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Herausgegeben von Hans-Jörg Albrecht und Günther Kaiser

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Coercive Measures in a Socio-legal Comparison of the People's Republic of China and Germany

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Freiburg im Breisgau 2004

Albrecht/Chen (Eds.)
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Foreword

Compulsory measures is one of the important issues in criminal justice systems that is not only related to the effectiveness of investigation, but also to the protection of an individual's right to liberty. Thus, it is a sensitive topic and it attracts attention from all perspectives. It is one of key issues of legal system reform.

The Center for Criminal Law and Justice at the China University of Political Science and Law and the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany, have had a relatively long-term co-operation relationship. I and Professor Hans-Jörg Albrecht had led a comparative research project on the Sino-Germany Non-Prosecution System, the outcome of this project was published both in Chinese and English in January of 2002, and has received significant attention and made a strong impact on academics and law practitioners in China. This project was a fruitful experience in co-operation. In order to exchange experience of the two countries' legislative and judicial systems, our two institutions decided to hold the symposium on Sino-German Compulsory Systems in Beijing on February 24 - 25, 2003. In total 25 participants gathered together, both from China and from Germany. In addition to heated and in-depth discussion during the symposium, which benefited all participants a great deal, 14 high quality articles were received for publication.

Although there are cultural and social differences between China and Germany, both countries have continental legal systems and therefore have a lot of similarities. For example, there are similar kinds of compulsory measures, such as summons and interrogation, pending trial with bail, residential surveillance, detention (in other countries it is called arrest) and arrest (in other countries it is called pre-trial detention) in China. In Germany, there is the possibility to stop someone to confirm identity, temporary arrest, pre-trial detention. However, we have recognized the slight differences as the term "compulsory measures" in the German Code of Criminal Procedure also includes search, seizure, examination of body, and communica-

tion monitoring et cetera. In China compulsory measures refers to those measures limited to suspects, the personal liberty of the accused. Through our discussion we recognised that both countries are making efforts to reduce using pre-trial detention, but trying to use alternatives such as pending trial with bail. During the discussion we learned that in some states in Germany, electronic monitoring is used instead of pre-trial detention. We may take account of this as China could also introduce this measure into pre-trial proceedings.

Through comparative research we have recognised those weak points in the Chinese system and in practice. In China, there is no judicial control for imposing compulsory measures. Pre-trial detention decisions are made or proven by prosecutors, but not judges. However, there are also positive provisions in our criminal procedure law. The duration of pre-trial detention is clearly provided by law, the extension of it is strictly limited. However, in Germany after 6 months pre-trial detention an application for extension can be made to an appeal court, and there are no time limitations. German participants suggested in their papers there is a need to establish a limitation for the application time.

Compulsory measures is a topic that has attracted our attention for a relatively long time in the academic circle of criminal law and we can see a need to continue this discussion in further in-depth. The Sino-German symposium has added several flowers to the research garden on this topic. In order to share the outcome of this symposium with all readers in the law area, we are editing and publishing the proceedings of this symposium.

I especially thank Prof. Yue, Liling in China and Dr. Thomas Richter in Germany, for the great contributions made by both of them in organising this conference. As well, Prof. Yue, and her assistant Dr. Zhao, Yan have worked hard to make the publication of these proceedings possible. I would also like to thank the Publishing House of the China University of Public Security for supporting us in the publication of the Chinese version. Finally I am very grateful for the successful co-operation with the Max Planck Institute, and especially for the support from Prof. Dr. Hans-Joerg Albrecht.

Chen Guangzhong August 2004

Foreword

The Sino-German workshop on compulsory measures in the investigation of crime and corresponding powers of prosecution and police during the investigative stage of criminal proceedings has dealt with topics that are growing in policy and scientific relevance. Among compulsory measures it is in particular detention prior to trial that is of paramount interest for both countries, Germany and China. This has various grounds. In Germany, there is widespread belief that the focus in criminal procedure has shifted from the trial to pre-trial stages of criminal procedure. With that the investigative parts of criminal procedural law and practice and in particular compulsory measures adopted during pre-trial stages have moved into the centre of political and scientific debates. Second, pre-trial detention has always received attention from the viewpoint of basic rights as well as from a viewpoint of systems of criminal sanctions. Detention deeply interferes with the right of liberty and more specifically with the principle of presumption of innocence. Then, German criminal policies in what has been called the "Big Reform of Criminal Law" („Grosse Strafrechtsreform) of 1969/1975 moved away from short-term imprisonment, which was considered to only have negative results. Pre-trial detention however is nothing other than short-term imprisonment. Furthermore, debates pointed at problems of legitimate grounds for detaining suspects prior to trial, as well as the overall duration of pre-trial detention that can be considered to be adequate in the light of demands put forward by the presumption of innocence.

In China, compulsory procedural measures up to now evidently did not receive that much attention in doctrine and research. However, as China is implementing various efforts to establish a rule of law based criminal justice system and to improve compliance with basic procedural principles.

In particular pre-trial detention concerns a field of policy making and doctrine where various basic principles of criminal procedure such as presumption of innocence and the right to have a fair trial, moreover also the position of the court and its relationship to prosecution services and police,

and finally efficiency of procedure and the necessity to enforce criminal law, demand careful evaluation and balancing.

The workshop has been developed along the line of a couple of goals which should serve to guarantee an in-depth discussion and a maximum of output. Among such goals adopting a comparative perspective was considered to provide for a framework that helps to generate an in-depth discussion. Practitioners of criminal justice, as well as representatives of legal doctrine on the one hand, and normative approaches and empirical socio-legal research on the other hand, have been included in the workshop programme in order to study the problems associated with compulsory measures from the viewpoint of different interests and theoretical perspectives.

The Sino-German workshop and its results demonstrate then that scientific co-operation between China and Germany and in particular co-operation between the China University for Political Sciences and Law have developed considerably, generating an added value from which both sides can derive significant profit. I would like therefore to express my deep gratitude to Professor Chen who has always supported Sino-German scientific co-operation and without whom this workshop could not have been carried out. I would like furthermore to extend my gratitude to the Deutsche Forschungsgemeinschaft (DFG) and the Ministry of Education of the People's Republic of China which has generously provided funds that have allowed us to hold this workshop.

Hans-Jörg Albrecht Freiburg, August 2004

Contents

The Reform and Improvement of Criminal Coercive Measures in China

CHEN GUANGZHONG

The coercive measures in criminal procedure are of great significance to ensure smooth and effective criminal justice and fulfill the goal of criminal procedure. The criminal coercive measures in China were established in 1996 by revising the related regulations in the criminal procedure law of 1979. Compared to the previous system the current system has made great strides. However, with the ever-increasing exposure of the deficiencies of the current system during the past 7 years, various problems arise in practice. Therefore, it is necessary to further reform and improve the criminal coercive measures in China by drawing on experiences and practices in other countries and summarising academic research in the field, in order to comply with the global development trend in criminal procedure.

1. Basic characteristics of criminal coercive measures in China

Great progress has been made in the science-based, democratic and rule of law direction, during the revision of criminal procedure law in 1996, having basically built up a comparatively well-established system. Generally speaking, main characteristics of criminal coercive measures in China can be summarised in the following points.

First, from the perspective of legislative forms, the legal origin of the criminal coercive measures in China is diversified and multifold. In China, the regulations involving criminal coercive measures can been seen in the Constitution, the Criminal Procedure Law as well as the judicial interpretations made by the Supreme People's Court, the Supreme People's Procuratorate and other judiciary organs. These regulations stipulate the adoption

and application of coercive measures from different perspectives and at different levels specify the general principle, specific system and detailed rules of implementation in applying coercive measures, thus constituting the whole regulatory system of coercive measures in China.

Second, in terms of basic rationale, in the past the punishment of criminals was overly stressed, and the safeguarding of human rights was ignored. The current system strikes a balance between the punishment of criminals and the safeguarding of human rights, between procedural justice and substantial justice. For instance, on the one hand, the current system has paid attention to lowering the conditions of arrest so as to meet the practical needs of prosecuting and punishing the criminals. On the other hand, a large number of regulations of human rights protection are incorporated or improved, such as eliminating the investigation of shelter (Sou Rong Shen Cha), improving the conditions of detention, stipulating that the public security and judiciary organs should timely withdraw or change the improper coercive measures, et cetera.

Third, as far as the category and structure are concerned, the criminal coercive measures in China are diversified in category, comparatively complete in structure and scientific in system. There are five criminal coercive measures in Chinese legislation, namely, summon for detention, bail, living at home under surveillance, detention and arrest. These measures represent different degrees of restriction of civil rights, respectively apply to suspects or defendants in different cases, interact with each other, constitute a comparatively complete structure and can basically adapt to the objective needs of judicial practices.

Fourth, with regard to the specific content, China has comprehensive and detailed regulations on criminal coercive measures. The rule of law is apparently enhanced in criminal justice. Clear regulations are made for each coercive measure in terms of the main body, subjects, the application conditions, specific procedure, and time limit and so on, enabling all coercive measures to follow the principle of the rule of law and embodying the basic requirements of the rule of law.

2. The necessity of reforming criminal coercive measures in China

Remarkable progress was made in the reform of criminal coercive measures in 1996. However, we have to be fully aware that obvious deficiencies

and defects still exist in the current coercive measures in China due to the philosophy and technology. In judiciary practice, the effect of using coercive measures is not fully consistent with our expectation. Therefore, at present, it is imperative to further reform and improve the criminal coercive measures in China.

A. Reforming and improving the criminal coercive measures are the inevitable requirements to adapt to the political and economic development and changes in China.

The development of a criminal justice system is inseparable from the specific time and place when and where it is created and carried out. According to German jurist Gustav Radbruch, if we consider law as a form of social life, the procedure law as the 'law on forms' is the form of the form, just like the masthead which would sway vehemently with the slightest movement of the boat. There is no exception in criminal coercive measures. In recent years, great changes have taken place in political and economic situations in China. On the one hand, socialist market economy has been gradually established and improved. The citizen's awareness of individual rights has been stimulated and gradually awakened, urgently in need of being recognised and protected. On the other hand, however, "administering the country according to the law, building up a socialist country of the rule of law", has been incorporated in the amendment of the Constitution, making it a necessity to regulate and restrict the authority of the governmental organs that would thus follow the principle of the rule of law and the procedure. On this basis, the 16th Party Congress further pointed out that the "socialist legal system must ensure the equity and justice of the whole society" and the "judicial process should be improved to guarantee the legitimate rights and interests of citizens and corporations". Hence, the new historic period has presented a clearer goal of building up the Chinese justice system consistent with the rule of law, i.e., further intensifying human rights protection in criminal justice and demonstrating the spirit and content of the rule of law. To tally with this goal, it is necessary to reform and improve the criminal coercive measures in China.

