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The Right to a Fair Trial in China
- Is the Bad Reputation Well-
deserved?

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Summary

The right to a fair trial is included in several major international human rights conventions, amongst others the ICCPR and the UDHR. The right contains several aspects, the right to counsel, the right to the presumption of innocence, the right to a hearing before an independent, objective and competent court and the right not to be subjected to arbitrary detention being some of them. In addition, the ICCPR as well as the CRC extends the judicial protection with regard to juveniles.

China has since 1979 rebuilt its entire legal system. It has moved from a system based upon the thoughts of Confucius and other great thinkers to a system based upon the rule of law. As a part of the reform, the CL and the CPL underwent major revisions in 1997. The revisions included an introduction of an adversarial criminal procedure in China, as opposed to the former inquisitorial system. Furthermore, changes were made to depoliticize the wordings of the CL and the Constitution, and the principles of “*nullem crimen sine lege*”, “equality before the law” and “punishment must fit the crime” were adopted.

Yet, the criminal procedure system of today’s China violates the right to a fair trial in several severe ways. Unjustified detentions of defence lawyers have made the profession very unattractive, resulting in a shortage of lawyers dealing with criminal cases in China. Consequently, it is hard for defendants to find lawyers to represent them. Furthermore, the close connection between Chinese judges and the CPC affects the independence and objectivity of courts, and the high rate of judges without a university degree makes their competence questionable. The system also fails to give accused juveniles the extensive judicial protection they are entitled to by the CRC and the ICCPR.

However, the most severe violation of the right to a fair trial is the practice of re-education through labor. Under this practice, police officers can place persons in labor institutions for up to four years. No court hearing is held and there is no right to legal counsel.

Nonetheless, even though the system still has some major flaws, more focus should be put on the fact that it is actually moving in the right direction.

Sammanfattning

Rätten till en rättvis rättegång är inkluderad i flera större internationella konventioner för mänskliga rättigheter, bland annat i ICCPR och UDHR. Rätten till ett försvar, oskyldighetspresumtionen, rätten att höras av en självständig, objektiv och kompetent domstol och rätten att inte godtyckligt bli berövad sin frihet är alla innefattade i rätten till en rättvis rättegång. ICCPR och CRC föreskriver vidare ett mer omfattande skydd för ungdomar som är misstänkta för brott.

Kina har sedan 1979 byggt upp ett helt nytt rättssystem. Landet har gått från ett system baserat på Confucius och andra stora tänkares filosofier, till ett system som istället bygger på legalitetsprincipen. Som en del av reformen genomfördes 1997 omfattande förändringar av CL och CPL. Förändringarna bestod bland annat i en övergång från ett inkvisitoriskt till ett akusatoriskt rättssystem. Vidare togs politiska formuleringar bort från både CL och konstitutionen, och principerna ”nulle crimen sine lege”, ”likhet inför lagen” och ”straff i proportion till brottet” infördes i systemet.

Trots dessa förändringar bryter det kinesiska rättssystemet fortfarande i flera allvarliga avseenden mot rätten till en rättvis rättegång. Ogrundade gripanden av försvarsadvokater har gjort yrket väldigt oattraktivt. Detta har resulterat i en brist på advokater som är villiga att ta sig an brottmål. På grund av detta är det ofta svårt för brottsmisstänkta att hitta en advokat som är villig att försvara dem. Vidare påverkar kopplingen mellan kinesiska domare och CPC domstolars självständighet och objektivitet, och det höga antalet domare utan universitetsexamen gör att deras kompetens kan ifrågasättas. Systemet misslyckas också med att ge ungdomsbrottslingar det utökade skydd de har rätt till.

Det mest allvarliga brottet mot rätten till rättvis rättegång är dock tillämpningen av ”re-education through labor”. Polismän har här rätt att placera personer i arbetsinstitutioner i upp till fyra år utan att saken prövas i domstol och utan rätt att de misstänkta har till rättsligt ombud.

Trots att det kinesiska rättssystemet fortfarande har allvarliga brister borde dock mer fokus riktas det faktum att det utvecklas i rätt riktning.

Preface

To endure an education that demands you to spend such countless hours in the library as law school does, you must either be insane or have a genuine interest in law. I am rather certain I belong to the second category. I'm truly fascinated by the way law challenges me to see things from different perspectives and I put a high value on the way my nine semesters at law school have changed my way of thinking in a very positive way. Nevertheless, I would not be completely honest if I said that there have not been days when my studies have seemed almost too hard to manage. These days I have been extremely lucky to have had the support from Erik, my family, my course mates and my other friends. This thesis is therefore dedicated to all of you. Furthermore, I would like to thank my thesis advisor Professor Per-Ole Träskman for the help and guidance he has given me during the writing process.

Having finished this thesis the time has come for me to see how far my genuine interest in law will take me. I very much look forward to finding out.

Paulina Möller-Jönsson
Hong Kong, May 26 2008

Abbreviations

CL	Criminal Law of the People's Republic of China
CPC	Communist Party of China
CPL	Criminal Procedure Law of the People's Republic of China
CRC	UN Convention on the Right of the Child
ICCPR	International Covenant on Civil and Political Rights
NPC	National People's Congress
UDHR	Universal Declaration on Human Rights

1 Introduction

1.1 Background

For a long time, China has had a very bad reputation with regard to complying with human rights. At the time of this thesis being written, the topic is hotter than ever. Less than three months remain until China is hosting the Olympic Games, but the positive aspects of this sports event are overshadowed by frequent reports on violent protests against China's actions in Tibet. China is presented as an evil dictatorship with no respect whatsoever for the rights of the people within its jurisdiction. This thesis aims to examine whether this is a fair picture, not by studying the situation in Tibet however, but a different field of human rights – the right to a fair trial.

A lot has happened in China in recent time. The revisions of several laws, for example the Criminal Procedure Law, show that there is an ambition to develop towards a system that better complies with international human rights standards. On October 5 1998, China signed the ICCPR and although it has not yet ratified it, it is already bound not to act in a way to defeat the objects and purposes of the covenant. The question remains though; does China succeed? Is the bad reputation no longer well-deserved?

1.2 Purpose and Research Question

The purpose of this thesis is to examine how well China's legal system complies with the criteria set out by international human rights conventions as minimum requirements for criminal trials to be considered fair. I have hereby chosen five criteria to examine; the right to a hearing before an independent, objective and impartial court, the right to presumption of innocence, the right to counsel, the right not to be subjected to arbitrary arrest and the extended rights of accused juveniles. The thesis looks into how they are fulfilled as set out by the UDHR, the ICCPR and the CRC.

As revealed by the title of this thesis, the question it aims to answer is whether China's bad reputation in the field of fair trials is well-deserved. The fact that China has a bad reputation is no big secret. The question is, however, if this reputation is based upon the flaws of no-longer existing regulations, or if also China's current legislation deserves the severe

criticism it gets. To find the answer to this question the thesis will compare the rights offered to criminal suspects today to the rights offered before the reform.

It is important to stress that the purpose of this thesis is not to find the flaws of the Chinese legal system, but rather to try to give as objective a picture as possible.

1.3 Delimitations

There are many aspects of a fair trial that can be examined in the context of the Chinese legal system. This thesis does not aim to look into all of them, but focuses instead on five of the most important ones, as mentioned above. In examining these five aspects I believe that I will be able to present a fair picture of the degree to which China complies with fair trial standards in general, while still giving the thesis a clear structure.

As can be seen in the outline below, the thesis provides a general overview of the Chinese legal system. It is important to stress that this is a rather simplified description. China's legal and governmental institutions are structured in quite a complicated way, and since the purpose of providing this is to put the criminal legal system in context, I believe that I make it easier for the reader if I avoid going too much into detail.

1.4 Method and Material

Writing a thesis demands an ability to have a critical eye towards the credibility of different kinds of sources. This applies even more when treating a subject of the kind dealt with in this thesis. The censorship of all published media that takes place in China makes it hard to trust its objectivity. Thus, this thesis is based upon material that has been published outside China. Even though Hong Kong today is under Chinese sovereignty¹, the censorship does not extend to this special administrative region. I have therefore considered material published there more trustworthy and used of a number of Hong Kong-published books and articles to find facts to base this thesis upon. In addition, I have made use of

¹ Hong Kong is a former British Colony that became Chinese in 1997.

some material that has been published in the USA. Nonetheless, it is important to remember that the Chinese censorship still blocks many important facts from becoming official, making it impossible for anyone to write a thesis or article that reveals the whole truth about how Chinese law is enforced.

