

# International Human Rights Law and the Advancement of the Right to a Fair Trial in China

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## 1. The Right to a Fair Trial Crystallized in International Human Rights Law

This policy brief discusses the role of international human rights law ('IHL') in the advancement of the right to a fair trial in China.<sup>1</sup> First of all, IHL evolved over the last seven decades, tracing its origin in international law to the adoption of the Charter of the United Nations ('U.N. Charter').<sup>2</sup> Although the Charter does not define or enumerate "human rights and fundamental freedoms",<sup>3</sup> a series of subsequent international human rights instruments – including the Universal Declaration of Human Rights<sup>4</sup> ('UDHR'), the International Covenant on Civil and Political Rights<sup>5</sup> ('ICCPR'), and the International Covenant on Economic, Social and Cultural Rights<sup>6</sup> – have been performing these functions and developing specific standards and rules for human rights protection, among which the right to a fair trial is one of the most important and prominent.

The right to a fair trial does not focus on a single issue, but rather consists of a complex set of rules and practices.<sup>7</sup> The concept of "the right to a fair trial" first appeared in IHL in UDHR Article 10 which provides

that, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". In addition, Article 11 of the UDHR guarantees the right to be presumed innocent, public trial, and "all the guarantees necessary for his defence". It also prohibits retroactive conviction or penalty. The other provisions of UDHR regarding the right to security of person, the right to be free from torture, the right to an effective remedy, and the right to be free from arbitrary arrest<sup>8</sup> are also relevant to the right to a fair trial.

Later the right to a fair trial has been established in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') of 1950.<sup>9</sup> The right to a fair trial, which has been specified further in the ECHR, holds a prominent position in the Convention, due not only to the importance of the right involved, but also to the great volume of applications and jurisprudence that it has generated. More applications involve Article 6 than any other provision of the ECHR.<sup>10</sup>

The 1966 ICCPR, which follows the pattern of Article 6 of the ECHR, establishes an international minimum standard of conduct for all States Parties, and further elaborates – primarily in Articles 14 and 15 but also in Articles 2, 6, 7, 9, and 10 – the criminal justice standards identified in the UDHR. Article 14 of ICCPR is the most extensive treaty provision on the right to a fair trial. Compared with the ECHR, the ICCPR expands some rights, such as the right against self-incrimination, the right to appeal, the prohibition against double jeop-

<sup>1</sup> On the discussion regarding this topic, see, for example, SUN Yi, "The Role of International Human Rights Law in the Professionalization of Public Administration: The Right to a Fair Trial", in FICHL Policy Brief Series No. 63 (2016), Torkel Opsahl Academic EPublisher, Brussels, 2016 (<http://www.legal-tools.org/doc/91e77e/>).

<sup>2</sup> U.N. Charter, Preamble, Articles 1(3), 13, 55, 56, 62, 68, 76 (<http://www.legal-tools.org/doc/6b3cd5/>).

<sup>3</sup> See generally Thomas Buergenthal, "The Normative and Institutional Evolution of International Human Rights", in *Human Rights Quarterly*, 1997, vol. 19, no. 4, pp. 703-723.

<sup>4</sup> UNGA res. 217A (III), 10 December 1948 (<http://www.legal-tools.org/doc/de5d83/>).

<sup>5</sup> See <http://www.legal-tools.org/doc/2838f3/>.

<sup>6</sup> See <http://www.legal-tools.org/doc/06b87e/>.

<sup>7</sup> David Weissbrodt, "The Administration of Justice and Human Rights", in *City University of Hong Kong Law Review*, 2009, vol. 1, no. 23, p. 26.

<sup>8</sup> Articles 11, 3, 5, 8, 9 of the UDHR.

<sup>9</sup> See <http://www.legal-tools.org/doc/c809a3/>.

<sup>10</sup> Weissbrodt, 2009, p. 38, see *supra* note 7. Also see Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White & Ovey: The European Convention On Human Rights*, Sixth Edition, Oxford University Press, 2012, p. 248.

ardy, and the right to be compensated. The changes from the UDHR to the ECHR and then to the ICCPR show the specification and improvement of the right to a fair trial.

Up to 2016, the right to a fair trial has been elaborated and guaranteed by no less than 20 global and regional human rights treaties and other instruments.<sup>11</sup> The International Convention on the Elimination of All Forms of Racial Discrimination,<sup>12</sup> the Convention on the Rights of the Child,<sup>13</sup> the regional treaties such as the American Convention on Human Rights,<sup>14</sup> and the African Charter on Human and Peoples' Rights<sup>15</sup> also contain fair trial provisions.<sup>16</sup>

Generally speaking, there is near universal consensus on the content of the right to a fair trial even though a few differences still exist, particularly at the regional and national levels. In most cases, however, it is uncontested that the core minimum of the right includes, *inter alia*, the presumption of innocence, the right against self-incrimination, the right to receive notice of charges, the right of the accused to counsel, the right to a prompt and public trial before an impartial tribunal, equality before the law, and the right not to be tried on the basis of a retroactive law. So fundamental has the right to a fair trial become in the administration of justice at both international and national levels that some scholars consider it as part of customary international law, by which all states are legally bound.<sup>17</sup> On this basis alone, China should undertake this obligation.

