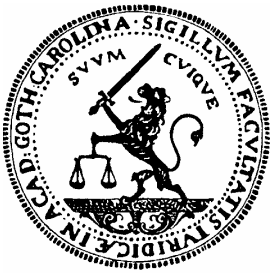

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The Right against Self-incrimination in Criminal Justice: A Comparative Study on International Human Rights Standards and Chinese Law and Practice

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Contents

Abbreviations

PRC	the People's Republic of China
CPL	Criminal Procedure Law
ECHR	European Convention for the Protection of Human rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant of Civil and Political rights
SPC	Supreme People's Court
SPP	Supreme People's Prosecution Service
UDHR	Universal Declaration of Human Rights

1 Introduction

1.1 An overview on the development of human rights in China

The fourth amendment of the Constitution Law of the People's Republic of China was approved on March 14, 2004, by the 10th NPC at its 2nd session; there was a significant progress in this session. A Human Rights clause had been enshrined into the Constitution. Article 33 has a third paragraph added: "The State respects and preserves human rights." [1]It is the first time that the term "Human Rights" receives recognition in the constitution law of People's Republic of China, which is really a landmark in the development of Human Rights in China.

The term "Human Rights" had particular meanings in the vocabulary of the Chinese government in the earliest days, it was considered a capitalist conception. The Constitution of China in 1954 enumerated a wide range of citizen's rights, but there was no room for "human rights" under the Marxist philosophy of state. "China did not normally legitimate its policies in terms of human rights, but rather in terms of the achievements of the revolution in ending class exploitation, and promoting the material needs and welfare of the working people."[2]

According to that philosophy, the authority of the government by no means could be challenged because the party state was believed to be the only representative of the fundamental interests of the people and the guardian of the people. That is why the concept of human rights, which is well known for their values in challenging the state, was something

[1] Constitution Law of the PRA(2004) , p 24
[2] Ann Kent, Between Freedom and Subsistence: China and Human Rights (1993), p 100

deemed hostile to the socialist regime.[3] The enshrinement of human rights into constitution law is the first gleam of dawn in the construction of Human Rights in China, also the milestone of the process of the democratization, it has spend 50 years to stride forward this goal from the first constitution law enacted in China in 1954. To memorize it, we should review the development of the construction of human rights in China.

In 1971, China's seat in the United States was repossessed by the PRC. From that time the PRC became a party to the basic human rights principles embodied in the U.N. Charter. In 1982, China was elected to be a formal member of the U.N. Human Rights Commission. Since then, the Chinese government began its process of acceding to international human rights conventions. Such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Rights of the Child. These human rights treaties initially accepted were thought to be less sensitive politically. Nonetheless, it was a big progress in contrast to the previous attitude of denying any human rights conception both at home and abroad.[4]

The events in Tiananmen Square in June 1989 brought about a cold snap to the development of Human Rights and democratization of China. The foreign criticism of the human rights conditions in China made the government feel greatly threatened: China lost the chance to host the 2000 Olympic Games, and Chinese government's negotiating position in talks over intellectual property rights and entry into the GATT/WTO was also weakened.

Since 1990, Chinese government is becoming more willing to take a

[3] Huang Jingrong , China's Tortuous Process of Accepting Human Rights Conception. http://www.hrsolidarity.net

[4] ibid

positive attitude towards international conventions as well as dialogues and cooperation on human rights. The 1991 Human Rights White Paper formally acknowledged the international aspect of human rights.[5] In Premier Li Pang's Government Work Report in March 1992, Li stated, "We believe that human rights and fundamental freedoms of all mankind should be respected everywhere. … … China agrees that questions concerning human rights should be the subject of normal international discussion."[6] In April 1994, the Minster of the Foreign Affairs of the Chinese government, Qian Qichen, declared that, "China respects the Universal Declaration of Human Rights, the Proclamation of Teheran, the Declaration on the Rights to Development, and other international documents related to human rights."[7] In the 1995 White Paper the Progress of Human Rights in China, the Chinese government stated that "China respects the purposes and principles of the Charter of the United Nations related to the promotion of human rights and fundamental freedoms. …. … In recent years China has, as always, actively supported and participated in international activities in the human rights field and has made new efforts to promote the healthy development of international human rights since the Cold War." In October 1997, in his press Conference with American President Bill Clinton, Chinese President, Jiang Zemin, stated: "It goes without saying that, as for general rules universally abided by in the world, China also abides by these rules."[8]

The signing of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) by the government of China in 1997 and 1998 respectively was a historical landmark in the transition to the rule of law in China. This indicated that China had not paid only lip service in promoting

[5] See 1991 White Paper on Human Rights, issued by the Information Office of State Council of PR China in 1991

[6] See 15 Beijing Review xvi (1992). For more information, please refer to the Journal's website at http://www.bjreview.com

[7] The Progress of Human Rights in China, Part X: Working Hard to Promote the Healthy Development of International Human Rights Activities, China Internet Information Centre, at http://www.china.org.cn/e- white/phumanrights19/p-11.htm (Dec. 1995)

[8] Clinton and Jiang in Their Own Words: Sharing a Broad Agenda, N.Y. Times, Oct. 30, 1997.

protection of human rights, on the contrary, had stridden forward a substantial step. On February 28, 2001, the National People's Congress Standing Committee deliberated and ratified the International Covenant on Economic, Social and Cultural Rights. In 2004, President Hu Jintao also pledged to ratify the International Covenant on Civil and Political Rights as soon as possible. Although ratification of the Covenant by China may still take some time, the on-going preparation is already a positive sign of real progress in the right direction. The active preparation is a process recognizing the ICCPR as a code of universal standards. It requires the reform of the law and practice in the light of the standards. Preparing the ratification of the ICCPR requires comprehensive assessment and adjustment of the Chinese laws according to the ICCPR standards.

1.2 Motivation of the thesis

In implementing the ICCPR standards, criminal justice is an area of great potential for improvement in China. The first criminal procedure law was adopt on 1 July 1979, and became effective 1 January 1980. Because this code was enacted shortly after the end of the Cultural Revolution, it was subject to unavoidable historical limitations. Since then, China has undergone dramatic changes in political and economic terms, and these changes have in turn, been accompanied by new forms of crime. As a result, legal practice has had to confront new questions and problems.

These questions and problems could not be solved by the old law his gave special urgency to the reform work which has been undertaken in recent years. Beginning in 1991, the Legislative Affairs Section of the National People’s Congress and judicial authorities, such as the Supreme People’s Court, the Supreme People’s Prosecution Service and the Ministry of Public Security organized several important workshops to consider law reform.

One expert's reform group was authorized by the Legislative Affairs Section to reformulate the law. As part of the process, the reform group also organized a very successful international conference in 1994 with the assistance of senior foreign law scholars. After extensive discussions, this new revised criminal procedure code was passed in 17 March 1996 and took effect on 1 from the 1990s to date. The main changes in this new code can be summed up as follows:

1. The constitutional principle that judicial authorities must exercise judicial power independently is incorporated into criminal procedure law;
2. Judicial supervision of the activities of prosecutors is enhanced;
3. Greater protection for the suspect and the accused is provided;
4. Victims of crimes are given more rights;
5. The systems of coercive measures is improved to give more human rights guarantees;
6. The principle of the presumption of innocence is established;[9]

Besides, China is still making a series of important changes to its criminal law, and the laws governing the judiciary, the prosecutors, the police and the legal profession. The reform of the law, which is still going on has greatly reduced the distance between the Chinese criminal laws and the relevant ICCPR standards.

However, important issues still need to be addressed through continuing reform of the Chinese law and the system of criminal justice. To prepare for the entry to the ICCPR, the reformers need to examine the remaining differences and see what can be done to reduce them. This is the start point of this Master's thesis. To cover all aspects of the issues in such a paper is unrealistic. It would be more proper to confine the research scope into a specific issue. In this case, this thesis will focus on the issues related to the

[9] David Weissbrodt and Rudiger Wolfrum .The Right to a Fair Trial (Springer) 1998 p 434

right against self-incrimination in criminal justice as the main topics of this thesis.