The sources used for this thesis mainly consist of articles and literature that have been written by scholars with a deep knowledge of Criminal Procedure in China as well as international human rights. The descriptive part of the paper is based upon these sources, as well as relevant provisions and cases. The analyzing part is entirely based upon the thoughts of the author.

1.5 Outline

This thesis consists of four major parts. In the first part I clarify what is meant by a “fair trial”. I hereby look into the standards set out by three international human rights conventions, with regard to the five aspects of a fair trial that I have chosen to focus on. In order to put the Chinese criminal legal system into context, the second part of the thesis offers a brief insight into the background of the current Chinese legal system, its constitution and government and the law enforcing institutions. The third part examines the Chinese laws that are the most relevant in the context of a discussion on fair trials that is the Criminal Law and the Criminal Procedure Law. The fourth part is where I try to find the answer to the question asked in the title of this thesis. I here analyze how well the current Chinese system complies with the standards presented in part one, and draw my own conclusions from what I find. I also offer some thoughts on my own expectations on the future development of criminal law in China.

2 What is Meant by a “Fair Trial”?

2.1 Introduction

The idea that a suspect of a criminal act should be entitled to a trial that reaches certain minimum standards has existed for a long time. It is possible to trace these thoughts all the way back to Magna Carta of the 13th century, that declared: “we will sell to no man, [and] we will not deny or defer to any man either justice or right”. Today, several international treaties address the issue, for example the Universal declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and, with regard to juveniles, the UN Convention on the Rights of the Child (CRC). The UDHR was adopted in 1948 by the UN General Assembly “as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms [...] to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”.² The ICCPR is based upon the UDHR and entered into force in 1976. However, as opposed to the UDHR that was not expected to impose binding obligations, the ICCPR is binding for the nations that have signed it.³ The implementation of the ICCPR is monitored by the Human Rights Committee, which makes interpretations of the regulations in case of suspected violations. As it was considered that children need an even more extensive protection than the UDHR and the ICCPR offer, the CRC was adopted in 1989. States parties to the Convention are obliged to develop and undertake all actions and policies in the light of the best interests of the child.⁴

In the three abovementioned international documents, it is specified what elements a fair trial is required to contain. The standards to which a trial has to assess in order to be considered fair are complex, numerous and constantly evolving.⁵ However, there is still a strong consensus on certain criteria that is considered particularly important, some of which will be examined in this section of the thesis.

² Preamble of the UDHR.

³ Preamble of the ICCPR.

⁴ CRC Art 3.

⁵ Lawyers Committee for Human Rights (2000) p 2.

2.2 Right to Counsel

An accused person cannot be assured a fair trial unless legal counsel is provided for him. This is provided for in ICCPR Art 14(d). As has been found by the Human Rights Committee, this counsel must fulfill some minimum requirements – the person must be qualified to represent and defend the accused. Furthermore, the lawyer must actually advocate in favor of the accused. In *Estrella v Uruguay* the appointed lawyer questioned the innocence of the accused, stressed confessions from his friends and failed to arrange an examination of his accusers. The Human Rights Committee held that the defense had not been adequate, which constituted a violation of ICCPR Art 14(d).

The Human Rights Committee has further found that an accused has a right to see his attorney at all times during the pre-trial period. In another case involving the state of Uruguay, *Lluberas v Uruguay*, the accused person was not allowed to see his defence lawyer for two years during the investigation period. Later he was sentenced to 30 years' imprisonment. This lack of counsel was regarded a violation of the right to counsel.

2.3 Right to Presumption of Innocence

Until and unless a person is convicted according to law in the course of proceedings which meet at least the minimum prescribed requirements of fairness, he has the right to be presumed innocent, and treated as innocent. The right requires judges to refrain from prejudging any case. It also includes the right not to be compelled to testify against oneself or confess guilt and the related right of silence.⁶

The right to presumption of innocence is contained in both the UDHR (Art 11) and ICCPR (Art 14(2)) and is considered fundamental to the protection of human rights. It places the burden to prove the criminal charge on the prosecution, and sets the standard of proof to “beyond reasonable doubt”.⁷ During the drafting of the UDHR, it was expressed that its Article 11 is not

⁶ <http://www.amnestyusa.org/fair-trials-manual/151-the-presumption-of-innocence/page.do?id=1104715&n1=3&n2=35&n3=843>

⁷ ICCPR General Comment 13.

limited to court proceedings, but also applies to administrative hearings dealing with criminal matters.⁸

In the case of *Dole Chadee et al. v Trinidad and Tobago*, a murder trial had been preceded by widespread and continuous publicity suggesting that the accused person was a notorious drug baron, wanted for international drug trade. The defendant alleged that the Attorney-General and the Director of Public Prosecutions should have taken measures to prevent the prejudicial publicity, as they would have been aware of its impact on the fairness of the trial. However, the Human Rights Committee was of the opinion that the State had taken proper measures for preventing the extensive publicity from rendering the trial unfair.

2.4 Right to a Hearing Before an Independent, Objective and Competent Court

The right to a hearing before an independent, objective and competent court is set out by Art 14(1) of the ICCPR as well as Art 10 of the UDHR. In the General Comment to the article, the Committee held that relevant constitutional and legislative texts should provide for the establishment of the courts and make sure that they are “independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative”.⁹

In the case of *Oló Bahamonde v Equatorial Guinea*, the defendant complained that he had been subjected to various degrees of discrimination, intimidation and persecution, only because he did not share the views or adhere to the ruling party of Equatorial Guinea. The Human Rights Committee noted that the State party’s president controlled the judiciary in Equatorial Guinea and held that “a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant”.

⁸ Weissbrodt p 23.

⁹ ICCPR General Comment 13.

The requirement of independence also applies to the pre-trial stages. The case *Kulomin v Hungary* illustrates this. A Russian citizen who had been charged with murder in Hungary was kept detained for ten months before being brought before a judge. During this time, the detention was renewed by the public prosecutor who had ordered the detention. The Human Rights Committee stated that the public prosecutor did not satisfy the criteria set out by Article 14(1) and therefore he did not have the authority to renew the detention.

2.5 Right Not to be Subjected to Arbitrary Arrest

One of the most fundamental aspects of a fair trial is not to be subjected to arbitrary arrest or detention. The right is stipulated in UDHR art 9 as well as in ICCPR art 9(1). In the General Comment to the ICCPR the Human Rights Committee points out that the right extends to all deprivations of liberty, whether in criminal cases or in other cases, such as mental illness, drug addiction and educational purposes.¹⁰

In the preparatory documents¹¹ to UDHR art 9, it is discussed whether governments should be permitted to interpret the word “arbitrary” for themselves. Voices expressed concerns on the issue and said that they wanted to be reassured that the article would forbid the Nazi laws which permitted many arbitrary arrests. Therefore, the word “arbitrary” should be given an international meaning. The drafters of article 9 did not accept to make such a detailed provision, but said that they still expected that the less detailed provision would ensure the particular procedures that had been discussed during the sessions, that is to (1) inform anyone arrested, detained or exiled or the reason of the action; (2) have a judge verify the legality of the action and, if the action was wrongful, free the detainee without delay; and (3) forbid depriving anyone of their liberty because of purely civil reasons or for having broken a work contract.¹²

¹⁰ ICCPR General Comment 8.

¹¹ Usually referred to as the *travaux préparatoires*.

¹² Travaux préparatoires of UDHR art 9.

2.6 Rights of an Accused Juvenile

Juvenile persons enjoy more extensive protection in international human rights treaties than others. The ICCPR and the UN Convention on the Rights of the Child (UNCRC) both set out some minimum requirements with regard to the treatment of juvenile suspects.

2.6.1 Definition of “Juvenile”

Neither the ICCPR nor the CRC specify limits of juvenile age. The General Comment to the ICCPR says that this is to be determined by each state party “in the light of relevant social, cultural and other conditions”, even though it is suggesting that all persons under the age of eighteen should be treated as juveniles.¹³ Article 40 of the CRC provides for states to establish a minimum age below which children shall be presumed not to have capacity to infringe the penal law. This limit shall not be fixed at too low an age level, “bearing in mind the facts and circumstances of emotional, mental and intellectual maturity and stage of growth”. The reason for this is explained in the commentary to the article, stating that the minimum age for criminal responsibility differs among countries due to historical and cultural reasons.

