrest and Detention

An arrest in the U.S. criminal proceedings constitutes a 'seizure' of a person in the Fourth Amendment:

[19] The right against self-incrimination
[20] Grants the defendant various trial rights including trial by jury

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[21]

The Supreme Court ruled that a seizure occurs when there is an intentional use of force or authority which either terminates or restrains the individual's freedom of movement (Dressler 2010, 106).[22] Thereby, the U.S. supports a comprehensive understanding of 'arrest', as the most intrusive form of seizure (Carmen 2010, 152), without distinguishing it operationally or legally from detention, as opposed to a separate employment of two terminologies in the Korean and the Chinese proceedings (Roh 2013, 188). However, not all seizures fall under the range of arrests (Dressler 2010, 141). The U.S. common law differentiates a 'stop' and an 'arrest' among seizures by the degree of restraints on personal liberty and the length of custodial period. The former refers to a seizure of the person "for the purposes of brief questioning" (Bradley 2007, 520). The Supreme Court held that "reasonable suspicion", rather than mere suspicion or hunches, of previous criminal activity is enough to justify a stop.[23] On the other hand, the latter corresponds to a subjective circumstance by the questionee where the subject perceives that a 'stop' trespasses beyond the level that a reasonable person would not feel that he is free to go within perhaps 15 to 20 minutes after he is detained (Bradley 2007, 523). Accordingly, arrest requires a higher constitutional standard that there should be "probable cause both that a crime has been

[21] U.S. Constitution, Fourth Amendment
[22] Terry v. Ohio, 392 U.S. 1 (1968); Henry v. United States, 361 U.S. 98 (1959)
[23] Terry v. Ohio, 392 U.S. 1 (1968)

committed and that the arrestee has committed it" (Bradley 2007, 521, 523). As opposed to a separate employment of two terminologies in the Korean and Chinese criminal proceedings, arrest is not operationally or legally distinguished from detention in the U.S. as described below (Roh 2013, 188).

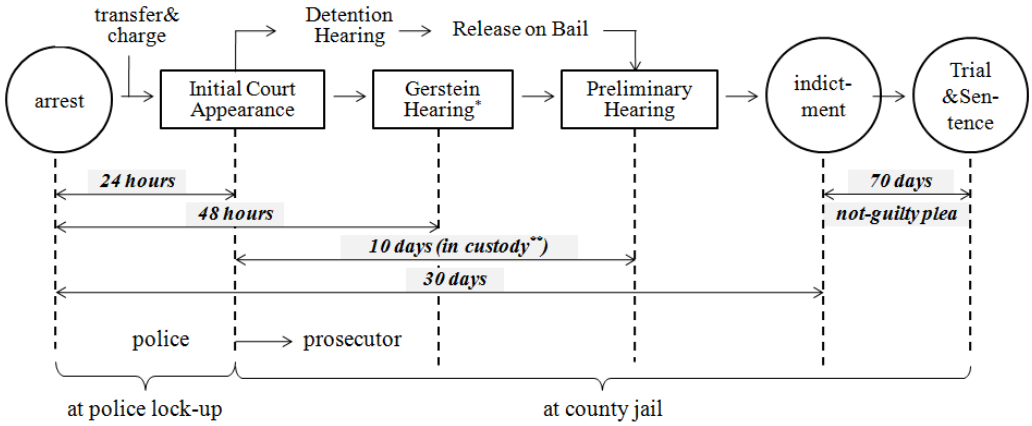
Regarding requirement of a judicial warrant, a police officer: (a) may arrest a person in a public place without a warrant even if the officer has ample time to obtain a warrant without fear that the suspects will flee; (b) may not arrest a person in his home without a warrant unless there is exigent circumstances or valid consent; and (c) may not arrest a person in another person's home without a search and arrest warrant without exigent circumstances or valid consent (Scheb and Scheb 1999, 94; Dressler 2010, 146). While it is always essential to have probable cause to make an arrest, judicial warrant is not the constitutional requirement (Lee 2007, 4). Notwithstanding the warrant preference[24] most arrests are not made pursuant to warrants in practice (Hall 2004, 363; Lee et al. 2010, 120).

A suspect who is arrested regardless of by warrant or not should be charged by a prosecutor and be brought before a magistrate or judge "without unnecessary delay"[25] usually within 24 hours of his arrest (Dressler 2010, 8). This is called initial court appearance or arraignment where the defendant[26] is informed of the charges against him and his constitutional rights in the impending prosecution such as the right to silence and counsel (Bradley 2007, 538-539). At the appearance, detention hearing also takes place to decide continuous detention or release on bail. If the arrest is not pursuant to a warrant, the judicial officer must determine whether there is probable cause to

[24] Aguilar v. Texas, 378 U.S. 108, 110-11)
[25] Federal Rules of Criminal Procedure 5(a)(1)(A)
[26] In the U.S. system, a suspect is called a defendant from the initial court presence although the indictment and information is not issued.

hold the suspect no longer than 48 hours after arrest (Lee et al. 2010, 67, 119). This is called probable cause determination or a Gerstein hearing.[27]

Figure 1. Criminal Proceedings in the U.S.



*Or probable cause hearing, in occasions of warrantless arrest
**20 days if released

Source: Lee et al. 2010, 119, FigureII-6

The next step is the preliminary hearing that is held within 10 days, or at least within two weeks, after the initial appearance (Dressler 2010, 8; Lee et al. 2010, 68). This is an adversarial proceeding with counsel[28] for the purpose of protecting the defendant against an unreasonable prosecution.[29] The judge or the magistrate determines whether there is "probable cause to believe an offense has been committed and the defendant committed it."[30] The public prosecution should be brought in 30 days after an arrest, and if the defendant plea non-guilty at the preliminary proceeding, the trial should be

[27] Gerstein v. Pugh, 420 U.S. 103 (1975)
[28] Coleman v. Alabama, 399 U.S. 1 (1970)
[29] "The grand jury issues an indictment or the prosecutor issues an information. There is no necessary difference in form" (Bradley 2007, 540).
[30] Federal Rules of Criminal Procedure 5.1(e)

open within 70 days from the indictment and information (Lee et al. 2010, 120). The criminal proceeding from an arrest to a trial is summarized in the Figure 1.

Procedural Rights of those Arrested

The due process principle in the U.S. Constitution is traced to the Bill of Rights "intended to secure the individual from the arbitrary exercise of the powers of government."[31] The Fifth Amendment of the Constitution declares that any proceeding that denies a citizen "life, liberty or property" should be based upon the "due process of law" as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, [...]; nor shall be compelled in any criminal case to be a witness against himself, nor be deprvied of life, liberty, or property, without due process of law."[32]

Right to counsel, the exclusionary rule and the Miranda warning requirement and all the other procedural safeguards have thereafter been derived from the due process principle. One of the most basic tenets of the due process principle is the presumption of innocence. That is, the suspect or defendant is presumed innocent until proved guilty and that the prosecution must establish the defendant's guilt beyond a reasonable doubt (Hall 2004, 13).

[31] 110 U.S. Hurtado v. California, 527 (1884)
[32] U.S. Constitution, Fifth Amendment

Such presumption lands the burden of proof upon the prosecutor. "If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal."[33] Unless the defendant is charged of a capital crime, based on the presumption of innocence, he has the constitutional right to be released on bail, and the "excessive bail shall not be required."[34]

Along with the procedural codes declared by the court rulings rather than the legislative promulgation, another noticeable aspect of the U.S. system is that the exclusionary rule is mandatory, not subject to the discretion of the trial judge" (Bradley 2007, 530, 548). If an invalid arrest does not prevent the defendant from being prosecuted, it will result in exclusion of any evidence found in a search either incidental or by consent, as well as exclusion of any subsequent statement made by the defendant (Bradley 2007, 523). The exclusionary rule is extended to the "fruit" of the poisonous tree. A fruit such as derivative evidence, incriminating statements or consents to search picked from the poisonous tree, an illegal stop or arrest, is unquestionably *poisonous* and therefore unusable (Scheb and Scheb 1999, 99).

The privilege against self-incrimination provided by the Fifth Amendment takes concrete form in the mandatory Miranda warnings prior to "custodial interrogation."[35] The warnings should include the that the suspect "has a right to remain silent, that anything he does say may be used against him, that he has a right to counsel and, if he cannot afford to hire one, a lawyer will be appointed to represent him" (Bradley 2007, 533). The term "custody" in *custodial interrogation* have been generally interpreted to be the same as an arrest, where "a reasonable person would feel that he will be held

[33] Commonwealth v. Webster, 59 Mass. 295, 320 (1850)
[34] U.S. Constitution, Seventh Amendment
[35] Miranda v. Arizona, 384 U.S. 436 (1966)

by the police for a substantial period of time" (Bradley 2007, 534). Custodial interrogation does not have to take place in the police station. Conversation in the living room of a suspect's house as far as he would have felt 'arrested' requires the warnings (Hall 2004, 366; Bradley 2007, 534).[36] Only one exception to the mandatory warnings is observed when there are "public safety" concerns presumably limited to involvement of weapons or destructive devices (Bradley 2007, 535).[37]

"A defendant has a constitutional right to be represented by counsel[38] anytime *actual imprisonment*[39] is to be imposed" (Bradley 2007, 545). The states and federal government provides habeas corpus relief as a means to challenge state court convictions. Theoretically, a defendant in custody can file the petitions at any stage of a criminal proceedings and fight against unlawful confinement (Hall 2004, 493).

