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Chinese Criminal Procedure Reform of 2012 – How Much Reform Did it Bring?

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Abstract: The 2012 reform of the Chinese Criminal Procedure Code may be taken as evidence that a new democratic openness has pervaded Chinese political and social life. The protection of individual rights was improved. On the other hand, traditional powers of the police were retained and sometimes extended. This article will offer critical comments on some of the most important changes the 2012 reform brought. At the same time, the article will indicate alternative solutions that can be found in other countries and that might serve as a model for further changes of the Chinese system. The following problems will be discussed:

- The exclusionary rules that were added to the Code suffer from several shortcomings.
- The newly introduced privilege against self-incrimination is irreconcilable with the traditional duty of the suspect to tell the truth.
- To retain the prosecutor's power to decide on arrest is hardly in line with international law and the law of other countries.
- The new residential confinement at a "designated residence" must be considered unsupervised police custody – an official measure that does not exist anywhere else.
- General wide and uncontrolled investigatory powers of the police would have needed restriction.

As criminal justice systems must be considered living organisms that develop in dynamic ways, there is hope that problems left by the 2012 revision will be solved by future reforms.

I. Introduction

Criminal procedure codes work like seismographs because they register how certain provisions are affected by the political and social structure of a country. In authoritarian states of the past, needles of seismographs remained rather static.

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Crime control and protection of the existing political system were typically given top priority; suspects and accused were considered subordinates who had to accept what was imposed by higher authorities. Only in relatively recent times, the tectonic plates of political and social life started moving in the majority of countries. It happened as a consequence of new philosophical and political ideas that were developed on national and international levels.

Today, effectiveness and efficiency of criminal justice systems are balanced with principles of fairness and due process as well as the requirement that individual rights must be protected. The individual has become, and, to some extent, still is in the process of becoming, a free and autonomous citizen who plays an active role in public life and, consequently, also in criminal proceedings. Seismographs today tend to oscillate between the traditional and new purposes that criminal justice serves – protecting society through efficient law enforcement and insulating the suspect and accused against arbitrariness and undue exercise of power by investigating and adjudicating authorities.

A general reform of a criminal procedure code may be taken as evidence that a major political earthquake occurred. The decisive question of a reform is what political forces have influenced the dancing of the seismograph's needle. In which way has the legislature decided to rebalance traditional values of authoritarian crime control with new, liberal ideas of due process and the safeguarding of individual freedom? Provisions where this is best visible are those that define the requirements for detention and arrest, search, seizure and the use of technical means, because these measures must be considered most severe, and therefore most problematic, invasions of individual liberty. Other important questions are to what extent the power of investigating authorities is restricted with the help of an exclusionary rule and in which cases the suspect can bring a complaint against invasions of his or her privacy.

The Chinese Criminal Procedure Code has followed the general development of criminal justice systems in other countries, but for historical reasons earthquakes in China occurred with some delay. The main, if not sole, purpose of the original Chinese Code, which was enacted in 1979, was to provide for effective crime control. The Code was, as Article 1 stated, an expression of the "dictatorship of the proletariat" serving "to attack the enemy and protect the people." The first revision of the Code, which occurred in 1996, took some careful steps towards modernizing Chinese criminal justice. From a comparative law point of view, protection of individual rights was, however, not one of its main objectives. The position of the suspect and accused was improved only to a limited extent.

This was different from the 2012 reform, which brought fundamental changes. The 2012 revision may be taken as evidence of a rapid and dynamic development that in recent years has affected Chinese political, social and economic life. At the

same time, ideas of placing more emphasis on individual rights and rebalancing the relationship between the individual and government have developed among Chinese citizens. The preparation of the reform took place in an atmosphere of democratic openness. Before the new law was enacted, a draft was published and widely discussed not only by officials but also in private circles. On the Internet, a number of Chinese and foreign authors criticized several changes proposed by the draft.

The new democratic atmosphere became a fertile ground for the far-reaching 2012 reform of the Criminal Procedure Code, which was unprecedented in the history of the People's Republic. The reform was obviously influenced by a political will and a public consensus to shift the weight of criminal justice administration from exclusive crime control towards placing increasing emphasis on ideas of fairness and protecting individual rights. This new policy is evident in a clause that was added to Article 2 of the Criminal Procedure Code[1]. The provision, which so far has only relied on crime control, now also requires "respecting and protecting human rights"[2].

The following chapters will offer critical comments on important changes brought by the 2012 reform. Criticism will, to some extent, also include what was not but should have been changed. Comments will refer to the laws of other countries when the reference may seem helpful to explain problems and shortcomings of the Chinese reform.

II. Comments on the Reform of Individual Articles

1. Exclusionary Rules (Article 54)

a) Article 54 (1) (1) – An Exclusionary Rule that is Too Wide

The introduction of exclusionary rules by Article 54 (1) of the Criminal Procedure Code may be considered a clear sign that the Chinese legislature wished the new general clause of Article 2 on respecting and protecting human rights to be taken seriously. Article 54 provides for two different exclusionary rules. With respect to confessions of the suspect or accused, a categorical exclusionary rule was intro-

1 If not otherwise indicated, the number of a specific article refers to the version of the Code that became effective on January 1, 2013.