B. Reforming and improving the criminal coercive measures in China is the objective demand of solving various problems existing in the judiciary practice in China

At present, various problems exist to a different extent in the judiciary practice in China, some of which are outstanding and gravely damaging the dignity of the rule of the law and the authority of the judicial organs. Those

problems are mainly demonstrated in the following aspects: first and foremost, detention beyond time limit is not unusual. According to par. 2 of Article 69 of the Criminal Procedure Law, major suspects who "commit crimes from place to place, in several cases or by groups" can be detained for 30 days before application for an arrest warrant. Some people distort this regulation intentionally in some places by applying it to other cases beyond the stipulated three cases and violate the suspect's right to liberty. In some other places, the regulation in the criminal procedure law is unscrupulously violated. It occurs frequently that the suspect is detained for several months over the time limit when he should be released. Secondly, *de facto* detention is commonly seen. In some places, while implementing the coercive measure of living at home under surveillance, another place would be designated as the place under surveillance no matter whether the suspect or defendant has a fixed residence in the location where the executing organ is situated. In some other places, the suspect or defendant under surveillance is isolated from the outside world. It is also required that prior approval from the executing organs should be filed for before relatives and lawyers visit the suspect or defendant. Such practices have changed living at home under surveillance into de facto detention, obviously departing from the original intention of living at home under surveillance. Thirdly, human rights protection in the coercive measures is difficult to guarantee. In accordance with the Criminal Procedure Law of China, from the date of execution of coercive measures, the suspect is entitled to the right to the assistance of a lawyer for such issues as legal consultancy, serving as the agent for petition, complaining and applying for obtaining bail. However, since the lawyer's right to visit is greatly restricted, the aforementioned rights are virtually difficult to fulfil. In addition, other issues such as obtaining evidence by unlawful means, e.g. torture and coercion are not extinguished even if the law strictly forbids them. Fourthly, the adoption of some administrative measures or means has imposed greater impact on the system of coercive measures, among which the two outstanding ones are "Liang Zhi" and "Shuang Gui" (to request an individual to a designated place in designated time to give an explanation or make a confession). Though law enforcers have played some part in this, the deficiencies in system cannot be neglected. Therefore, without timely reform and improvement of these deficiencies, endless damage would be imposed on the judicial practice.

C. Gaps still exist between the criminal coercive measures in China and

the United Nations (UN) norms of criminal justice and international human rights standards.

The current laws have initially established a system safeguarding rights in the criminal justice system with a series of regulations confirming and guaranteeing human rights. They have approximately reached the criminal justice standards prescribed in the international conventions. However, there is no denying that inconsistency still exists between the current laws and regulations with international norms in criminal justice. As far as criminal coercive measures are concerned, by referring to the regulations on coercive measures in the UN International Covenant on Civil and Political Rights and other related treaties, apparent deficiencies still remain in Chinese legislation. For example, as to the coercive measures about depriving freedom, up till now, Chinese legislation has not yet set up a corresponding judicial review mechanism or "habeas corpus". After the suspect or defendant is arrested or detained, no neutral third party reviews the legitimacy of the arrest or detention. Meanwhile, the suspect or defendant has no channel of presenting objections and seeking remedies. Furthermore, no strict guarantee in system is instituted in Chinese laws in terms of the rights to be tried or released promptly after arrest. Although Chinese laws have clear regulations on the timeframe of the investigation and detention after arrest, at the same time, it also allows extending or recalculating the timeframe owing to various reasons. Moreover, all procedures on determining whether to extend the time of detention are administrative approval procedures. In practice, these regulations are often abused, so the suspect or defendant may be detained for a long time awaiting trial. In addition, the general rule that persons awaiting trial shall not be detained in custody has become a rare case in China. Although Chinese criminal procedure law has stipulated bail, it is unable to be fully applied in practice. On the contrary, the application scope of arrest has been artificially extended. To some organs and staff, as long as there is sufficient evidence to prove the suspect or defendant committed the crime, arrest is applied no matter whether the gravity of crime is enough or a danger to society existed. Although the lawyer may apply for bail for his client, it is difficult to achieve since the law is not detailed enough. It is necessary to point out that China participated in the formulation of the UN Charter and has signed, ratified or accessed 18 international human rights conventions including the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. In accordance with the prin-

ciple that "treaties should be honored" in international law, except reservations, China should observe the criminal justice norms as well as human rights standards established in the above-mentioned international treaties. Therefore, China should timely adjust inconsistentencies to adhere with international conventions. Otherwise, we face losing credit with the international community and being plunged into a negative situation.

3. Some suggestions for the reform of criminal coercive measures in China

As for the various deficiencies of criminal coercive measures in China exposed in legislation and practice, China should reform and improve the actual conditions in China by referring to UN human rights norms and drawing on experience and good practice in other countries.

A. Warrant approval and judicial review system should be implemented to improve the application procedures of arrest.

Since arrest entirely deprives the freedom of the citizen and represents the severest coercive measure, it is vital to strictly control the procedure. However, grave weakness exists in Chinese law in this aspect. In accordance with Chinese Criminal Procedure Law, the Public Security Organ should apply to the People's Procuratorate for arrest if it considers it necessary to arrest the suspect during investigation. It is subject to the People's Procuratorate to decide whether or not to arrest the suspect. In cases investigated by the People's Procuratorate itself, the investigating section considering it necessary to arrest the suspect should apply for review by the arrest review section. However, as the public prosecutor, the function of the People's Procuratorate is, to some extent, of the same nature of the investigating bodies, it would be doubtful whether the People's Procuratorate could make the decision of arrest in an objective and neutral manner in such cases. This weakness is more prominent in the cases investigated by the People's Procuratorate. Besides, in Chinese law there is no regulation that, after the arrest, a neutral third party should review the legitimacy of the arrest. Although, in accordance with the criminal procedure law in China, the person arrested by People's Court or People's Procuratorate, or by the Public Security Organ and approved by People's Procuratorate must be interrogated within 24 hours. However, since such review is conducted by the organs that make the decision itself, it is entirely a "self-discipline" mechanism and the effect is therefore limited. As a result, the investigating

organ has absolute power in arresting a suspect. Obviously, it is easy to abuse this power and is unfavourable in safeguarding the legitimate rights and interests of the suspect and defendant.

To solve the above-mentioned defects, the author believes that a warrant and judicial review system should be implemented. In a warrant system, before adopting related coercive measures to the suspect, the investigating organs should apply to a judge or other officials with judicial authority for a warrant before the coercive measures are carried out. The judicial review system would require that, after the coercive measures are applied to the suspect, the investigating organs should promptly bring the suspect to the judge or other officials with judicial authority who would review whether the coercive measures are justified and then decide if the suspect should be detained or released. Hence, the warrant and judicial review system would put the whole process of coercive measures by the investigating organs under the control of the judge, which would not only prevent the improper use of coercive measures in advance, but also provide opportunity for later corrections in cases where coercive measures are determined unfounded. It is undoubtedly of great significance to regulate the proper exercise of the authority of government organs and ensure that the rights and interests of citizens are not interfered with unreasonably. In fact, the warrant and judicial review system are also universally adopted in western countries. For example, in the UK, except in cases of "arrest without warrant" stipulated by the law, the police must apply to the Magistrate prior to the arrest of any person. Only with the permission of the Magistrate and in accordance with the signed warrant, can the arrest be executed. After the arrest, the police must bring the suspect to the Magistrates Court in a short time period specified by the law and the Court reviews and decides either to detain the suspect or set bail. As well a similar system can also be found in the USA, Germany and other countries. In order to improve the system in China we should learn the matured practices from these countries. According to the reality in China, it is suggested that the following reform measures should be taken. Firstly, in cases investigated by the public security organs, the arrest of the suspect is approved by the prosecuting organs. If the decision of arrest is challenged or the suspect is detained longer than the specified time, a petition can be made to the court who can withdraw the decision of arrest. Secondly, in cases investigated by the prosecuting organs, the arrest of the suspect is approved by the court.

B. The application conditions and procedures of living at home under surveillance should be revised so as to comprehensively reform the system of living at home under surveillance.

As mentioned above, in judicial practice in China the coercive measure of living at home under surveillance has always been changed into de facto detention. Of course, it is owing to the decision of law enforcement. Fundamentally, this deficiency is caused by the weakness in legislation. In accordance with the criminal procedure law in China, the restriction of living at home under surveillance is generally applied to those suspects or defendants with a "fixed residence". However, this regulation is difficult to implement because with the suspect or defendant in his own residence it means that the monitoring officers must also stay in the defendant's residence for a long period of time, which is obviously difficult. Under such circumstances, only two alternatives are available: firstly, placing the suspect or defendant in his fixed residence and not having the officers stay with him, but regularly or irregularly monitor his activities or require him to voluntarily report to the executing organs. Secondly, placing the suspect or defendant in a "fixed place" designated by the executing organs so as to conduct surveillance. In the first case, the suspect or defendant actually is not subject to strict control. His treatment, to a great extent, is equal to that of bail. However, since there is no need to provide a guarantor and money as bail, the suspect or defendant actually enjoys less restriction than a suspect out on bail. While in the second case, since there is no clear and specific regulation on the legitimate rights and interests of the person under surveillance, it is prone to be turned into de facto detention. For instance, there is no clear regulation that the executing organs should timely inform the relatives of the suspect or defendant of the reasons, conditions, time, location and other information of the surveillance after it is adopted. As a result, in many cases, the relatives of the person under surveillance do not know of the whereabouts of the suspect or defendant. As well, the law fails to state clearly whether the suspect or defendant is entitled to meet his family and his lawyer. In practice, the executing organs always prevent the suspect or defendant from meeting with his relatives or lawyer on this ground. So, to a great extent, living at home under surveillance has been changed into de facto detention or custody. But compared with the suspect or defendant arrested or detained, the rights of the resident under surveillance have been deprived and restricted more than the former, in particular, the legal time period of the living at home under surveillance is longer than that of the detention. Hence, grave weakness exists in the system of living at home under surveillance in China, so it can hardly be brought fully into play. Therefore, it is necessary to comprehensively reform and improve this system.

The author believes that the following aspects should be considered in reforming and improving the system of living at home under surveillance. Firstly, narrowing the scope of the persons subject to living at home under surveillance. According to the current regulation, if the suspect or defendant meets the conditions for bail and living at home under surveillance, in principle, bail instead of living at home under surveillance is applicable. The measure of living at home under surveillance can only be applied in cases when the suspect or defendant has no fixed residence (including the location of the domicile or a comparatively fixed residence in other places) in the location of the executing organs and the suspect or defendant is most likely to escape or engage in activities endangering the society. Secondly, improving the application procedure of living at home under surveillance. In approving the procedures for living at home under surveillance, it is necessary to clarify that the public security organs can decide on their own to apply the measure of short-term living at home under surveillance for up to a month and apply for approval from the People's Procuratorate to extend the time to between 1 to 3 months. Thirdly, shortening the period of living at home under surveillance. The author suggests the general period should be three months. In special cases, with approval of the People's Procuratorate, it can be extended by one month. Fourthly, defining the rights of the person under surveillance. After the suspect or defendant is confirmed living at home under surveillance, the competent organs should timely inform the relatives about the conditions, reasons, location and other information of the living at home under surveillance. At the same time, the suspect or defendant can meet relatives and lawyers at any time without the approval of the executing organs.