2. Relevant Procedure in South Korea

The criminal justice system of Korea has experience remarkable changes since democratization stipulated by the June Movement of 1986. It was in the 1987 Constitution, that the due process principle in criminal proceedings was explicitly introduced (Cho 2006, 100,101). Arrest, detention, search, seizure and interrogation should be based on statutes.[40] Warrants issued by a judge through *due procedures* are required for the

[36] Oregon v. Elstad, 470 U.S. 298 (1985)
[37] New York v. Quarles, 467 U.S. 649 (1990)
[38] U.S. Constitution, Sixth Amendment
[39] Scott v. Illinois, 440 U.S. 367 (1979).
[40] Constitution of Korea, art. 12 (1)

abovementioned compulsory measures unless a criminal suspect is a flagrant offender or if a person who is suspected of committing a crime punishable by three or more years of imprisonment may escape or destroy evidence.[41] Article 198 of the Criminal Procedure Act (CPA) of Korea was wholly amended in 2007 to declare the principle that investigation should be conducted without putting the suspect into detention. In addition to the warrant requirement provision in the Constitution, Article 75 of the CPA elaborates on the essential elements of arrest and detention warrants.

Conditions and Period of Arrest and Detention

Article 75 deals with the detention of defendants at the court. Article 200-6 and Article 209, provides the applicability of Article 75 to pre-trial arrest and detention, respectively:

> "(1) A warrant of detention shall contain the name and address of the defendant, the name of the crime, essential facts concerning the public action, the place to bring the defendant or prison where he is to be detained, the date of issue, effective period of the writ and a statement that the warrant shall not be executed after the lapse of such period whence it shall be returned to the court of issuance, and the signature and seal of the presiding judge or commissioned judge issuing the warrant."[42]

[41] Id., art. 12 (3)
[42] Criminal Procedure Act of Korea[hereinafter CPA], art. 75 (Form of Warrant of Detention)

Pre-trial detention in Korea is distinguished from arrest by its conditions and duration. Arrest is short-term: that is less than two days deprivation of liberty of a criminal suspect in the earliest stage of investigation. On the other hand, detention by police or prosecution lasts up to 30 days with or without precedent arrest. Therefore, more stringent requirements for seeking detention warrants are imposed and a judicial hearing is mandatory. [43]

As a general rule, police officers and public prosecutors should carry a warrant issued by a judge to arrest a criminal suspect.[44]Police officers cannot request any warrant directly from the judge. Instead, they request the warrant from a prosecutor, who in turn applies for the warrant from the judge.[45] Arrests with a warrant requires (a) probable cause to suspect that a person has a committed crime, and (b) concern that a suspect refuses or is likely to refuse to appear before investigative authorities. Exceptions to warrant-based arrests are: (a) emergency arrests[46] and (b) arrest of flagrant and quasi-flagrant offenders. Although the Constitution requires investigative authorities to request *ex post facto* a warrant after the emergency arrests, there is no regulating articles provided in the CPA.

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[43] Before the 2007 revision of the CPA, such preliminary hearing by a judge was only held if there was request of a suspect or his lawyer. According to the Article 201-2 (1) of the current CPA, "a judge, who receive a request for a warrant of detention of a suspect arrested, should hold a hearing to examine the suspect without delay."

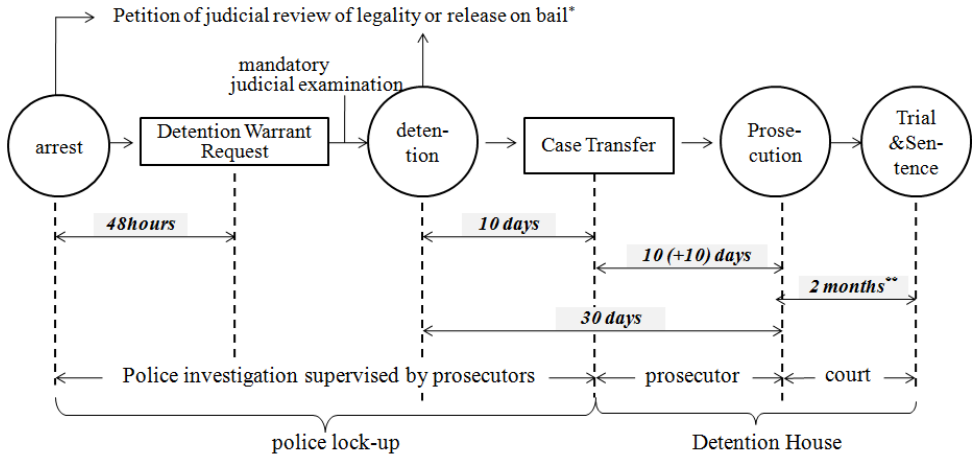
[44] CPA, art. 200-2, In Korean criminal justice system, public prosecutors play exclusively dominant role in pre-trial investigation as well as prosecution(Article 195). Judicial police officials should investigate crimes under instructions of a public prosecutor (CPA of Korea, art. 196 (1)) (Pyo 2007, 192).

[45] Id., art. 200-2 (1), 201 (1)

[46] Id., art. 200-3, If there is probable cause to believe that the suspect may destroy evidence or attempt to escape. Provided, he should be suspected to have committed crimes statutory punishment of which is death penalty, life imprisonment, or imprisonment whose maximum sentence is three years or longer.

If police or public prosecutors do not request a detention warrant within 48 hours after the arrest, they should release the suspect.[47] A detention warrant can also be issued against a suspect who is not yet arrested. On both occasions, the judge should examine the case within 24 hours after the prosecutor applies for a detention warrant.[48] Detention by police is allowed for up to ten days, including the period of arrest, upon the issuance of the detention warrant, before the case is transferred to the prosecutors' office.[49] After the transfer, the prosecutors' office can detain the suspect for another ten days before they make the decision to prosecute or release the suspect. A prosecutor can request an extension of the detention up to ten more days for further investigation.[50] Detention at the investigative stages can last up to 30 days. The proceeding and the period of arrest and detention of Korea is summarized in the Figure 2 below.

Figure 2. Criminal Proceedings in Korea



* On request of the arrestee or detainee or their representatives
**The period can be renewed twice by two months at each level of trial; three times of exceptional extension is acceptable at appellate court

[47] Id., art. 200-2 (5), 200-4 (2), 213-2
[48] Id., art. 201-2 (1)-(3)
[49] Id., art. 202
[50] Id., art. 205

Procedural Rights of those Arrested or Detained

Article 12 (6) of the latest 1987 Constitution of Korea ensures the liberty of persons by stating, "any person who is arrested or detained, shall have the right to request the court to review the legality of the arrest or detention." Compulsory measures for the purpose of pre-trial investigation in Korea should have a statutory basis provided in the Criminal Procedure Act and are taken "to the least extent necessary".[51] The due process principle for arrest and detention is mainly developed through warrant requirement as stated in the Constitution and CPA. In addition, as a preventive measure against unlawful arrest and detention, exclusionary rules are inserted as Article 308-2 of the CPA. Unlike the U.S. case, exclusion of illegal evidence does not have constitutional grounds in Korea. Without other effective remedies for illegal misconduct by investigative organs (Cho 2008, 17), exclusionary rules are expected to deter the illegal arrest and detention of suspects, beforehand as well as consequent unlawful collection of physical evidence. Admissibility of the written record of interrogation obtained as a result of warrantless arrest and detention without statutory grounds is denied. Interrogation of a suspect without notification of their right to silence also loses admissibility (Shin 2013, 242).

Procedural rights after arrest or detention takes place are similar to those of the U.S. rules: rights to silence and privilege against self-incrimination, rights to counsel, rights to be released on bail.[52] Article 200-5 provides the duty of investigative authorities to notify the following elements and rights to those arrested when the arrest takes place or as soon as it

[51] Id., art. 199
[52] Id., art. 95 (compulsory bail)

becomes possible to notify[53]: (a) the gist of the suspected crime, (b) reasons for the arrest, (c) the right to appoint a defense counsel, and (d) the opportunity to vindicate him or herself. In addition, Article 244-3 adopting the Miranda rule of the U.S. requires investigative organs to inform a suspect prior to interrogation, the right to remain silent without any disadvantage and the right to have the counsel present during the interrogation. Right to counsel is also applied in the judicial hearing to examine issuance of a detention warrant. The public prosecutor and the defense counsel may appear before the court on the date of the hearing to make a statement.[54]

As a matter of remedies for inappropriate or illegal arrest and detention, the Constitution and CPA provides habeas corpus. When a suspect is arrested or detained with or without warrant, he or she has "a right to request the court to review the legality of the arrest or detention."[55] On receipt of the request, the court must examine the suspect and make a decision of release or not within 48 hours.[56] Alternatively, a suspect can file a petition for cancellation or alteration of inappropriate arrest and detention.[57] There are several laws offering legal basis for general measures to challenge the unlawfulness of an investigation. The Criminal Act punishes unlawful arrest and detention by abusing the authority and violent or cruel acts during the performance of duties with imprisonment and suspension of qualifications in Article 124 and 125. The Act on the Performance of Duties by Police Officers also includes penal provisions for violation of duties by police officers.[58]

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[53] Supreme Court Decision 2011 Do 7193 decided on 9 February 2012
[54] CPA, art. 201-2 (4)
[55] Constitution of Korea, art. 12(6)
[56] CPA, art. 214-2
[57] Id., art. 417
[58] The Act on the Performance of Duties by Police Officers, art. 12