The right against self-incrmination, derived from the maxim “nemo tenetur seipsum accusare,” that “no man is bound to accuse himself.”[10] Expressed in Article 14(3) (g) of ICCPR, and in other international or regional human rights instruments, is one of the minimum standards of the right to a fair trial. The appearance of the right---- the guarantee that no person “shall be compelled in any criminal case to be a witness against himself”----was a landmark event in the history of Anglo-American criminal procedure. Prior historical scholarship has located the origins of the common law right in the second half of the seventeenth century, as part of the aftermath of the constitutional struggles that resulted in the abolition of the courts of Star Chamber and High Commission. [11]This right is firstly recognized in the Scotch Claim of Rights of 1689,[12] then it entered criminal procedure and finally deeply embedded in the common law after development of hundred years, nowadays this right is described as one of the “basic freedom secured by English law”.[13]

The right against self-incrimination as an international human rights standard, as well as a legal theoretical term, has not yet been introduced to Chinese judicial authorities, although some legal scholars has attach importance on this term, and the negative influence on the legal practice for the absence of the protection on this right is attracting the attention of people. There is still a long way to go to meet the international standards set down by ICCPR and other international human rights instruments and it is urgent to assess the distance in order to promote a sound reform before ratifying the Covenant. As a legal practitioner from the prosecution service

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[10] Ricardo Alberton do Amaral & Eduardo de Lima Veiga. The right agains self-incrimination (Fall 1998)，para,13

[11] ibid

[12] Scotch Claim of Rights (1689): "That the forcing the lieges to depose against themselves in capital crimes, however, the punishment be restricted is contrary to law." And it goes on "That the using of torture without evidence or in ordinary crimes, is contrary to law."

of China, I have long concerned about the human rights issues within the prosecution service of China. A comparative study on the international human rights standards and the Chinese law and practice on the issue of right against self-incrimination would be helpful to develop my academic knowledge and practical skills in dealing with the problems of violation of human rights occur in my daily work.

1.3 Research scope of the thesis

The structure of the thesis when analyzing the international human right standards and examining the domestic laws and legal practice of China follows that of General Comment 13 on article 14(3) (g) of ICCPR, namely, follow the arrangement of paragraph 14 of the General Comment 13, for the reason that the statement of article 14(3) (g) itself is highly recapitulative.

HRC has emphasized that article 7 and article 10, paragraph 1, of the ICCPR should be borne in mind to fulfill the right against self-incrimination. The article 7 prescribe the right to freedom from torture while article 10, paragraph 1, provided the right of persons deprived of liberty to be treated with humanity. That is to say, the above two rights is the essential protection for the right against self-incrimination. Additionally, the prohibition on the use of evidence obtained through unlawful means is also analyzed as well as the work of the defense counsels to guarantee the right against self-incrimination, which is the extension of this right.

As for the international human rights standards referred to in this thesis, there are two main categories: those set forth in ICCPR, including the text of the Covenant, General Comments, jurisprudences, and Concluding Observations of the Human Right Committee (HRC) and those set forth in other international human rights instruments, such as the S*tatute of the*

[13] In Re Arrows Ltd (No 4)[1995] 2 AC 75

International Criminal Court, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Furthermore, when discussing some specific issues, for example, the bound of the right to science, which is regarded as the crucial aspect of the right against self-incrimination , it seems that documents of HRC had not chance to elaborate, whereas the jurisprudence of European Court of Human Rights, covering more than 50 years, that provides us with insight not only with respect to how the issue of right to remain silent is understood but also how the Court has interpreted the State Party's obligations under a human rights instrument . Thus, that jurisprudence of European Court of Human Rights is quoted when necessary in the thesis to understand and explain the specific question. The "domestic law" of China examined in this thesis should be understood as a broad concept of law, which includes (a) these legislated by National People's Congress (hereinafter NPC) and its Standing Committee, such as the *Constitutional Law*, *Criminal Procedure Law* (hereinafter CPL),; (b) these enacted by Supreme People's Court (hereinafter SPC) and Supreme People's Prosecution service (hereinafter SPP), such as *SPC's Interpretation on Several Issues Regarding Implementation of the Criminal Procedure Law* and *SPP's Rules of Criminal Procedure.*

2. Right against self-incrimination in the UN covenant and regional convention

2.1 The international standards

The right against self-incrimination is a fundamental legal principle that is a part of the right to a fair trial. It says that a suspect can not be forced to incriminate himself or to yield evidence against himself. It is included explicitly in several international treaties: such as the article 14(3) (g) of The International Covenant on Civil and Political Rights states that:

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality……
(g) Not to be compelled to testify against himself or to confess guilt"

More recent international documents have explicitly included the right against self-incrimination: The right is provided in article 20(4) (g) and article 21(4) (g) of the respective Statutes of the International Criminal Tribunals for Rwanda and the Former Yugoslavia. [14]. And the Rome Statute of the International Criminal Court also contains such contents. [15]

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[14] STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Article 20(4). In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:…

(g) Not to be compelled to testify against himself or herself or to confess guilt.

(found at http://www.ictr.org/ENGLISH/basicdocs/statute.html)
STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA.
article 21(4) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:…

The right against self-incrimination are also provided in other regional conventions, article 8(2) (g) of the American Convention provides for the right of everyone "not to be compelled to be a witness against himself or to plead guilty", a provision that is strengthened by article 8(3) according to which "a confession of guilt by the accused shall be valid only if it is made without coercion of any kind". It is useful to explore the discussion surrounding the right against self-incrimination at the regional level. The regional human rights instruments mirror, to a certain extent, the norms as set out in the ICCPR and therefore provides a further opportunity to examine this issue.

The right against self-incrimination has its roots in English common law and today generally belongs to the essence of a fair trial, such that it must also be viewed as being covered by Art6 of the ECHR. [16] as interpreted by the European Court of Human Rights. The right to a fair trial incorporates "the right of anyone 'charged with criminal offence' within the autonomous meaning of this expression in Art 6,[17] to remain silent and not to contribute to incriminating himself.[18] The Court laid down the basis for determining the meaning of the right against self-incrimination in the case of *Funke.v. France ,Saunder v United Kingdom* and *the Murry v United Kingdom.*

In the case of *Funke.v. France* , The Court notes that "special features of customs law cannot justify such an infringement of the right of 'anyone charged with a criminal offence', within the autonomous meaning of this

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(g) Not to be compelled to testify against himself or herself or to confess guilt.
(found at http://www.un.org/icty/legaldoc/index.htm)

[15] Rome Statute of the International Criminal Court. (UN Doc.A/CONF.183/9)
Arts.55(1). In respect of an investigation under this Statute, a person:
(a) Shall not be compelled to incriminate himself or herself or to confess guilt;
(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
(found at www.un.org/law/icc/statute/romefra.htm)

[16] M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, (N.P.Engel, Kehl, 1993) 264,

[17] the "autonomous meaning "of the term "criminal charge" means that the ECtHR does not only look at the classification of the alleged offence in a nation's law, but also at the nature of the offence and nature of the penal threatened.

[18] Funke v France ECHR 25 February 1993

expression in Article 6 to remain silent and not to contribute to incriminating himself ". [19]

This was the first time the European Court of Human Rights established the right to remain silent as part of the Convention obligations. But the most definitive statement about the right against self-incrimination was given in the case of *Saunder. v. United Kingdom* :

"The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."[20]

From these cases we can see that the right to silence and the right against self-incrimination are closely related right. The restrictions on the right to silence is bound to violate the right against self-incrimination.

The right to silence has been analysed by the House of Lords as including the following

…….

(3)A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officer or others in similar positions of authority, from being compelled on pain of punishment to answer question of any kind.