C. Improve the defense system and enhance the human rights protection in coercive measures

In accordance with criminal procedure law in China, from the date when the suspect is interrogated for the first time by the investigating organs or when the coercive measures are taken, the suspect can hire a lawyer and have access to legal assistance from the lawyer. Also the suspect can be represented by the defender, from the date the case is transferred for review and prosecution. However, due to legislation and practice, the right to defense of the suspect or defendant in the coercive measures is not fully guaranteed, which is mainly demonstrated in the stage of investigation. During the investigation stage in China, lawyers have very limited rights, which are even subjected to various restrictions throughout the investigation. In light of the criminal procedure law in China, lawyers retained in the stage

of investigation mainly have the following rights: meeting the detained suspect to obtain information related to the case, learning from the investigating organs about the crime the suspect involved in, providing legal consultancy for the suspect and serving as the agent for petition and complaint, applying for bail in the case the suspect is arrested. Hence, lawyers in China have no right to be present when the investigator interrogates the suspect. Inevitably, this leads to another related issue, i.e., obtaining a confession through coercion cannot be prevented effectively even if it is strictly forbidden by law, this greatly violates the legitimate rights and interests of the suspect. Besides, the already limited rights entitled to lawyers are restricted by various means, including the restriction in the legislation, as well as the undue restriction from the executing organs. Take the lawyer's right to visit his client as an example. In accordance with the regulations in the Criminal Procedure Law in China, while a lawyer visits the detained suspect, an investigator can be present in some cases when necessary. This greatly hinders the interview between the suspect and his lawyer. If the investigator violated the law, the suspect may feel frustrated and not dare to speak about it, nor can the lawyer do anything to help him. Meanwhile, various restrictions have been imposed on the lawyer visiting the suspect by the executing organs, such as the time and frequency of visit, refusing the visit with the excuse of national secrecy and so on. The deprivation or restriction of the lawyer's rights to visit makes it difficult for the lawyer to provide services, such as serving as the agent for petition and complaint.

To earnestly safeguard the right to defense of the suspect and strengthen human rights protection in the coercive measures, the improper restrictions of the legitimate rights of the lawyer should be ruled out in China. For example, officers should not be present during visits; instead, the investigator can only monitor the visit within a visible but not audible distance, so as to ensure a free and sufficient exchange between the lawyer and suspect. Rules should be made to prohibit the public security organs from restricting the lawyer's right to visit, otherwise they should bear the responsibility for legal consequences. Also, the scope of the lawyer's rights during the investigation stage should be widened and include the right to be present during the interrogation to be able to monitor the interrogation by investigators, prevent and impede coercion and other unlawful means used to obtain a confession and guarantee the legitimate rights of the suspect.

D. Monitoring mechanism should be set up to prevent longer detention

As mentioned above, longer detention is a chronic malady in criminal

procedure in China. Without establishing a relevant system or improving the related rules to prevent long detention, it is unfavourable for human rights protection in coercive measures and poses a negative impact on procedural justice and its efficiency. Hence, the author believes that longer detention should be prevented in the following two aspects.

Firstly, the detention house should be neutralised and be obligated to ensure the legitimate rights of the detainee. In law enforcement practice in China, generally, the suspect is detained in a detention house. In the administrative structure the detention house and investigating organs belong to the same department with the same task, both of them aim to investigate the truth of the case, prosecute and punish the criminal. Such relationship of stakeholders makes it impossible for the detention house to remain neutral between the investigating organs and the detainees and fulfill its responsibility of protecting the human rights of the detainees. On the contrary, to achieve the common goal of prosecuting and punishing the criminals, the detention house might provide conveniences to the investigative officers for some malpractice. Therefore, the author maintains that the detention house should be independent from the public security organs and subject to the leadership of the justice administrative authorities (local justice bureaus at various levels), who has no responsibility of prosecuting and punishing the criminals as the investigating organs, nor the responsibility of assisting investigating organs. So, the separation of main bodies and the differences in responsibilities have provided possibilities for the detention house to remain neutral between investigating organs and the detainee. The law should specify that one of the main responsibilities of the detention house is to ensure the rights of the detainee are fulfilled, including informing the detainee of his rights during detention, such as the detention period specified by the law. At the same time, if the detention period is beyond that specified by the law, the detention house is obliged to inform the organs adopting coercive measures to release or change the coercive measures, and entitled to ask the People's Procuratorate and Court for legal supervision and judicial review on longer detention.

Secondly, establishing an effective judicial remedy system is important. In line with the regulation in the current law, in terms of longer detention, the suspect, defendant and his legal agent, close relative and the retained lawyer are entitled to request the Public Security Organs, Procuratorate and the People's Court to release the suspect. However, such remedy to detainees is difficult to use due to the lack of effective judicial remedy measures. To this end, the author thinks that, first of all, the legal supervision of the

People's Procuratorate should be reinforced, during which the People's Procuratorate should immediately issue the suggestion letter of correction and require the detention organs timely release upon finding out about the longer detention. More importantly, the rights to review whether the longer detention or continued detention is justified should be given to the People's Court. The specific review procedure can be designed as the mode of hearing. The court should have the authority to order an immediate release of the detainee after the review by hearing.

E. Relationship between "Liang Zhi" and "Shuang Gui" and criminal coercive measures should be adjusted

According to Article 20 of the Administrative Inspection Law in China, in investigating the acts breaking the discipline, the suspect may be ordered to explain and state the issues concerned in the investigation at the designated time and in the designated location according to the actual condition, however the person should not be put into detention or de facto detention. This is the so-called "Liang Zhi". In the instruments about the inspection of Party discipline, similar regulation is stated as specified time and location, i.e., the so-called "Shuang Gui". As far as the content is concerned, "Liang Zhi" and "Shuang Gui" have been involving the restriction and deprivation of the freedom of the citizen and should be subject to the related regulations in the constitution and law. But that is not the fact. Procedurally, "Liang Zhi" and "Shuang Gui" are decided by the administrative authorities or the Party departments themselves. With regard to the timeframe, the laws and instruments concerned fail to define the length of the specified or designated timeframe. Although related laws and instruments have stipulated that "detention or de facto detention are not allowed", it is often changed into de facto detention in the practice owing to the lack of institutional supervision. From this, we can see that, as to the occupational crimes committed by staff in party and governmental organs, "Liang Zhi" and "Shuang Gui" approaches have endowed the administrative inspection organs and the Party discipline inspection departments more authority than the Public Security organs in ordinary criminal cases. Strictly speaking, the above approach is prone to be regarded as a breach of constitution. However, on the other hand, we should also see that it is still a long-term objective of criminal policy in China to crack down on occupational crime, especially embezzlement and bribery. In order to strongly and effectively crack down on such crimes, it is not feasible now to abolish the approach immediately. The author believes that the problem can only be solved thoroughly by combining the reform of this approach with the improvement of the investigating

system. Specifically, the author thinks that by learning from the Independent Commission against Corruption (ICAC) in Hong Kong and separating the investigation of occupational crimes committed by senior officials from the responsibility of the Procuratorate, a specialised occupational crime investigation organ could be set up directly attached to the Central Government, and would be in charge of the cases investigated by the People's Procuratorate themselves and endowed with greater authority not only in adopting coercive measures and exercising the right of direct prosecution. At the same time, the present investigation and coercive detention in the name of Party discipline and administrative measures by the Party discipline inspection departments should be eliminated. Of course, such reform can hardly be put into place in a short period of time. Therefore, at present, the following aspects should be followed at least. Firstly, the relevant laws or instruments should clearly indicate the timeframe, such as 48 hours, of "Liang Zhi" and "Shuang Gui". Secondly, it is necessary to clarify that, after the review during a specified timeframe, the suspect should be immediately transferred to the concerned Public Security or judicial organs to determine if he is believed to be involved in crimes. If the suspect meets the conditions for coercive measures according to the law, the Public Security organs should decide whether to apply the criminal coercive measures according to the law instead of continuing to leave the suspect in the designated place for inspection. The suspect should be immediately released if he only violates the laws and regulations or breaks the discipline, but the organs and departments concerned can continue the inspection and impose administrative punishment or punish according to the Party discipline. The suspect should be immediately released if he is believed neither of committing the crime nor of violating the regulations or breaking the discipline.

Compulsory Measures and Human Rights Protection in China's Criminal Proceedings

WU YANPING

How to realise the objective of compulsory measures, particularly in effectively controlling crime while protecting lawful rights and interests of citizens (including criminal suspects and the accused), has been one pursuit of jurists and lawyers in all countries. The Chinese legal circle has also made tremendous efforts and accomplished great achievements for this cause, which are demonstrated in the revised Criminal Procedure Law and shown specifically in aspects as follows.

I. Abolishing "detention for interrogation" (shou rong shen cha) and further reforming conditions for compulsory measures.

Detention for interrogation originally is an administrative measure in which the public security organs (police) detain persons who are suspected of fleeing and about to commit crimes, or have committed acts but refuse to tell their true names, addresses and origins during interrogation. This kind of detention has several shortcomings: first, this measure was provided by the administrative act, but not criminal procedure law, however, it was quite widely to be used by police and even the prosecutor in criminal proceedings; second, this measure is decided on and imposed by police alone and without any judicial control mechanism; third, restraining personal liberty for too long, normally it would last for three months and under special conditions for one year. Thus, detention for interrogation was abolished through the revision of the Criminal Procedure Law in 1996. In the meanwhile, in order to ensure that police have sufficient means to investigate cases, the legislator tried to cope with the situation and revised conditions for arrest and pre-trial detention in Criminal Procedure Law. For arrest

(short-term detention), except for old conditions, they added two conditions in the law, one is "who are not telling true names and addresses and of unknown identity" and the other is "who are suspected of fleeing about to commit crimes, repeatedly committing crimes and ganging up to commit crimes". For the pre-trial detention, the former law requires that main facts of the case have been clarified and the new law provides that if there is evidence to prove the facts. This revision on the one hand, has not only strengthened the protection of citizens' rights, but also offers police and prosecutors proper means and times to investigate cases lawfully.

II. Providing for multiple compulsory measures

The Chinese legal system and tradition are close to the continental system, which is different from the common law system. We use the general term "compulsory measure" in the law, which refers to those measures used to limit the liberty of the suspect or accused during the investigation and pre-trial phrase. There are in total five kinds of compulsory measures in Chinese Criminal Procedure Law, namely summons and interrogation; pending trial with bail; surveillance of residence, arrest and pre-trial detention.

We can see from the content of these compulsory measures that the law provides a relatively wide range of compulsory measures with different degrees of limitation of personal liberty, which depends on the actual situations of criminal suspects and the accused. The principle of imposing compulsory measures which provided by the law is: Compulsory measures should be imposed as little as possible and it should be the last mean to be used in pre-trial detention (Article 60 of the Criminal Procedure Law).

III. Strict limitation in law on the application of various compulsory measures

To ensure the correct application of compulsory measures and prevent infringement upon citizens' legal rights by compulsory measures abuse, the Criminal Procedure Law has made strict restrictions on state organs with applicable compulsory measures and applicable objects and conditions. According to provisions in Article 50, 59 and 61 of the Criminal Procedure Law, only authorised police, prosecutors or courts could impose compulsory measures on a suspect or the accused.