Administrative disciplinary disposition[59] are administrative measures for discipline of public officials imposed according to Article 78 and 79 of the State Public Officials Act. Citizens can claim state tort liability against the governmental organizations for unlawful accusation and detention as guaranteed in the Constitution[60] as well as recovery of damages as expressed in Article 750 of the Civil Act (Shin 2013, 241). Additionally, for instant response, the CPA authorizes public prosecutors to "inspect the place where a suspect is arrested or detained under the control of police" and to immediately release those arrested or detained not through due process of law.[61]

[59] Removal, dismissal, demotion, suspension from office, reduction of salary and reprimand.(The State Public Officials Act, art. 79)
[60] Constitution of Korea, art. 28 and 29
[61] CPA, art. 198-2

Table 1. Arrest and Detention in the U.S. and Korea

Country	Arrest and Detention	In Charge	Period of Confinement	Place
U.S.	Arrest with/without Warrant	Police	(a) initial appearance within 24 hours (b) Gerstein Hearing within 48 hours (c) burden of proof of exceptional circumstances on police for arrests longer than 48 hours.	Police Lock-up
	Detention	Court	(a) no definite period of pre-prosecution or pre-trial detention (b) Provided, preliminary hearing before a judge	County Jail
Korea	Arrest with Warrant/ of (quasi) flagrant offenders/ Emergency Arrest	Judicial Police Officials/ Public Prosecutors	(a) 48 hours (b) either make a request for detention warrant to a judge or release	Police Lock-up
	Detention	Judical Police Officials	10 days (from the date of arrest)	Police Lock-up
		Public Prosecutors	(a) 10 days with options to extension by another 10 days with a court's approval (b) decision of either prosecute or release in maximum 20 days	Detention House

Source: Lee et al. 2010, 221, Table V-1

IV. Arrest and Pre-trial Detention in China

Criminal procedure of China also distinguishes arrest (*juliu*) and detention (*daibu*) (Guo 2014, 160).[62] The purpose of arrest and detention is to ensure the appearance of the criminal suspect or defendant at trial and prevent continuing danger to society (Yi 2014, 175). Basically, arrest and detention does not require any judicial warrant in China. Instead, approval of the people's procuratorate should be obtained for detention and consideration of the degree of deprivation of liberty.

1. Legal Grounds for Arrest and Pre-trial Detention

Since the revision in 1996, the CPL has explicitly required that arrest and detention be enforced in accordance with the law:

> "With respect to a criminal case which has been filed, the public security organ shall carry out investigation, [...] Active criminals or major suspects may be detained first according to law, and criminal suspects who meet the conditions for arrest shall be arrested according to law."[63]

[62] Mostly, Western scholars and English translations of Chinese CPL uses arrest for *daibu* and detention for *juliu*. However, the author would suggest the opposite in order to avoid confusion and make comparison easier. Arrest and detention is operationally used to indicate distinguished procedures only in criminal justice system with European continental traditions such as in Germany, France and Japan. Although arrest in Anglo-American proceedings includes the further detention before trial, the author focused on the nature of arrest that takes a suspect to a police station from the scene while detention is perceived more distant from the 'catching' moment. Therefore, the author decided that arrest is a more appropriate word for prior deprivation of liberty (Roh 2006, 2008; Lee 2009; Guo 2014).

[63] 1996 CPL, art. 89; 2012 CPL, art. 113

2. Conditions of Arrest and Detention

Arrest (*juliu* 拘留)

Similar to that in Korea, arrest is a coercive measure to stop, apprehend and take a flagrant or quasi-flagrant criminal suspect to an investigative organs or the public security.[64]

The public security organ might arrest an active criminal or a major suspect in any of the following circumstances according to Article 80 of the new CPL[65]:

(a) A person is preparing for a crime, is committing a crime, or is found right after a crime has been committed;
(b) A person is identified by a victim or other eye-witnesses as a criminal offender;
(c) Evidence of a crime is found in the surroundings of a person or in his residence
(d) A person attempts to commit suicide or escape or is on the run after committing a crime;
(e) Evidence is likely to be destroyed or falsified, or a person is likely to make false confessions in collusion;

[64] In China, the public security or police are granted exclusive power of investigation. The people's procuratorate, therefore cannot directly arrest or detain any suspect. Exceptions are crimes of "embezzlement and bribery, dereliction of duties", abuse of authorities by state public officials and other examples as stated in Article 18 of the 2012 CPL, on which procurators initiate and proceed to the investigation.

[65] 1996 CPL, art.61; 2012 CPL, art. 80, In the 1979 CPL, the seventh example used to be applied in 'behavior of beating, smashing, looting and gravely undermining work, production or the social order.)

(f) A person refuses to provide his true name and address when his identity is unknown;

(g) There is strong suspicion that a person has committed crimes in different places, or has repeatedly committed crimes, or committed gang crimes.

Detention (*daibu* 逮捕)

Detention, compared to arrest, is to take a suspect into custody for a longer period. Unlike the Korean system, in China arrest must come before the request for detention. It is the most severe coercive measure imposed on a criminal suspect during pre-trial stages. Therefore, the CPL requires stricter conditions for the request of the public security and approval of the people's procuratorate to detain the arrestee, which is not necessary for arrest. The first paragraph of the revised Article 79 of the 2012 CPL[66] provides preconditions of detention, which could be summarized into three categories: (a) the facts of crime, (b) sentencing of imprisonment and (c) the necessity of arrest.

Where there is evidence of a crime, and the criminal suspect or the accused person is likely to be sentenced to a criminal penalty of imprisonment or a more severe penalty and if the placement of the criminal suspect or the accused person on bail will not be enough to prevent a risk to the public, the criminal suspect or the accused person shall be detained in accordance with the law.[67]

The existence of evidence of a crime refers to the facts of a crime. Only those suspected of committing the alleged crime and whose offenses are

[66] 1996 CPL, art. 60
[67] 2012 CPL, art. 79

verified by evidence shall be detained. If the evidence is weak or uncertain, the detention is prohibited. The imprisonment clause is closely related to the primary aim of the detention stated in the article: to ensure the appearance of the defendant, who is still a criminal suspect, and to secure the public's safety during trial. There is a presumption that if the sentence is less than fixed-term imprisonment, the suspect is less likely to run away.

The imprisonment clause functions as the minimum precaution to avoid the risks of a defendant's absence or corresponding danger to society. However, legal probability of imprisonment is not the absolute factor in determining arrest; the enforcement of the law should also conclude that less-severe alternative measures such as bail are not sufficient. Article 65(b) states that investigative organs may release a criminal suspect on bail (*qubaohoushen* 取保候审) if the placement on bail would not pose a risk to society even if the imposed penalty of the alleged crime is not less than fixed-term imprisonment.

Lastly, the necessity of detention is meant to consider the suspect's personal dangerousness, either the accused poses a danger to the community or is likely to flee to avoid trial. Some Chinese scholars argue that any evidence satisfying the first requirement is sufficient to prove the necessity (Yi 2008, 9-11). The necessity clause is elaborated into the following circumstances where: [68]

(a) the criminal suspect may commit a new crime;
(b) the criminal suspect poses a real risk to state security, public security or the social order;

[68] Id., art. 79

(c) it is possible that the criminal suspect will destroy or falsify evidence, interfere with the testimony of witnesses or collude with the evidence;

(d) it is likely that the criminal suspect will retaliate against the victim, informant or complainant; or

(e) the criminal suspect may attempt to commit suicide or escape.

3. Duration of Arrest and Detention

The CPL used to allow generous time limits for arrest and detention. It was due to the expectations and that investigative organs would have completed a thorough investigation of the defendant's crime, and reliable and sufficient evidence would have been collected before trial.

The time period for criminal detentions is composed of two parts: first, time limits for the public security organs to submit a request for detention after arrest; second, the people's procuratorate receiving the request should decide the approval or disapproval in a given amount of time. The CPL prescribes three types of time periods for criminal detention: (a) three days for ordinary cases, (b) four to seven days for major and complex cases and (c) 30 days for cases across regional boundaries (Yi 2014, 195).

If a public security organ considered it necessary to detain an arrestee, it is required, within three days after arrest, to submit a request to the people's procuratorate for review and approval. Under exceptional circumstances, the time limit for request might be extended by one to four days, which finally gives seven days of arrest before asking for examination

of detention approval. However, for the detention of "a major criminal suspect who is involved in widespread crimes, or repeated crimes or gang crimes, the time limit for the submission of an application" may be extended to 30 days.[69]

The people's procuratorate is required to make a decision whether to approve detention within seven days from the date of the request. If the detention is not approved, the arrested suspect should be released immediately, and the public security personnel should report the release back to the people's procuratorate.[70] Therefore, before the decision of the detention is approved, an arrested suspect of ordinary crimes could be held in custody for at most 14 days: seven days before the request of detention and another seven days waiting for an answer to the request.

Once a criminal suspect is detained, the time limit to have for custody for investigation must not exceed two months. An extension by one month might be permitted upon the approval of the people's procuratorate at the next higher level.[71] An extension of two additional months is granted upon approval or decision of the provincial-level (province, autonomous region, or directly administered municipality) people's procuratorate if the case falls into any of the four following conditions prescribed by Article 156 of the 2012 CPL:

(a) major and complex cases committed in remote areas where transport is particularly inconvenient;

(b) major cases committed by criminal gangs

(c) major and complex cases committed by persons who go from place to place to commit crimes; or

[69] Id., art. 89
[70] Id., art. 89
[71] Id., art.154

(d) major and complex cases which involve large areas and for which gathering evidence is difficult

Article 157 grants further extensions by two months for the cases described above, only if the alleged crime is punishable by fixed-term imprisonment longer than 10 years, and the public security organ needs more time to conclude the case. So far, for ordinary crimes detention is allowed for three months while seven months of detention could be approved for organized or complex criminal cases.