2 This change obviously followed a revision of the Constitution of the People's Republic of China. In 2004, Art. 33 of the Constitution was amended by a sentence providing that "the Nation respects and protects human rights."

duced. The first sentence of Article 54 stipulates that a confession obtained by torture or "illegal means" must, without exception, be excluded. The exclusionary rule found in the second sentence of Article 54 (1) may be considered relative because it provides that physical and documentary evidence must be excluded only if it is gathered in a way that "may seriously affect justice."

The exclusion of confessions extorted from the suspect or accused by torture brings Chinese law in line with the UN Convention against Torture[3] as well as the law of other countries[4]. Upon a closer view it appears, however, that the exclusionary rule introduced by Article 54 (1) (1) is too broad. It provides without exception for the exclusion of statements that were obtained by any "illegal means." Articles 51 (1) and 181 of the Criminal Procedure Rules for Public Security Organs in Dealing with Criminal Cases, which were promulgated in 1998, are somewhat more specific because they prohibit collecting evidence with the help of torture, threats, temptation and fraud. In addition, the Rules also refer to "other illegal means."

As already mentioned in my Report on the Draft to Amend the Criminal Procedure Law of the People's Republic of China, it must be asked how such "illegal means" clause providing for a categorical, wholesale exclusion will work in practice[5]. A statement will, for example, have to be excluded in a case where the police officer who conducted the interrogation produced no credentials and thus neglected Article 117 (1). Likewise, a statement will not be admissible, if the suspect or accused was not, as required by Article 118 (2), informed that a confession may be taken as a reason for imposing a lighter sentence. The question is whether the exclusion of evidence would, in such cases, be necessary to protect the suspect's or accused's rights. As Chinese defense counsel will not know what will be covered by the new "illegal means" clause they might feel compelled to bring various motions requesting that a statement of the suspect or accused be excluded because it was obtained by illegal means.

Rules requiring categorical exclusion of illegally obtained evidence are not only found in China but also in other countries. The truth is, however, that in other legal systems they are often not fully enforced. Three examples will be given here to explain how wholesale exclusionary rules have been restricted in different ways.

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3 Art. 15 of the Convention reads: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence…". The Convention was ratified by the People's Republic of China in 1988.

4 See § 136a German Criminal Procedure Code. As to American law, see *LaFave/Israel/King/Kerr*, Criminal Procedure, § 6.2, 5th ed. St. Paul 2009.

5 *Herrmann*, Report on the Draft to Amend the Criminal Procedure Law of the People's Republic of China, Journal of Comparative Law 2012, No. 1, 155; Procedural Law & Judicial System 2012, No. 5, 66.

In Russia, not only the Criminal Procedure Code but also the Constitution of the Russian Federation contains categorical exclusionary rules[6]. Experts on Russian law report, however, that Russian criminal justice authorities are still influenced by the authoritarian ghosts of the lawless past. They often simply disregard the legal and constitutional requirements by admitting illegally obtained evidence on a more or less regular basis[7].

The Corte Suprema di Cassazione, the highest Italian appellate court, has taken a peculiar approach to restrict the categorical exclusionary rule contained in Article 191 of the Italian Criminal Procedure Code. In a drug case where a dwelling was searched the Court held that even though the search was illegal, the cocaine found and seized could still be used as evidence at the trial. The Court separated search and seizure in an artificial manner. It reasoned that the search was finished with the discovery of the drugs. The seizure was, therefore, independent of the illegal search and thus, the cocaine was considered admissible evidence. In addition, the Court referred to Article 253 (1) of the Criminal Procedure Code, which requires the police to seize fruits of the crime. This legal obligation should be given priority over the exclusionary rule[8].

The United States Supreme Court has taken more rational approaches when restricting categorical exclusionary rules. The Court did not have to face the same difficulties as the Italian Cassation Court because it worked within the American case law system and was, therefore, not bound by a statutory provision. The Supreme Court held, for example, in *Mapp v. Ohio*, a landmark decision of 1961 that evidence found in a home must without exception be excluded if the search was illegal[9]. The main reason for the exclusionary rule was to deter the police from invading the constitutionally protected rights of the individual. In 1984, however, the Supreme Court turned this categorical protection into a relative exclusionary rule by introducing a good faith exception[10]. If police officers who conduct a search did not know they were relying on an invalid search warrant,

6 Criminal Procedure Code of the Russian Federation Arts. 7 (3) and 75; Constitution of the Russian Federation Art. 50 (2): "In the administration of justice no evidence obtained in violation of the federal law shall be allowed."

7 See, for example, *Newcombe*, Russia, in: *Bradley*, Criminal Procedure – A Worldwide Study, 397 ff. at 437, 2nd ed. Durham 2007; *Thaman*, The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond, 40 Cornell Intl. L. J. 355 ff. at 375–377 (2007); *Pomorski*, Justice in Siberia: A Case Study of a Lower Criminal Court in the City of Krasnoyarsk, Communist and Post-Communist Studies 34, 447 ff. (2001).