2.6.2 Special Treatment

The ICCPR provides that “the procedure shall be such as will take into account of their age and the desirability of promoting their rehabilitation”.¹⁴ Furthermore, it is stipulated that juvenile offenders shall be segregated from adults, be brought as speedily as possible for adjudication and be treated in a way that is appropriate to their age and legal status.¹⁵ The CRC also addresses the issue, stating that accused juveniles shall be “treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society”. Furthermore, it specifies that this includes an obligation for states to seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to juvenile offenders.¹⁶

¹³ ICCPR General Comment 21.

¹⁴ ICCPR Art 14(4).

¹⁵ ICCPR Art 10(2b) and 10(3).

¹⁶ CRC Art 40.

2.6.3 Prohibition of Death Penalty and Life Imprisonment

Article 37 of the CRC includes constraints for states to impose death penalty or life imprisonment for offences committed by persons below 18 years of age. The prohibition of death penalty is also contained in Art 6(5) of the ICCPR. It is important to remember that it is the age of the time when the crime was committed that is crucial – it is still prohibited to execute a person who has reached the age of 18 if it is for a crime he committed before he reached this age.

The CRC is the only major universal and regional general convention on human rights that expressly prohibits life imprisonment without the possibility of release for offences committed by persons younger than 18 years old. However, the prohibition is in line with the approach taken to restrictions on and deprivation of personal liberty of juveniles in the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“the Beijing Rules”) and the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty.¹⁷ During the drafting of the CRC, the representative of Japan stated that his delegation could not go along with an absolute prohibition of imposing life imprisonment on minors and the United States delegation expressed disagreement with the whole provision. As a result, the CRC only prohibits the imposition of life imprisonment *without the possibility of release*.¹⁸

¹⁷ Detrick p 627.

¹⁸ Ibid.

3 An Introduction to the Chinese Legal System

3.1 Background

For a person with non-Chinese background, the Chinese legal system might be very difficult to understand. Our perception of a legal system is a formal system with such things as a law of contracts and procedure laws. Until very recently, such institutions were not to be found in China. Instead, the system was based upon a vast number of statements by China's most prominent thinkers, most notably Confucius that show strong skepticism to what we think is law. This underlying philosophy is still present in today's China. As late as about 50 years ago, a London-educated Chinese barrister practising in Hong Kong remarked to a Professor who was just beginning his researches into Chinese law:

*The trouble with you Westerners is that you've never got beyond that primitive stage you call the "rule of law". You're all preoccupied with the "rule of law". China has always known that law is not enough to govern a society. She knew it twenty-five hundred years ago, and she knows it today.*¹⁹

Nonetheless, since 1979, major work has been done to rebuild a new legal system in China. In the period between 1979 and 2003, approximately 1200 items of laws and regulations were enacted. In addition, a new Constitution was promulgated in 1982, expressly adopting the principle of the rule of law into the Chinese legal system. For the first time, the Constitution provides that the Party must operate within the scope of the state constitution and state law. Furthermore, legal education has been revived, the system of courts and procuratorates has been strengthened and a Ministry of Justice has been established.²⁰

It is obvious that such a dramatic change of a legal system cannot run too smoothly. Even though China today has all the apparatus of a western legal system; it is still a country that is heavily influenced by the former underlying view. One example where this can be seen is in the way it has

¹⁹ Cohen p 4.

²⁰ Chen p 36 f.

been very hard to apply the western categories of law into the Chinese system. The distinction between civil law and criminal law has formerly not existed. Instead, the entire system of law has been regarded as governing internal administrative matters where the criminal provisions in form have been a directive to the district magistrate to tell him when to punish and what punishment to inflict for different acts that were perceived by the state to be legally significant.²¹

The Chinese legal system will most likely continue to develop, both on paper and in practice. It is however clear that it will take time until the actors within the system will become accustomed to its new character.

3.2 Constitution and Government

3.2.1 The Form of Government of China

3.2.1.1 The System of the People's Democratic Dictatorship

The Communist Party of China is the vanguard both of the Chinese working class and of the Chinese people and the Chinese nation. It is the core of leadership for the cause of socialism with Chinese characteristics and represents the fundamental interests of the overwhelming majority of the Chinese people. The realization of communism is the highest ideal and ultimate goal of the Party.

These are the first sentences of the General Program of the Constitution of the CPC,²² sentences that help understanding the nature of the Chinese state. It becomes even more clarified when reading the preamble to the Constitution of the People's Republic of China.

Under the leadership of the Communist Party of China and the guidance of Marxism- Leninism and Mao ZedongThought, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship

²¹ Jones p 14 f.

²² The Constitution of the CPC should not be confused with the Constitution of the People's Republic of China.

and follow the socialist road, steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize industry, agriculture, national defence and science and technology step by step to turn China into a socialist country with a high level of culture and democracy.

The statement that China is a dictatorship with “a high level of democracy” may seem contradictory. However, even though the Constitution sets out the CPC as the permanent ruling party, the CPC officially endorses a system of “multiparty co-operation and political consultation under the leadership of the PRC.”²³ A major component of the system is that some senior positions in state organs will be filled by members of the democratic parties rather than CPC members, as well as appropriate proportions of seats in people’s congresses and their standing committees. Nonetheless, the CPC has maintained firm control over the democratic parties. One example of this is that the budgets of these parties are incorporated in the state budget. Furthermore, some members of the democratic parties are simultaneously members of the CPC.²⁴

3.2.1.2 The Communist Party of China

The Communist Party of China was founded in 1921. At that time, its objectives were to start a proletarian revolution to overthrow the bourgeoisie, to establish a dictatorship of the proletariat and to abolish the private ownership of the means of production. After 28 years of struggle, the CPC won the “new-democratic revolution” in 1949 and founded the People’s Republic of China. Since then, the CPC has been the ruling party of China.²⁵

The formal organizational structure of the party is presented in its Constitution. It specifies the institutions established by the party through which the party governs the state. Furthermore, it stipulates the conditions of party membership; any Chinese citizen over eighteen years of age who accepts the Party's Program and Constitution and is willing to join and work actively in one of the Party organizations, carry out the Party's decisions and pay membership dues regularly may apply for membership in the Communist Party of China.²⁶ As a party member you enjoy certain rights, for example to attend party meetings and to make suggestions and proposals regarding the work of the party. However, they must also fulfill certain

²³ General Program of the Constitution of the People’s Republic of China.

²⁴ Chen p 74 f.

²⁵ <http://www.chinatoday.com/org/cpc/> .

²⁶ Article 1 of the CPC Constitution.

duties, including conscientiously study Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents.²⁷

Every 5 years, the party holds the National Party Congress, in which the leadership of the state is decided. At the last congress that was held in 2007 the sitting president Hu Jintao was re-elected for another 5-year term.

The CPC has strong support amongst the Chinese people. They consider the Party the protector of the Chinese people. Becoming a Party member is not easy and the ones that succeed reach a high social status.²⁸

3.2.1.3 The National People's Congress and the Legislative System

In contrast with most Western countries, China does not practice a system in which the powers of the legislative, executive and judicial functions are separated from each other. Instead, the system is based upon the National People's Congress (the NPC), which plays a double role as both the organ of state power and the parliament.²⁹

The Chinese Constitution stipulates that all power in the People's Republic of China belongs to the people. The NPC is the organ through which this power is exercised, as well as through local people's congresses at different levels.³⁰ Deputies to the local people's congresses at county and township levels are elected by their constituents. All citizens of the People's Republic of China who have reached the age of 18 have the right to vote and stand for election, regardless of ethnic status, race, sex, occupation, family background, religious belief, education, property status or length of residence.³¹

The Constitution of the People's Republic of China gives the NPC a number of powers, including the power to:

- amend the Constitution;

²⁷ CPC Constitution Art 3.

²⁸ This perception is based upon numerous discussions with people that have grown up in China.

²⁹ Guiguo & Mo, p 40 f.

³⁰ Constitution of the People's Republic of China Art 2

³¹ Constitution of the People's Republic of China Art 34.