Moreover, if a case may not fulfill the conditions of Article 156, but is particularly complex and has specific reasons that it cannot be handed over for trial in three months, the Supreme People's Procuratorate can report to the Standing Committee of the National People's Congress (SCNPC) and apply for a postponement of release.[72] A legal loophole is apparently observable as the indefinite term of detention for serious and major cases before transfer to the people's procuratorate might be allowed by the decision of the SCNPC (Chen 2013, 65).

Upon the expiration of these time limits, the public security organ should send the case, along with case materials and evidence, to the people's procuratorate with an opinion of either recommending prosecution or non-prosecution.[73] After the transfer of the case, the people' procuratorate examines and determines whether to prosecute or not within one month. "For major or complex cases, an extension of half a month may be permitted."[74] If a supplementary investigation is needed, another month is given for each

[72] Id., art. 155
[73] Id., art. 160
[74] Id., art. 169

supplementary investigation, which is allowed twice at most.[75] Upon the announcement of a non-prosecution decision, the criminal suspect in custody should be released immediately.[76] Finally, the longest detention of a suspect of ordinary crimes before trial adds up to six months including one month for examination of prosecution and two supplementary investigations. Detention may continue for more than ten and a half months if the case is regarded as serious as stated in Article 156 and 157. Effectively, the CPL allows "indefinite pre-trial detention at the sole discretion of the investigating authorities" (LCHR 1996, 18).

Trials of public prosecution cases[77] shall be completed within two months, or in three months with exceptions, after the acceptance of the case by the court.

4. Rights of Detained Criminal Suspects in China

Article 37 of the 2004 Constitution declares inviolable freedom of the people:

> "no citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ. Unlawful detention or deprivation or restriction of citizens' freedom of the person by

[75] Id., art. 171
[76] Id., art. 174
[77] China also allows private prosecution of a crime, which is not covered in the research.

other means is prohibited, and unlawful search of the person of citizens is prohibited."

Legal grounds to safeguards the rights of detained suspects from the early stages of criminal proceedings are derived from this principle. However, there is distinct difference between the legal grounds for arrest and detention in China. When arresting a person, a public security organ must produce an 'arrest certificate(*juliuzheng* 拘留证).'[78] Article 149 of the Regulations on the Procedures for the Handling of Criminal Cases by Public Security Organs states that an arrest certificate is issued by the public security organ:

"On the basis of custody certificates and arrest certificates signed by public security organs, detention centers will detain suspects and defendants who have been taken in custody or arrested."[79]

Missing checks and balances in police arrests makes the certificate a mere non-binding piece of paper. Although detentions of criminal suspects should obtain external approval by a people's procuratorate and should be executed by a public security organ[80], the examination does not belong to any judicial authority.

[78] 1996 CPL, art. 64; 2012 CPL, art. 83 first paragraph; as far as the document is signed by the public security organs, the author choose to call it a 'certificate' rather than a 'warrant'

[79] The Regulations on the Procedures for the Handling of Criminal Cases by Public Security Organs (People's Republic of China Public Security Department Order No. 127), art. 149, first paragraph, [公安机关办理刑事案件程序规定, English translation available at http://chinalawtranslate.com/en/public-security-organ-procedures-for-handling-criminal-cases/]

[80] 1996 CPL, art. 59; 2012 CPL, art. 78

Legal Device for Prevention of Arbitrary Detention

Contrary to common law traditions to have exclusionary rules that provide a popular remedy for violation of individual freedom during criminal process, abuse of compulsory measures in Chinese proceedings did not necessarily result in exclusion of evidence. China promulgated Rules for Excluding Illegally Obtained Evidence in Handling Criminal Cases in 2010 which was incorporated into the new CPL as follows (Yi 2014, 199-200):

> "Confessions by a criminal suspect or a defendant obtained through torture, extortion or other illegal methods, and witness testimony and victim statements obtained through the use of violence, threats and other illegal methods shall be excluded." [81]

Where evidence that should be excluded is identified during the course of investigation, examination for prosecution or adjudication, such evidence shall be excluded in accordance with the law and shall not be used as a basis for prosecution recommendations, prosecution decisions or judgments.

Nevertheless, there is no explicit reference that abuse of coercive measure falls into "other illegal methods." Therefore, applicability of the new article on unlawful arrest or detention depends on its interpretation. If evidence obtained through illegal arrest or detention may also be excluded, admissibility of evidence collected under the following circumstances may be challenged due to its illegality: detention of a criminal suspect who does not satisfy any condition for a detention request enlisted in Article 80, or

[81] 2012 CPL, art. 54,

detention whose time limit has surpassed the legal standard. Furthermore, the exclusionary rules are expected to prevent arbitrary arrest and detention beforehand.

Secondly, presumption of innocence that is an undeniable foundation for the due process principle of criminal procedure in Anglo-American traditions is missing from the Chinese judicial system (Davidson and Wang 1996, 147). However, the official stance of China on presumption of innocence is that the Chinese CPL neither recognizes nor denies any presumption (LCHR 1993, 14), rather putting more emphasis on truth from facts.[82] In practice, suspects are "presumed guilty until found guilty" (Butterfield 1980, 9D). Indeed, terminologies in 1979 CPL are contradictory. In the provisions on arrest and detention, those under arrest or detention are called either 'defendants (*beigao*)' or 'offenders (*renfan*)'.[83] Before the court rulings, those under investigation could be named 'offenders' and their detention is requested when "major facts of his crime had been clarified."[84] (Gelatt 1982, 285-286) It was with the 1996 revision, that 'criminal suspects' are finally distinguished from defendants and offenders.

Effective regulations on pre-trial detention are also one of the most relevant issues to the presumption of innocence (Gelatt 1982, 293). Presumption of innocence implies that "no measure may be taken; no restriction imposed which implies the guilt of the suspect" (Trechsel 2005, 156). He elaborated how detention could become incompatible with the presumption of innocence:

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[82] The Law enforcement authorities must "take facts as the basis and the law as the criterion." 1979 CPL, art. 4; 1996&2012 CPL, art. 6)

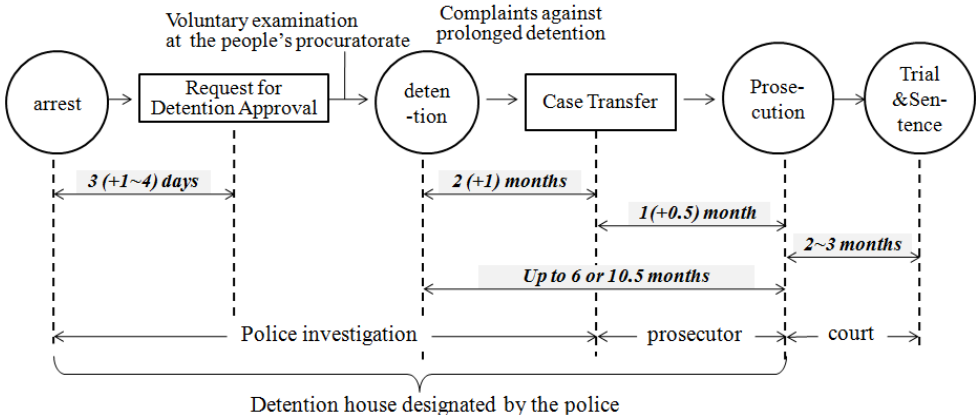
[83] 1979 CPL, art. 38&39

[84] Id., art. 40

"Some of these [coercive] measures may become so intrusive that they must be viewed as anticipating the punishment. [...] For this reason (such) detention is subject to strict limits and must not last beyond a 'reasonable time'." (Trechsel 2005, 180)

Therefore, pre-trial detention that could be continued for as long as six or ten and a half months or in some cases longer, is obviously inconsistent with the presumption of innocence. This blurs the line between pre-trial investigation and punishment. Figure 3 briefly shows the criminal proceedings in China.

Figure 3. Criminal Proceedings in China



*Exceptions described in Article 89; indefinite term of detention by the decision of the SCNPC
**Supplementary investigations

As pointed out above there is no requirement of judicial warrant for arrest or detention in China. Instead, once a case is filed, police can exercise powers of search and seizure including criminal arrest and detention, among which only arrest requires the approval of the people's procuratorate. A 'warrant' implies a judicial warrant proposed by investigative organs and is issued by a judge or judicial authority. The argument of Yi (2014) that China also has warrant requirement for detention claiming functional similarity does not seem suitable. Checks and balances between two investigative organs are expected to result in no more than "a rubber stamp for the police" (Yi 2014, 186).

After the revision in 2012, the people's procuratorate can question an arrested suspect after they receive a detention request from the public security organ. The questioning is mandatory in any of the following circumstances where: (a) there is a doubt as to whether or not the conditions for detention is met; (b) the suspect asks to give a statement to the procuratorial official face-to-face; or (c) the investigation may involve a serious violation of the law.[85] Judging from the second condition and the vagueness of the other two, the people's procuratorate are not likely to bother themselves to inform the arrestee of the right to ask for the pre-detention examination or neither do they have to necessarily confront with the public security organ by questioning legitimacy of their detention request. The face-to-face examination for detention approval is not held by a judge, but by a prosecutor.