8 Decision of the Court of Cassation, Giustizia Penale 1997, 138. See also Decision of the same Court, Giustizia Penale 1995, 368.

9 367 US 643.

10 *United States v. Leon*, 468 US 897 (1984).

they acted in good faith and thus did not need to be deterred by an exclusionary rule. As a consequence, evidence found by the police officers was held admissible.

Chinese criminal justice authorities will have to develop their own technique of working with the exclusionary rule of Article 54 (1) (1). If they come to the conclusion that it cannot be applied without exception, they must find a way of transforming the categorical into a variation of the relative exclusionary rule. As pointed out before, a possible solution is offered by Article 54 (1) (2). Under this provision, evidence must only be excluded if its use would "seriously obstruct justice"[11]. According to this clause there can be no question that evidence procured by torture must always be excluded. It will, however, be necessary to develop a definition of what will be included in the concept of torture[12]. With respect to the exclusion of other evidence, Spanish law could help explain what may be considered a "serious obstruction of justice." Article 238 (3) of the Spanish Organic Law on Judicial Power provides that the collection of evidence is null and void if essential procedural provisions are disregarded and thus rights of the defence have actually been compromised[13].

There are two other problems that were left open by the new Article 54 (1) (1). One important question is whether illegally obtained evidence will be admissible as soon as the suspect or accused consents to its use. To admit evidence in such cases could easily be taken by criminal justice authorities as an invitation to procure consent with various kinds of pressure. Under German law, this possibility is excluded because the German Criminal Procedure Code provides that an illegally obtained statement of the suspect is inadmissible even if the suspect consents to its use[14].

On the other hand, Article 54 (1) (1) does not address the question of whether and to what extent the exclusionary rule will apply to derivative evidence, for instance, fruits of the poisonous tree. Experience teaches that the exclusion of evidence directly obtained by illegal means is often only of symbolic value if additional evidence derived from such evidence is admissible. To take care of this problem, the Spanish Organic Law on Judicial Power provides

11 See my Report on the Draft, above footnote 5.

12 For a clear definition, see UN Convention against Torture, Art. 1.

13 In the Canadian Charter of Rights and Freedoms, Art. 24 (2), an even more detailed provision can be found: Evidence that was "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, ... shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

14 Sec. 136 a (3).

for the exclusion of evidence "obtained directly or indirectly in violation of fundamental rights..."[15].

These gaps left by the Chinese legislature in Article 54 (1) (1) of the Code need to be closed. It may be expected that the Supreme Court of the People's Republic will try to solve some of the problems. On the other hand, it must be noted that the "other illegal means" clause contained in the Chinese Code could only be abrogated by the legislature which enacted it.

b) Article 54 (1) (2) – An Exclusionary Rule of Mainly Symbolic Character

Article 54 (1) (2) refers to physical and documentary evidence that is not gathered under "legal procedure." Articles 134ff. of the Criminal Procedure Code are the relevant "statutory" provisions for searches. Article 136 (1) provides that a search warrant must be shown to the person to be searched. There is, however, no provision in the Code or in any other statute stating who is authorized to issue a search warrant, under what conditions a search warrant may be issued and in which way a search may be conducted. No distinction is made between a search of the suspect and of other persons. According to Article 136 (2), a search without a warrant may be conducted incident to an arrest and under exigent circumstances, but the provision does, again, not define what the requirements for such searches are. Article 205 of the Rules of Criminal Procedure for Public Security Organs in Dealing with Criminal Cases provides that searches must be authorized by a higher officer of the police force, but otherwise the Rules do not restrict the power to search in any way. In a similar way, the Rules of Criminal Procedure for the People's Procurate do not contain any restrictions for searches.

This omission of any statutory or other guidance leaves Chinese police with wide discretion concerning when and in which way to conduct a search. The police are, for example, free to search a private residence at any time during the night even though Article 39 (1) of the Chinese Constitution declares residences to be "inviolable." The police are also not prohibited from conducting extended searches of offices and business premises that may last for days; thus, the office or business can no longer function and innocent employees will lose their job. As there are no legal restrictions that the police could disobey, the exclusionary rule of Article 54 (1) (2) will remain a largely ineffective sanction. At the same time, Article 39 (2) of the Constitution, which prohibits the "unlawful search of ... a citizen's residence," is

15 Art. 11 (1). In a similar way, indirect evidence is excluded under Art. 23 of the Criminal Procedure Code of Colombia.

reduced to an empty phrase because there is hardly a possibility for the police to conduct an unlawful search under Article 136 of the Code.

Similar problems exist as to the seizure and impounding of objects and documents because Articles 139 ff. of the Code do not state under what conditions these measures can be taken. Furthermore, the just mentioned Rules of the Public Security Organs are silent as to this issue. As police officers conducting a seizure are not restricted by any legal provision, their activities are governed exclusively by considerations of efficiency. Police officers often do not know which objects will be needed as evidence at the trial, so they may be tempted to seize more than would be necessary in the individual case. This will pose special problems in cases involving the seizure of mail because the practice violates Article 40 (1) of the Chinese Constitution, which guarantees the "freedom and privacy of correspondence".