Rules on system cannot completely tackle compulsory measures abuse, so the Criminal Procedure Law has set down strict rules on use of compul-

sory measures. Firstly, compulsory measures can only be imposed on suspects or the accused according to the law. Secondly, those conditions provided as prescribed in Article 238 of the Criminal Law of the People's Republic of China, where a functionary of a state organ by taking advantage of his functions and powers detains another person or unlawfully deprives the personal freedom of another person by any means, he shall be given a heavier punishment of being sentenced to a fixed-term imprisonment of not more than three years, criminal detention or public surveillance; if he causes serious injury to the victim, he shall be sentenced to a fixed-term imprisonment of not less than three years but not more than 10 years.

IV. Supervision mechanism in compulsory measures

To prevent possible compulsory measures abuse by public security organs and procuratorates and courts from infringing upon citizens' rights, the Criminal Procedure Law sets down a series of restrictive measures for rights applicable for compulsory measures and in the first case for arrest. It is specifically stipulated in the Criminal Procedure Law that the public security organ does not have the right to decide upon arrest by itself. When a public security organ thinks it is necessary to arrest a criminal suspect, it should report to the people's procuratorate for examination and approval. This kind of restrictive procedure will prevent public security organs from infringing on citizens' legal rights with the wrongful use of arrest. When a public security organ is implementing a decision of arrest made by the people's procuratorate and people's court, if any fault is found the public security organ may immediately report to the organ that made such decision and ask for reconsideration, which is also a kind of restriction on the decision of arrest made by the people's procuratorate and the people's court. It is stipulated in Article 8 of the Criminal Procedure Law that the people's procuratorates conduct legal supervision on criminal proceedings according to law. Such legal supervision is in favour of the appropriate use of compulsory measures by public security and judicial organs according to law and prevention of the abuse of power.

According to provisions in Article 65 and 72 of the Criminal Procedure Law, public security and judicial organs should question arrested and detained criminal suspects and the accused within 24 hours after their arrest, and must release them and issue release certificates when such arrest and detention is found to be wrongful. This is a kind of self-restrictive provision.

The above restrictive measures have played a good positive role in ensuring public security and judicial organs' appropriate use of compulsory measures and effective protection of citizens' legal rights.

V. Strengthened self-relief in compulsory measures

To protect the legal rights of citizens, particular criminal suspects and the accused, the revised Criminal Procedure Law has strengthened self-relief in this aspect.

The previous Criminal Procedure Law prescribed that the accused could engage counsel to defend them in the trial stage. The revised Criminal Procedure Law advanced the time for the criminal suspect to engage counsel from the trial stage to the prosecution stage, which certainly is very much in favour of the protection of the legal rights of criminal suspects and the accused.

According to provisions in the revised Criminal Procedure Law, criminal suspects are not allowed yet to engage counsel in the investigation stage (this is mainly limited by Chinese judicial reform and development state). However, according to Article 96, criminal suspects cannot engage counsel to defend themselves in the investigation stage, but they can hire a lawyer to give them legal advice and protect their legal rights.

In addition, the law has also vested criminal suspects and the accused with a series of self-relief rights. Taking Article 75 of the Criminal Procedure Law for example, criminal suspects, the accused and their legal personal representatives, immediate family or lawyers and other counsel entrusted by the criminal suspects and the accused have the right to ask for the removal of compulsory measures taken by the people's court and procuratorate or public security organs exceeding legal duration. Article 29 of the Criminal Procedure Law prescribes that judges, procurators or investigators shall not accept invitations to dinner or presents from the parties to a case or the persons entrusted by the parties and shall not in violation of regulations meet with the parties to a case or the persons entrusted by the parties, otherwise, the other parties to the cases and their representatives shall have the right to request him to withdraw.

Through the above elaboration, we can say that Chinese criminal proceedings activities give full attention to the protection of citizens' legal rights, while disclosing and cracking down on crimes in order to effectively control crimes without doing harm to the innocent and protecting human rights including the legal rights of criminal suspects and the accused. Our

efforts in protecting the lawful rights and interests of criminal suspects and the accused in particular have resulted in a notable effect.

Nonetheless, we are aware that compared with some advanced countries, we still have much consummation and improvement to achieve. For example, should criminal suspects be allowed to engage counsel in the investigation stage? Can criminal suspects and the accused be vested with the right to silence? How to establish and perfect the exclusive rule for illegal evidence? These questions are all related to the effective protection of the legal rights of criminal suspects and the accused. We will continue to make efforts to perfect our law, strengthen control of social crimes, reinforce human rights assurance and strive to realise the "Strike and Protection" double-value goal of criminal compulsory measures.

The Essential Conditions of Pre-Trial Detention in China

LIU GENJU & YANG LIXIN*

Pre-trial detention is the compulsory measure used to deprive suspects of personal liberty during pretrial procedures. Criminal procedure laws of all countries clearly prescribe the essential and procedural elements applicable for pre-trial detention and relevant legal control systems of pre-trial detention. In China, pre-trial detention is the hardest compulsory measure in criminal proceedings and Chinese criminal procedure law has clear provisions on pre-trial detention while the essential elements of pre-trial detention are the preconditions to ensure correct application of pre-trial detention. That is why this article focuses on discussion of this issue.

Pre-trial detention is a kind of measure provided by law for depriving a suspect or a defendant of his personal liberty who might be sentenced by certain penalty. The purpose is mainly to preserve evidence related to the crime committed by the suspect and obtain the above evidence through interrogation of the suspect or defendant. At the same time, detention is also used for preventing other social dangers from happening, e.g. the suspect or defendant commits suicide, escape or destroy or counterfeit evidence in collusion to make each others confessions tally, interfere with witnesses testifying or even carry out other criminal activities. Therefore, the pre-trial detention in Chinese criminal proceedings has the characteristics of preventing damage to the smooth proceeding of litigious activities and repeated crimes to some extent. Of course, it may also cause the deprivation of the suspect or defendant's personal freedom in a period of time. To protect citizens' personal freedom from illegal violation, [1], Article 37 of the Chinese Constitution has vested every citizen with the right of being free

[1] [America] Compiled by Jorge. F. Kerr, *the Rights of Defendant in American Criminal Cases* from the 1st Volume of *Translations of Legal Works* in 1980 translated by Gengshu Liu.

from wantonly pre-trial detention, "any citizen is free from pre-trial detention unless approved or decided by people's procuratorate or people's court as well executed by a public security organ. It is not allowed to deprive or set limitation on citizen's personal freedom by the means of false imprisonment or others illegal methods, nor is unlawful search of citizen's body permitted." The above provision in the Chinese Constitution embodies a procedural assurance towards citizens' freedom in a legalised country, and the objectives of it on one hand lies in limitations on a country's power and prevention from abuse of national power, bestowal of right of defence and resistance to a country's infringement on a citizen, on the other hand is to bring criminal justice into full play so as to promote justice and outstand civilisation. "Freedom amounts to a kind of value. For this reason, any limitation set either by direct criminal law or by other rules on citizen's freedom requires a detailed depiction of reasons and conditions of such limitations being met. This is not only an abstract question raised by philosophers of law but also a knotty and unavoidable problem lies ahead of legislator in every democratic country."[2], Thereout, every country in the world has prescribed clear conditions of pre-trial detention and our country is surely without exception. The Chinese Criminal Procedure Law enacts explicit provisions about the essential conditions, procedural requirements as well as related contents in order to bring about the constitutional function of protecting a citizen's fundamental rights and the justifiability of detention. The conditions of pre-trial detention prescribed in legislation are the essential elements of maintaining justifiability of detention and belong to a type of norms and assurance proving the standard; While the procedural requirements serves as an element realising the proper application of pre-trial detention conditions and is a kind of norm and assurance for public security and judicial organs in approving and executing pre-trial detention. The law in these two aspects standardises and forms the conditions of pre-trial detention, which not only ensure the legal exercise of the State's right to prosecute, but also protect citizens' basic rights from unlawful violation. Owing to limited space of this article, hereinafter the writer will only research the essential conditions for the reader's reference.

The establishment of pre-trial detention conditions as well as its level of stringency is directly tied to different historical periods, various countries and their objectives of litigation. However, no matter how it varies in every

[2] Zhang, Wenxian *Research of Western Philosophical Ideology in the 20th Century*, P.546, Law Press, 1996.

country, something remains in common, i.e. seeking an ideal meeting point and balance among punishment of crimes, assurance of smooth criminal proceedings and guarantee of human rights, moreover, this goal is fully reflected in the essential conditions of pre-trial detention. With respect to this, law and concerned judicial interpretations definitely stipulate the conditions of pre-trial detention. Article 60 of the Law of Criminal Procedure specifies: "when there is evidence to support the facts of a crime and the criminal suspect or defendant could be sentenced to a punishment of not less than imprisonment, and if such measures as allowing him to obtain a guarantor pending trial or placing him under residential surveillance would be insufficient to prevent the occurrence of danger to society, thus necessitating his pre-trial detention, the criminal suspect or defendant shall be immediately pre-trial detentioned according to law." From this, we may conclude that pre-trial detention should be subjected to three conditions: grounds for suspect, condition of penalty, as well as the condition of necessity.

I. Grounds for suspect

The so-called grounds for suspect means that a significant reason (proof) leads to the belief that a crime has been committed and it has been committed by the suspect. As for this condition, Article 60 of the Law of Criminal Procedure specifies "there is evidence to support the facts of a crime." To be specific, Article 26 of *the Rules* of 6 organs, Article 77 of *judicial interpretations* of the supreme people's court, Article 86 of *the regulations* (hereinafter abbreviated as regulations) as well as Article 115 and 116 of *the provisions about procedures of criminal cases handled by public security organs* (following abbreviated as the provision) have all mandated an explicit judicial interpretation of grounds for suspect when deciding on pre-trial detention, i.e. (1) there is evidence to support the facts of a crime; (2) there is evidence to prove that the suspect committed a crime; (3) some evidence to prove that the suspect committed a crime has been verified. The fact of crime may be one of the facts of several crimes committed by the criminal suspect. As to the above stipulations of legislation, we may characterise it in 2 aspects: first there are facts of crime and criminal offenders; second there is evidence to prove the crime, moreover, this evidence has reached the extent of "some evidence has been verified". In view of the former one, it is about the issue of realising a country's rights of penalty and guarantee of human rights from the angle of the goal of pre-trial detention. Viewing from the technique of legislation, it provides a compara-

tively detailed and reasonable dimensionality and measuring scale beyond or below which may result in the prosecution of an innocent person and a handicap of the criminal justice proceedings, to pre-trial detention of a criminal suspect or defendant. With respect to its practical application it proves to be operational, executors of the law realise at least in their subconsciousness that pre-trial detention should be conditioned on statutory "fact" and definite "person". As to the latter, it is about the requirement of evidence and proof. Evidence provides grounds for fact of a crime and pre-trial detention presupposes the existence of crime facts. Evidence and crime facts remain as inseparable as the relationship between body and flesh and blood of an animal. These two aspects are integral and overlap under many circumstances. Thus, evidence in the condition of grounds for suspect is of the foremost importance. However, the knottiest issue in this condition consists of how to evaluate the requirements of evidence.