[85] 2012 CPL, art. 86

Criminal procedure law in China generally implies two defense approaches as described in the Table 2 below: self defense and defense handled by a lawyer (Chen, Spronken and Chai 2012, 20). The former has been recognized as an inherent right for any criminal suspect[86] and explicitly stated in the Article 32 of the 1996 CPL. On the other hand, the right to lawyer's defense used to be divided into (a) right to appoint a defense lawyer to provide legal advice and (b) right to entrust persons as defenders, with the latter undoubtedly allowing broader access to materials and wider scope of authority to defenders. The difference was obvious from the moment a criminal suspect could legitimately ask each kind of defense: after the first interrogation at investigative organs[87] and after the case is sent to the procuratorate. In addition, during the police investigation stage, only lawyers could be appointed as representatives to provide legal advice while guardians, relatives or friends would also be entitled to defenders from the moment the case dossier was transferred for examination of prosecution.[88] However, in the 2012 CPL the differentiation finally becomes meaningless as all criminal suspects become able 'to appoint a defense counsel from the date on which the suspect is first interrogated or is subject to coercive measures.'[89] Still, only lawyers are allowed to participate before the transfer of the case.[90] At the investigative stage, a lawyer has the following rights:

> "(a) to provide legal advice, to represent the suspect or to file petitions and complaints on his behalf when the suspect is

[86] Chinese Constitution, art. 125
[87] 1996 CPL, art. 96,
[88] Id., art. 32
[89] 2012 CPL, art. 33,
[90] Id., art. 38

interrogated by an investigative organ for the first time or from the day any compulsory measure is adopted against him; and

(b) to apply for bail on behalf of a suspect if the suspect is arrested."[91]

In addition, a defense lawyer may interview a client in police custody. However, the lawyer cannot obtain any assistance from the police other than being informed of "the crime suspected" and the confidentiality of the meeting *can* be violated.[92] At the prosecution or trial stage, a lawyer has rights to consult, extract and copy the case files and the technical verification material, and meet and correspond with the criminal suspect in custody.[93]

"Revisions affecting the position of the defendant appear too weak to make a significant difference to the position of the defense. For example, it should be required that, at least in cases where confession has been retracted, audio recordings of the defendant's interrogation be fully presented at trial. As long as no such rule is enacted, it is unlikely that defendants will have more voice in the criminal process, or have an effective right to silence. Criminal defense lawyers will in such cases have little chance of an effective defense" (Rosenzweig et al. 2013, 499-500).

[91] 1996 CPL, art. 96
[92] Id., art. 96,
[93] Id., art. 36,

Table 2. Legal Ground and Scope of Right to Defense in China

Right to Counsel	Right to self-defense	Right to appoint a defense lawyer for legal advice	Right to entrust persons as defenders
	被告人除自己行使辩护权	可以聘请律师	有权委托辩护人
Initial Involvement	After the beginning of police investigation	(a) After the first interrogation at the investigative organ; or (b) from the day on which compulsory measures are adopted against the suspect.[94]	After transfer of the case files to the people's procuratorate[95]
Qualifications for defenders		Lawyers only	(a) Lawyers; (b) persons recommended by a public organization or the unit to which the suspect belongs; or (c) guardians, relatives or friends[96]
Authorities		(a) to provide a suspect with legal advice (b) to file petition and complaint on behalf of the suspect (c) to apply for obtaining a release on guarantee or bail (*qubaohoushen* 取保候审) on behalf of an arrested suspect	- consult, extract and copy the judicial documents and written expert opinion; meet and correspond with the detained suspect[97] - Provided, defenders other than lawyers should acquire permission of the people's procuratorate. - apply for the collection and obtaining of evidence and request to inform the witnesses to appear at court to give testimony[98] - demand cancellation of the overdue compulsory measures[99]

[94] Id., art. 96
[95] Id., art. 33
[96] 1979 CPL, art. 26, 1996 CPL art. 32; 2012 CPL, art. 32
[97] 1996 CPL, art. 36
[98] Id., art. 37
[99] Id., art. 75

The public security organ must notify the detainee's family or the unit to which he belongs of the reasons for detention and the place of custody, except in circumstances where such notification would hinder the investigation or there is no way of notifying them.[100] There are two exceptions to the requirement of notification. One exception is if there is no ways of notifying the detainee's family or the unit to which the suspect belongs and includes the following circumstances: (a) the suspect does not provide his true name and his address and therefore his identity is unknown; (b) the suspect has no relatives; (c) there are problems in contacting relatives of the suspect using the contact information provided by the suspect and (d) there is no way to contact them because of natural disasters.[101] The other exception is when notification would hinder the investigation. This includes three circumstances: (a) it is likely that the suspect will destroy or fabricate evidence, harass or collude with witness; (b) it is likely that conspirators will flee or impede the investigation; and (c) family members of the suspect have a vested interest in the outcome of the case.[102] With respect to the second exception, once the circumstance hampering an investigation disappears, the public security organ must immediately notify the detainee's family (Yi 2014, 198).

[100] 2012 CPL, art. 83
[101] Regulations on the Procedures for the Handling of Criminal Cases by Public Security Organs, (公安机关办理刑事诉讼案件程序规定), art. 109
[102] Id., art. 123

Remedies for Violation of the Rights

Even the latest CPL does not provide a habeas corpus proceeding with which an arrested or detained suspect could challenge the validity of the arrest or detention before a judge. It is not until the expiration of time limits of coercive measures that a criminal suspect or defendant, or his legal representative, close relatives or defense counsel has the right to demand release.[103] While there is no duty imposed on the people's procuratorate to give an answer to the demand, general rules on release are applied when the investigative organs find the arrest[104] or detention[105] inappropriate. Therefore, there is practically no mechanism through which a suspect or defendant party could appeal to judicial authority for unlawful or prolonged arrest or detention (LCHR 1996, 16).

The 2012 CPL inserted Article 98 that provides "after a criminal suspect or defendant is detained, the people's procuratorate should still examine the necessity for detention." If further detention is found no longer necessary, the people's procuratorate should recommend the release of the detainee or the alteration to less intrusive measures. On receipt of the recommendation, the public security organ should action the release in ten days. However, the new article does not specify the rights of the suspect and defendant to demand reexamination of detention approval. Moreover, there is no judicial review of the lawfulness of detention, which might be natural consequences as there is no requirement of judicial warrants for either arrest or detention.

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[103] 1996 CPL, art. 75; 2012 CPL, art. 97
[104] 1996 CPL, art. 65; 2012 CPL, art. 84
[105] 1996 CPL, art. 72; 2012 CPL, art. 92

Article 41 of the 2004 Constitution provides that "citizens have the right to file complaints against relevant state organs for violation of law or dereliction of duty", and the Criminal Law punishes state personnel who abuse their authority and violate the law.[106] The 1989 Administrative Litigation Law also enables citizens to sue government officials for infringement of their rights. The State Compensation Law of 1994 also provides means to deter misconduct by public officials such as false arrest and police brutality. However, observers take skeptical views that these rights are claimed. In practice, for example, with the current interpretation of the Administrative Litigation Law, the police usually escape the litigation arguing the wrongful arrest is an "act of criminal investigation", not an "act of administration" (Clarke and Feinerman 1995, 146).

[106]Chapter 9, Crimes of Dereliction of Duty of the Criminal Law

V. Amendments to the Criminal Procedure Law of China

The significance of procedural justice was not perceived until recently in China (Chen 2008, 299). Therefore, for the first 30 years following the foundation of China, the national goal of maintaining social control and public security was largely achieved through administrative sanctions or political campaigns (Potter 1999, 681). It is hardly surprising that in 1979, the People's Republic of China finally promulgated its first Criminal Procedure Law("1979 CPL"), which was heralded as "an efficient instrument of crime control for the Chinese Communist Party" (qtd. in Lan 2010, 155). [107] The earliest CPL consisting of broad provisions left room for flexible application was not at all interested in protecting the rights of criminal defendants but focused on retrieving the state's exclusive and legitimate authority to exercise coercive measures in the aftermath of the Cultural Revolution (Potter 1999, 681). China's criminal procedure has been designated as an inquisitorial system since 1979 when its first coded criminal procedure law was enacted (Liu and Situ 1999).

In February 1980, a month after the criminal procedure law of 1979 became effective, the NPC Standing Committee announced a decision regarding exceptional extensions of the times for handling cases within that year. Also the Standing Committee passed another decision in 1981 that approved longer investigations on complex cases and those that took place in

[107] There were a few statues governing criminal justice such as the Act for the Punishment of Corruption of 1952; Regulations on Arrest and Detention of 1954, which was eliminated in 1996; and the Security Administration Punishment Act of 1957 (Leng and Chiu 1985, 85)

remote districts where transportation was inconvenient, beyond the time limits set in the articles of the 1979 CPL (Leng and Chiu 1985, 86-87)

"The 1979 CPL, based on drafts prepared in the mid-1950s and early 1960s, was one of the first of seven major laws enacted in post-Mao china. The purpose of this enactment was two-fold: to elaborate the constitutional provisions regarding the division of powers and responsibilities among the people's courts, the people's procuratorates and the public security organs; and to provide working procedures for criminal adjudication" (Chen 2013, 55).