Articles 148 ff. of the Code on "technical investigation measures" deserve still more severe criticism because the drafters fail to define what kinds of measures the police are authorized to take. It is no secret that police today conduct investigations with a great variety of technical measures, which may involve considerably deeper intrusions of privacy than traditional search and seizure. Typical measures are wiretapping and electronic eavesdropping, different types of computer assisted investigation and the use of global-positioning systems to track suspects.

Article 148 (1) seems to restrict the use of technical measures because it authorizes such measures only for the investigation of a number of crimes that are listed in the provision. The list includes, however, "crimes seriously endangering the society." This clause is obviously broad enough to include almost any crime, especially if one keeps in mind that in the past, political campaigns to "crack down on crime" have defined individual cases as a general danger to society. Thus, it can hardly be expected that the crimes listed in Article 148 (1) will have any limiting effect.

Article 148 (1) refers to "strict approval formalities" that are required to authorize technical investigation measures. It is, however, left open who is in charge of the approval procedure and under what conditions which measure can be authorized. As far as could be ascertained, it has up to now been the job of the head of the local police force to approve technical measures. If this practice is not going to change under the new law, there will still be the problem that police officers are in charge of approving what other police officers plan to do. This can hardly be considered an effective procedure to control the police and protect privacy.

As the chapter on technical investigation measures fails to offer any relevant legal restriction of police activities, it must be expected that the exclusionary rule of Article 54 (1) (2) will scarcely play an important role in Chinese practice.

It should be mentioned in this context that the United States Supreme Court has with the help of exclusionary rules systematically expanded the protection of individual rights and thus created a general system of balancing the traditional exercise of state power with modern respect of privacy[16]. In Germany, courts have also taken exclusionary rules as a vehicle for improving the protection of individual rights[17].

2. Interrogation of the Suspect – A Clash of New and Old Law

As to the interrogation of the suspect, the 2012 reform gives rise to considerable confusion. Two tectonic plates representing essential differences in official policy seem to have moved against each other leaving deep cracks in the law. On the one hand, a new clause was added to Article 50 of the Criminal Procedure Code providing that no one shall be forced to incriminate himself or herself. As a consequence, Chinese law now seems to be in line with the UN Covenant on Civil and Political Rights, which was signed but not yet ratified by the People's Republic[18]. On the other hand, Article 118 (1) of the old law requiring the suspect to answer questions of the police truthfully was not abolished by the reform. There can be no doubt that the two contradictory provisions can never be reconciled.

As far as could be ascertained, the duty of the suspect to tell the truth was first introduced in the Chinese Criminal Procedure Code of 1979. At that time the after-effects of the Cultural Revolution were still influencing political life in China, individuals were subordinates oppressed by Party and government, and a strictly enforced inquisitorial principle dominated criminal justice administration. The suspect was considered an enemy of the people who must be brought under control. People who were willing to oppose the official policy hardly dared to raise their voice. The 1996 reform of the Criminal Procedure Code did not touch the requirement to tell the truth even though the political landscape had changed by that time.

When the 2012 reform was being prepared there was a general dispute over whether the duty to tell the truth should not be replaced by the privilege against self-incrimination. Some Chinese scholars and lawyers recommended giving

16 As to details of this development see *LaFave*/*Israel*/*King*/*Kerr* (footnote 4), at chapters 3–6; *Bradley*, United States, in: *Bradley*, Criminal Procedure – A Worldwide Study, 519 ff., at 526 ff., 2nd ed. Durham NC 2007.

17 *Weigend*, Germany, in: *Bradley* (footnote 16), 243 ff., at 248 ff.; *Feeney*/*Herrmann*, One Case – Two Systems, Ardsley NY 2005, 242 f., 364, 369, New York 2005.

18 Art. 14 (3) (g) of the Covenant.

priority to the privilege. Practitioners, however, above all representatives of the police, considered the suspect's duty to tell the truth to be indispensable for effective crime control[19]. In the end, practitioners won the argument. This may be taken as a symbol that some of the old inquisitorial ideas are lingering still today in spite of the general changes in the political life. Also the teaching of criminologists was neglected who have explained in great detail that criminals cannot simply be defined to be enemies of the people but must rather be treated as individuals who often have social and sometimes psychological problems.

As has been explained in my report on the Draft of the 2012 Amendments to the Code, similar controversies existed some 100 to 200 years ago in continental European countries[20]. In the old European systems criminal justice authorities were guided solely by the inquisitorial principle. The suspect was considered merely an object of the proceedings upon which the investigation was focused. The suspect didn't have any procedural rights, he or she was only expected to make a confession. Torture was considered necessary to procure a confession and thus discover the truth.

Beginning with the eighteenth century, Enlightenment, a philosophy of Natural Law and the introduction of individual rights in constitutional documents have fundamentally changed the position of the suspect in the western world. Torture was abolished, but the suspect was still required to make a confession. The confession was considered to be the "queen of proof." Starting with the late nineteenth century, the privilege against self-incrimination was introduced in European countries. In the course of the twentieth century the privilege has been considerably expanded as a consequence of the general human rights movement. Today, it would be considered a clear violation of human dignity to require a suspect to incriminate himself or herself. As suspects are generally not aware of their privilege against self-incrimination, there is general consensus in western countries that suspects must be informed of their right not to answer questions.