There are various viewpoints of such evaluation in academic circles. Generally speaking: the first kind is the theory of quantity which holds that "there is evidence" may be met as long as there is one or two pieces of evidence; the second type is the theory of considerable evidence which stresses that considerable evidence to prove crime facts should be obtained in regard to standard of proof; the third is the theory of substantiality which insists substantial evidence to prove crime and suspect should be collected so as to prevent false pre-trial detention; the fourth type is the theory of ampleness which deems that "there is evidence" refers to ample evidence instead of just a single piece of evidence. However, substantiality should not be equated with ampleness, as there is a difference in amount between the two. No matter how comments vary, many people hold that these stipulations have not yet resolved the issue of the level of evidence in pre-trial detention conditions and have displayed its difficulty to understand and grasp in practice. In particular, as to the prescription "some evidence to prove that the suspect committed a crime has been verified", it is difficult to assess the standard of proof under circumstances that some indirect evidence has been verified. In this case, the people's procuratorate always adopts a rigorous standard to pre-trial detention in order to fall into a passive situation of criminal compensation arising from false pre-trial detention. [3] With respect to this, the author deems that the above stipulations in the law are consistent with the regular pattern of knowledge in litigation and appropriate for the reason that criminal cases are the objective facts,

[3] Fan, Chongyi *Enforcement and Research of Implementation of the Law of Criminal Procedure*, pp.129-130, publishing house of China People's University.

which have already taken place and been irreversible. The conduct of litigation, as a matter of fact, amounts to a process in which the knowledge of a case gradually closes in on the objective facts. The knowledge process that occurrs in criminal procedures is similar to a process in which prosecutors may fulfil their subjective initiatives. Details lie in the aspects in which the investigators positively discover and collect evidence and further examine and determine the evidence on the basis of the former step in order to properly utilise the evidence and ascertain the facts. Therefore, legislation should not set too rigid stipulations towards the condition of grounds for suspect when deciding on pre-trial detention, but provide investigators with space to fulfil their subjective initiatives under certain legal guidelines. In this way, investigators give full play to their subjective initiatives with the prerequisite of observance of rules and regulations thus to guarantee the proper application of the condition of grounds for suspect. In this respect, legislation in every country of the world is diversified. For instance, the first clause of Article 199 in the Law of Criminal Procedure of Japan stipulates the condition of pre-trial detention as "ample evidence is obtained"; while the Law of Criminal Procedure of Yugoslavia states "being well-grounded as the condition of pre-trial detention", etc. In contrast to these countries, the Chinese provision on conditions of pre-trial detention as well as its interpretation is more detailed and clear. There are multiple views in this regard within academic circles. For example, some scholars believe that "fuzzy science tells us that in many situations, fuzzy judgement sometimes is more scientific and accurate than seemingly accurate judgement." There are also other scholars who believe that in Japan, typical interpretation deserves our research. It holds that "so-called grounds for suspect amounts to a considerable ground for suspect and this ground is less stringent than the condition of conviction 'verified evidence', even looser than the condition 'an ample evidence leads to suspect" of 'emergency pre-trial detention' [4], while a little bit more rigorous than the standard of 'normal pre-trial detention' [5], that is to say, the condition is met as long as the fact of

[4] Emergency pre-trial detention is a kind of compulsory measure in Japanese criminal proceedings.

[5] Normal pre-trial detention refers to the pre-trial detention based on pre-trial detention warrant. The 1st condition of it lies in "grounds for pre-trial detention", i.e. "considerable grounds which result in the reasonable suspect of crimes have been achieved", in other words, considerable suspect. The 2nd condition is "necessity of pre-trial detention". The 3rd is that pre-trial detention towards minor crimes may be allowed only in

crime exists based on a normal person's judgement." And "facts being suspected" are inclusive of facts of crime that have happened as well as the criminal suspect has committed such crime. Therefore, only when "considerable grounds" which lead to a reasonable suspect are achieved can the detention be decided. [6] Thus it can be seen that on the one hand, it is not suitable to prescribe conditions of "evidence" for pre-trial detention in excessive detail, otherwise, it would violate people's natural pattern of understanding. On the other hand it is impossible for law to be a coverall with provisions, otherwise, it would violate the rule of development of things. At the same time, foreign legislation has also told us that in Japan where pre-trial detention set ahead, the grounds for suspect differs slightly with the condition of pre-trial detention, while in China detention is an inevitable outcome of pre-trial detention as well as a legal effect arising from pre-trial detention. Therefore grounds for suspect of pre-trial detention correspond to the conditions of detention. Besides, we should notice that the International Covenant on Civil and Political Rights signed by the United Nation specifies that detention should be treated as an exceptional measure and should not be widely applied. On the contrary, detention after pre-trial detention is not an exception in China but a type of compulsory measure commonly applied. For this reason, both the stern provisions of the condition of pre-trial detention in current legislation and the adoption of a rigorous standard to pre-trial detention in legal practice are beneficial to safeguard a legitimate detention and prevent human rights from being illicitly encroached upon.

II. Condition of penalty

The so-called "condition of penalty" refers to the level of gravity a penalty being consistent with the triggering of measure of pre-trial detention. First of all, we should make clear that there is an in-depth certain tie between pre-trial detention and penalty, they are even always conditional on each other. Only those who should be criminally punished may be subject to pre-trial detention while only those criminals who have been controlled or deprived of personal freedom, may realise the enforcement of a penalty. In other words, subjection to criminal punishment is an essential and statutory

the event that the criminal suspect lacks regular domicile or is unable to receive summons to stand trial.

[6] Sun, Changyong, Criminal Investigation and Human Rights, p. 202, China Square Publishing House, 2000.

condition of pre-trial detention while pre-trial detention constitutes material conditions or prerequisites of imposition of criminal punishment on felonies, thus both of them are interdependent. However, the gravity of punishment that may trigger pre-trial detention should be of a certain level, because pre-trial detention is the severest compulsory measure. The gravity of punishment corresponding to pre-trial detention should be in accordance with statutory conditions and judicial principle on the account that pre-trial detention is the severest measure. According to Article 60 of the Law of Criminal Procedure states that pre-trial detention may only apply to the criminal suspect or defendant who could be sentenced to a punishment of not less than imprisonment. That is to say pre-trial detention as the severest compulsory measure can be applicable merely to those who could be convicted of punishment of not less than imprisonment. This provision fits in with the ideology of limited application of compulsory measures and the principle of moderateness. This ideology and principle has become one of basic minds in modern criminal justice proceedings and been observed when carrying out compulsory measures no matter that it is in the English-American Legal System, which emphasises legitimate procedures, or the Continental Legal System which focuses on legalised process. In the process of criminal litigation, it is inevitable for prosecution organs to fulfil national power to limit or even deprive the criminal suspect, defendant, as well as other involved citizens of personal rights in order to find out the truth. To prevent the abuse of national power, the Constitution and criminal legislation of each country have all set demands that the adoption of compulsory measures should abide by not only the principle of procedure ruled by law, but also the principle of moderateness and proportionality. In general, the application of compulsory measures in criminal justice proceedings should correspond to the gravity of crime, level of suspect as well as urgency and necessity of the case, and the condition of penalty discussed here refers to the correspondence of pre-trial detention to the gravity of a crime.

Countries in the world differ in setting conditions of penalty for detention, one of the factors lies in their disparity in stipulation of crime and penalty. Therefore, when we look at appropriateness of conditions of penalty for detention, we should bear in mind a general principle, i.e. principle of moderateness and proportionality which mainly embodies in the process when the prosecution organ use pre-trial detention and detain the criminal suspect or defendant by whom damages incurred should adapt to the gravity of crime he or she has committed, moreover, a general balance between

damages incurred by offenders and protection of social interest should be maintained. The goal of the principle of moderateness and proportionality is to eliminate excessive or improper compulsive punishment and prevent the fundamental rights of the criminal suspect and other involved citizens from being illicitly infringed upon.

The reason for such stipulations in Chinese law goes to three aspects. First of all, pre-trial detention is applied before the verdict of conviction and penalty produced by the court is issued. For this reason, "likelihood to commit crime" may be more appropriate. Second, a penalty of not less than imprisonment is always comparatively or highly grave, so it is consistent with the principle of moderateness to give pre-trial detention to those offenders. Third, pre-trial detention and penalty are of identical essence and attribute. The essence of pre-trial detention lies in the deprivation of personal freedom that though cannot be regarded as the same as a penalty, there is hardly any difference in the level of deprivation of personal freedom between the two in the sense that one-day under detention counteracts a one-day term of imprisonment. Viewing this, we can see that pre-trial detention and penalty possess the characteristics of identical essence and attribute in a physical sense. All of these indicate that legislation of our country fits in well with the ideology of limited application of severe compulsory measures and the principle of moderateness.

III. The condition of necessity

The so-called "condition of necessity" means necessity factors for the application of pre-trial detention. The Law of Criminal Procedure of our country has not only specified conditions of grounds for suspect and penalty, but also taken full notice of condition of necessity. This is reflected in the second clause of Article 60, Article 56, as well as Article 57 of the Law of Criminal Procedure. Of these, the second clause of Article 60 states: "If a criminal suspect or defendant who should be pre-trial detentioned is seriously ill or is a pregnant woman or a woman breast-feeding her own baby, he or she may be allowed to obtain a guarantor pending trial or be placed under residential surveillance." This provision makes clear that pre-trial detention is only applicable when necessary. Therefore, three conditions namely grounds for suspect, condition of penalty, as well as the condition of necessity have constituted the essential condition of pre-trial detention and not a single one of these conditions can be dispensed with. Similarly, it also expresses the ideology of limited application of severe compulsory measures and the principle of moderateness in our legislation. However,

something that should not be overlooked is the effect of Article 56 and 57 prescribed in the Law of Criminal Procedure, as well as relative judicial interpretations[7] on the above essential conditions of pre-trial detention.

First of all, we should fix our eyes on "he or she should be pre-trial detentioned" prescribed in Article 56 and 57 of the Law of Criminal Procedure, as well as Article 82 of judicial interpretations by the Supreme People's Court which is also "modified pre-trial detention", a breakthrough of the condition of penalty for pre-trial detention. According to Article 60 of the Law of Criminal Procedure, pre-trial detention may only be applicable to the criminal suspect or defendant who could be sentenced to punishment of not less than imprisonment. While viewing the second clause of Article 56 and 57, if a defendant who has obtained a guarantor pending trial or been under residential surveillance violates statutory duties and the case is serious, he or she should be given pre-trial. However, the person who has obtained a guarantor pending trial or been under residential surveillance may comprise of not only the criminal suspect or defendant who could be sentenced to a punishment of not less than imprisonment, but also the criminal suspect or defendant who may be just subject to punishment of public surveillance, criminal detention or independent imposition of supplementary punishments. As to the former object, the application of pre-trial detention to him or her when statutory duties are violated is appropriate and in line with the condition of penalty for pre-trial detention. While pre-trial detention of the latter object breaks through the condition of pen-

[7] The 2nd clause of Article 56 of the *Criminal Procedure Law* stipulates: "If a criminal suspect or defendant who has obtained a guarantor pending trial violates the provisions of the preceding paragraph, the guaranty money paid shall be confiscated. In addition, in light of specific circumstances, the criminal suspect or defendant shall be ordered to write a statement of repentance, pay guaranty money or provide a guarantor again, or shall be subjected to residential surveillance or pre-trial detentioned. If a criminal suspect or defendant is found not to have violated the provisions in the preceding paragraph during the period when he has obtained a guarantor pending trial, the guaranty money shall be returned to him at the end of the period." The 2nd clause of article 57 of the *Criminal Procedure Law* specifies: "If a criminal suspect or defendant under residential surveillance violates the provisions of the preceding paragraph and if the case is serious, he shall be pre-trial detentioned." Article 82 of judicial interpretation by the Supreme People's Court states that if a "defendant who has obtained a guarantor pending trial or been under residential surveillance violates article 56 and 57 of the *Criminal Procedure Law* and only through pre-trial detention can we prevent the occurrence of danger to society, he or she shall be pre-trial detentioned."

alty and at the same time puts an excessive emphasis on the condition of necessity.