1. 1996 Amendments to the CPL of China

The inquisitorial style of trial and the pro-active role of the judge as a result were blamed for insufficient protection of defendant's rights. Therefore, one of the most noticeable changes in the 1996 revision was the adoption of an adversarial-style trial model, which granted procedural safeguards to the accused and defendants (Lan 2010, 153). Adopting adversarial elements was significant in a sense that the prosecuting party had the burden of proving guilt and leading evidence in front of a relatively neutral judge(s). Consequently, the defense lawyers are more likely to challenge the prosecution and make a difference at future trials (Fu 1998, 44).

Despite the move toward a more adversarial model, the 1996 CPL shared similar flaws with the previous one. The prime mission of criminal proceedings is to combat crime with a specific emphasis on factual truth and

substantive correctness. However, the key values of the adversarial system such as procedural fairness were missing.[108]

Background

The promulgation of the 1979 CPL was accompanied by re-establishment of law enforcement organs, especially the people's procuratorates and the courts that had stopped functioning during the Cultural Revolution (1966-1976). From the late 1970s, legal research was resumed to bring due process principles to the center of discussion (Chen 2008, 302). In the meantime, China adopted open door policy as it primary goal had been transferred from class struggle to modernization (qtd. in Liu and Situ 2001, 136). Subsequent foreign influences also contributed to domestic awareness of deficiencies in the criminal justice system at the time. The 1996 revision was part of a broad reform effort toward a new criminal justice system "in response both to international criticisms and to domestic pressures" (Potter 1999, 682). Key players in the criminal justice system, the Supreme People's Court, the Ministry of Justice, the Supreme People's Procuratorate and the Ministry of Public Security, conceded the need for the reform, but they had to negotiate degrees of protection of rights and redistribution of powers. Meanwhile, an academic campaign to urge the revision in the direction of human rights protection was expressed in a significant amount of publications both in law review journals and newspapers (Fu 1998, 40-41).

After the SCNPC formally announced the revision of the CPL as one of the Legislative Agendas of the NPC in 1993, drafts for the 1996

[108]1979 CPL, art. 2; 1996 CPL, art.2

revision were organized by a group of scholars led by Professor Chen from the China University of Political Science and Law. The final draft bill was completed through discussions and symposiums either hosted by scholars or the Legislative Affairs Commission of the SCNPC (Chen 2008, 302-304). During the Fourth Plenary Conference of the Eighth National People's Congress on 17 March, 1996 the major revisions to the 1979 CPL were accepted.

Major Changes

The 1996 CPL marked a legislative attempt to partly adopt the adversarial model, introducing several elements from the adversarial system (Belkin 2000, 22; Chen, Spronken and Chai 2012, 12). The 1996 CPL finally separated "criminal suspects" from "defendants" a term that used to refer to the accused throughout the procedure. This differentiates *real* defendants or those prosecuted, by guaranteeing more freedom and rights compared to mere suspects.[109]

Major changes of an adversarial nature were aimed at protecting the rights of defendants in the criminal process, including measures such as shifting the power from the police and the prosecutor to the judges, setting up a more neutral role for judges (e.g., via limiting judges' active roles in investigation and prosecution), and granting more rights to defendants and defense attorneys (e.g., via use of cross-examination during trials.) (qtd. in Zhong, Hu and Liang 2011, 192) In order to supervise and control prolonged detention by public security organs, the 1996 revision redefined the

[109]1996 CPL, art. 8 and 10

requirements for detention and conditions for extension, by partially incorporating relevant articles in the Arrest and Detention Regulations (1954)[110]. The revision also abolished the controversial preventive detention called "Shelter and Investigation". Article 40 of the 1979 CPL used to require major facts of a crime to be 'clarified' prior to request for detention. This led to excessive use of prolonged administrative sanctions. The revised article erased the 'clarification' condition and included the 'existence of evidence of crime' instead (Chen 2008, 309).[111]

In addition, defendants are provided with earlier access to legal counsels. Defense attorneys are also allowed to meet criminal defendants after the first interrogation, which is only allowed under supervision. However, mandatory legal assistance is provided only to defendants with physical disability, those under 18 years of age, or those charged with a capital offense. This does not include all the indigent, and procurators still dominate criminal trials over the defense by exclusively presenting evidence and questioning witnesses at the court. Furthermore, defense attorneys take the risk of being punished for "inappropriate defense" as described in Article 306 of the Criminal Law (Zhong, Hu and Liang 2011, 193).[112] A defense counsel or litigation agent in a criminal proceeding who destroys or forges evidence, assists the parties concerned to destroy or falsify evidence, or threatens or induces a witness to change his or her testimony to depart from the facts or to make false testimony, shall be sentenced to fixed-term imprisonment of less than three years or criminal detention. Where the circumstances are serious,

[110] The Regulations were abolished upon the 1996 revision.
[111] 1996 CPL, art. 60, Shelter and Investigation was not a punishment and was neither formal arrest or detention. It was categorized as an administrative measure of investigation, but recklessly imposed upon minor offenders or criminal suspects when the public security organ did not have necessary evidence to request for detention (Chen 2008, 307).
[112] Criminal Law, art. 306

he shall be sentenced to fixed-term imprisonment of more than three years and less than seven years.

A defense counsel or litigation agent who provides, presents or quotes a witness's testimony or other evidence that does not conform to the facts but is not intentionally forged is not regarded as falsifying the evidence. Nevertheless, the 1996 revision was not enough to curb the exercise of excessive political power by the party-state in the area of criminal justice (Potter 1999, 683).

2. 2012 Amendments to the CPL of China

Background

Despite the major reforms to the CPL in 1996, the Chinese government could not avoid critiques questioning the effectiveness of the new law in practice and that the rights of the criminal suspects and defendants were incompletely protected. Domestic scholars criticized that the new measures still lacked adequacy and effectiveness in legal protection of the rights of criminal suspects and defendants. They could not fully exercise the right to remain silent, they were not subject to exclusionary rules for illegally obtained evidence, and their trial was heavily relied on written documents throughout the proceedings (qtd. in Zhong, Hu and Liang 2011, 192, 193). In particular, the right of the suspects to hire their own attorneys was denied on politically contingent occasions (Potter 1999, 683).

Since the limited revision of the CPL in 1996 and China's signature to the ICCPR in 1998, theorists have strongly insisted on the introduction of

right to silence to China (Chen, Spronken and Chai 2012, 20). Lewis (2010) pointed out that the major motivation for the government to swiftly pass the Evidence Rules following the highly publicized wrongful conviction of Zhao Zuohai was to contain the public's growing discontent with rampant injustice and police abuses, which apparently had threatened the regime's legitimacy (qtd. in Chen 2010, 714).

In addition, "both the overall national goal of 'managing state affairs according to the law' (*yifa zhiguo*) and the imperative that 'the state should respect and protect human rights' were codified in the Constitution." (Guo 2014, 154) Increasing demands on rule of law and human rights protection in the criminal justice arena, combined with the defective operation of the 1996 CPL, identified the need for a revision of the criminal procedure law which was adopted as the legislative agenda for the 10th SCNPC in 2003. Drafts have been modified several times and were subject to intense debates among scholars and practitioners. On 30 August 2011, the NPC eventually released the draft of the amendments to the 1996 CPL on its web site. It was unusual for the Chinese legislature to look for public opinion (Guo 2014, 155). Finally, the Standing Committee of the National People's Congress of China approved a comprehensive set of amendments to the Criminal Procedure Law on March 14, 2012 by 2,639 to 160 votes in favor (He 2012).

Major Changes

The final version of the 2012 CPL includes seven main areas of concern: rule of evidence, coercive measures, criminal defense and representation, investigative measures, trial procedure, enforcement procedure

and special proceedings. Several improvements intended to safeguard right to liberty of criminal suspects and defendants are noticeable.

First, conditions for detention request are elaborated in the article 79. The article incorporated Article 1(5) of the Provisions on Applying Arrests in accordance with the Law adopted by the Supreme People's Procuratorate and the Public Security Ministry in 2000 and provided two additional circumstances when detention is compulsory or recommended. Compulsory detention should be imposed (a) when there is evidence proving the facts of a crime which is likely to be punished by fixed-term imprisonment of ten years or longer or by a more severe criminal penalty; (b) when there is evidence proving the fact of a crime which is likely to be punished by fixed-term imprisonment and the person in question has previously intentionally committed a crime; or (c) his identity is unknown. When a suspect on bail or under residential surveillance violates the provisions on bail or residential surveillance, may be detained in serious circumstances.

In addition, Article 86 of the 2012 CPL allows compulsory or voluntary interrogations for a detention review where the people's procuratorate examines a detention request by the police. The defense attorney can accompany the suspect and express his opinion. The prosecuting organ used to have access only to documentary materials (Guo 2014, 161). The new procedure is seemingly similar to the obligatory examination of a suspect by a judge upon receipt of a detention warrant request in Korea, except that the questioning does not occur before a judge or any other judicial authority. Moreover, periodical review for detainees is clarified and

strengthens supervisory function of the people's procuratorate after they already approve of detention.[113]

Besides, Article 83 restricts circumstances under which incommunicado detention is allowed where: (a) the alleged crime is might endanger national security or involved in terrorism; and the notification are worried to impede the investigation. Otherwise, family members of an arrested suspect should be informed of his arrest.[114]

The 2012 CPL incorporates the revised Lawyer's Law and the 2010 Exclusionary Rules of Evidence (Guo 2014, 155-156). Involvement of a defense counsel becomes available as early as from the investigative stage.[115] Furthermore, as a general and preventive rule against extra-judicial investigation, the exclusionary rule is adopted. Combined with Article 43 which recognizes the right to silence that "no one shall be compelled to prove his guilt"[116], confessions made under duress or unlawful pressure should be excluded. These changes appear to have brought Chinese legislation closer to international standards represented in the research by the ICCPR. However, despite expected progresses in formality, effective implementation in reality is largely doubted due to remaining loopholes intertwined with structural limitations.