Each of these reforms was accompanied by severe criticism, above all from investigating authorities, that criminal justice administration would break down if the suspect's autonomy was going to be protected by the privilege against self-incrimination. History proves, however, that such allegations were an unfounded myth; the predicted disasters never happened. This lesson of history should be taken to encourage the Chinese legislature when preparing future reforms in the

19 *Chen Guangzhong*/*Liu Mei*, Reform of Criminal Evidence System in China, in: International Centre for Criminal Law Reform and Criminal Justice Policy ed., Promoting Criminal Justice Reform: A Collection of Papers from the Canada-China Cooperation Symposium, 1ff., at 5, Vancouver 2007.

20 See above footnote 5.

People's Republic. As long as the Chinese Criminal Procedure Code places the privilege next to the suspect's duty to tell the truth, it relies on an irrational contradiction. Harmony which is a basic requirement of Chinese criminal justice administration can never be achieved in this way.

It must be expected that on the basis of the contradictory law Chinese police officers will decide to continue with their standard practice of requiring the suspect to tell the truth and simply disregard the privilege against self-incrimination. As a consequence, the officers will at the beginning of interrogation inform the suspect of his or her legal duty to make a confession. From a psychological point of view, this will place the suspect under considerable pressure. This pressure will be increased when the officer will, according to Article 118 (2), inform the suspect that a confession might lead to a less severe punishment. The suspect will likely misunderstand this information as a warning that neglecting the legal duty to make a confession will be punished by an increase in the sentence.

There is the additional question of whether the suspect will have a right to be assisted by defense counsel during police interrogation. In the past, the right to counsel started only after the first interrogation[21]. As was explained in my report on the Draft, the right to defense counsel is mainly worthless if counsel is not permitted to represent the suspect during the first interrogation[22]. Police will in such case continue questioning the suspect with a variety of interrogation tactics until they have procured a confession.

The 2012 reform tried to take care of this problem by providing in Article 33 (1) (1) that the right to have defense counsel starts "from the day when the suspect is interrogated... for the first time." This seems to have considerably improved the position of the suspect. The clause "from the day" must, however, be criticized for ambiguity. It can be read to provide the suspect with the right to be assisted by counsel "from the beginning of the first police interrogation." This would be the proper way of interpreting the clause if the right to counsel is to operate as an effective barrier against oppressive police tactics. The clause can, however, also be read in a different way: counsel will be admitted "at the day of the first police interrogation but not necessarily before the first interrogation." This would take the teeth out of the reform because police could continue questioning the suspect without any interference by counsel. To enforce the privilege against self-incrimination introduced by the reform, Chinese police should be forced to admit counsel from the beginning of the first interrogation.

21 Art. 96 of the 1996 version of the Criminal Procedure Code. See also Art. 33 of the Draft.

22 See above footnote 5.

If counsel will be admitted in this way, there will be the next question: whether the new Article 33 (1) (1) allows defense counsel to be present at police interrogation or whether the suspect can only consult with counsel during this procedural stage. This is an important distinction because police interrogation, above all the first interrogation, must be considered a decisive stage in criminal proceedings. Different from a common assumption, it is often not the trial but rather police interrogation where cases are solved. Once the police have managed to extract a confession from the suspect, "the cat will be out of the bag", and the case will more or less be solved. Defense counsel who may participate in the proceedings after the first interrogation was finished will have little chance to help. If the suspect should, on defense counsel's advice, refuse at the trial to repeat a wrong confession, the testimony of the investigation organ who conducted the first interrogation or the record of the interrogation may be used as evidence.

On the other hand, it remains unclear how a Chinese lawyer who would be permitted to sit next to the suspect during police interrogation could actually defend his or her client. As the suspect is under a legal duty to answer questions truthfully, counsel could only try to make sure that no confession will be forced out of the suspect. There are serious doubts whether counsel could advise the client to remain silent.

With respect to these unsolved problems, it can only be said that the new Article 33 (1) (1) raised considerably more questions than it answered. It should be added that in western legal systems the privilege against self-incrimination has been developed to provide more than a right to remain silent and to answer questions in a way the suspect wishes. New dimensions have been added to the privilege.

Under German law, suspects and accused must be informed of the offense of which they are suspected before any interrogation. Suspects must further be advised that they are free to make a statement or to remain silent, that they can consult with defense counsel even prior to the interrogation and that they can request exonerating evidence to be taken into consideration[23]. The German Federal Court of Appeals held statements to be inadmissible if the suspect or accused was not informed of the right to remain silent and to consult with counsel[24]. The Court reasoned that the privilege against self-incrimination is jeopardized if the required information is not given.

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23 Arts. 136 (1), 163a (3), (4) German Criminal Procedure Code.