Secondly, we should make a concrete analysis of the question whether the application of pre-trial detention to the criminal suspect or defendant who may be just subject to the punishment of public surveillance, criminal detention or independent imposition of supplementary punishments is consistent with the principle of limited application of severe compulsory measure and moderateness. The principle of limited application of severe compulsory measure and moderateness is a detailed embodiment of the principle of proportionality in criminal proceedings. "The basic meaning of principle of proportionality is that under circumstances where a limitation on citizen's personal rights goes inevitable out of social interest, legislature, administrative and judicial organs of the country should try their best to choose the measure which doing the least harm to citizen's personal rights, moreover, the detriment incurred by the citizen should not be greater than the social interest the measure is about to protect." [8] In light of this, we may draw the conclusion that the principle of proportionality comprises three subsidiary principles, i.e. the principle of appropriateness, the principle of necessity as well as the principle of equity. Of the three, the principle of appropriateness lays a foundation for the other two principles. To be more detailed, the first question that arises when pre-trial detention and detention are applied should be what is the function of pre-trial detention and detention? As mentioned above, detention in criminal justice proceedings in our country possesses a function of both protection and prevention. Application of pre-trial detention to the criminal suspect or defendant who may be just subject to punishment of public surveillance, criminal detention or independent imposition of supplementary punishments in statutory circumstances is in consistent with the function of pre-trial detention and detention. However, to accomplish the above goals, legislation of our country should not conduct at all costs, but pay attention to necessity and equity of measures adopted. Pre-trial detention applied to the above criminal suspect and defendant is qualified for condition of necessity, however, among the measures of necessity, the application of whichever measure should take a full account of the equity of the measure. In other words application to above offenders should consider both the necessity and gravity of crime. As

[8] Fan, chongyi and Chen, Yongsheng *Principle of Equilibrium in Criminal Justice Proceedings* from *Legal Theory and Practice of Litigation* (1st volume), p.14, Publishing House of China University of Political Science.

specified in the Japanese criminal justice proceedings "pre-trial detention towards suspects and defendants of petty and minor crimes is limited to the case in which the domicile of suspect and defendant is irregular or summons of investigation organ cannot be delivered to suspect and defendant. We should compare the detriment of detention incurred with gravity of the crime and for minor cases, pre-trial detention is only permissible when completely necessary." In light of the criminal policy prevailing for more than a half century in China of "seriousness combined with prudence", "punishment combined with lenience", the writer holds that when considering conditions of necessity for pre-trial detention, we should adhere to the principle, i.e. when there is an alternative measure available, do not choose pre-trial detention; when it is feasible to accomplish our goal through looser measures, never adopt the severest measure of pre-trial detention. Therefore, the author advocates that: first we cannot apply pre-trial detention to all of the suspects and defendants subject to punishment of public surveillance, criminal detention or independent imposition of supplementary punishments when they seriously violate statutory duties, especially to the criminal suspect and defendant who may only be sentenced to independent imposition of supplementary punishments. Second, only when ample conditions of necessity are obtained can we give consideration to the compulsory measure of pre-trial detention; third, regardless of the ample conditions of necessity, we should also take into account the balance between implementation of national power and protection of citizen's fundamental rights, that is to say, we should take full notice of the principle of moderateness when a compulsory measure is to be applied. Only a strict observance of the above three aspects and we can reduce the illegitimate detention to a minimum.

For example, China's Supreme Procuratorate and the Ministry of Public Security jointly issued the Regulations on Issues related to Application of Measures of Pre-trial detention Pursuant to Law on August 6, 2001, which prescribed that suspects should be given pre-trial detention in the following conditions: in the third condition in item 4, Article 1, a suspect who has obtained bail and awaited trial with restricted liberty of moving "made bold to leave the city or county where he lives in for twice without approval"; in the fourth condition, the suspect who "did not appear before the court for twice after being summoned for trial"; in the fourth condition in item 5, the suspect living at home under surveillance "made bold to leave domicile or designated residence for twice without approval"; in fifth condition, "made

bold to meet other persons for twice without approval"; in the sixth condition, the suspect who "did not appear before the court for twice after being summoned for trial" is under grave circumstances.

The author believes that it is unnecessarily proper for these regulations to be applicable for all persons who have obtained bail and awaited trial with restricted liberty of moving or living at home under surveillance, because the crimes these people were involved in may merely be punished by detention, public surveillance or independent imposition of supplementary punishments. The author thinks it is improper to give pre-trial detention to these people without any consideration just for being bailed or under surveillance, or for going out twice without asking for leave, or not appearing before the court after being summoned twice or making bold to meet another person without approval, though neither grave result was caused nor was a new crime committed. Pre-trial detention, the severest compulsory measure, is not only in unbalance with the gravity of suspected crime, in accordance with possibly applicable penalty, violating principle of compatibility and principle of equilibrium, but also its decision will not get the due social effect which can be predicted.

Again, we should also examine persons who are applicable for bail or living under surveillance for other reasons and all of them would be given pre-trial detention for violating the above legal obligation. It is worth discussing whether these regulations are feasible. According to the provision in Article 65 of the criminal procedure law, for a suspect who has obtained a guarantor pending trial or has been placed under residential surveillance "necessary to pre-trial detention when sufficient evidence is still lacking, this kind of object itself does not have condition of evidence. Even if the crimes he formerly was involved in are grave like homicide, rage or robbery, he still cannot be given pre-trial detention for violating the above regulations in the period in which he has obtained a guarantor pending trial or has been placed under residential surveillance. This is because it is not determined yet whether he has committed a crime or not. If he is given pre-trial detention as a change, is it not obvious pre-trial detention by mistake? Again, according to the provision in Article 74, if a case involving a criminal suspect or defendant in custody cannot be closed within the time limit stipulated by this Law for keeping the criminal suspect or defendant under custody for the sake of investigation, for conducting examination before prosecution, or for the procedure of first or second instance and thus further investigation, verification and handling are needed, the criminal suspect or defendant may be allowed to obtain a guarantor pending trial or subjected

to residential surveillance. These objects are substantially no longer than objects for pre-trial detention. The public security organ has lost the power to give pre-trial detention. Measures of pre-trial detention cannot be resumed for these people's violation of regulation. Otherwise, it would be contradictory to the length of detention prescribed by law and go against the purpose of legislation.

In connection with the above legal provisions and judicial interpretations, how to understand the essential conditions of pre-trial detention, what is the relationship between "the conditions for suspect or defendant shall be pre-trial detentioned (modified pre-trial detention)" as prescribed in Article 56 and item 2 of Article 57, and conditions of pre-trial detention (hereinafter may be referred to as "general conditions of pre-trial detention") in Article 60 of this law? Are they of equal relationship or a relationship of basic conditions with exceptional provisions? If it is the former, namely "equal theory" of the two, modified pre-trial detention should also have three major elements: grounds for suspect, condition of penalty and condition of necessity. That is to say if only a suspect or defendant who might be sentenced by less than imprisonment violates legal obligations (provisions in judicial interpretation) which has not constituted a new crime or caused grave result in the period of obtaining a guarantor pending trial or being subjected to residential surveillance, he should be given pre-trial detention. Evidently, this does not comply with the purpose of legislation, because it cannot accomplish the purpose of restraining and punishing the violator of legal obligation. If it is the latter, namely "totally different theory" of the two, if only the person who has obtained a guarantor pending trial or has been subjected to residential surveillance deviate from legal obligation satisfying the condition requirement of "shall be pre-trial detentioned", he should be pre-trial detentioned without exception. In this way, it certainly will cause conflict in legislation and contradiction in practice deviating Article 60 of the criminal procedure law from Article 65, Article 74 and the whole criminal procedure. Hence, making a comprehensive survey on the basic ideas of the criminal procedure law on the whole structure of conditions of pre-trial detention and punishing crime and safeguarding human rights, the author believes the general condition of pre-trial detention and condition of modified pre-trial detention are dialectically unified and interrelated but with difference. Their relationship is the relationship between general and exception, a relation of the combination of principle and flexibility. However, when deciding whether to give pre-trial detention to a person who has obtained a guarantor pending trial or has been subjected to

residential surveillance and could possibly be sentenced by penalty of less than imprisonment, particularly independent imposition of supplementary punishments, for his violation of legal obligation, we should be extremely prudent (generally he shall not be given pre-trial detention). As for a person who has been changed to obtaining a guarantor pending trial or being subjected to residential surveillance for the formerly "lack of evidence" or "cannot be closed within the time limit stipulated by this Law", even if he has conducted violations of legal obligation or even satisfying condition requirement for pre-trial detention, under the circumstances of absence of conclusive evidence proving that he should be pre-trial detentioned or has committed new crime again, he cannot be pre-trial detentioned. Therefore, the author proposes that when applying measures of modified pre-trial detention, the decision of pre-trial detention should be made based upon factors of different cases, different objectives and different circumstances in violation of obligation and weighing the advantages and disadvantages. Thus, it would not only give warning to persons who have obtained a guarantor pending trial or have been subjected to residential surveillance not to challenge the law personally by observing disciplines and law and appearing before the court upon being summoned ensuring smooth operation of litigious activities, but also to protect human rights to avert misjudged cases from happening, including substantial unjust cases and procedural misjudged cases to show justice and judicial stateliness.

International Standards of Preventive Detention in Criminal Process

Ratification and Application of the ICCPR in China

YUE LILING

The right to personal liberty is one of the oldest and the most fundamental of all human rights. Some medieval charters recognised this right nearly 800 years ago.[1] Today it is provided by a number of major international and regional human rights instruments. Besides the International Covenant on Civil and Political Rights (ICCPR) [2] that we will discuss in the following parts, the first and still one of the most important of these instruments is the Universal Declaration of Human Rights (UNDHR), adopted in 1948.[3] Article 3 states that "everyone has the right to life, liberty and security of the person," while Article 9 states that "no one shall be subjected to arbitrary arrest, detention or exile."

Many important regional instruments also protect the right to personal liberty. Among these are the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)(article 5),[4] the American Convention on Human Rights (ACHR)(article 7),[5] and the African Charter on Human and Peoples' Rights (AFHR)(article 6).[6]

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[1] Nowak, Manfred, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY, p.159, 1993.