- supervise the enforcement of the Constitution;
- enact and amend basic statutes concerning criminal offences, civil affairs, the state organs and other matters;
- elect the President of the Supreme People's Court;
- elect the Procurator-General of the Supreme People's Procuratorate; and
- decide on questions of war and peace.³²

Subordinated to the NPC are four levels of law-making organs.³³ First, is the NPC Standing Committee. When the NPC is not in session, the NPC Standing Committee acts as the permanent organ of the NPC. Its powers include enacting and amending all laws except those which can only be enacted by the NPC itself. Second, is the State Council that has power to enact administrative regulations. Third, are the people's congresses at provincial level that may enact local regulations. Finally, are the people's congresses of national autonomous areas, which may enact autonomy regulations and specific regulations.³⁴

3.3 Courts and Procuratorates

3.3.1 The External Structure of the Court System

The Constitution of the People's Republic of China gives the adjudicative power of the state exclusively to the People's Courts. The aspect of exclusiveness was introduced in the Constitution for the first time in 1982. The Constitution further provides that the courts shall exercise the adjudicative power independently in accordance with the law and without interference by administrative organs, social organization and individuals.³⁵

The Chinese Court system is based upon four levels of courts. However, it should take no more than two trials to conclude a case. At county level,

³² Constitution of the People's Republic of China Art 62.

³³ See Appendix A.

³⁴ Chen p 97.

³⁵ The Constitution of the People's Republic of China Art 126.

thousands of basic-level people's courts are to be found, at prefecture level there are hundreds of intermediate people's courts, at provincial level 31 high people's courts practice and at the highest level the Supreme People's Court rules.³⁶ Each court normally consists of a number of divisions, which specialize in different types of cases, such as criminal, civil, economic and administrative cases.³⁷

The different levels of courts are organized as follows.³⁸ The basic-level courts deal with the majority of cases tried at first instance. In addition, they provide guidance for the work of the people's mediation committees. Cases from the basic-level courts may be appealed to the intermediate people's courts, which also function as the first instance for cases of crimes against national security (also known as counter-revolutionary crimes), cases involving life imprisonment and the death penalty, criminal cases involving foreigners, and "important" foreign-related civil cases. The high people's courts hear appealed cases from the intermediate people's court as well as trying first instance cases that are considered important cases at the provincial level. Finally, the Supreme People's Court exercises appellate jurisdiction, as well as original jurisdiction in important cases at the national level. Furthermore, it fills an important legislative function by promulgating judicial interpretations and documents providing general rules for courts to follow.³⁹

In addition, there are a number of special people's courts that have jurisdiction in certain specific areas of activity. For example, there are military tribunals, marine tribunals and rail transport tribunals.⁴⁰

The president of the Supreme People's Court is appointed for a five-year term by the NPC itself, whereas the vice-presidents, members of the judicial committee, chief judges and associate chief judges of divisions and judges are appointed and removed by the Standing Committee of the NPC upon the recommendation of the President of the Supreme People's Court.⁴¹

The presidents of the basic-level courts, intermediate people's courts and high people's courts are elected and removed by the local People's Congresses at various levels. The rest of the judges at these courts are appointed or removed by the standing committees of the people's congresses

³⁶ Guiguo & Mo, p 54 f.

³⁷ Chen p 138.

³⁸ See also Appendix B.

³⁹ Chen p 139.

⁴⁰ UN Working Group on Arbitrary Detention p 6.

⁴¹ Judge's Law of the People's Republic of China Art 11.

at the corresponding levels upon the recommendation of the presidents of those courts.⁴²

3.3.2 The Internal Structure of the Courts

The general rule is that cases in Chinese courts are heard before a collegiate bench. Exceptions are simple civil cases and minor criminal cases, which may be heard before a single judge. The provision regulating who the bench shall include is very flexible. At first instance it usually includes professional adjudicators as well as people's assessors. It is up to the court to decide whether it wants to include people's assessors as members. Litigants have no possibility to apply for a trial by a bench that includes people's assessors. Furthermore, people's assessors are never included in appeal cases.⁴³

3.3.3 The People's Procuratorates

The Constitution of the People's Republic of China defines the people's procuratorates as the legal supervisory organs of the state.⁴⁴ They are organized on exactly similar lines as the local courts. They are also appointed and removed by the local congresses under the same conditions as judges. Each procuratorate has a procurator's committee that takes the most important decisions by majority votes. If the head of the procuratorate here is outvoted, the matter is submitted to the Standing Committee of the local People's Congress.⁴⁵

The procuratorates work in four different areas. Firstly, they review the work of public security organs. When such an organ has finished an investigation, a procuratorate reviews the case and decides whether to prosecute. If it decides to do so, its procurators will appear in court to prosecute. Secondly, they directly investigate certain cases, mainly involving corruption and dereliction of duty by state functionaries. Thirdly, they supervise the work of the courts in criminal cases, and fourthly, they supervise the legality of the activities of the public security organs and the prison authorities.⁴⁶

⁴² Ibid.

⁴³ Chen p 140.

⁴⁴ Constitution of the People's Republic of China Art 129.

⁴⁵ UN Working Group on Arbitrary Detention p 6-7.

⁴⁶ Chen p 169 f.

3.4 The Role of Judges and Legal Education

The number of legally educated people in China is relatively low. The reason for this is to be found in the political history of China. In 1966, the current leader of the CPC Mao Zedong launched the “Great Proletarian Cultural Revolution” as an attempt to purge all “counter revolutionaries”.⁴⁷ As part of the revolution, almost all law schools in China were closed down and many law teachers were even persecuted as “capitalist roaders”. It was not until 1978 that the legal education system in China started to rebuild and from the 1990s, legal education has expanded more rapidly.⁴⁸

As will be shown below, China recently shifted from a system of inquisitorial character to a more adversarial one. In the inquisitorial system, judges not only decided the cases, they also served as pre-trial investigators. Because of this, they had in practice as good as already decided how to judge the case even before the trial started. The trial merely served as a verification and ratification of evidence that had already been uncovered in the investigation. This shows in a very low acquittal rate. In an inquisitorial system it is more likely that the suspects who are potentially innocent are screened out during the investigation phase. Under the adversarial system that has now been introduced, Chinese judges no longer take part of the investigation process. Instead they serve as passive referees between two equal parties – the prosecution and the defense.⁴⁹

As a part of its struggle to raise the quality of the legal system, China has also carried out top-down reforms of the courts. In 1999, the Supreme People’s Court issued a five-year plan for reforming China’s courts, setting out 50 goals. A second plan, again listing 50 goals, was issued in late 2005, covering the period from 2004 to 2008. The substantial effect of the plans is that the competence of judges and the professionalism of the court system have strengthened significantly. The education levels of judges have improved dramatically since more than 50 per cent of Chinese judges now have university degrees. This is a sharp contrast to the 6.9 per cent in 1995. The percentage will continue rising in view of the fact that since 2002, all new judges in China have been required to possess a bachelor’s degree and all sitting judges below the age of 40 have been required to obtain a degree within five years or else they will lose their jobs.

⁴⁷ Chen p 30.

⁴⁸ Hen p 131,

⁴⁹ Chu p159 ff.

Scholars in China have argued that the reform gradually has depoliticized courts and that they now more and more focus on providing justice rather than being a political tool. It is argued that the new education requirement will result in a remarkable change in who is appointed to be a judge, since the selection process no longer relies on political backgrounds. In practice, however, local Party organizations continue to oversee court appointments, court presidents are often primarily chosen for political reasons and an overwhelming majority of the judges are Party members.⁵⁰

⁵⁰ Liebman p 625 ff.

4 The Criminal Procedure in China

4.1 Introduction

As mentioned above, China's entire legal system has been rebuilt since 1979. The reform included major revisions in the field of criminal trials, aiming to provide greater legal protection to the accused of criminal charges. In 1997, both the Criminal Law and the Criminal Procedure Law got extensive face-lifts.

Nonetheless, it is important to stress that Chinese law has a more restrictive definition of "crime" than most other jurisdictions. The term is defined as any act that endangers society with *serious* circumstances or consequences, while conduct that gives rise only to *minor* circumstances or consequences instead is regarded as "unlawful" and falls under the system of administrative jurisdiction of the police.⁵¹ Statistics show that police-administered punishment for such "unlawful" offences is far more common than court-tried punishment of "criminal acts". Each year approximately 500 000 criminal offences are adjudicated in China, while the number for unlawful offences is more than three million.⁵²

4.2 Criminal Litigation

4.2.1 The Reform of the Chinese Criminal Law

In 1997, after 15 years of reforming process, a new Chinese Criminal Law saw the light of day. The process of moving from a planned to a market economy and implementing the rule of law that started in 1979 are seen as the driving forces behind the reform.⁵³

The revision is said to be based on three principles: unity, continuity and clarity. "Unity" refers to the extensive supplementation of new provisions in the law. It aimed to fill the gaps of the 1979 CL as well as provided for the criminalization of new offences. After the revision, a total of approximately

⁵¹ Hualing (2004) p 194.