As China has gradually become a State Party to more international human rights conventions, she is obliged, in accordance with the principle of *pacta sunt servanda*, to respect, protect and promote human rights. China has not ratified the ICCPR, but signed it in 1998 and has been making efforts to ratify it as early as possible. In the circumstances, China shall not behave contrary to the realization of the aim and purpose of the ICCPR, including the protection of the right to a fair trial.

Against this background, let us turn more specifically to the role of IHRL in the advancement of the right to a fair trial in China.

## 2. Legislation

Besides constitutional provisions on some fundamental human rights – not including the right to a fair trial<sup>18</sup> – we have seen several amendments to the Criminal Procedure Law of the People's Republic of China ('Criminal Procedure Law').<sup>19</sup> The Law was adopted at the Second Meeting of the Fifth National People's Congress ('NPC') on 1 July 1979;<sup>20</sup> amended for the first time on 17 March 1996,<sup>21</sup> and then for the second time on 14 March 2012.<sup>22</sup> The amendment to the Criminal Procedure Law of 2012 emphasizes respect for and protection of human rights. Several revisions focus on the concept and aims of human rights protection. The so-called "Human Rights Protection Law" marks a new era for Chinese criminal procedure.

Regarding the revised articles in Criminal Procedure Law of 2012, much attention is given to the principle of the presumption of innocence.<sup>23</sup> As the cornerstone of modern criminal justice, the principle of the presumption of innocence has been recognized as a basic principle in international criminal justice, and to some extent, as customary international law. It is, however, a long journey for China to obtain broad understanding and acceptance of this prominent principle, due to complex historical, political and social factors. There existed no rule on the presumption of innocence in the 1979 Criminal Procedure Law, although it provided for some relevant rules and institutions. Article 12 of the 1996 Criminal Procedure Law provided that, "[n]o person shall be found guilty without being judged so by a people's court in ac-

<sup>18</sup> See 中华人民共和国宪法 (Constitution of the People's Republic of China), 14 March 2004, Chapter 2 (<http://www.legal-tools.org/doc/0764a1/>); see also SUN Yi, 2016, *supra* note 1, p. 3.

<sup>19</sup> 中华人民共和国刑事诉讼法 (Criminal Procedure Law of the People's Republic of China), 1 July 1979 ('Criminal Procedure Law of 1979') (<http://www.legal-tools.org/doc/c5a944/>); 中华人民共和国刑事诉讼法 (Criminal Procedure Law of the People's Republic of China), 17 March, 1996 ('Criminal Procedure Law of 1996') (<http://www.legal-tools.org/doc/90c001/>); 中华人民共和国刑事诉讼法 (Criminal Procedure Law of the People's Republic of China), 14 March 2012 ('Criminal Procedure Law of 2012') (<http://www.legal-tools.org/doc/2b7be5/>).

<sup>20</sup> "Order of the Standing Committee of the National People's Congress of the People's Republic of China (No. 6, 7 July 1979)", in *People's Judicature*, 1979, no. 8, pp. 1–15.

<sup>21</sup> "Decision on the Amendment of the Criminal Procedure Law at the Fourth Meeting of the Eighth NPC on 17 March 1996", in *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China*, 1996, no. 3, pp. 25–47.

<sup>22</sup> "Decision on the Amendment of the Criminal Procedure Law at the Fifth Meeting of the Eleventh NPC on 14 March 2012", in *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China*, 2012, no. 2, pp. 143–192.

<sup>23</sup> With regard to the evolution of the principle of the presumption of innocence in China, see XIE Jinjie, "How to Treat the Suspects and Defendants: Discussion over Presumption of Innocence since 1949", in *Journal of Sun Yat-Sen University (Social Science Edition)*, 2012, vol. 52, no. 4, pp. 169–181.

<sup>11</sup> Besides, international humanitarian law, codified in the four Geneva Conventions and two Additional Protocols, ensures that the right to a fair trial and related criminal justice standards are upheld during periods of non-international and international armed conflicts.

<sup>12</sup> See <http://www.legal-tools.org/doc/43a925/>.

<sup>13</sup> See <http://www.legal-tools.org/doc/f48f9e/>.