[2] ICCPR was adopted by the General Assembly of the United Nations on December 16, 1966 and entered into force on March 23,1976.

[3] UNDHR was adopted by the General Assembly of the United Nations on December 10, 1948.

[4] ECHR was adopted by the Council of Europe on November 4, 1950 and entered into force September 3, 1953.

[5] ACHR was adopted on November 22, 1969, and entered into force on July 18, 1978.

[6] AFHR was adopted by the Organization of African Unity on June 27, 1981, and entered into force on October 21, 1986.

From a world-wide point of view, another critical instrument is the International Covenant on Civil and Political Rights (ICCPR) adopted by the General Assembly in 1966, this great charter of human rights entered into force in 1976. Not only did its promulgation play an important historical role in the creation of some of the regional charters but this instrument continues to encourage countries and groups to focus attention on the principles that it embodies.

ICCPR Article 9(1) provides the basic guarantee against deprivation of liberty: "No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."

Some rights provided by the ICCPR are absolute. Torture, for example, is simply prohibited (Article 7), the same with slavery (Article 8). Deprivation of personal liberty, however, is not absolutely prohibited. Every modern state finds it necessary to deprive some individuals of their liberty in order to punish crime. There is also widespread use of detention to ensure that individuals charged with crime do not commit crimes wile the trial is pending or flee in order to escape trial or punishment. Detention is also widely used in connection with such quasi-criminal and administrative matters as mental illness, vagrancy, drug addiction, and immigration control.

Because these uses of detention are widely regarded as legitimate—when properly imposed, it is unlikely that the right of personal liberty will reach the level of absolute protection any time soon, if ever. On the contrary, trends such as the abolition of the death penalty and corporal punishments, suggest that detention will continue to play an important role in all jurisdictions for the foreseeable future. The guarantees of personal liberty contained in the ICCPR and in other international and regional human rights instruments are therefore best understood as procedural guarantees—a requirement that personal liberty not be deprived by arbitrary and unlawful means.

The "liberty of person" guaranteed by the ICCPR Article 9(1) is only a small part of the broad ideals of "liberty" and "human freedom" that the human rights movement seeks to realise. "Liberty of person," as used in Article 9(1), refers only, according to human rights experts, to "freedom of bodily movement."[7] In the criminal justice system, the term generally means interference with personal liberty through the use of compulsory measures to detain suspects, persons awaiting trial, and persons who have already been tried and who are being punished.

[7] Nowak, *see supra* note 1, p. 160.

Some international, regional, and national instruments provide only a minimum guarantee with respect to the right to personal liberty. In addition to guarantees against arbitrary and illegal deprivations of liberty, these instruments typically prohibit torture and inhuman or degrading treatment.[8] Generally, however, they say nothing about such things as conditions of detention and whether the detainee is allowed to contact family members or a lawyer. The ICCPR goes further. It not only provides a minimum guarantee against arbitrary deprivation of personal liberty, but also provides a separate right to humane treatment and certain minimum conditions of pre-trial detention and imprisonment.[9]

China signed the ICCPR in October 1998. However, the Standing Committee of the People's Congress has not yet ratified this instrument. In this paper I will not attempt to discuss all the issues now under consideration by the Standing Committee. I will focus solely on the ICCPR provisions relating to preventive detention, such as arrest and pre-trial detention, in the criminal justice process. There is widespread recognition that pre-trial detention is different from punishment. Before punishment may legitimately be imposed, there must be fair judicial proceedings and proof that the accused is guilty. Preventive detention in the criminal justice process, on the other hand, is a precautionary measure--taken to prevent the accused from fleeing from the trial or harming society by the commission of additional crimes. In many countries, "pre-trial detainees," according to the United Nations, "are subjected to the worst conditions of confinement in their national prison systems."[10] It is also well known that many human rights abuses occur during periods of pre-trial detention.

I. Principle of Legality—No Pre-Trial Detention Without Law

The most important standard provided in the ICCPR for pre-trial, and indeed all, detention is that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by

[8] *See* ECHR , Article 3.
[9] Article 10 of the ICCPR.
[10] United Nations, Human Rights and Pre-trial Detention – A Handbook of International Standards relating to Pre-Trial Detention. P.3 1994.

law."[11] This means that states have an obligation to make laws stating clearly and precisely under what conditions and with what kinds of procedures it is permissible to deprive citizens of their personal liberty. A second important requirement is that any deprivation of liberty that occurs should not be arbitrary. This requirement is necessary because even if a country has a law that complies with the first standard, law enforcement organs might violate the law.

The term "law" as used in the ICCPR[12] refers to the domestic law of the country that has adopted the covenant. Normally this means statute law adopted by the adopting country's legislature. Even those countries with a common law tradition often develop written law for the protection of basic human rights. The United States, for example, has a Federal Constitution that includes a Bill of Rights, while the United Kingdom has the Human Rights Act 1998. These laws embody common law norms that would be violated by the arrest or detention of citizens on grounds that are not clearly provided by the domestic law.

The Chinese Constitution provides the general principles governing deprivation of personal liberty in China: No citizen may be arrested except with the approval or by decision of procuratorate or by decision of a court and enforced by police. Unlawful detention or deprivation or restriction of citizen's freedom by other means is prohibited.[13] The specific grounds for arrest and pre-trial detention and the procedure to impose them are provided largely by the Criminal Procedure Law (CPL). Here we should notice that the meaning of "arrest"(*dai bu*) in Chinese law is different from that in other western countries. It refers to pre-trial detention (longer period of detention until court will reach the judgement, in German law it is called *Untersuchungshaft*). The detention (*ju liu*) refers to "arrest" in other countries, (shorter period of detention, in German law it is called *Vorlaeufige*).

Under the Criminal Procedure Law (Article 61) detention for shorter terms is permitted in only seven situations in which there is an urgent need to detain the suspect. These situations are 1) the suspect is preparing to commit a crime, is committing a crime, or has just committed a crime and has been found; 2) the suspect has been recognised by a victim or eyewitness; 3) evidence has been found on or near the suspect or in the place where the suspect lives; 4) after committing the crime, the suspect tries to

[11] Article 9 (1) of the ICCPR.
[12] Article12(3), 18(3), 19(3),21 and 22(2).
[13] Article 37 (2) (3) of the Constitution.

commit suicide, to flee or has fled; 5) evidence will be destroyed if the suspect is not detained; 6) the suspect's real name, address, and identity is not clear; 7) there are reasons to believe that the suspect may repeat the crime or commit further crimes with a gang.

In China this kind of short-term detention does not require a warrant issued by a judge. It does, however, require a warrant issued by the head of the police. The police must notify the suspect's relatives or employer as to the place of and reason for the detention. They should interrogate the suspect within 24 hours. Normally the police may detain the suspect no more than three days. If police think it would be necessary to put a suspect into pre-trial detention, they have to send their request to the prosecutor's office within three days and get their approval. The Criminal Procedure Law allows the extension of sending the request to the prosecutor's office up to seven days. In practice, there is a large percentage of defendants who are held in custody pending trial.[14] In complicated cases, the law permits the police to detain the suspect even longer before contacting the prosecutor--up to 30 days. When the prosecutor's office receives a request for further detention, the office should make its decision within seven days. If the prosecutor's office denies the request for pre-trial detention, the police must release the suspect. As a practical matter, these provisions mean that detention in normal cases lasts for a minimum of 10 days and a maximum of 37 days.

Pre-trial detention for any period longer than that discussed above must be justified under Article 60 of the Criminal Procedure Law. Article 60 requires: 1) that there be evidence to show that a crime has occurred; 2) that the defendant is likely to be sentenced to imprisonment or an even more serious sentence; and 3) that neither measures of bail pending trial nor putting the suspect under surveillance could prevent harm being inflicted on society and that there is therefore a necessity for pre-trial detention. Article 60 requires the issuance of a pre-trial detention warrant. In practice, the prosecutor generally issues such warrants. Although the Criminal Procedure Law also authorises courts to issue pre-trial detention warrants they generally do so only at later stages in the proceeding—usually in cases in which the prosecutor decided not to detain the accused prior to trial. If the court finds it necessary to detain the accused after the prosecutor has turned the case over to the court, the court will issue a pre-trial detention warrant.

Although such matters as the length of the temporary period of detention

[14] The statistic is unavailable.

and the authorities empowered to issue warrants for temporary and pre-trial detention, are unusual by the normal international standards, Chinese law clearly specifies both the grounds and the procedure required for short-term detention and longer periods of pre-trial detention. From the legislative perspective, the Chinese law fully respects the principle of legality.

II. Prohibition of Arbitrary Arrest and Detention

The International Covenant on Civil and Political Rights prohibits illegal arrests and detentions. It does not stop, however, with this prohibition. The second sentence of Article 9(1) prohibits "arbitrary" arrests and detentions as well. When the ICCPR was drafted, there were debates as to whether the term "arbitrary" should be used. Some delegates argued that the term "arbitrary" was redundant, that it was similar to the term "unlawful" and thus added nothing to the Covenant.[15] The majority, however, rejected this opinion. As the United Nations Human Rights Committee said at a later time: "'Arbitrariness' is not to be equated with 'against law,' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances."[16]

When does deprivation of liberty become arbitrary? The Working Group on Arbitrary Detention of the UN Commission on Human Rights has provided one of the best explanations. It states that if a case falls into one of the following three categories, the deprivation of liberty is arbitrary: 1) when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty; 2) when the deprivation of liberty results from the exercise of rights or freedoms guaranteed by Articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and insofar as State parties are concerned, by Articles 12, 18, 19, 21, 22, 25, 26 and 27of the International Covenant on Civil and Political Rights; 3) when the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.[17] In gen-

[15] Nowak, *supra* note 1, P.172.
[16] Communication No.305/1988, the view of the Human Rights Committee in *van Alphen v.the Netherlands.* §5.8.
[17] Fact Sheet No.26 of the Working Group on Arbitrary Detention.

eral, "arbitrary" involves two quite different perspectives. On the one hand, the law itself should not be arbitrary. The national legislature of state parties has the responsibility not to enact arbitrary laws. Laws should at least reach the minimum standards established by international norms. The other perspective concerns enforcement. The enforcement organs should not implement the law arbitrarily. In practice this second perspective is particularly important, presenting governments with a difficult task.

Two aspects of the law relating to arrest and pre-trial detention continue to be debated in China. One issue is the length of short-term detention (*ju liu*). In many countries, three days would be the maximum time allowed before bringing a suspect before a judge. Ten days, the normal time in China, is seldom found in other legal systems. The special situation of 37 days for short-term detention is entirely too long. In practice, the unlawful extension of detention remains one of the most problematic issues in the implementation of criminal procedure law.