(4)A specific immunity, possessed by all persons undergoing trial, from

[19] *Funke.v. France* ECtHR 25 Feb 1993 para,44

[20] *Saunder.v.United Kingdom.* ECtHR 17 Dec 1996 para,68

being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

(5)A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

(6)A specific immunity…possessed by accused persons undergoing trial, from having adverse comment made on any failure(a)to answer questions before the trial., or (b) to give evidence at the trial. [21]

Although the ICCPR do not expressly provide for the right to silence, the HRC's Concluding Comments on the UK indicate that the right to silence is the crucial aspect of the right against self-incrimination and the restrictions on the right to silence threaten one's right against self-incrimination.[22]

"the provisions of the Criminal Justice and Public Order Act of 1994, which extended the legislation originally applicable in Northern Ireland, whereby inferences may be drawn from the silence of persons accused of crimes, violates various provisions in article 14 of the Covenant, despite the range of safeguards built into the legislation and the rules enacted thereunder. "[23]

The adverse inferences drawn from the silence of persons accused of crimes evidently put restriction on the right to silence , accordingly violates the right against self-incrimination . this point , has been taken by HRC in the part of "suggestions and recommendations" ,of the Concluding Comment on UK

"The Committee recommends that the Criminal Justice and Public Order

[21] Richard Clayton and Hugh Tomlinsen : Fair Trial Rights, pp,47. See also per Lord Mustill, R v Director of Serious Fraud Office, ex p smith
[22] Joseph; Schultz; Castan, ICCPR cases, materials, and commentary.,2004,Oxford University press ,450.
[23](1995)UN doc. CCPR/C/79/Add.55

Act of 1994 and the equivalent legislation in Northern Ireland be reviewed in order to ensure that the provisions which allow inferences to be drawn from the silence of accused persons do not compromise the implementation of various provisions in article 14 of the Covenant. "[24]

As to the bound of the right to silence, the European Court of Human Rights has made more detailed comment compared with the HRC, The European Court of Human Rights takes the point that not all the inference drawn from the silence of accused persons is prohibited, "whether the drawing of adverse inference from the accused's silence infringes is a matter to be determined in the light of all the circumstances of the case".[25] This point has been illustrated comparatively in the judgement of the case of *John Murray v. the United Kingdom* and the case of *Condron v. the United Kindom.*

In the case of *Murry* , the applicant was arrested under the Prevention of Terrorism (Temporary Provisions)Act 1989 and cautioned by the police officer pursuant to article 3 of the Criminal Evidence (Northern Ireland) Order 1988 that, although he did not have to say anything unless he wished to do so, his silence might be treated in court as supporting any relevant evidence against him; he was subsequently cautioned several times. During his trial for the offence of conspiracy to murder, the applicant remained silent but was again cautioned that the court , in deciding whether he was guilty, might take into account against him "to the extent that it considers proper" his "refusal to give evidence or to answer any questions"[26] He was found guilty of the offence of aiding and abetting the unlawful imprisonment of the man against whom there was a conspiracy to murder, but acquitted on the other charges.

The ECtHR held that

[24] ibid
[25] Eur.Court HR, Case of John Marry. v . the United Kingdom, judgement of 8 February 1996, Reports 1996-I, para.51
[26] Ibid,para.20

"there can be no doubt that the right to remain silent under police questioning and the right against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6....By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6"[27]

However the Court refrained in this case from giving "an abstract analysis of the scope of " the right to remain silent and, in particular, of what constitutes in this context 'improper compulsion'", because what was at stake was "Whether these immunities are absolute in the sense that the excise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be so used, it always to be regarded as "improper compulsion"[28]

While it was "self-evident" to the Court " that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself", it was "equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution". It followed that, "wherever the line between these two extremes is to be drawn", the question whether the right to be silent "is absolute must be answered in the negative"[29].It thus also followed that it "cannot be said ... that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him". Agreeing with the respondent Government, the Court further observed that "established

[27] Ibid,para. 45.
[28] Ibid, para.46
[29] Ibid, para. 47.

international standards in this area, while providing for the right to silence and the right against self-incrimination is silent on this point". [30] This also meant that the question whether "the drawing of adverse inference from an accused's silence infringes article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation"[31]

The European Court carefully analysed the powers of the national trial judge and concluded that he could only draw "common-sense inferences which [he] considers proper, in the light of the evidence against the accused". In addition, the trial judge had "a discretion whether, on the facts of the particular case, an inference should be drawn", and, finally, the exercise of discretion was "subject to review by the appellate courts"[32]. Against the background of this particular case, the European Court eventually denied that "the drawing of reasonable inferences from the applicant's behaviour had the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence".[33]

While in the case of *Condron.v. the United Kindom*. The applicants followed the advice of the solicitor to remain silent and not to reply to questions at the time of their interview with the police since they were suffering from heroin withdrawal symptoms. And the trial judge gave the jury the option of drawing an adverse inference from the applicants' silence during interview "With reference to section 34 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act")"[34] . The applicants complained that their right to a fair trial, guaranteed by Article 6 of the European Convention

[30] Ibid,para 47
[31] Ibid,para,47
[32] Ibid,para,51
[33] Ibid,para,54
[34] Eur. Court HR, *Case of Condron .v. the United Kingdom*, judgment of 2 May 2000. para. 18

on Human Rights, was violated on account of the decision of the trial judge.

The Court observed with reference to its earlier judgment in the case of *John Murray .v. United Kingdom* that the right to silence cannot be considered an absolute right. “Whether the drawing of inferences from an accused’s silence during police interview infringed Article 6 was a matter to be determined in the light of all the circumstances of the case. For the Court, the fact that the question of an accused’s silence was left to the jury could not, of itself, be considered incompatible with Article 6. However, given that the right to silence lay at the heart of the notion of a fair procedure guaranteed by that Article, the Court stressed, in line with its John Murray judgment, that particular caution was required before a domestic court could invoke an accused’s silence against him.” [35]

In the case of *Condron v UK*, the Court found fault with the manner in which the trial judge directed the jury on the issue of the applicants’ silence. “In its opinion, the terms of the direction could not be said to reflect the balance which the Court in its *John Murray* judgment sought to strike between the right to silence and the circumstances in which an adverse inference may be drawn from silence.” [36] therefore the court concluded the applicant were denied the right to silence, in violation of the article 6.1 of the ECHR.

We could see that inference could be made in the *Murray* case because the court found that the circumstances “clearly” called for an explanation and that the inference were “reasonable”. In the situations, an adverse inference could be drawn if certain safeguards were in place, including the right to counsel, providing a caution in clear terms and ensuring that the accused understood the possible consequence of their decision. Whereas in the case of *Condron v UK*, the European Court found a violation when balancing between the right to silence and the

[35] ibid
[36] ibid

circumstances in which an adverse inference could be drawn. The court held that, as a matter of fairness, the jury should have been directed that if it was satisfied the applicant's silence at police station could not sensibly be attributed to their having no answer or none that would stand up to cross-examination, it should not draw an adverse inference.

Conclusions can be drawn from the two cases: "the right to silence could not be considered an absolute right". Whether the drawing of inferences from an accused's silence has a violation of the right to silence is a matter to be determined in the light of all the circumstances of the case.

2.2 The Chinese law and practice

We regret to see that in the criminal procedure law of PRC, the right against self-incrimination is completely denied. As article 93 states:

Article 93. When interrogating a criminal suspect, the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and let him state that circumstances of his guilt or explain his innocence; then they may ask him questions. The criminal suspect shall answer the investigator's questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case.

The Chinese legislature established the law in this way to serve the objective stipulated in criminal procedure law, namely "to guarantee the accurate and timely clarification of the facts of crimes, to apply the law correctly, and to punish criminal elements to safeguard innocent people from criminal prosecution." [37] The legislature thought that this objective would be best served if the suspect answered honestly the questions asked

[37] Art2 of the CPL The aim of the Criminal Procedural Law of the People´s Republic of China

by the authorities.

According to Art 93, the criminal suspect has the obligation to tell the investigator the 'truth' that whether or not he has committed any criminal act, and if he committed, he has to "state that circumstances of his guilt", even he has not committed, he also has to "explain his innocence". Which is evidently a violation of the right to be presumed innocent. In the case of *Sauders v UK,* the European Court noted the close link between the presumption of innocence and the freedom from self-incrimination[38]. The presumption reflecting "the expectation that the state bear the general burden of establishing the guilt of an accused, in which process the accused is entitled not to be required to furnish and involuntary assistance by way of confession". [39]Therefore the right against self-incrimination is an important element in safeguarding an accused from oppression and coercion during criminal proceedings and it is closely linked with the presumption of innocence.