<sup>14</sup> See <http://www.legal-tools.org/doc/1152cf/>.

<sup>15</sup> See <http://www.legal-tools.org/doc/f0db44/>.

<sup>16</sup> Weissbrodt, 2009, p. 25, see *supra* note 7.

<sup>17</sup> John Dugard, *International Law: A South African Perspective*, Juta & Co., Lansdowne South Africa, 2005, Third Edition, p. 241.

cordance with law”. However, this article only absorbed the inner core of the presumption of innocence, but did not present the specific contents of the principle. Moreover, the 1996 Law obliged the criminal suspect or defendant to truthfully confess the crimes; that is to say, he or she was not entitled to the privilege of silence.

When it finally comes to the 2012 Criminal Procedure Law, the principle of the presumption of innocence has been implemented further by stipulating that “it shall be strictly prohibited to extort confessions by torture, gather evidence by threat, enticement, deceit, or other illegal means, or force anyone to commit self-incrimination”,<sup>24</sup> and that the “burden of proof of guilt of the defendant in a public prosecution case shall fall on the people’s procuratorate”.<sup>25</sup> Moreover, the 2012 Law has also consolidated this principle by means of specifying other relevant rules. For example, the definition of “hard and sufficient evidence” in the rule on the standard of proof for convictions<sup>26</sup> reflects a combination of Chinese characteristics and international standards, and the rule of exclusion of illegal evidence<sup>27</sup> has been upgraded to law from judicial interpretation which obviously helps the implementation of the presumption of innocence and human rights protection.

Although the 2012 amendment entails significant progress as explained, further improvement is required. The amendment still preserves a rule contrary to the principle of presumption of innocence: “The criminal suspect shall truthfully answer the questions of the investigators, but have the right to refuse to answer questions irrelevant to the case”.<sup>28</sup> Future amendment needs to revise or even abolish this article in order to realize the principle of presumption of innocence to the greatest extent.

Analogous advancement has flowed from revisions of other articles of the 2012 version that manifest and strengthen the value of procedural justice and the concept of human rights protection. How to balance the fight against impunity with the protection of human rights, and how to respond to the humanization of international law<sup>29</sup> – these remain guiding interests directing the further fine-tuning of China’s Criminal Procedure Law.

Besides prominent amendments to the Criminal Procedure Law, the legislative activities involving the abol-

ishment of the system of re-education through labour, the advancement of judicial reform, and the improvement of administrative adjudication<sup>30</sup> also manifest the advancement of the right to a fair trial.

### 3. Law Enforcement

From the perspective of law enforcement, we can observe that progress has been made in several areas of Chinese practice. Firstly, fairness in the criminal justice process has improved. According to the report of “Progress in China’s Human Rights in 2014”,<sup>31</sup> public security, prosecutorial and judicial bodies continued to prevent, identify and redress cases of unjust, false or wrongful charges in criminal justice. While in 2014 the courts at all levels punished criminals in accordance with law, they acquitted 518 defendants in cases of public prosecution and 260 of private prosecution based on the principles of *nulla poena sine lege*, *in dubio pro reo* and “evidentiary adjudication”. The courts altered the judgments in 1,317 criminal cases following retrial.<sup>32</sup> In addition, the Supreme People’s Court (‘SPC’) issued the Measures of the SPC for Listening to Opinions of Defense Lawyers in the Handling of Death Penalty Review Cases,<sup>33</sup> which ensures lawyers’ rights to search case-filing information and consult case files, and empowers lawyers to present defence arguments directly to the judges of the SPC. Furthermore, prosecutorial bodies at all levels made investigation agencies cancel 17,673 cases which should not have been filed; provided 54,949 opinions to correct illegal investigation activities such as misuse of compulsory measures, illegally obtaining evidence and extorting confessions by torture; made 116,553 arrests and annulled 23,269 prosecutions as the conduct in question did not constitute a crime or lacked sufficient evidence.

<sup>30</sup> “Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensive Deepening the Reform”, *People’s Daily*, 16 November 2013, p. 1.

<sup>31</sup> The State Council Information Office of the People’s Republic of China, “Progress in China’s Human Rights in 2014”, available at <http://www.scio.gov.cn/zfbps/32832/Document/1437483/1437483.htm>, last accessed on 15 August 2016.