⁵² Ibid.

⁵³ Dobinson p 17.

300 offences were contained in the CL, 100 of which were completely new.⁵⁴ “Continuity” related to the numerous interpretations that were issued by the Supreme Court and the Supreme Procuratorate and which, prior to the revision, had been inconsistent with each other.⁵⁵ The third principle, “clarity”, refers to the ambition to make provisions less general and ambiguous.⁵⁶ However, most significant changes of the CL concern the general principles of criminal liability.

One of these changes was the depoliticization of the criminal law system. The old CL expressed it as its aim to “fight against all counterrevolutionary [...] acts in order to defend the system of the dictatorship of the proletariat”. This aim has been removed from the new CL, as well as from the Constitution. Furthermore, the revision abolished the crimes of counterrevolution and replaces them with crimes endangering national security.⁵⁷ However, it has been argued that the elimination of certain political vocabulary has not made a change of substance in the system, but only aimed to make it seem depoliticized on the surface.⁵⁸

In addition, the revised CL expressly adopts the principles of “nulleum crimen sine lege”⁵⁹, “equality before the law”⁶⁰ and “punishment must fit the crime”⁶¹.

4.2.2 The Reform of the Chinese Criminal Procedure Law

In 1996, hope arose amongst legal scholars that China would get a criminal justice system that was in accordance with international standards, when a new Criminal Procedure Law was promulgated. The former Criminal Procedure Law of 1979 had often been criticized of having some major flaws. Significant deficiencies and ambiguities in the law made it possible for authorities to disregard many legal safeguards granted to criminal suspects. The revised Criminal Procedure Law aimed to better comply with the standards of a fair trial.⁶² The revision was substantial, including revision of 70 of the original 164 articles, addition of 63 new articles and deletion of two articles. In the new law, considerable changes were made concerning the presumption of innocence, arrest and detention, prosecutorial

⁵⁴ Dobinson p 20 f.

⁵⁵ Dobinson p 23.

⁵⁶ Ibid.

⁵⁷ Dobinson p 24.

⁵⁸ Lawyers Committee for Human Rights (1998), p 29.

⁵⁹ CL Art 3.

⁶⁰ CL Art 4.

⁶¹ CL Art 5.

⁶² Chu p166 f.

discretion, defense lawyer participation and trial proceedings.⁶³ With those changes, China introduced aspects of the adversarial system into its criminal justice system, as opposed to the former one that showed a clear inquisitorial character.

4.2.3 Detention, Arrest and Interrogation

Under the 1979 Criminal Procedure Law, the police often used the infamous “shelter for examination” as a means for detaining and interrogating suspects and to extend the period of time needed to conduct investigations and collect evidence. This sanction was used as a substitute for the standard procedure of arrest and detention. However, since the practice of “shelter for examination” was an administrative sanction, it fell outside the scope of the Criminal Procedure Law and had few procedural safeguards. Even though there were some directives regarding it, for example time limits for its use, it was often reported that these directives were violated, resulting in people being detained for long periods without being charged or tried.

With the revision of the Criminal Procedure Law, the procedure of “shelter for examination” was abolished. Provisions regarding pretrial arrest and attention are now entirely within the scope of the criminal procedure framework, instead of being an administrative sanction.⁶⁴ Nonetheless, instead the revision extended the maximum detention period from seven days to thirty days. Furthermore, the revised law provides that the period of custody between the time of arrest and the point of completion of the “investigation stage” should not exceed two months. However, the period is often much longer since the rule is subject to numerous exceptions. One of the exceptions, that the NPC Standing Committee has general power to further extend the period of custody in “especially major and complex cases”⁶⁵, does not express any time limit at all.⁶⁶

Interrogation of a detained person should be commenced within 24 hours. The suspect is then under a legal obligation truthfully to answer all questions that relate to the case concerned⁶⁷. There is no right to remain silent.

⁶³ Chu p 173.

⁶⁴ Chu p 175 f.

⁶⁵ CPL Art 125.

⁶⁶ Chen p 207.

⁶⁷ CPL Arts 65, 72, 133, 93.

4.2.4 The Role of Defense Lawyers

The revision of the Criminal Procedure Law represents a significant change of the role of defense lawyers. Under the 1979 Criminal Procedure Law, defense lawyers had very limited abilities to protect the rights of the accused. Firstly, the defendant wasn't allowed access to counsel by an attorney until seven days before trial. The defense lawyers had therefore very little time to prepare the case. The biggest improvement to this in the new law is that the right to counsel now is extended to the investigation stage. Lawyers can now provide legal advice and file petitions in two circumstances: when the police interrogate the suspect for the first time and on the day compulsory measures are adopted against the suspect. They have the right to find out from the investigative organs the nature of the suspected crime and may meet with the suspect in custody. Moreover, they are permitted to apply on the suspect's behalf for a guarantor pending trial. However the right to legal counsel is strongly weakened by the fact that the revised Criminal Procedure Law, "in light of the circumstances of the case and needs" allow investigatory organs to be present when the lawyer meets with the suspect. In addition, if the case involves a state secret, the lawyer has to seek prior approval to meet with his client.⁶⁸ Furthermore, the police is under no obligation immediately to inform a suspect of the right to legal counsel.

A major problem lawyers face in their profession is the risk of them being detained themselves. Especially in "state sensitive" cases lawyers have become a target of government repression. In such cases, they run a high risk of being accused of leaking state secrets. This is a problem that has not changed much since the revisions of the CL and the CPL. Between 1997 and 2002, about 500 lawyers were detained, accused or punished. However, nearly 80 percent were found innocent, suggesting that there was no substantive evidence supporting the allegations. Due to the aggravation caused by such accusations, too few people in China chose to pursue a career within criminal law. Consequently, defendants have major difficulties finding lawyers to represent them, especially in sensitive cases. Instead they are left with the only option of representing themselves. A Beijing law professor estimated in 2005 that 70 percent of criminal defendants are not represented by a lawyer.⁶⁹

4.2.5 The Burden and Standard of Proof

The revised CPL introduces for the first time some form of presumption of innocence. Article 12 provides that "Prior to a judgment rendered by the people's court according to law, no one may be convicted of guilty [sic!]"

⁶⁸ CPL Art 96.

⁶⁹ HRIC p 4.

and article 162 stipulates that the court shall render a judgment of innocence if the evidence is so insufficient that the defendant cannot be found guilty. Even though there is still no provision that expressively uses the term “presumption of innocence”, these two provisions can be seen as proof of introduction of some form of the principle into the criminal legal system. However, even though article 162 seems to set the burden of proof on the prosecutor, article 35 places responsibilities on the defense “to present, according to facts and the law, materials and opinions to prove the innocence or pettiness of the crime of the crime suspect or the defendant, or to prove to mitigate or exempt his criminal responsibility”.

An issue closely related to the question of burden of proof and presumption of innocence is the standard of proof, i.e. the degree reached when the defendant is found guilty by using evidence according to law. In most jurisdictions, this standard is expressed as “beyond reasonable doubt”. The Criminal Procedure Law expresses the standard of proof as where the “facts of the crime are clear [and] the evidence is reliable and sufficient”. In November 2006, the president of the Supreme People’s Court gave a speech where he stressed the importance of adherence to this standard of proof and that it is of tremendous significance to the court’s accurate determination of criminal facts and effective prevention of wrongful convictions.

Nonetheless, the standard of proof is not constant. Cases where the defendants are likely to be sentenced to death penalty require a higher degree of proof than other cases. Article 4 of the *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* provides that “Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.”.

Furthermore the standard of proof can be lowered, for the subjective elements of a crime, such as the criminal intent. In some cases, the subjective elements can even be presumed.⁷⁰

4.2.6 Juvenile Offenders

China has faced a growing number of crimes committed by offenders under the age of 18. The average annual increase rate between 2000 and 2004 was 14 %.⁷¹ As a response to this, over 2400 juvenile courtrooms have been established.⁷² Experts have also called for the establishment of substantive and procedural laws dealing with juvenile delinquency.⁷³ However, such

⁷⁰ Chen & Liu p 10 f.