24 Decisions of the Federal Court of Appeals in Criminal Matters 38 BGHSt 214 (1992); 42 BGHSt 15 (1996).

The United States Supreme Court held in the famous *Miranda* decision that the privilege against self-incrimination contained in the Fifth Amendment to the US Constitution requires a verbal warning to be given before interrogating a suspect[25]. Similar to German law, the suspect must be informed of the right to remain silent and to have counsel. Different from German law, the warnings must include what may be considered a "declaration of war," explaining that anything the suspect will say may be used against him or her at the trial. Also, unlike in Germany, the police must stop any further questioning as soon as the suspect expresses the wish to remain silent. On the other hand, Miranda warnings must only be given prior to "custodial interrogation," which is an interrogation where the suspect is not free to leave. A police officer who, for example, stops the driver of a vehicle on the street does not need to give the warnings.

The European Court of Human Rights which functions as a transnational watchdog of European legal systems held in *Salduz v. Turkey*, a landmark decision of 2008, that under Article 6 (3) (c) of the European Convention on Human Rights defence counsel must be provided during the first police interrogation[26]. Referring to the right to a fair trial which is guaranteed by Article 6 (1) of the Convention, the Grand Chamber of the Court indicated that "[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for conviction"[27]. The decision of the European Court does not legally bind other Member States of the Council of Europe; it is, however, interesting to note that France and Belgium have taken steps to reform their law in order to make it conform to the holding of Salduz[28].

This development of the privilege against self-incrimination proves that western and Chinese legal systems are worlds apart. Bridging this gap would perhaps require another major earthquake in Chinese politics. The new policy of improving the protection of the individual, which has become visible in recent years, will need to gain more ground.

25 *Miranda v. Arizona*, 384 US 436 (1966).

26 Judgment of 27.11.2008, (36391/02), 49 EHRR 421 (2009).

27 Id. at par. 55.

28 See *Thaman*, Constitutional Rights in the Balance: Modern Exclusionary Rules and the Toleration of Police Lawlessness in the Search for the Truth, 61 University of Toronto Law Journal, 691, 716 (2011).

3. Compulsory Measures

a) Arrest and Detention – Old and New Shortcomings

The reform brought only minor changes in the law of arrest and detention. It did, above all, not touch the principle that the prosecutor rather than the judge decides on the arrest of the suspect. Article 37 (2) of the Chinese Constitution and Article 78 of the Criminal Procedure Code, which was not changed by the reform, refer to the prosecutor and alternatively to the judge to be in charge of arrest decisions. In Chinese practice it is, however, the prosecutor who decides.

This power of the prosecutor may be traced back to Russian tradition. Peter the Great established the procuracy as the "eyes and ears of the Tsar." The prosecutor was in charge not only of running the criminal justice system but also of supervising all other government officials, including judges[29]. In Soviet times, this role was reinforced by the principle of Socialist legality according to which the prosecutor was an independent organ ensuring that the legal provisions are strictly followed as well as policies of the government and the party be enforced. This system was adopted by the People's Republic. The 2001 Russian reform significantly reduced the powers of the prosecutor, but the Chinese criminal justice system still relies on the pervasive powers of the prosecutor. This is explicitly stated in the introductory chapter to the Criminal Procedure Code as well as in the Chinese Constitution[30].

The Chinese system of entrusting the prosecutor with the power to decide on arrest must be considered unique. In other countries, not only of the western world but also of formerly Socialist Eastern Europe, including Russia, it is the judge rather than the prosecutor who is in charge of this decision. As indicated in my report on the Draft of the 2012 reform, there are two main reasons for placing this power in the hands of the judge[31]. From a psychological point of view, it might be difficult for the prosecutor to decide with an independent and objective mind on the suspect's freedom, because the prosecutor may later have to determine whether or not to bring a charge against the suspect. The prosecutor may also have to represent the accusation at the trial of this person. In addition, there is the modern constitutional requirement that governmental power should be distributed among different institutions. Consequently, the judge who is not

29 *Newcombe*, supra note 7 at 401.

30 Art. 8 of the Code; Arts. 129 and 131 of the Constitution.

31 See above footnote 5.

involved in the prosecution of the case should decide whether the suspect should be taken into custody.

In this context, it is interesting to note that in 2012 a new chapter was added to the Chinese Criminal Procedure Code providing that persons with mental problems who have committed a criminal act but cannot be held responsible for it shall be submitted to involuntary medical treatment. Under the new law, it is not the prosecutor but the judge who decides on this measure involving an invasion of individual freedom. The prosecutor is only authorized to file a request with the judge that such measure be imposed[32]. This is certainly a step in the right direction, so it must be asked why no similar step was taken in the area of arrest and detention.

It could be argued, however, that Chinese law is in line with Article 9 (3) (1) of the International Covenant on Civil and Political Rights which provides that anyone arrested shall be brought "before a judge or other officer authorized by law to exercise judicial power." As there is no court enforcing the International Covenant and no other institution offering an official interpretation of its provisions, it cannot be said whether such argument would be valid. There is, however, a provision in Article 5 (3) (1) of the European Convention on Human Rights, which is identical to the International Covenant. The European Court of Human Rights found in a number of cases that a prosecutor's decision to arrest was not compatible with Article 5[33]. In the Court's view, the prosecutor is to be considered a party to the proceedings who, therefore, cannot be expected to be impartial when performing a judicial function in the same case. The Court considered it sufficient that the suspect might have doubts about the prosecutor's impartiality.