Conclusion can be drawn that article 93 of the CPL constitutes a violation of not only article14, paragraph(3)(g)but also article14, paragraph 2, in another word, denying both the right against self-incrimination and the right to be presumed innocent. Furthermore, this provision also contradicts with Art 12 of the criminal procedural law of PRC.

Art12. No person shall be found guilty without being judged as such by People's Court according to law.

We have talked about the main change of the reform of criminal procedural law in China; the principle of the presumption of innocence is undoubtedly one of the most important productions of the reform. And this principle is provided in the General Provisions of the criminal

[38] Eur. Court HR, *Case of Saunders .v. the United Kingdom,* judgment of 17, Dec, 1996 Reports 1996-VI

[39] ibid

procedural law of PRC. This principle, however, has not been implemented successfully in the legal practice, even not been embodied in the operational provision of the same law.

Besides, the greatest significance of the presumption of innocence, however, comes to light in the criminal trial itself. The prosecutor must prove the defendant's guilt; in case of doubt, the accused must be found no guilty in accord with the ancient principle in *dubio pro reo*. According to Article 93, the criminal suspect was obliged to "explain his innocence", which can not be regarded as the right to defence for himself in the context of this article, but the obligation to prove his innocence, which is completely the violation of the presumption of innocence .

The violation of right against self-incrimination inevitably leads to the negative influence on legal practice, such as the arbitrary extension of detention; the psychological pressure on the suspect (which is difficult to be proved if the victim appeals); the overtime interrogating with the intention of obtaining confession , even the torture and other inhuman treatment and so on .

In this thesis I will choose the arbitrary extension of detention as the instance to discuss the negative influence on the legal practice throwed by the absence of right against self-incrimination.

For the investigators can take advantage of the obligation of criminal suspect to testify against themselves to obtain confession, they try to force the suspect to tell them the "truth", although they are strictly forbidden to the unlawful methods, they make use of the leak of the criminal procedure law to extend their control on the suspect as long as possible. There has been no mechanism or procedure by which the suspect can challenge the continued detention.

The CPL of China generally limits pre-trial detention (post-arrest

detention) for investigation to two months after arrest. Article 124 of the CPL, however, allows authorities to extend post-arrest pre-trial detention by an additional month with permission from the prosecution service of an immediately higher level. Furthermore, Article 126 lists four situations under which such detention can be prolonged for an additional two months with approval from provincial level prosecution service.[40] Moreover, Article 127 permits the authorities to extend detention by two more months if the investigation in question has not been completed after the two-month extension prescribed by Article 126 and the alleged crimes may merit a sentence of more than ten years' imprisonment.

The standard of "grave" , "complex" and "can not be concluded within the time limit" is decided by the investigator themselves. The approvalment of the prosecution service at the next higher level and the people's prosecution service , autonomous region or municipality directly under the Central Government: is formalistic in most cases.for the prosecution service at higher level has no chance to know the details of the case concerned.

This is a general description of the time limits of pretrial detention in China. The provisions about post-arrest detention stipulated in CPL have given the investigators much place to extend the detention. Nevertheless, detentions of people in excess of time limits still do happen often all over China. Statistics coming from the annual reports of the provincial people's prosecution service to the annual meetings of the provincial people's congresses held in 2000 may illustrate the severity of the

[40] Article 126 of CPL stipulates:
With respect to the following cases, if investigation cannot be concluded within the time limit specified in Article 124 of this Law, an extension of two months may be allowed upon approval or decision by the People's Procuratorate of a province, autonomous region or municipality directly under the Central Government:
(1)grave and complex cases in outlying areas where traffic is most inconvenient;
(2)grave cases that involve criminal gangs;
(3)grave and complex cases that involve people who commit crimes from one place to another; and
(4)grave and complex cases that involve various quarters and for which it is difficult to obtain evidence.

problem.

Statistics for 1999 from the Provincial People's Prosecution service on People Detained in Excess of the Time Limits

Provinces	Numbers found	Numbers Corrected
Chongqing	3,444	3,203
Fujian	--	2,826
Gansu	--	922
Guangdong	--	10,559
Hainan	--	1,253
Henan		9,952
Hubei	--	3,602
Hunan	3,793	4,025
Jilin	1,533	--
Liaoning	2,352	--
Qinghai	34	--
Zhejiang	746	734
National		74,051*

From this statistics we can see the arbitrary extension of detention is really one of the evil consequences of the denial of the right against self-incrimination. As long as as the investigator can benefit from the confession of the criminal suspect, which means, they can solve cases by the clue provided by the statement of the criminal suspect, and they may be under pressure to solve cases, they may reflect that pressure in how they deal with suspects, then they try their best to force the criminal suspect to tell them the "truth" as much as possible. Which accordingly leads to

recourse to unlawful methods. The right against self-incrimination should be introduced to criminal procedural legislation to put an end to these methods.

From the above we can see the denial of the right against self-incrimination brings about many negative impacts on the criminal justice of China, as it is ,why the state does not legislate to admit this right? What's the origin of the denial of the right?

The first reason for the denial of the right lies in the legal history of the PRC: the Chinese legal system was established on the basis of the Pre-1949 experience of communist justice and on the Soviet model. Soviet influence or Marxist theories of law did not, how ever lead to any significant activities in law-making or institution –building in China. Instead, the early communist experience and Soviet practice led, in the first 30 years of communism in China, to the use of law as a terrorist means for class struggle, with complete disregard for formal enactments and for formal procedure. [41]

Before the enactment of the first CPL in 1979 , the formal procedure for criminal process were completely absent in Chinese law system and legal practice, which can be the reason why the first procedure law contains numerous defects that on their face violate international standards of fair judicial process. Although in 1996 the revision of the CPL incorporated some fundamental 'due process' principles, it still can not clear all the defects of the old law. Such as the denial of the right against self-incrimination.

Another reason for the denial of the right against self-incrimination is that the state has not keep balance between the

Competitive goals of the criminal justice system, which is "crime control"

[41] J.chen, Chinese Law, towards an understanding of Chinese law , its nature and development. (Kluwer law international ,1999)p31.
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and “due process”. The state has paid much more attention to the “crime control” than the latter. The police and prosecutors are always on the pressure of solving the cases therefore neglect the “due process”. In some cases, the substantial justice is realised at the expense of procedural justice. But in most cases, both of the substantial justice and the procedural justice has been lost for the denial of the “due process”.

The poor capability of many prosecutors and polices is another reason for the denial of the right against self-incrimination, since they can hardly get other evidence in the criminal proceeding except for confession and statement. The confession and statement is still the main source of the evidence in criminal procedure in China, at least is the way through which the investigator can obtain other evidence. And the other evidence is admissible legally even the confession and statement is obtained by torture and inhuman treatment.

3. The crucial rights in

safeguarding the right against self-incrimination

Concerning the right against self-incrimination which is prescribed in the ICCPR article 14(3) (g), the term “to be compelled” refers to various forms of direct or indirect physical or psychological pressure, ranging from torture and inhuman treatment prohibited by article 13 and 10 of the ICCPR to various methods of extortion or duress and the imposition of judicial sanctions in order to compel the accused to testify. [42] Although Art14 does not expressly prohibit forced confessions or statements by the accused from being admissible as evidence in criminal trials, the Committee called upon States Parties in its General Comment on article 14 to set down in law corresponding prohibitions of the use of such evidence.

14. Subparagraph 3(g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

According to this General Comment, the right to freedom torture and the right to be treated with humanity is significant for the right against self-incrimination. That is to say, the realization of these two rights in legal practice is the procedural protection for the right against self-incrimination.