[113] 2012 CPL, art. 93
[114] 1996 CPL, art. 64; 2012 CPL, art. 83)
[115] 1996 CPL, art. 96; 2012 CPL, art. 33
[116] 2012 CPL, art. 43

VI. Assessment of Protection of Right to Liberty of Criminal Suspects in China

1. Comparative Analysis

Previous chapters presented the international standard against arbitrary deprivation of liberty, and arrest and detention procedures in the U.S., Korea and China. Safeguards and rights of the detained suspects are summarized in the Table 3 below.

Table 3. Protection against Arbitrary Arrest or Detention in the U.S., Korea and China

Operation	Legal Safeguards	U.S.	Korea	China
Preventive	Presumption of Innocence	O	O	X
	The Exclusionary Rule	O	O	O
Procedural	Judicial Examination of Detention	O	O	X
	Warrant Requirement	O	O	X
	Right to Silence/ Privilege against self-incrimination	O	O	△
	Family Notification	O	O	△
	Recusal of Investigatory Personnel	X	X	O
Remedial	Right to Counsel	O	O	O
	Complaints against overdue detention	O	O	O
	Habeas Corpus	O	O	X

The right to be presumed innocent has failed to be adopted in the Chinese CPL against to the Article 2 of the ICCPR. Therefore, the burden of

proof does not lie on the prosecution but on the defense party. Indeed, Article 35 of the 2012 CPL has continued to impose the duty to prove the innocence of a criminal suspect on the defense counsel. Secondly, It is one of the remarkable changes that the exclusionary rule and the doctrine of the poisonous tree is newly provided in Article 54 of the 2012 CPL of China. However, the Chinese version carries different implications than the U.S. rule. While the Chinese and Korean system leaves the exclusionary decision of illegal evidence to the judge's discretion, with a hope that it will regulate police conduct, the U.S. system makes the exclusionary rule mandatory by Supreme Court decisions. The newly adopted exclusionary rule in China may not necessarily result in active exclusion of unlawful evidence at the trial and therefore fail to enforce police compliance with procedural rules unless the independence of the court is guaranteed.

In terms of procedural safeguards before or at the moment of arrest or detention, “it is noticeable that Chinese law does not require a judicial warrant” (Yi 2014, 185). China basically lacks the external checks and balances by the independent and impartial judicial authority. Judicial examination of detention takes place by the initial court appearance in the U.S., and a compulsory judicial hearing by a judge in Korea. China introduced an interrogative examination by the people's procuratorate upon the detention request in the 2012 revision. This is a step forward from the document-only examination. Nevertheless, the examination is neither conducted by a judge nor mandatory so that it is far below the effective protection of the right to "be brought promptly to a judge" as provided in the Article 9(3) of the ICCPR. Warrant requirement for arrest and detention is also denied as the prosecuting organ, not the judicial authority is the subject of issuance in China. Furthermore, arrest does not even require any certificate from the procuracy;

the signature of the police themselves is enough to justify an arrest.

Although the privilege against self-incrimination is included in the new Article 43, the article is incompatible with the duty to "answer truthfully" to the police investigators in Article 118 of the 2012 CPL, formerly Article 93 of the 1996 CPL. The right to silence is informed prior to custodial interrogation and at the time of arrest in the U.S. and Korea, respectively. Interestingly, China is the only country where a recusal request is available from the investigative stage. Recusal and disqualification of a trial judge can be sought in the U.S. and Korea. The excessive protection for fear of unfair investigation is inconsistent with poor protection of other rights. This merely reflects how other protective measures are ineffective in China.

As remedies to unlawful arrest or detention, right to counsel is extended to those interrogated by the police or arrested. Before the 2012 revision, although defense lawyers could participate as early as right *after* the first questioning of the accused by the police, they could not be entrusted as defenders before the police transferred the case to the prosecuting party. Their activities were limited to providing legal assistance and collecting materials for the defense. The latest CPL, on the other hand, allows a criminal suspect to designate a defense counsel *from* the date of the first interrogation or the first day when the suspect is taken into custody. The new CPL also requires the public security organ to inform the suspect of the right to counsel from the first interrogation and first day of arrest.[117] This notification used to be the duty of the people's procuratorate's in the former CPL and was supposed to take place within three days of the prosecution's review. Still, the CPL does not guarantee the presence of a defense attorney at the police interrogation.

[117] Id., art. 33

Confidentiality of the attorney meeting is newly secured in Article 37 of the 2012 CPL. However, there was little change in what a defense lawyer can do at the investigative stages. In order to access, excerpt and copy the materials of the case dossier, the lawyer still must wait until the people's procuratorate begins to examine the case for prosecution.[118]

The defense lawyer can file a petition of release on behalf of the detained suspect[119] even though a judicial proceeding similar to habeas corpus does not exist. It is the people's procuratorate that examines such a complaint for prolonged arrest and detention; judicial bureaus and courts disclaim authority before indictment. No independent judge can or should examine the legality of the detention according to Article 93, while a judicial hearing is mandatory in the U.S. or Korea.

2. Symbolic or Substantial Protection of Criminal Suspects

Despite significant changes in the 2012 revision to the Chinese CPL, there are concerns that these changes would remain symbolic for the following reasons: (a) loopholes in provisions of the latest CPL, (b) structural limitations due to the inquisitorial basis and (c) absence of the independent court and judge.

Clearly, time limits of arrest and detention before trial provided by previous and the latest CPL are far from any international standard for

[118] Id., art. 38
[119] Id., art. 115

preliminary detention (Chen 2008, 306). The UN Human Rights Committee require a 48-hour standard for a detainee to be brought before a judge after arrest;[120] while the Chinese CPL allows three days of arrest for ordinary cases[121] and the arrestee is not brought to a judge, but is brought to a prosecutor only if the arrestee asks for the hearing.[122] Normally, the documentary request for detention is sent to a prosecutor.

Moreover, indefinite extension of the police investigation under detention could be granted by the SCNPC upon request by the Supreme People's Procuracy "in particularly serious and complex crimes."[123] However, the interpretation becomes arbitrary when politically sensitive offenses are involved. Amnesty International estimated in a report that many political prisoners had been taken into custody for investigative purposes for far longer than the legally prescribed period, some for over two years (Amnesty International 1996, 18). Circumstance of exempted notification that used to be "where notification would hinder the investigation"[124] is somehow elaborated into where the [alleged] crime would endanger the State security or be involved in terrorism.[125] However, "critics found the definition of 'endangering national security' and 'terrorist activities' vague" (Guo 2014, 162).

Renewable time limits dependent upon the identification of a suspect may let the investigative organ fabricate a "John Doe". That is reporting that a suspect's identity is not yet confirmed so as to facilitate the seemingly formal extension of detention:

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[120] Human Rights Committee, General Comments No. 35 Article 9: Liberty and security of person CCPR/C/GC/35 30 Oct 2014
[121] 2012 CPL, art. 89
[122] Id., art. 86
[123] 1972 CPL, art. 92; 1996 CPL, art. 124; 2012 CPL, art. 155
[124] 1996 CPL, art. 64
[125] 2012 CPL, art. 83

> "If a criminal suspect has not disclosed his real name or address, and his identity is not clear, the identity should be investigated. [...] The period of investigative detention will start on the date on which his identity is established."[126]

Accordingly, Article 126 and 148 of the Public Security Organ Procedures for Handling Criminal Cases permits the public security organ to arrest and detain a suspect without time limits. Any institution other than the police gives neither examination nor approval of the recalculation of the detention period:

> "Where a suspect does not state their true name and address, and their identity is unclear, an inquiry shall be conducted into their identity. Upon approval of the responsible persons at a public security organ at the county level or above, the period of arrest may be calculated beginning on the day his identity is clarified."[127]

A generous standard of the detention of an unidentified is again introduced in Article 79:

> "When there is evidence proving the fact of a crime which is punished by fixed-term imprisonment and the identity of the suspect is unknown, the suspect should be arrested."[128]

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[126] 1996 CPL, art. 128; 2012 CPL, art. 158,)
[127] The Public Security Organ Procedures for Handling Criminal Cases, art. 126
[128] 2012 CPL, art. 79

Secondly, the newly inserted Article 43 of the 2012 CPL that declares the privilege against self-incrimination or right to silence is practically incompatible with the 'truthful-answer' requirement. Article 118 of the 2012, which used to be Article 93 in the 1996 CPL continues to require that the criminal suspect "must answer the questions of the investigators truthfully"[129] (Chen, Spronken and Chai 2012, 20).