<sup>32</sup> For example, the Higher People’s Court (‘HPC’) of the Inner Mongolia Autonomous Region retried the case of HUGJILTU who was originally charged with intentional homicide and indecent assault, and absolved him of guilt. The HPC of Fujian Province heard the poisoning case involving NIAN Bin, and acquitted the suspect on the ground of “lacking sufficient evidence”. Both of these cases have already given rise to a heated discussion in China, which in turn contributes to the advancement of judicial justice. See LONG Zongzhi, “A Study on the Issues Embodied in Nianbin’s Being Reconvicted as Criminal Suspect from the View of Jurisprudence”, in *Law and Social Development*, 2015, vol. 21, no. 1, pp. 43–52; XIONG Qihong, “Promoting Litigation System Reform Centering on Trial Through Nianbin Case”, in *China Law Review*, 2015, vol. 1, pp. 31–37; and LU Jianping, “Historical Reflection on Hugjiltu Case”, in *China Law Review*, 2015, vol. 1, pp. 25–30.

<sup>33</sup> “Measures of the SPC for Listening to Opinions of Defense Lawyers in the Handling of Death Penalty Review Cases”, *China Court*, 30 January 2015, p. 4.

<sup>24</sup> See Article 50 of Criminal Procedure Law of 2012.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, Article 53.

<sup>27</sup> *Ibid.*, Articles 54–58.

<sup>28</sup> *Ibid.*, Article 118.

<sup>29</sup> ‘Humanization’ is a new concept and value orientation of international law as it should be. See ZENG Lingliang, “Trends towards Humanization in Contemporary International Law”, in *Social Sciences in China*, 2007, vol. 1, pp. 89–207.

Secondly, judicial transparency has gradually increased. Since 2013 the SPC has begun to implement the Several Opinions on Advancing the Establishment of the Three Major Platforms of Judicial Openness.<sup>34</sup> A trial procedure information platform has been established to enable the litigants to inquire about the progress of their cases. A judgment disclosure platform has been created so that a total of 6,294 million judgments were publicized on the Internet in 2014. An execution information disclosure platform has also been built to improve the system of publicizing the name and other information of people who fail to obey the rulings of the court. On 1 October 2014, the Provisions on Case Information Disclosure by the People's Procuratorates (Trial)<sup>35</sup> were implemented, and since then China has completed the construction of a nationwide system of case information disclosure by prosecutorial bodies.<sup>36</sup>

Thirdly, it is my impression that the mechanism of exclusion of illegal evidence is more strictly implemented.<sup>37</sup> Public security, prosecutorial and judicial actors have further improved the implementation mechanism to exclude illegally-obtained evidence. They would refuse the evidence obtained by these means: confessions of criminal suspects or defendants that are extorted by torture or other illegal means, witness testimony or victim presentations obtained through violence or threats, material or written evidence obtained by violating legal procedures, or other actions that might severely affect justice and to which no correction or supplementation can be made. In 2014, by refusing to adopt illegally obtained evidence, prosecutorial bodies at all levels decided not to arrest 406 people and not charge 198 people.<sup>38</sup>

Fourthly, state compensation and judicial assistance

<sup>34</sup> "Several Opinions on Advancing the Establishment of the Three Major Platforms of Judicial Openness", *China Court*, 29 November 2013, p. 2.

<sup>35</sup> "Provisions on Case Information Disclosure by the People's Procuratorates (Trial)", *Procuratorial Daily*, 18 October 2014, p. 3.

<sup>36</sup> The State Council Information Office of the People's Republic of China, "Progress in China's Human Rights in 2014", see *supra* note 31.

<sup>37</sup> It's also a hot topic in Chinese society, see YANG Yuguan and CHEN Zinan, "On the Questions of Exclusionary Rule in China", in *China Legal Science*, 2015, vol. 1, pp. 4–23.

<sup>38</sup> The State Council Information Office of the People's Republic of China, "Progress in China's Human Rights in 2014", see *supra* note 32.

has also been enhanced. China has made it clear that the principles and conditions guiding the compensation for psychological damage can be applied in state compensation cases, and is making efforts to build a joint mechanism for state compensation to safeguard the lawful rights and interests of compensation applicants. According to the report of "Progress in China's Human Rights in 2014", the courts concluded 2,708 state compensation cases and decided to award compensations amounting to RMB 110 million. China has also improved the criminal victim relief system, reducing or exempting litigation fees for a total amount of RMB 180 million, so as to protect the litigation relief rights of impoverished people.<sup>39</sup>

#### 4. Conclusion

The development of IHRL has not only changed the structure of international law. It has also played an increasingly important role in the professionalization of public administration, including the advancement of the right to a fair trial in China. China has undertaken the obligations to respect, protect and promote human rights through treaties she has ratified. Although China has not yet ratified the ICCPR, the relevant rules concerning the right to a fair trial have in this author's opinion obtained the status of customary international law. These rules are therefore binding on China. As illustrated in this brief, we can see progress in China's administration of justice in recent years both in terms of legislative protection and law enforcement.

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<sup>39</sup> *Ibid.*