[42] M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, (N.P.Engel, kehl, 1993) 264

3.1 Freedom from torture and the right to humane treatment.

3.1.1 International Standard

Article 7 of the ICCPR prohibits torture and inhuman and degrading treatment, and punishment. It is one of the few absolute rights in the ICCPR; no restrictions are permitted. Furthermore, it is a non-derogable right. [43]The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ('CAT') expands on the scope of obligations not to commit torture and, to a lesser extent, other heinous forms of punishment or treatment.[44]

3.1.1.1 Freedom from torture

Torture is the most reprehensible of the three standards of treatment prohibited by article 7 and CAT.[45] The definition of torture, as opposed to inhuman or degrading treatment or punishment, is important, even though perpetration of all three forms of treatment is prohibited under the treaties. Certain consequences may flow from a finding of torture which do not flow from a finding of a lesser standard of treatment. Finally, it is of moral value to a State not to be branded a 'torturer' even it is branded a sponsor of inhuman and/or degrading treatment; a special stigma attaches to torture. [46]

[43] Joseph; Schultz; Castan, ICCPR cases, materials, and commentary.,2004,Oxford University press ,195
[44] ibid
[45] M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, (N.P.Engel, Kehl, 1993) 129.See also the argument of the State Party in *Vuolanne v Finland* (265/87), at para 6.4
[46] Joseph; Schultz; Castan, ICCPR cases, materials, and commentary.,2004,Oxford University press ,196;see also *Aydin v Turkey* (1998) 25 EHRR 251, para 82

The HRC has not issued a specific definition of 'torture' for the purposes on article 7 of ICCPR, but in numerous early cases against Latin American States, the HRC found various combinations of the following acts to constitute torture. Systematic beatings, electroshocks, burns, extended hanging from hand and/or leg chains, repeated immersions in a mixture of blood, urine, vomit, and excrement(´submarino´), standing for great lengths, simulated executions, and amputations. In Muteba.v. Zaire(124/82). Miango Muiyo.v.Zaire(194/85). AmdKanana.v.Zaire(366/89), the HRC found that various combinations of the follwing acts constituted torture: beatings, electric shocks to the genitals, mock executions, and deprivation of food and water, and thumb presses.[47]

Article 1 of the CAT provides a definition of torture. In view of the universal status of CAT. Which is a widely accepted definition of torture.

"For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

This definition confirms the 'torture' entails a certain severity in pain and suffering. Importantly, this suffering can be mental as well as physical. International human right cases have confirmed that the threshold of

[47] Joseph; Schultz; Castan, ICCPR cases, materials, and commentary.,2004,Oxford University press . 214

severity for torture is extremely high. [48] For example, the European Court of Human Rights found that the combined effects of the following interrogation techniques: hooding detainees, subjecting them to constant and intense 'white'noise, sleep deprivation, giving them insufficient food and drink and making them stand for long periods in a painful posture.[49]Which were used on terrorist suspects in the UK in the early 1970s, constituted inhuman treatment rather than torture. Holding that they "did not constitute a practice of torture since they did not occasion suffering of the particular intensity and cruelty implied by the word torture"[50]

Whereas in article 1 of the UN Convention against Torture, torture only relates to acts that are committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

Article 1 also prescribes that torture be inflicted for a purpose. The definition lists a number of example purposes, though the list is not exhaustive. The enumerated purpose is all linked to a desire personally to persecute victims because of who they are.[51] In this thesis, we particularly pay attention to the purpose "as obtaining from him or a third person information or a confession", which often arises in the process of criminal justice.

[48] ibid.196
[49] Eur. Court HR, *Case of Ireland .v. the United Kingdom*, judgment of 18 January 1978, pp32
[50] ibid.
[51] Joseph; Schultz; Castan, ICCPR cases, materials, and commentary.,2004,Oxford University press . 197

3.1.1.2 The Cruel, inhuman, and degrading treatment or punishment.

Article 7 of the ICCPR prohibits three levels of 'bad' treatment or punishment of a person. The prohibition on heinous 'treatment' is broader than the prohibition on heinous 'punishment'; the latter is inflicted for the disciplinary purpose (how ever unsound), whilst treatment can be inflicted for numerous purposes. Article 7 is complemented in the ICCPR by article 10, which prohibits less serious forms of treatment than that prohibited by article 7.[52]

The HRC often fails to specify which aspect of article 7 has been breached; violations may simply be described as 'violations of article 7'. Article 7 of the ICCPR prohibits three levels of 'bad' treatment or punishment of a person while the HRC decided not to differentiate between the three levels of banned treatment/punishment in article 7. It has been able to elaborate and develop the scope of the prohibition without actually defining the terms. [53]As the General Comment 20 states that:

"The Covenant does not contain any definition of the concepts covered by article 7, nor does the committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment, the distinctions depend on the nature, purpose and severity of the treatment applied."[54]

This may be contrasted with the practice of the European Court of Human Rights in its interpretation of the equivalent provision of the European Convention on Human Rights in article 3. The Court usually

[52] Joseph; Schultz; Castan, ICCPR cases, materials, and commentary.,2004,Oxford University press ,195
[53] Joseph; Schultz; Castan, ICCPR cases, materials, and commentary.,2004,Oxford University press ,208
[54] CCPR General Comment 20. para.4

specifies which type of 'treatment' has occurred. [55] In the case of *Ireland v United Kingdom,* the court stated that "ill-treatment must attain a minimum level of severity if it is to fall with in the scope of article 3. The assessment of this minimums is, in the nature of things, relatives; it depends on all the circumstances of the case".

In this case, while the applicants alleged that the five 'techniques' use by British police in Northern Ireland as an aid to their interrogation amounted to torture. These 'techniques' consisted basically of hooding detainees, subjecting them to constant and intense 'white' noize, sleep deprivation, giving them insufficient food and drink, and making them stand for long periods in a painful posture.

The Court held instead that the five techniques constituted inhuman treatment. It stated that "The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3". [56]

Concerning degrading treatment or punishment, the court have consistently argued that a treatment or punishment is degrading when it grossly humiliates an individual before himself or others, or drives him to act against his conscience or will. [57] And the court has emphasized that, for a punishment to be 'degrading', "the humiliation or debasement involved must exceed a particular level and must in any event be

[55] D.Harris, M.O´Boyle, and C.Warbrick, The Law of the European Convention on Human Rights (Butterworths,London,1995)56-7
[56] Eur. Court HR, *Case of Ireland .v. the United Kingdom,* judgment of 18 January 1978, para.66
[57] Eur. Court HR, *Case of Tyrer.v. the United Kingdom,* judgment of 25 April, 1978, para.15; *Case of Guzzardi v Italy* , judgement of 6 November, 1978. para.80; *Case of Campbell and Cosans* v *United Kingdom,* judgement of 25 February 1982, para.13

different from the normal humiliation involved in being criminally convicted."[58] .

The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that:

"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

Article 10(1) of the ICCPR guarantees that States treat people in detention with humanity and dignity. It seems to prohibit a less serious form of treatment than that prohibited by article 7. Which provides extra protection for a particularly vulnerable group, people deprived of their liberty, an important distinction between article 7 and article 10 is that the latter is a derogable right. [59]

Art 10, on the other hand, ensures minimum guarantees of humane treatment that, particularly in conjunction with the above-mentioned rights, reduce or define more precisely the permissibility of restrictions on the latter.[60]

Several general conclusions may be drawn for the interpretation of Art.10, paragraph 1: in contrast to Art 7, Article 10 relates only to the treatment of persons who have been deprived of their liberty. Whereas Arts.7 primarily is directed at specific, usually violent attacks on personal integrity, Art 10 relates more to the general state of a detention facility or some other closed institution and to the specific conditions of detention. As a result, Art.7 principally accords a claim that State organs refrain from certain action (prohibition of mistreatment), while Art.10 also covers positive state duties

[58] Eur. Court HR, *Case of Tyrer.v. the United Kingdom*, judgment of 25 April, 1978, para. 30

[59] Joseph; Schultz; Castan, ICCPR cases, materials, and commentary.,2004,Oxford University press ,275

[60] ibid

to ensure certain conduct: Regardless of economic difficulties, the State must establish a minimum standard for humane conditions of detention (requirement of humane treatment). In other words, it must provide detainees and prisoners with a minimum of services to satisfy their basic needs (food, clothing, medical care, sanity facilities, communication, light, opportunity to move about, privacy, etc.). Finally, it is again stressed that the requirement of humane treatment pursuant to Art.10 goes beyond the mere prohibition of inhuman treatment under Art.7 with regard to the extent of the necessary "respect for the inherent dignity of the human person".[61]

3.1.1.3 The duty of the state to prohibit the torture and the inhuman treatment.

In General Comment 20, the HRC made the following general statements on the definition of the acts prohibited by article 7 ('article 7 treatments'):

"The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

The duty to pass and enforce legislation to prohibit 'article 7 treatment' is prescribed by the General Comment 20.