The decisions of the European Court can, of course, not be taken as an interpretation of the International Covenant. It would, however, in view of the Court's decisions, be difficult to argue that Chinese law authorizing the prosecutor to decide on arrest is clearly in line with the International Covenant.

As to the rights of the arrested or detained suspect, the 2012 reform left important questions open that need an answer. According to Article 9 (2) of the International Covenant "the arrested shall be informed, at the time of the arrest, of the reasons of his arrest and shall be promptly informed of any charges against him." Under Article 91 of the Chinese Criminal Procedure Code, the police officer

32 Art. 285.

33 *Huber v. Switzerland*, Oct 23, 1990, (12794/87), Series A, No 188; *Niedbala v. Poland*, July 4, 2000, (27915/95), 33 EHRR 175.

who arrests someone must produce an arrest warrant. Article 84 of the Code provides for the interrogation of the detainee by the police officer. It may be assumed that both instances will offer some information to the suspect but it is questionable whether this will always be sufficient. The European Court interpreted Article 5 (2) of the European Convention, which is comparable to Article 9 (2) of the International Covenant as requiring that the suspect be informed with a degree of specificity of the essential legal and factual grounds for the deprivation of his or her liberty[34]. The reason for such comprehensive information is that only on its basis the suspect will be able to challenge the lawfulness of the arrest or detention. As a consequence, a copy of the arrest record should be handed to the suspect.

Article 86 (1) of the Chinese Criminal Procedure Code provides that the prosecutor who decides on the arrest may interrogate the suspect. Interrogation is obligatory only upon the suspect's request. Article 9 (3) (1) of the International Covenant requires, however, an oral hearing in all cases. A decision on the suspect's freedom should only be taken after the suspect had chance to face the decision-maker explaining his or her side of the case and asking questions. Under Article 86 (1) of the Code such chance would hardly ever exist because the provision does not require informing the suspect of the right to request a hearing, so the suspect will not be aware of it.

Articles 115 (1) (1) and 97 (2) of the Code authorize the suspect who is being detained to file a petition with the judicial authority refusing to release him or her in a case where the statutory term of the detention has expired. In addition, Article 95 (1) provides that the suspect who is subject to a compulsory measure can apply for its modification. As a consequence, a detained suspect who falls ill may perhaps request to be transferred to a prison hospital.

If these provisions are understood correctly, the suspect is not entitled to file a petition requesting to review whether the detention is justified. In other words, the suspect has no right to request discharge because there is not sufficient evidence that he or she has committed a crime. Under Article 161 (1), the police are in such case required to release the suspect, but the suspect cannot bring a corresponding motion. The Criminal Procedure Code seems to be based on the assumption that the police know everything about the case, so no petition of the suspect is necessary.

As explained in my report on the Draft, a right of the detained suspect to bring a complaint requesting that the reason for arrest and detention be reviewed, new evidence be heard and the warrant be revoked has been generally acknowl-

34 *Fox, Campbell and Hartley v. United Kingdom*, August 30, 1990, (12245/86), Series A, No 182.

edged in other legal systems[35]. It was first introduced as the *habeas corpus* right by the *Magna Charta* in England in 1215 and it has been expanded ever since as a mechanism in the hands of the suspect to enforce the protection of his or her freedom. Today such right is considered so fundamental that it is included in the International Covenant[36].

In view of this worldwide development it remains a mystery why the revision of the Chinese Code did not bring a general right of complaint in arrest cases. After Article 115 (1) (3) (4) introduced a general right to bring a complaint in search and seizure cases it would only have been consequent to have an analogous right in arrest cases which involve a much more serious invasion of individual rights.

It has been argued that it might be too heavy a burden on criminal justice authorities if a detained suspect could steadily bring new complaints requesting to be released. This danger can, however, easily be avoided by providing that complaints can only be lodged at certain intervals.

b) Confinement at a Designated Residence – A New Type of Police Custody

Under the old law, residential confinement could only be executed at the suspect's residence; it was a compulsory measure to avoid arrest and detention. The 2012 reform has created a new kind of residential confinement that must be considered the consequence of a major political earthquake, which considerably increased the power of the police. Article 73 (1) (2) of the Criminal Procedure Code now provides that residential confinement can in numerous cases be executed at a "designated residence" if holding the suspect at his or her own residence would obstruct investigation. The "designated residence" may be any location selected by the police as long as it is not a place where suspects are kept in custody.

This new type of residential confinement is restricted to cases involving crimes endangering national security, terrorist activities and extraordinarily serious bribery. The term "endangering national security" seems to be rather vague, so it will allow all kinds of different interpretations, especially during political campaigns to "crack down on crime." As indicated above there are doubts about whether such restriction will have a visible limiting effect[37].

The new clause was met with approval because it might work to replace the extra-legal residential detention that so far has been used by the police in day-to-

35 See above footnote 5.
36 Art. 9 (4).
37 See above II.1.b).

day practice[38]. While the police are obviously free to hold a suspect under extra-legal detention for as long as they wish, Article 77 sets a time limit of six months for the detention. In view of this it can only be hoped that the extra-legal detention will no longer be tolerated.