⁷¹ China Daily (September 17, 2005).

⁷² BBC (October 28, 2003).

⁷³ China Daily (December 5, 2007).

laws have still not seen the light of day, even though the Law of the People's Republic of China on the Protection of Minors sets out some general standards for the judicial protection of juveniles.

The Criminal Law stipulates the age of Criminal Responsibility in China.⁷⁴ The law sets two age limits. The age of complete criminal responsibility is eighteen. A person above this age will be prosecuted as any other adult. The second age limit is fourteen to eighteen. This is the age of relative criminal responsibility. A person of this age who commits the crimes of intentionally killing another or intentionally injuring another, even causing serious injury or death, and the crimes of rape, robbery, drug trafficking, arson, explosion, and poisoning shall bear criminal responsibility. However, he will then be given a mitigated punishment. For other crimes than the ones listed above, the head of his family or guardian is to be ordered to subject him to discipline. The law does not clarify what kind of disciplinary action it refers to, neither what happens if the head of the family or the guardian does not obey the court order. No person under the age of fourteen shall be subjected to criminal sanctions.

With the revision of the Criminal Law in 1997, China abolished juvenile death penalty.⁷⁵

Despite the current law offering extended legal protection for juveniles, criticism has been expressed with regard to its enforcement. Most severely, there are still reports on juvenile executions taking place, due to insufficient care on determining the age of defendants.⁷⁶

4.3 Administrative Litigation

4.3.1 Introduction

Some minor offences under Chinese Law are punishable even though they are not in breach of the criminal law. Various legislative and administrative regulations authorize different types of punishments to be imposed by administrative authorities, primarily the police. The punishment is not preceded by a court hearing or right to legal counsel.

There are two main types of administrative penalties. The first one is public order punishment, relating to petty theft and other activities disrupting

⁷⁴ Art 17 of the Criminal Law.

⁷⁵ <http://www.deathpenaltyinfo.org/article.php?did=203&scid=>

⁷⁶ <http://www.deathpenaltyinfo.org/article.php?did=203&scid=>

public order. The second type is re-education through labor. Both penalties lack clear administrative authority and has therefore been much criticized.⁷⁷

4.3.2 Public Order Punishment

A new Public Order Administration Punishment Law came into force as late as March 1st, 2006. This does not mean that this kind of punishment has not existed before. The law replaced the Public Order Administrative Punishment Act and the most important purpose of the enactment was to establish greater legal certainty by providing for the punishment by national law rather than by “regulation”.⁷⁸ Nevertheless, the law contains some novelties. For the first time, it covers streetwalkers, pimps and football hooligans.⁷⁹ The Public Order Punishment may include a warning, a fine or detention of not more than fifteen days.⁸⁰

4.3.3 Re-education Through Labor (Laojiao)

Re-education through labor, or *laojiao* as it is usually called, is an administrative punishment that has existed in China since 1955. Originally, it was employed by the CCP as a method of controlling people with dubious political backgrounds. Today, however, it serves more as prevention and punishment of minor offences.⁸¹ Throughout the years, *laojiao* has expanded and there is now a consensus among police researchers and officers that *laojiao* is elastic enough to include most, if not all, offences. There is really nothing that stops the police from imposing *laojiao* for any offence.⁸²

According to the Ministry of Public Security, the idea behind re-education through labor is to use compulsory education to change the behaviour of offenders to make them "obey law, respect public virtue, love their country, love hard work, and possess certain standards of education and productive skills for the building of socialism."⁸³ The reform takes place through confinement in work camps or farms where the offender takes part of collective labor. The police determine the re-education term within the scope of one to three years of confinement. If, in the camp authorities'

⁷⁷ <http://law.jrank.org/pages/643/Comparative-Criminal-Law-Enforcement-China-Concept-crime.html>

⁷⁸ Amnesty International p 2.

⁷⁹ People's daily online.

⁸⁰ <http://law.jrank.org/pages/643/Comparative-Criminal-Law-Enforcement-China-Concept-crime.html>

⁸¹ Hualing (2005) p 812.

⁸² Hualing (2005) p 821.

⁸³ <http://www.hrw.org/campaigns/china-98/laojiao.htm>

judgment, the offender has not yet been sufficiently re-educated, fails to admit guilt, or violates camp discipline, the term can be extended for a fourth year.⁸⁴

Laojiao today serves four functions. Firstly, it has the function of crime control. It here has two main targets; migrants, especially rural migrants, who have committed minor violations of the law, and offenders with a record of previous criminal convictions, lao jiao or other administrative penalties. Moreover it enforces moral values by punishing for example adultery. Secondly, lao jiao works as a drug control measure imposed on addicts who continue to use drugs after being subjected to the police-run compulsory drug treatment programme. The main justification for using lao jiao in those cases is that it takes a minimum of three years to eliminate psychological dependence on drugs. The three-months-long police-run treatment is therefore deemed to be a failure. Thirdly, lao jiao has the function of investigative detention. It is here used as a means for the police to detain someone beyond the period allowed by law. This way they get more time to clarify the facts and gather evidence. Lao jiao as an investigative detention is mainly used for cases that are barred from entering the criminal process since there is not sufficient evidence. There are no official statistics on how big percentage of offenders serves lao jiao as investigative detention, but according to sporadic reports from lao jiao institutions the percentage is substantial and increasing. Finally, lao jiao serves as political control. Even though the percentage of political offenders under lao jiao has declined during the years, it remains an important instrument to punish state enemies. It gained new importance after the 9/11 terrorist attacks, when China dramatically changed its strategy against domestic terrorism. Religion is now considered the underlying driving force of separatist and terrorist activities in China, making it legitimate for the police to crack down on religious practice and to detain religion/ethnicity-based dissidents.⁸⁵

At present, according to official statistics there are close to 300 re-education through labor centres in China. The conditions in the centres are very poor. According to reports from political detainees and others, the detainees have to endure overcrowded, unsanitary living conditions; inadequate food; endemic violence; and excessive working hours. There are few differences between the treatment of detainees in re-education through labor camps and the treatment of prisoners in the criminal justice system; although now, unlike in the past, they are generally segregated from inmates convicted of criminal offenses.⁸⁶

⁸⁴ <http://www.hrw.org/campaigns/china-98/laojiao.htm>

⁸⁵ Hualing (2005) p 823 ff.

⁸⁶ <http://www.hrichina.org/public/contents/article?revision%5fid=2254&item%5fid=2253>

The most important criticism against the practice of laoiao is that it does not include any right to a hearing, to counsel or to any kind of judicial determination of the case. In addition, decisions are often hastily made.⁸⁷

Re-education through labor should not be confused with “reform through labor”, a punishment imposed by courts after a person has committed a criminal offense.⁸⁸ As stated before, those who are subject to laoiao are not considered criminals.

⁸⁷ <http://www.hrw.org/campaigns/china-98/laoiao.htm>

⁸⁸ Chen p 215.

5 How does the System Work in Practice?

It is clear that the law now after the revision of the Criminal Procedure Law is much more in conformity with international standards. However, it is important to examine if these changes only have taken place in theory, or if the criminal procedure in practice is fairer now. A frightening indication that the system does not work in practice was given by the infamous case *The Virgin Prostitute*. In the case, that took place in 2001, a 18-year old girl was detained in her sister's barber shop by two policemen, suspected of being a prostitute. The two policemen tortured the girl for almost 23 hours, in the presence of the chief police officer. Before they released her, they forced her to sign a confession. Hoping to restore her reputation, the girl later submitted a petition of revision to the city police bureau, requesting the dismissal of the county police's judgment, punishment of the policemen who tortured her, and to get damages from the policemen. However, the police bureau did nothing. Instead, they asked the girl to be inspected by a local hospital to confirm that she was a virgin and thereby prove her innocence. The case proves that China still violates many of the principles in the ICCPR.

Furthermore, there is a high risk that the higher evidential requirement in the revised Criminal Procedure Law only creates an illusionary safeness. The claimed increasing percentage of offenders serving laojiao as investigative detention might be an indication that many cases with insufficient evidence now instead fall within the practice of laojiao.

6 Analysis

6.1 Does China Offer a Fair Trial to Criminal Suspects?

6.1.1 Introduction

So far, this thesis has been of a descriptive character. The criteria for a fair trial, as set out by international human rights conventions, have been examined, as well as the structure and character of, first, the Chinese legal system in general and, second, the Chinese criminal procedure system. In this final section these pieces will be put together and an analysis will be made on how well criminal litigation in China fulfills the criteria for a fair trial. Each criterion that has been examined under section 2 will here be examined separately.