[61] M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, (N.P.Engel, Kehl, 1993) 189

"State parties should indicate when presenting their reports the provisions of their criminal law which penalise torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other, persons acting on behalf of the State or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible."[62]

Accompanied with the duty to pass and enforce legislation flows the duty to investigate allegations of article 7 treatment, this duty, is reflected in the General Comment 20.

"Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with."[63]

The HRC 's General Comment on Arts. 7 are primarily directed at State duties to ensure protection against torture, which correspond in part to those set forth in the 1984 UN convention against Torture. The Committee has stressed that in implementing this right, it is not sufficient to prohibit torture or make it a crime. When read together with Art.2, there arises a duty on State Parties to ensure effective protection through some machinery of

[62] CCPR General Comment 20, para,13
[63] CCPR General Comment 20, para,14

control. Complaints about ill-treatment must be investigated effectively by competent authorities, tortures must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation. [64]

The duty to investigate specific allegations of torture and other ill treatment was confirmed in the case of *Herrera Rubio v Colombia (161/83).*

"It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. In no circumstances should a State party fall to investigate fully allegations of ill-treatment when the person or persons allegedly responsible for the ill-treatment are identified by the author of a communication. The State party has in this matter provided no precise information and reports, inter alia, on the questioning of military officials accused of maltreatment of prisoners, or on the questioning of their superiors". [65]

The corresponding duty in CAT is reflected in article 12 and article 13.

"Each State party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction".

"Each state party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant

[64]M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, (N.P.Engel, Kehl, 1993) 136
[65] *HERRERA RUBIO V COLOMBIA* (161/83). CCPR/C/31/D/161/1983,para.10.5

and witnesses are protected against all ill treatment or intimidation as a consequence of his complaint or any evidence given".

The duty to investigate allegations of torture and other ill treatment is confirmed in the case of *Halimi-Nedzibe.v. Austria* . (CAT 8/91) in this case, the author was arrested ad charged with drug trafficking. The author claims that the failure of the Austrian authorities promptly to investigate his allegation of torture as a result of torture constitute a violation of article 12.and the CAT Committee agreed with the author that the State Party had failed adequately to investigate his allegation of ill treatment. [66]

It remains to be determined whether the State party complied with its duty to proceed to a prompt and impartial investigation of the author's allegations that he had been subjected to torture, as provided in article 12 of the Convention. The Committee notes that the author made his allegations before the investigating judge on 5 December 1988. Although the investigating judge questioned the police officers about the allegations on 16 February 1989, no investigation took place until 5 March 1990, when criminal proceedings against the police officers were instituted. The Committee considers that a delay of 15 months before an investigation of allegations of torture is initiated, is unreasonably long and not in compliance with the requirement of article 12 of the Convention.[67]

[66] *Halimi-Nedzibi.V. Austria .(CAT 8/91*) CAT/C/11/D/8/1991
[67] Ibid ,para.13.5

3.1.2 Chinese law and practice

The right to freedom from torture is provided directly in both the criminal procedure law and the criminal law of PRC. Which is protected through the restriction on the means used by law-enforcement personnel.in interrogation?

Article 43: Judges, prosecutors and investigators must, in accordance with the legally prescribed process, collect various kinds of evidence that can prove the criminal suspect's or defendant's guilt or innocence and the gravity of his crime. It shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means

This article regulated the process of collecting evidence by the law-enforcement personnel, "extorting confessions by torture" is strictly forbidden, " threat, enticement, deceit or other unlawful means "are also not permitted, the same principle is also dealt with in the Arts.240 of *SPP's Rules on Implementation of the Criminal Procedure Law*;

And the same provision can be found in the *SPP's Rules on Implementation of the Criminal Procedure Law*. Article 265 prescribes that *statements and exculpations of criminal suspects or defendants obtained by torture, threat, enticement, deceit or other unlawful means shall not be invoked as evidence in the criminal proceedings.*

Besides, the criminal law of PRC contains the offence and punishment of torture in the special provisions on "infringing upon the rights of the person".

Article 247. Any justice or law-enforcement personnel who extort a confession or evidence from a criminal suspect or a defendant by torture or violent force shall be sentenced to fixed-term imprisonment of not more than three years of criminal detention. If he causes injury and disability or death to a person, the offender shall be given a heavier punishment according to the provisions of Articles 232 and 234.

The articles 234 and 232 respectively provided the crime of intentionally homicide and intentionally bodily injury. And the punishment of these two crimes varies from fixed-term imprisonment, life imprisonment to death penalty.[68]

From the provisions above we can see that in China, the state has passed the legislation to prohibit torture in criminal justice, but it is not sufficient to prohibit torture or make it a crime. The state also has the duty to ensure effective protection through some machinery of control. Complaints about torture must be investigated effectively by competent authorities, torturers must be held responsible. We regret to say that, in China, the duty to enforce the legislation to prohibit torture in criminal procedure has not been successfully fulfilled, and the mechanism or procedure by which the criminal suspect can challenge torture is not effective.

In China , the most important machinery of control on torture is the People's prosecution service . It carries out this duty through legal supervision on the criminal proceedings and investigating the cases of torture. Apart from the work of the prosecution service, the victim of torture

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70 Article 232. Anyone who intentionally commits homicide shall be sentenced to death, life imprisonment of fixed –term imprisonment of not less than ten years. If the circumstances are relatively minor, the sentence shall be fixed-term imprisonment of not less than three years nor more than ten years.

Article 234. Anyone who intentional inflicts bodily injury upon another person shall be sentenced to fixed-term imprisonment of not more than three yeas, criminal detention or public surveillance

Anyone who commits the crime mentioned in the preceding paragraph, and thereby causes severe bodily injury to another person, shall be sentenced to fixed-term imprisonment of not less than three years nor more than ten years. In cases causing a person`s death or severe bodily injury and disability using especially vicious means, the sentence shall be fixed-term imprisonment of not less than ten years, life imprisonment or

also can complain to the court through private prosecution. All the three methods will be discussed in the following paragraphs.

To analyze the work of the People's prosecution service to prohibit torture more clearly I'd like to introduce the duties of prosecution service proscribed in CPL.

Article 8. The People's prosecution service shall, in accordance with law, exercise legal supervision over criminal proceedings.

Article 18 of the CPL provides that:

"Investigation in criminal cases shall be conducted by the public security organs, except as otherwise provided by law.

Crimes of embezzlement and bribery, crimes of dereliction of duty committed by State functionaries, and crimes involving violations of a citizen's personal rights such as illegal detention, extortion of confessions by torture, retaliation, frame-up and illegal search and crimes involving infringement of a citizen's democratic rights -- committed by State functionaries by taking advantage of their functions and powers -- shall be placed on file for investigation by the People's Prosecution service ……

Cases of private prosecution shall be handled directly by the People's Courts."

Firstly, the people's prosecution service fulfils the obligation to prohibit torture through legal supervision over criminal proceedings: For the cases investigated by them, no effective supervision on the proceeding of the interrogation can be expected for the self-discipline is rather vulnerable while the temptation may be great to exert pressure on the criminal suspect to get confession

As for the cases investigated by the police, the supervision of criminal proceedings is likewise weak. The cases of torture are often handled in an

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death. Where this law has other applicable provisions, such provisions shall prevail.