At the same time, confinement at a designated residence deserves severe criticism because it introduces a compulsory measure that does not seem necessary in addition to arrest and detention. The purpose of the detention at a designated residence can only be to place the suspect under exclusive control of the police. Its proper name would, therefore, be "police custody." Experience teaches that the "designated" residence is a secret residence known only to the police. Unlike in arrest and detention cases, the police rather than the prosecutor decide whether the suspect should be held at a designated residence. Article 73 (4) entrusts the prosecutor with a power to exercise control, but this still leaves the original decision on the detention in the hands of the police.

Under Article 83 (2) (1), a detained person must immediately be transferred to a jail. The reason of this provision, which was introduced by the 2012 reform, is to reduce the possibility that the suspect might be ill-treated by the arresting police officer who cannot always be under strict supervision. At the jail, the danger of abuse seems reduced because there is a general system of control. It is an open question whether a similar system of supervising and controlling individual police officers exists at designated residences.

Article 73 (2) requires notification of the family when the suspect is held at a designated residence, but the provision does not state that the police must reveal where the designated residence is located. Under the provision, nothing needs to be done in cases where notification is "impossible." This vague clause leaves the police with wide and uncontrolled discretion to decide whether or not to notify the family.

Article 76 provides that communications of suspects held in residential confinement may be monitored. It remains unclear whether this also applies to communications between the suspect and defence counsel. According to Article 37 (4) (1) a meeting of counsel with the suspect who is held in custody shall not be monitored. However, under the terminology of the Criminal Procedure Code, residential confinement cannot be deemed to be a case of custody.

38 As to the practice of extra-legal confinement see *Chen Guangzhong*, The Reform and Improvement of Criminal Coercive Measures in China, in: *Albrecht*/*Guangzhong* (eds.), Coercive Measures in a Socio-legal Comparison of the People's Republic of China and Germany, 1, at 4 (2004).

From a comparative law point of view, it can only be stated that something similar to an official police confinement in a designated residence is not found in any of the other major legal systems.

4. Police Discretion – Wide and Uncontrolled

As in the Chinese criminal justice system the police are institutionally independent from the other criminal justice authorities, neither the prosecutor nor the judge can control what the police do in the course of their investigations. A rare exception is the law on arrest and detention of the suspect where the prosecutor rather than the police decides. There are, however, hardly any provisions in the Criminal Procedure Code guiding or restricting the police in the exercise of their discretion. Typical examples are the aforementioned provisions on search, seizure, technical investigation measures and confinement at a designated residence[39].

Also decisions as to investigation strategies are mainly left to the discretion of the police. Articles 107 and 113 of the Criminal Procedure Code require the police to start investigations when they discover that a crime was committed; Article 161 provides for the dismissal of a case if the police come to the conclusion that the suspect has not committed a crime. The Code does, however, not address the important question whether and to what extent the police will have discretion to dismiss a case for other reasons. It is left open whether the police will, without exception, have to transfer every case to the prosecutor when they are of the opinion there might be sufficient evidence for conviction.

Another problem exists as to minor offences. Article 13 of the Chinese Penal Code provides that an act of minor importance which caused little harm is not to be considered a crime. Under Article 173 (2) of the Criminal Procedure Code, the prosecutor is authorized in such cases to terminate proceedings. There is, however, no provision in the Code stating whether the police have a similar right to drop cases. It must be expected that without such provision and without any other outside control Chinese police will feel authorized to decide on their own when and to what extent to conduct investigations and when to drop which case. There is danger that this will cause unequal law enforcement, abuse and even corruption.

As can only be briefly mentioned here, criminal justice systems today ordinarily follow the principle that discretion of the police must be limited and guided

39 See above II.1.b) and II.2.b).

by legal rules as well as supervised by outside institutions. If provisions on restrictions of this kind are not included in the criminal procedure code, necessary control of the police must be provided by other laws, court decisions or measures of inner-office and disciplinary supervision.

III. Concluding Remarks

Reforming a criminal procedure code may be an important step towards improving a criminal justice system. It must, however, be noted that such reform can never be more than one step on a long road that will require many additional steps to be taken. This is also true as to the 2012 reform of the Chinese Criminal Procedure Code. As this article has tried to explain, the 2012 reform was an important step forward but there were, at the same time, visible steps backward. The 2012 reform also omitted necessary steps that should have been taken. In view of the rapidly developing political and social life in the People's Republic there is hope that further earthquakes will occur in a not so distant future which will bring new reforms and, above all, develop new ways of balancing efficient law enforcement with a further improvement of the protection of individual rights.

The 2012 reform did not reach its final goal when the revised Criminal Procedure Code became effective on January 1, 2013. Courts will have to take every occasion to explain what is meant by individual provisions of the new law. In addition, institutions in charge of criminal justice administration should issue guidelines that will fill the gaps left by the Code. Last but not least, training programs will have to be instituted, so personnel involved in criminal justice administration, above all police officers, will learn how to work not only with the letters but also with the spirit of the reformed law. Only with the help of such combined efforts will it be possible to enforce the new law in a harmonious way.

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