6.1.2 Right to Counsel

It is not an overstatement to say that it was not until the revision of the Criminal Procedure Law that defense lawyers started to play a role in the criminal procedure. It is a tremendous improvement that suspects now can get access to legal counsel from the early stages of the process. However, the exceptions to the right to legal counsel that the law provides for are very questionable. The fact that a lawyer has to seek prior approval to meet with his client if the case involves a state secret constitutes an exception that is not in compliance with the ICCPR. It can easily turn into a loophole that risk to be abused by authorities.

Furthermore, the presence of investigatory organs when a lawyer meets with his client is a heavy limitation on his ability to help the client. It is important that strategies for the defense can be discussed without having to worry about if what is said can be turned against the client.

However, it is not enough to look at whether the law on the paper gives the defendant a right to counsel. Two additional criteria must be fulfilled in order for this right not only to exist in theory, but also in practice. Firstly, the accused person must be informed of his right to counsel. If he is not aware of having this right, there is a risk that he won't make sure to enjoy it. Secondly, in order for defendants to get access to adequate legal counsel, the legal system must ensure that such counsel is accessible. Unless lawyers are given a work situation that makes it possible for them to provide the accused person with an adequate defense, it does not help much that the law gives

defendants right to legal counsel. Today's system does not provide such a work situation, since lawyers run the risk of being detained themselves when practicing their profession. This has resulted in two major problems. Firstly, there are too few defense lawyers acting on the market, making it very hard for a defendant to find a lawyer at all. Secondly, the work of the lawyers that does exist is to a large extent affected by the fact that they know that they may risk their own personal safety when taking on certain cases.

A separate issue is the practice of re-education through labor. As shown earlier in this thesis, the accused person can be deprived of his liberty for up to four years without any access at all to legal counsel. Considering that the Human Rights Committee considered a two year detention without access to legal counsel in *Llubeas v Uruguay* a violation of the ICCPR, the same conclusion would with all likelihood apply to the practice of re-education through labor.

6.1.3 Right to Presumption of Innocence

As shown above, the right to presumption of innocence is not explicitly expressed in Chinese Law. Instead, it can be interpreted into the wordings of CPL art 12 and 162. However, at the same time art 35 places heavy responsibilities on the defense, obligating it to "present [...] materials and opinions to prove the innocence [...] of the crime suspect". This article contradicts art 12 and 162. In a system where the prosecutor bears the burden of proof, the defense should have no such obligation. If the prosecutor does not succeed in proving that the defendant is guilty, he should be found not guilty regardless of what the defense has managed to prove or failed to prove. Furthermore, the lack of a right to remain silent creates a system that contains an implied obligation for the accused person to prove his innocence.

With the reform of the CPL, the Chinese Criminal Procedure changed character from inquisitorial to adversarial. The most significant distinction between inquisitorial and adversarial systems is that in inquisitorial systems, the investigator is also the one who decides the case, whereas the assumption under adversarial systems is that the prosecution and the defense are two equal parties, and the judge merely serves as a passive referee.

Strong arguments can be made that adversarial systems better comply with the right to presumption of innocence. When the investigator is identical to the person deciding the case, there is a high risk that he has made up his mind regarding the conviction before the parties even enter the courtroom.

In the light of the above-mentioned, it is reasonable to believe that the post 1997-system better complies with the right to presumption of innocence.

Since Chinese judges no longer take part of the investigation process, they look at the case with fresh eyes.

6.1.4 Right to a Hearing Before an Independent, Objective and Competent Court

China's form of government is called a "people's democratic dictatorship". "Democratic" refers to the fact that there are actually other parties present in China even though they have no possibility of becoming ruling parties of the state. In practice, this makes it questionable if these "parties" really are parties or if it is not more correct to call them advisory organs to the CPC. Since these organs have no power to challenge the decisions of the CPC, the CPC has exclusive powers to control every institution and organ of the state. The intimate connection between Chinese courts and the CPC is therefore a strong reason to question the independence and objectivity of the courts. The control of the party puts judges in a different position than they would be otherwise. The courts in China not only serve to enforce the law, they are also institutions of the dictatorship. This perception is strengthened by the fact that all judges, with very few exceptions, are party members. In particular, this fact in particular risks affecting their objectivity in cases that regard crimes that are challenges to the political order. It also increases the risk of judges engaging in corruption.

Secondly, the competence of the courts can be questioned in the light of the low percentage of judges with university degrees. Even though dramatic improvements have been made in this area, 50 percent of the currently practising lawyers still lack such degrees. This fact makes it likely that Chinese judges lack the kind of deep legal knowledge which is required to be able to enforce the law in a proper way. Instead, the arbitrary opinions of the judges risk deciding the case.

Furthermore, it can be questioned if Chinese judges have adopted the "western" way of looking at law that has been gradually introduced to the Chinese legal system since 1979, including respecting the rule of law.

6.1.5 Right Not to be Subjected to Arbitrary Arrest

As a deprivation of someone's liberty is an action that has such substantive negative impact on that person's life, the ICCPR and the UDHR set out strict criteria under which circumstances this can be allowed. These provisions do not only apply to deprivation of liberty as a punishment for a crime, but also for other reasons, such as drug addiction and educational purposes. The practice of re-education through labor clearly does not

comply with these standards. People are here being detained for up to four years without having a judge verifying the legality of the action in question. Whether re-education through labor is imposed for minor violations of the law, as a drug control measure, as an investigative detention or in the purpose of political control, the accused should still have the right to have his case heard before a competent court.

The fact that re-education through labor can be imposed as an investigative detention creates a huge loop-hole in the system. There is a high risk that officials use this measure when they believe that the evidence in a certain case is insufficient to render a court conviction. If this happens, the standard of proof that is set out by the CPL, “where the facts are clear [and] the evidence is reliable and sufficient”, becomes rather artificial.

Furthermore, to use re-education through labor as political control is highly unacceptable from a human rights perspective. It is here imposed on so-called “state enemies”, however the appointment of the persons who fall within this category is highly arbitrary. As shown above, during the last years religion has come to be considered the underlying force of separatist and terrorist activities in China, making police officers impose re-education through labor on people merely because they practise their religion. Not only is this a violation of international fair trial standards, but also a severe violation of the right to freedom of religion.

6.1.6 Rights of an Accused Juvenile

The ICCPR and the CRC provides for a more extensive protection with regard to accused juveniles. On the surface, the Chinese law system seems to comply fairly well with these standards. It sets the age limit for criminal responsibility at 14 and provides for mitigated punishments if the accused is below 18 years of age. However, under the surface there are some significant problems concerning how the Chinese system treats minors accused of crimes.

In spite of the abolishment of imposing death penalty on persons under the age of 18, evidence proves that executions of minors still take place in China. The reason for this is said to be that the courts do not investigate the age of the accused. This severely undermines the rights of accused juveniles. In order to avoid violating the rights of children, it is an absolute must that such investigations are conducted. In case of uncertainty, the accused should enjoy the extended protection of juveniles.

Another problem is that the system for administrative punishments does not have special rules that apply to minors. The fact that those punishments are imposed for “unlawful” acts instead of criminal acts does not make the standards set out by the ICCPR and the CRC inapplicable to the process.

6.2 Expectations on the Future Development of Criminal Law in China

During the last 40 years (the last 10 in particular), China has shown a positive trend with regard to complying to human rights standards. It has moved from a system that did not even recognize the rule of law to a system with detailed provisions in both the CL and the CPL. The question is how far this trend will continue.

The problems with the current system are, to some extent, to be found on the face of the laws, but particularly on how they are enforced in practice. I find it likely that China will continue to make the wordings of the laws more in compliance with human rights standards. For example, I believe that the severely criticized practice of re-education through labor will be abolished within a relatively close future. This will surely signify a big step towards a “fair trial criminal law system”.