"overly tolerant manner" .the complaints of torture are always neglected except for the particular serious case. In some cases, the prosecutor even use the confessions obtained by torture as evidence. Which is reflected in the "Announcement of Prohibition on Using the Statement Obtained by Torture as the Basis in Deciding a Case"(2001, Enactment by the SPP) In this Announcement , the SPP admitted that many cases of serious torture had taken place on the criminal proceeding , and some provincial prosecution services had not fulfilled the obligation of legal supervision strictly, even invoking the confessions and statement as evidence against the criminal suspect, which constituted the serious violation of human rights.

The SPP also selected the *case of Du Peiwu* as the typical instance of torture. In this case, the criminal suspect, Du Pei wu is a policeman of the public security organ of Kunming City, in April 1998, he was suspected of having committed the offence of murdering two officers, during the process of interrogation he was tortured to confess guilty. And his complaint of torture is neglected by the prosecution service of Kunming City, the confession was used by the prosecutor as the basis in deciding the case and also admitted by the court, as a result he was found guilty of murder. In February 1999, he was sentenced to death by the People's Court of Kunming City. He appealed to the People's Court at the next higher level, the People's Court of Yunnan Province,and was still found guilty of murdering and sentenced to death with a two-year suspension of execution. In June 2000, the real murderer of this case was captured; Du Peiwu was pronounced innocent and set free.

From this case and the statement of SPP we can see that the legal supervision of the prosecution service need to be reinforced for it is far from the international standard of freedom from torture.

Secondly, the obligation to prohibit torture is fulfilled by the prosecution service through investigating the cases of torture. The victims of torture and the relatives of the victims may complain to the prosecution service of the torture. And the complaints about torture will be investigated. If the

evidence of torture is reliable and sufficient, the prosecution service will initiate a public prosecution to the People's Court and the court will decide that if the conduct of the defendant constitutes torture. When the defendant is found guilty, he must be held responsible for the torture. The public prosecution against torture is the main mechanism by which people can challenge torture. Only when the prosecution service is indifferent to the complaint about torture, the private prosecution should be adopt.

Article 170 of CPL has proscribed the circumstances in which the private prosecution will be initiated:

(1) cases to be handled only upon complaint;

(2) cases for which the victims have evidence to prove that those are minor criminal cases; and

(3) cases for which the victims have evidence to prove that the defendants should be investigated for criminal responsibility according to the law because their acts have infringed upon the victims' personal or property rights, whereas, the public security organs or the People's Prosecution Service do not investigate them as criminal cases.

Conclusion can be drawn from this article that the private prosecutor has little chance to prove the torture through private prosecution since the burden of proof has been transferred to them. Regarding "the public security organs or the People's Prosecution Service do not investigate them as criminal", the only chance to appeal is the private prosecution. Owing to the great difficulty in collecting the evidence of torture by private prosecutor. The victims of torture seldom get effective redress through the mechanism of private prosecution.

To sum up, the state has passed legislation to prohibit torture but there are still leaks in the relevant law. Such as the clause of "private prosecution", in my opinion, in the case of torture, even in the procedure of private prosecution, the burden of proof should be taken by the state. The state has

the duty to prove that no torture has been committed during the criminal proceedings.

Conclusion can be drawn that in China, the state has not fulfilled the duty to enforce the legislation, nor does the state ensure effective protection of the right to freedom from torture through some machinery of control.

Concerning to the right to freedom from inhuman and degrading treatment, less attention have been attached to it, the only provision concerning this right is article 14, paragraph 3 of CPL:

The participants in criminal proceedings shall have the right to file charges against judges, procurators and investigators whose acts infringe on the citizen's procedural rights or subject their persons to indignities.

The criminal suspect is certainly involved in the category of the "*the participants in criminal proceedings"*, then they surely have the right to charge against the judges, prosecutors and investigators when violated by indignities, but there is no definition of the "indignities" nor punishment to the "indignities" specified in the law, this right is not provided by any operational provision of law, so it is hard to be realized.

The following interrogation techniques, being subjected to constant and intense 'white' noize, sleep deprivation, giving them insufficient food and drink, and making them stand for long periods in a painful posture. ('wall-standing')[69] which is used on terrorist suspects in the UK in the early 1970s and was regarded as inhuman treatment, are now still used on criminal suspects in China, no investigators will be punished for such conducts in the legal practice. According to the Criminal law, the personnel of detention centres shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention only when they engages in "serious battery or physical abuse of the detainees"[70], there is not even a

[69] *Ireland v UK* (1979-80) 2 EHRR 25, para,167

[70] Art 248: Any personnel of prisons, detention centers or surveillance house, which supervise and control offenders, who engages in battery or physical abuse of any prisoners or detainees, and serious circumstances are involved, shall be sentenced to not more than

word about the punishment to the violation of the" inherent dignity of the human person"

In a word, the State has not fulfilled the duty to pass and enforce the legislation to prohibit the inhuman and degrading treatment.

three or criminal detention. If the circumstances are exceptionally serious, the sentence shall be fixed-term imprisonment of not less than three years nor more than ten years. If he causes an injury and disability or death, he shall be given a heavier punishment according to the provision of Articles 234 and 232 hereof.

3.2 The prohibition on the use of the evidence obtained through unlawful means/treatment

3.2.1 International standards

According to the General Comments 13 of the HRC, the evidence obtained through torture and unlawful means /treatment should be strictly excluded to protect the right against self-incrimination,

"…*The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable*".[71]

Furthermore, the HRC reaffirm this point in the General Comments 20 on the Arts.7:

It is important for the discouragement of violations under article 7 that the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment. Article 7 in this respect complements article 14 (3) (g).[72]

In Concluding Observations on Romania, the HRC stated that:

[71] HRC General Comment 13, para14
[72] HRC General Comment 20, para112

The Committee is also concerned at the lack of legislation invalidating statements of accused persons obtained in violation of article 7 of the Covenant.

The State party should adopt appropriate legislation that places the burden on the State to prove that statements made by accused persons in a criminal case have been given of their own free will, and that statements obtained in violation of article 7 of the Covenant are excluded from the evidence.[73]

Thus, the burden is on the State to prove that a confession has been obtained without duress. Implementation of certain procedures, such as the audio or video recording of police interviews, assists in alleviating such a burden.[74]

We have made a reference to Guideline 16 on the Role of Prosecutors, according to which prosecutors shall refuse to use evidence which they "know or believe on reasonable grounds" to have been "obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's rights", in particular when such methods have involved recourse to torture or other human rights abuses.[75]

[73] (1999) UN. Doc.CCPR/C/79/Add.111,para,13

[74] Joseph; Schultz; Castan, ICCPR cases, materials, and commentary.,2004,Oxford University press ,450

[75] Guideline 16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

3.2.2 Chinese law and practice.

The regulation of exclusion of the confessions and statements obtained by torture and other inhuman treatment is provided in article 265 of the *SPP's Rules of Criminal Procedure:*

Article 265. The confessions and statements obtained by torture, threat, enticement, and deceit are not to be invoked as evidence in the trial.

When I talked about the torture and inhuman treatment in China, I have mentioned the Announcement of Prohibition on Using the Statement Obtained by Torture as the Basis in Deciding a Case"(2001, Enactment by the SPP). In this Announcement, the SPP admitted that many cases of serious torture had taken place in the criminal proceedings, and some provincial prosecution services even invoke the confession and statements as evidence against the criminal suspect, which constituted a serious violation of human rights.

Why the confession and statement obtained by torture and other inhuman treatment is still used in criminal proceeding although the state has legislate to prohibit it. Firstly, owing to the poor capability of many prosecutors and the police, the confession and statement is still the main source of the evidence in criminal procedure, at least it is the way through which the investigator can obtain other evidence. Secondly, the regulation of exclusion of illegal evidence is rather limited. The evidence obtained on the ground of confession and statement is admissible legally even if the confession and statement is obtained through torture and inhuman treatment.

To solve this problem measures should be taken to improve the quality of the prosecutors and polices, specialized courses and schools should be established for the training of prosecutors and police in the art of interviewing and interrogation. At the same time, the state should adopt more strict regulation of exclusion of illegal evidence.