The problem of ineffective implementation becomes obvious with the structural limitations. Although the 1996 and 2012 CPL is designed to have more adversarial-type of court proceedings, the basic concern of crime control have stayed intact in the inquisitorial setting. Inquisitorial proceedings have confidence that those who are potentially innocent are efficiently screened out from the beginning of criminal procedures. With the innocent already ruled out, presumption of innocence in later stages is considered no more than a courtesy (Chu 2000, 156-159). A Chinese judge points out one of the main problems in the Chinese trial process:

> "Many prosecutors and judges still have the old mentality of a presumption of guilt and 'We would rather wrongfully convict an innocent person rather than wrongfully let a person escape justice.' The Public Security Bureau and the People's Procuratorate have the same task in making criminals responsible for their crimes and judges appear to assist in determining the sentence. It is not easy for a judge to find someone innocent."[130]

Despite the slight shift toward the adversarial model in the two revisions, the emphasis of criminal justice system remains on the investigative

[129] 1996 CPL, art. 93; 2012 CPL, art. 118
[130] Qtd. in McConville et al. 2011, 406

stages, and therefore the excessive authority of the public security organs is easily justified. This is likely to end up in "overzealous enforcement and persistent violation of the criminal procedure law" (Chen 2002, 14)

Lastly, judicial supervision such as warrant requirements and habeas corpus is least likely to appear in the absence of checks and balances between the police, prosecuting organs and courts. "Although the prosecutor's office of China is supposed to serve as the 'watchdog of legality' and protest the misconduct of not only the police but also other prosecutors, it seldom offers relief" (Cohen 2002, 37) It is no wonder that defense lawyers can hardly challenge the violations of investigators. Failure of supervisory role of the procuratorate is observed from the higher approval rate of detention requested by the police as shown in Table 4, when compared to the U.S. and Korean statistics in Table 5 and 6 , respectively.

Table 4. Approval Rates of Detention in China

Year	Number of People Requested for Detention	Number of People Actually Detained	Approval Rate of Detention(%)
2007	1,033,942	920,766	89.05
2008	1,087,615	952,583	87.58
2009	1,090,125	941,091	86.33
2010	1,076,831*	916,209	85.08*
2011	1,074,605**	908,756	84.57**
2012	1,165,268	986,056	84.62

Source: Law Yearbook of China(2008-2013)

*, **The yearbook of 2011 and 2012 provide total number of people whose detentions were examined both upon the request of the police or by the procuratorate's own decision. Real numbers of people requested for detention should be smaller.

The approval rate of detention by the people's procuratorate is estimated to be above 84 percent from 2007 to 2012. During the same period, the rate of criminal defendants of U.S. Federal District Courts who were

detained throughout the pre-trial stages hovered around 50 percent. In the U.S. as the continuance of pre-trial detention is granted upon judicial approval, the comparable approval rate of detention is drawn from the rate of pre-trial detention shown in the Table 5.

Table 5. Pre-trial Detention in U.S. Federal District Courts excluding Immigration Cases[131]

Year*	No. of People Charged**	Detained and Never Released	Rate of Pre-trial Detention (%)
2007	69,775	36,454	52.2
2008	68,393	35,392	51.7
2009	70,290	37,405	53.2
2010	72,789	38,615	53.1
2011	72,970	38,957	53.4
2012	64,266	36,621	57.0

Source: Administrative Office of the U.S. Courts (2007-2012)

*for the 12-month period ending in September

**Data represent defendants whose cases were activated during the 12-month period. Excludes dismissals, cases in which release is not possible within 90 days, transfers out, and cases that were later converted to diversion cases during the period.

Table 6 derives the approval rate of detention in Korea from the number of issued detention warrants. It shows the issuance rate ranging between 74.3 and 78.2 percent for six years of the same period. Although the numbers have been collected from overall criminal cases, the Chinese practice suggests an excessive use of detention in pre-trial proceedings when compared to the U.S and Korean counterparts.

[131] Defendants of immigrant cases where more than 90 percent of defendants are detained are excluded.

Table 6. Request and Issuance of Detention Warrant in Korea

Year	No. of People Requested for Detention Warrant	No. of People Issued Warrant	Issuance Rate of Detention Warrant(%)
2007	58,911	46,062	78.2
2008	56,878	43,031	75.7
2009	57,014	42,727	74.9
2010	43,574	32,516	74.6
2011	38,770	28,814	74.3
2012	35,060	27,327	77.9

Source: The Supreme Public Prosecutors' Office of Korea (2008-2013)

Lack of supervision on the compulsory measure is largely attributed to the disproportionate distribution of power between law enforcement organizations and courts. The police are granted significant control throughout the investigation and reserve to themselves “the discretion to deal with individuals through administrative powers” (McConville 2012, 35). "Since there is no constitutional review or legality review in the Chinese legal system, rules concerning the implementation of the CPL violate rules prescribed by the CPL without challenges. From time to time there are challenges from legal scholars, but on most occasions, such challenges go without responses" (Yi 2014, 196-197). Moreover, the people’s procuratorate neither effectively interferes with the police discretion making the problem worse.

In addition, an independent judiciary is indispensible to the effective realization of human rights protection. In politically sensitive cases or when the interests of the Party-state are likely to be threatened, the rule of law is interrupted and decisions are made upon “Party-defined political correctness” (McConville et al. 2011, 400-401).

VII. Conclusion

In regards to criminal process, conflicting values and aims of the individual and society have always been controversial. Packer (1964) proposed two opposite models each of which lays emphasis on repression of criminal conduct and protection of individual rights. Although Packer's model was based on the American adversarial system, a contrast of value priorities occurs between inquisitorial and adversarial structures of criminal procedure. In practice, in order to balance the efficient fact-finding and due process principle, the inquisitorial system may adopt adversarial elements and vice versa.

China has adopted several adversarial elements to the CPL since the first revision in 1996. However, the implementation of the 1996 CPL was not as satisfactory as expected with arbitrary arrest and prolonged detention rampant. Pressure to another comprehensive set of amendments came from in and out of China for last couple of decades. The new CPL of China seemingly provides more protection of human rights against illegal deprivation of liberty through procedural safeguards. Indeed, changes to the CPL over time have resulted in positive change that has been influenced by both internal and international pressure related to human rights. The 2012 CPL has adopted the exclusionary rule, privilege against self-incrimination and timely access to a defense counsel and added “less-vague” details in provisions. The Law now seems nearer in line with international standards suggested in the ICCPR and common procedural measures in the U.S. and Korean criminal justice.

However, the just law does not necessarily guarantee the justice of law. Crime control orientation and the inquisitorial basis outweigh the protection of procedural rights of those arrested or detained. Disproportionate separation of power among criminal justice institutions, grants the greatest power to the public security organs and deprives the people's procuratorate of the actual supervisory role. Independence of the judiciary has not been secured yet from the Party and State controls. These loopholes identified previously in the latest CPL indicate that there is room for further change to be made.

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국문초록

중국 <형사소송법>은 범죄 피의자와 피고인의 신체의 자유를 박탈하는 대인적 강제수사 수단으로 체포와 구속을 규정하고 있다. 2012 년 제 2 차 <형사소송법> 개정을 거치면서 제 2 조(목적)에 '인권에 대한 존중과 보장'을 추가하였고, 이를 실현하기 위한 구체적인 기준을 형사절차 전반에 걸쳐 마련하였다. 본 연구는 중국 형사절차상 체포·구속제도의 변화에 주목하여, 피의자 신체의 자유와 부수적인 절차적 권리의 확대에 관하여 다루고 있다.

중국에서 <형법>과 <형사소송법>은 사회의 안정을 해치는 각종 범죄 행위에 대항하는 무기로 인식된다. 체포와 구속 또한 범죄 행위를 효과적으로 통제하기 위한 목적으로 사용된다. 중국에서 일반 범죄 피의자를 체포 또는 구속하고 수사하는 주체는 공안기관이며, 대인적 강제수사는 법관이 발부한 영장에 의하지 아니한다. 체포 시에는 공안기관이 자체적으로 서명한 체포증을 제시하며, 구속의 경우 인민검찰원에 구속비준심사를 제청하여 구속증을 발부받아 제시하여야 한다.

2012 년 개정에서는 체포·구속 절차와 관련하여 다음과 같은 변화가 있었다. 공안부령인 <공안기관형사사건처리절차규정>에서 규정한 구속 요건이 형사소송법으로 편입되어 구체화되었고, 공안기관의 송치 서류만을 검토하던 구속비준심사 또한 피의자의 신청이 있거나 위법 수사가 의심되는 경우에는 인민검찰원으로 하여금 피의자를 심문하도록 하였다. 구속을 비준한 이후에도 구금의 필요성에 대한 인민검찰원의 계속적인 감독을 명문화하였으며, 체포 및 구속 이후 가족에게 통지할 의무가 면제되는 상황을 구체적으로 제시하였다. 인민검찰원의 기소 이후에서야 가능했던 변호인의 선임은 수사 단

계로 앞당겨져, 변호인의 조력을 받을 권리 또한 확대되었다. 체포와 구속을 비롯한 강제수사에서의 위법을 방지하기 위한 사전 억제 장치로서의 위법수집증거 배제법칙 및 독수독과의 원칙이 도입되었다. 그러나 이러한 변화에도 불구하고, 시민적·정치적 권리에 관한 규약의 내용과 미국, 한국의 제도와 비교하였을 때 입법의 미비점이 발견된다. 또한 상호모순적인 법률 조항에 따른 수사기관의 자의적인 해석 우려, 직권주의를 바탕으로 하는 소송구조의 한계, 법원의 독립성 부재로 인해 개정 법률의 효과적인 집행과 체포·구속 피의자의 절차적 권리의 적극적인 보장은 어려울 것으로 보인다.

주요어: 중국 형사소송법, 자의적 체포 및 구속, 신체의 자유, 수사 절차상 구속, 피의자 권리

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