While changing laws is comparatively easy to do, it is a lot more troublesome to change how they are enforced. Since there is no clear distinction between the legislative, executive and judicial functions in China, there is no one to practise an objective supervision of the different institutions. This rises an important question; will China ever be able to establish a system that complies with fair trial standards while maintaining its current government system? I believe the answer to this question is no. In a system where all institutions are controlled by the CPC, officials will always partly be driven by other interests than judicial fairness. The next question which must then be asked is; will China ever get a democratic government system? I am doubtful that this will happen. The criticism against the CPC dictatorship comes almost exclusively from outside the country. This will probably put enough pressure on the CPC to start considering changing the system. Instead, a change would probably demand the rise of massive internal pressure within the state. Today, such pressure is very limited. Whether it depends on the censorship of certain troubling facts, or on other reasons, it is clear that the CPC has strong support from the Chinese people. Sadly, this means that it is likely that human rights violations will continue to take place in China.

6.3 Conclusions

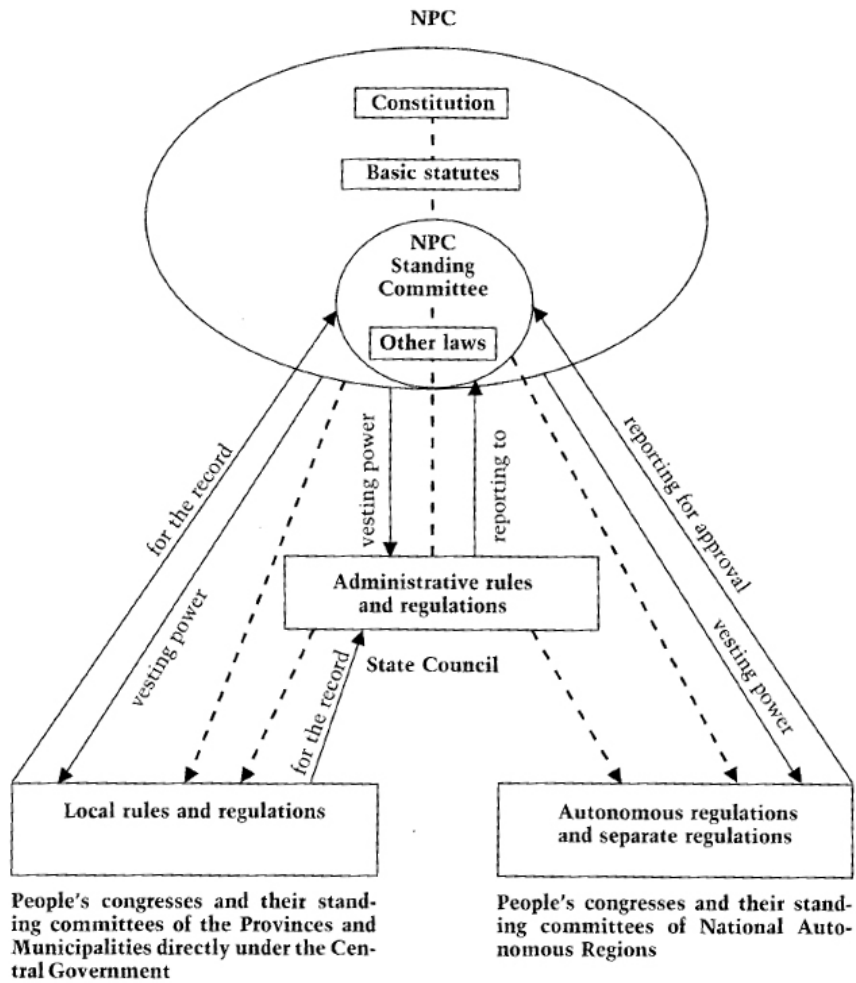
Since 1979, China has rebuilt its entire legal system. In a relatively short period of time, it has moved from a system based upon the thoughts of Confucius and other great thinkers to a system based upon the rule of law. It is easy to understand that it takes time for a state to adjust to such major changes. Yet, China has gradually moved towards a system that better

complies with human rights standards. In the field of fair trials, the revisions of the CL and the CPL in 1997 signified major improvements. Furthermore, actions have been taken to increase the level of judges with university degrees, which constitutes an important step towards raising the competence of Chinese courts. However, it is important to understand that it takes time to carry through such fundamental changes of a law system. Considering how different the system is today compared to before 1979, it is hard to believe that not even 30 years have gone by since the reform was initiated.

I believe that a big part of China's bad reputation is based upon the flaws of former laws. This does not mean that the current system does not deserve criticism – as long as practices such as re-education through labor and death penalty imposed on minors can be found in the China, the state will have a hard time convincing the rest of the world that it offers fair trials. Nonetheless, it is unfortunate that so little focus is put on the major changes that actually have taken place, instead of only focusing on what is left to be done.

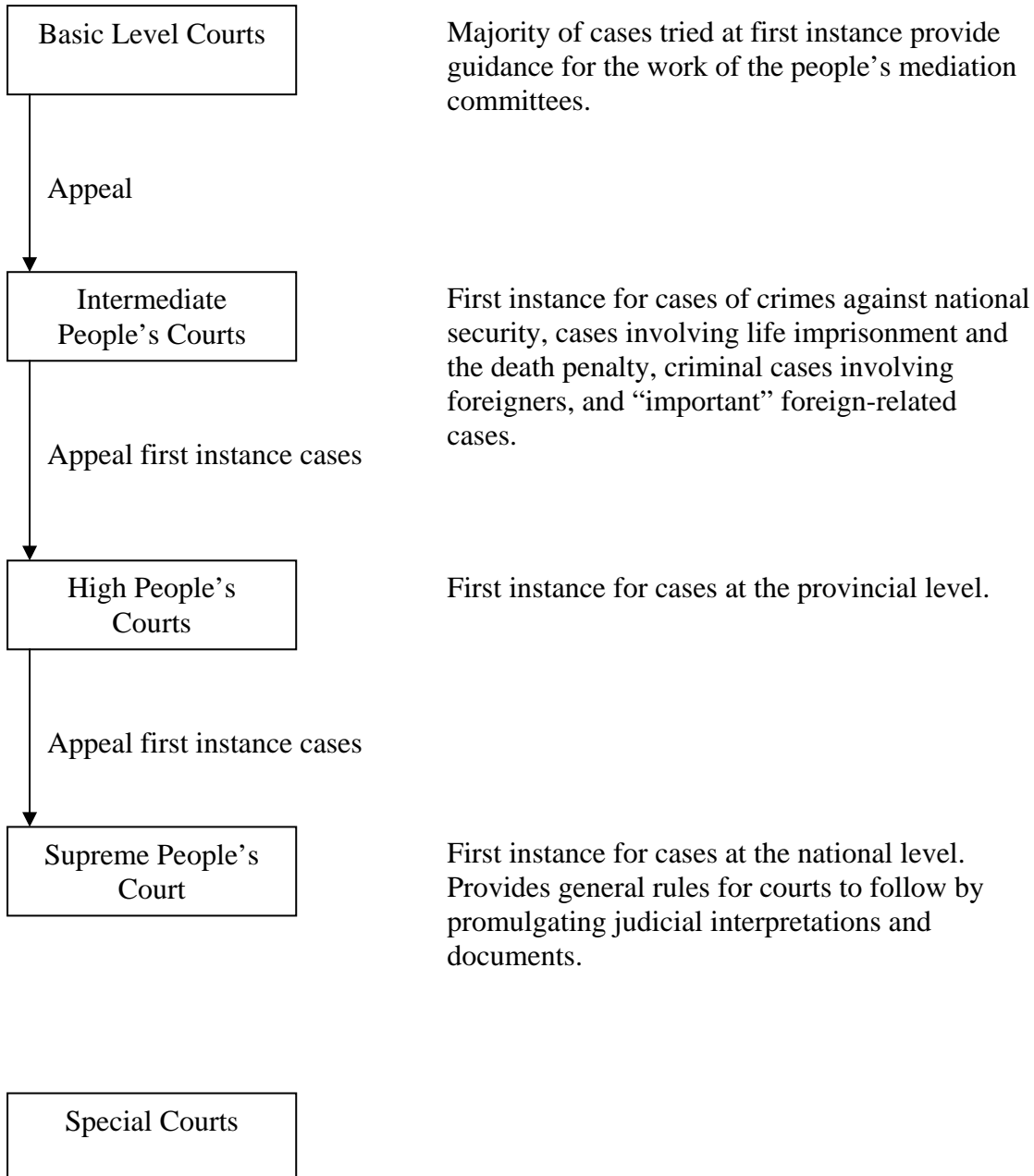
Appendix A

DIAGRAM OF CHINA'S LEGISLATIVE SYSTEM AND LEGAL HIERARCHY



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Appendix B



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