4 The right to legal assistance in safeguarding the right against self-incrimination

4.1 International Standards

The right to legal assistance upon arrest and detention is essential in many respects, both in order to guarantee the right against self-incrimination and for the purpose of protecting the physical and mental integrity of the person deprived of his liberty. To demonstrate this point I will review the work of the defence counsel in the development of the right against self-incrimination.

From the middle of the sixteenth century, when sources first allow us to glimpse the conduct of early modern criminal trials, until late in the eighteenth century, the fundamental safeguard for the defendant in common law criminal procedure was not the right to remain silent, but rather the opportunity to speak. The essential purpose of the criminal trial was to afford the accused an opportunity to reply in person to the charges against him. Among the attributes of the procedure that imported this character to the criminal trial, the most fundamental was the rule that forbade defence counsel. The prohibition upon defence counsel was relaxed in stages from 1696 until 1836, initially for treason, then for felony. Although persons accused of ordinary felony began defence counsel did not become quantitatively significant until the 1780s.[76]

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[76] Ricardo Alberton do Amaral and Eduardo de Lima Veiga, The Right against Self-incrimination http://www.gwu.edu/~ibi/minerva/Fall1998/Amaral.and.Veiga.html

In the later eighteenth century and especially in the nineteenth century, a radically different view of the purpose of the criminal trial came to prevail. Under the influence of defence counsel, the criminal trial came to be seen as an opportunity for the defendant's lawyer to test the prosecution case. The right against self-incrimination entered common law procedure (together with the beyond-reasonable-doubt standard of proof and exclusionary apparatus of the modern law of criminal evidence) as part of this profound reordering of the trial. It was the capture of the criminal trial by lawyers for prosecution and defence that made it possible for the criminal defendant to decline to be a witness against himself.[77]

Defence counsel silenced the criminal defendant in the second half of the eighteenth century for reasons of strategic advantage, as the logic of the adversary procedure unfolded. Counsel welcomed the opportunity to pour this new wine into an old vessel, the maxim *nemo tenetur prodere seipsum*, the centrepiece of the traditional account of the history of the right against self-incrimination in the first decades of the nineteenth century, adversary procedure had become the norm. Defence counsel made the right against self-incrimination possible. Defence counsel disentangled the defensive and the testimonial functions that previously had been merged in the hands of the defendant. By assuming the defensive function, and doing it within the structure of the adversary criminal trial, counsel largely suppressed the defendant's testimonial role. [78]

Conclusion can be drawn from this paragraph that: To safeguard the right against self-incrimination during criminal proceedings, every accused person should have the right to communicate freely and privately with the counsel of his own choice. This right is provided in the arts 14(3) (b) of the ICCPR, the General Comment 13 on Arts 14 provides the details of the right

"The accused must have adequate time and facilities for the preparation of

[77] ibid
[78] ibid

his defence and to communicate with counsel of his own choosing. And the accused should have the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter."[79]

The right to communicate with counsel of one's own choosing is confirmed in the case of *Kelly V Jamaica. (537/93)*

"…..According to the file, the author, when brought the police station in Hanover on 24 March 1988, told the police officers that he wanted to speak to his lawyer, Mr. McLeod, but the police officers ignored the request for five days. In the circumstances, the Committee concludes that the author's right, under article 14, paragraph 3 (b), to communicate with counsel of his choice, was violated."[80]

The Committee has confirmed on numerous occasions that detention incommunicado breaches article 14(3) (b) as it renders access to legal assistance impossible. The shortest period of detention incommunicado so far found to constitute a breach of this article is forty days in *Drescher Caldas v Urugray* (43/79). Presumably, a lesser period, such as the five days prescribed in Kelly, would also suffice to breach the provision. Such cases have not yet come before the HRC. [81]

We should draw conclusion that a person has the right to access to legal

[79] CCPR General Comment 13, para 9
[80] CCPR/C/57/D/537/1993, para9.3
[81] Joseph; Schultz; Castain, The ICCPR cases, materials, and commentary. Second Edition Oxford University Press 2004,432

counsel without delay and to be able to confer with counsel in private. To have prompt access to a lawyer at early stage of police investigations may be essential in order to avoid lasting prejudice with regard to the rights of the defence.

4.2 Chinese law and practice

The right to legal assistance is provided in the CPL in the process of both interrogations and prosecution. Article 96 prescribed this right in the process of interrogation.

"After the criminal suspect is interrogated by an investigation organ for the first time or from the day on which compulsory measures are adopted against him, he may appoint a lawyer to provide him with legal advice and to file petitions and complaints on his behalf. If the criminal suspect is arrested, the appointed lawyer may apply on his behalf for obtaining a guarantor pending trial. If a case involves State secrets, the criminal suspect shall have to obtain the approval of the investigation organ for appointing a lawyer. The appointed lawyer shall have the right to find out from the investigation organ about the crime suspected of, and may meet with the criminal suspect in custody to enquire about the case. When the lawyer meets with the criminal suspect in custody, the investigation organ may in light of the seriousness of the crime and where it deems it necessary, send its people to be present at the meeting. If a case involved State secrets, before the lawyer meets with the criminal suspect, he shall have to obtain the approval of the investigation organ."

"A criminal suspect in a case of public prosecution shall have the right to entrust persons as his defence counsel from the date on which the case is transferred for examination before prosecution. ….and the prosecution service, shall within three days from the date of receiving the file record of a

case transferred for examination before prosecution, inform the criminal suspect that he has the right to entrust persons as his defence counsel."

Although the CPL has provided the criminal suspect the right to legal assistance, there are obstacles on the way of the counsel to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

The criminal suspect have difficulty to fulfil the right to communicate with his counsel, as the article 96 provided: "When the lawyer meets with the criminal suspect in custody, the investigation organ may in light of the seriousness of the crime and where it deems it necessary, send its people to be present at the meeting." Whereas the standard of "seriousness" and "where it deems it necessary" is totally decided by the investigation organ, in the legal practice, almost all the meetings between criminal suspect and the defence counsel are at the surveillance of the investigation organ. The lawyer even has little chance to talk with his client without interference.

As the EctHR pointed out in the judgment of the *Case of S. v. Switzerland:*

"if a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assitance would lose much of its usefulness," [82]we can see that there is still a long distance between the international standard and Chinese law on the right to prompt legle assistance. Measures should be taken to made the right practicle and effective.

[82] ECtHR Judgment of *Case of S. v. Switzerland* (Merits and just satisfaction) of para,48 see inter alia the Artico judgment of 13 May 1980,
series A no. 37, p. 16, para. 33).

5 .Conclusion

This thesis makes it possible to make conclusions regarding the international standard of the right against self-incrimination and the status of the right in China.

There should be no doubt the right against self-incrimination, generally belongs to the essence of a fair trial, has been prescribed in many international convention and regional agreements.

The right to freedom from torture and the right to be treated with humanity should be born in mind to guarantee the right against self-incrimination. As a result, all the confessions and statements obtained through recourse to torture and other inhuman treatment should not be invoked as evidence in criminal justice. Additionally, the right to prompt legal assistance is similarly important to guarantee the right in criminal justice.

The right against self-incrimination is denied in the criminal procedural law of China for many historic and existent reasons. Some other principles, which are significant for the fulfilment of this right, such as the right to freedom from torture and the prohibition on the use of evidence obtained through unlawful means has been proscribed in the criminal law and criminal procedural law but has not been enforced effectively. The denial of the right against self-incrimination contradict with some fundamental principles of criminal justice, such as the presumption of innocence, and it is also the deep-seated source for the arbitrary extension of detention , torture , and inhuman treatment in legal practice.

In a sum , the right against self-incrimination should be provided in the second revision of the CPL. At the same time, the other rights which are significant for guaranteeing this right should be prescribed more strictly : There should be effective mechanism or procedure by which the suspect can

challenge the arbitrary extension of detention; More attention should be paid to the inhumane treatment to the criminal suspects and detainees; the criminal suspects should be able to confer with his counsel and receive confidential instructions from him with out surveillance which is beyond need.

Criminal justice is an area of great potential for improvement in implementing the ICCPR standards in China. It requires the reform of the law and practice in the light of the standards. and now we have strided the first step.

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