III. Rights for Detained Persons

1. Right to be informed

The International Covenant on Civil and Political Rights requires that persons who are arrested be informed at the time of the arrest of the reasons for the arrest. Article 9(2), which contains this requirement, refers to "arrest," (in Chinese law, the short-term detention). It does not refer to pre-trial detention (in Chinese law, the longer-term detention). As a practical matter, however, this omission does not matter much. The ICCPR clearly contemplates two different notifications. The first is the right to be informed of the reasons for arrest at the time of the arrest. The second is the right to be informed promptly of any charges made against the suspect. In the case of *Adolfo Drescher Caldas v. Uruguay,* the UN Human Rights Committee explained the purpose of the first notice requirement. It is to enable a person who has been arrested to "take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded".[18]

Article 9(2) speaks generally about the timing of the notifications. The reasons for arrest should be given "at the time of arrest." The suspect who has been arrested "shall be promptly informed of any charges against him." Although the ICCPR itself says nothing more about the timing of the noti-

[18] Communication No.43, 1979. HRC Report 1983.

fications, there is international recognition that the notification should be provided within a very short time after the arrest. In several cases, for example, in which the arrestee was not informed about the detailed reasons for his arrest for several weeks, the UN Human Rights Committee found a violation of this right.[19]

A second aspect of the right to be informed concerns the kind of information that must be given. In order to fulfil the purpose of allowing the person arrested to make a judgment about the lawfulness of the arrest, "the notice must be sufficiently detailed as to the facts and the law authorizing the person's arrest that he can tell if the arrest is in accordance with the law."[20]

A third aspect of the right concerns how the information is conveyed to the person arrested. A UN training book indicates some of the problems. It states that "in order for notification to be effective, it must be in a language which the person understands."[21] The European Charter on Human Rights contains a provision of this kind in its text.[22]

In China when the police detain a suspect, the Criminal Procedure Law requires them to show the warrant of detention to the suspect. In cases of urgency in which the detention is made without a warrant, the warrant must be shown to the suspect at a later time. The reason for the detention is written on the warrant. Although this is generally very brief, usually only the name of offence, the warrant informs the suspect as to the reason for the detention. The Criminal Procedure Law contains no requirement for the giving of any oral information at the time of arrest and no requirement that the warrant or anything that is said to be in a language that the suspect can understand. [23] Except for private prosecutions, formal charges under the Chinese Criminal Procedure Law are made by the prosecutor's office only after the police investigation has been concluded. We should note that in China, most minor cases are dealt with as administrative matters rather than as criminal offences. Most traffic cases, for example, are not criminal offences in China. In comparison with many European countries, the cases entering the Chinese criminal justice process are more serious.

[19] *Kelly v.Jamaika*, No.253, 1987.

[20] See *Monja Jaona v.Madagascar* , Communication No.132, 1982. See also *supra* note 10, P.11.

[21] *Id.* UN Training Book.

[22] Article 5 (2) of the ECHR .

[23] The ICCPR does require a written warrant for arrest. In many countries, arrest without a warrant is normally allowed, but the suspect must be brought to court within a short and reasonable time.

2. Right to be Brought Promptly before a Judicial Authority

Article 9(3) requires that the person arrested to be brought promptly before a judge or other officer authorised by law to exercise judicial power. The UN training manual explains the function of this right. The purpose, it says, is " to access whether a legal reason exists for a person's arrest and whether detention until trial is necessary. This procedure is the first opportunity for a detained person or his counsel to secure release if the arrest and detention are in violation of his rights."[24] States have an obligation to take persons who have been arrested promptly before a court, even if other methods exist by which the person arrested can challenge the legality of their arrest or detention. The right to be brought promptly before a court is thus independent of the right to challenge the legality of the arrest or detention. Both rights provide important safeguards against arbitrary or unlawful detention.

Although the International Covenant on Civil and Political Rights states clearly that an arrestee "shall be brought 'promptly' before a judge" or other judicial officer, neither the ICCPR nor any of the regional human rights treaties define "promptly" in terms of hours or days. The UN Human Rights Committee's view is only a little more precise. Paragraph 3 of Article 9 requires, it says that: "in criminal cases any person arrested or detained has to be brought 'promptly' before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days..."[25] In recent years, the Human Rights Committee's views on the time allowed in detention prior to appearance in court seems to have changed. In 1998, it said that, "the law relating to arrest and detention should be reviewed to bring it into conformity with Article 9 of the Covenant and to ensure that individuals are not held in pre-trial custody for longer than 48 hours without court order..."[26] One commentator interprets the 1998 statement as an indication that the Human Rights Committee is beginning to take a stricter view of the requirement.[27] In 1988, the European Court of Human Rights held that a detention of four days and six

[24] See *supra* note 10, p. 12.
[25] General Comment 8,§2.
[26] UN doc. CCPR/C/79/Add.106, para. 18.
[27] Joseph, Schultz, Castean, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS-CASES, MATERIALS AND COMMENTARY, P. 223, 2000.

hours did not fulfil the requirement of promptness required under Article 5(3) of its treaty.[28]

Another issue relating to this right is the meaning of "other officer authorized by law to exercise judicial power." One common explanation is that "other officer" means an officer with judicial authority who is independent of the authorities that make arrest or detention decisions. Under this view the "officer" should have an impartial position that allows him to review the legality of the decision to arrest or detain and have an objective mind as to whether sufficient reasons exist to justify further detention.[29]

In the case of *Kulomin v.Hungary,*[30] the UN Human Rights Committee took the position that prosecutors lack these qualities. This is an important question because in some countries, especially those countries with continental law traditions, prosecutors have the authority to lead investigations and supervise police arrests and detentions. Some even issue arrest and pre-trial detention warrants. In many countries, public prosecutors are thought to belong to the executive rather than the judicial authorities. In it's ruling in Kulomin, the UN Committee concluded that "it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the instant case, the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power' within the meaning of article 9(3)."

Short-term detention in China, as mentioned earlier, is initiated by the police and pre-trial detention is approved by the prosecutor. There is generally no judicial review and no requirement that detainees or those held in pre-trial detention be brought before a court or a judicial officer at an early point. The Criminal Procedure Law requires the police and the prosecutor to interrogate suspects within 24 hours of an arrest or detention. If the police or the prosecutor find that the arrest or pre-trial detention decisions were improperly made, the Criminal Procedure Law directs them promptly to withdraw or change the decision.[31] These provisions show that the review of arrest and pre-trial detention decisions is entrusted to the police and

[28] *Brogan and others v. United Kingdom,* Series A, No.145-B, pp.33-34, November 29, 1988

[29] Helena Cook, INTERNATIONAL STANDARDS AND INDIVIDUAL PROTECTION, P. 18

[30] Communication No.521, 1992.

[31] Article 73 of CPL.

the prosecutor rather than to the courts. The police and the prosecutor thus rely on internal but not external controls. As a practical matter, information about unlawful arrests or unlawful pre-trial detentions are hardly to be found outside of custodial places. In China procuratorates are independent organs. They do not belong to the Ministry of Justice and are quite often called "judicial authorities" (*si fa ji guan*). Their extensive powers in the criminal justice process, mentioned earlier, however, put them into a position where they could hardly have the "institutional objectivity and impartiality" necessary to review decisions of arrest and pre-trial detention under the International Covenant on Civil and Political Rights. These parts of the Criminal Procedure Law still seem distant from the ICCPR standards. These issues need to be seriously discussed in China in order to assist the legislature in its consideration of the ICCPR.

3. Right to be Released Pending Trial

The International Convention on Civil and Political Rights provides a limited right to release pending trial. This is spelled out in Article 9(3), which states that: "it shall not be the *general rule* that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial." It is important to notice that the ICCPR has a different approach than other regional human rights conventions. The UN Human Rights Committee has in several cases made it clear that pre-trial detention is permitted when it is necessary, but confirmed that detention should be the exception rather than the general rule.[32] According to the Committee, neither "the seriousness of a crime" nor "the need for continued investigation, considered alone," justify prolonged pre-trial detention.[33] In order to guarantee appearance of trial, many countries use bail as an alternative to pre-trial detention. The Human Rights Committee recognises this alternative, but "notes that bail is established according to the economic consequences of the crime committed and not by reference to the probability that the defendant will not appear in court or otherwise impede due process of law." In the Committee's view bail is not "compatible with the presumption of innocence that the length of pre-trial detention is not a product of the com-

[32] *See* the cases *W.B.E.v.The Netherlands* , Communication No.432,1990, and *Hill and Hill v. Spain,* Communication No.526, 1993.

[33] *See* the case of *Floresmilo Bolanos v.Ecuador,* Communication No.238, 1987, Human Rights and Pre-Trial Detention, *supra* note 19, p.15.

plexity of the case but is set by reference to the possible length of sentence."[34] There is international recognition that bail should not be set at an excessively high figure that might preclude a detainee from being able to raise bail and secure pre-trial release from custody.[35] The Committee also recognises that in exceptional cases "pre-trial detention may be necessary ... to ensure the presence of the accused at the trial, avert interference with witnesses and other evidence, or the commission of other offences."[36]

Under the Chinese Criminal Procedure Law as written by the legislature, pre-trial detention is an exceptional measure. This is demonstrated by the conditions that must be satisfied before short-term detention or pre-trial detention may be imposed, as discussed in section 1. Even in cases where the conditions necessary for pre-trial detention have been satisfied, the Criminal Procedure Law provides two alternatives to pre-trial detention. One is similar to the bail system in other countries. Under the Criminal Procedure Law, persons who have been arrested or detained may provide either financial or personal guarantees of presenting trial. A second alternative is surveillance of the residence of the accused. The accused can have normal movement in certain areas, such as from home to the place of work or study. Only when neither of these two measures is sufficient to protect society from possible harm should pre-trial detention be imposed. This means that the seriousness of the case alone is not sufficient to impose pre-trial detention. In practice, however, these two alternatives are not often used. Pre-trial detention on the other hand is widely imposed. Although no exact statistics are available, we cannot say that pre-trial detention is an exceptional measure in China.

4. Right to have a Trial within Reasonable Time or to be Released

A number of United Nations and regional human rights documents guarantee criminal defendants the right to be tried within a reasonable time. The International Covenant on Civil and Political Rights has two provisions relating to this principle--Articles 9(3) and 14(3)(c). Some experts argue that Article 9(3) guarantees that an accused will not be held in detention for an unreasonable period of time prior to his trial, while Article 14(3)(c) guarantees that the criminal trial of the accused will be held within a reasonable

[34] UN Concluding Comments on Argentina, UN doc.CCPR/C/79/Add.46,1995.
[35] L.Henkin (ed.) THE INTERNATIONAL BILL OF RIGHTS 1981, p.130.
[36] Id. *W.B.E. v. The Netherlands.*

period of time after the accused has been charged. Under this view Article 9(3) regulates the length of pre-trial detention whereas Article 14(3) regulates the total length of time that passes before the trial of the accused.[37]

The right to be tried within a reasonable time is a different right than the right to be released pending trial. Even if there are proper reasons for pre-trial detention, the detention should not go on indefinitely without a trial. What, however, should happen if the detention continues but there is no trial? Article 14(3)(c) addresses this issue. It says that if the trial is not begun within a reasonable time, the accused must be released.

The most difficult issue relating to the right to be tried within a reasonable time is to determine the meaning of "within a reasonable time." Although the UN Human Rights Committee argues that "pretrial detention should be an exception and as short as possible," there is no international standard as to the permissible length of pre-trial detention. Some countries have established a maximum length for pre-trial detention in their domestic criminal procedure law. Most, however, have not. The Human Rights Committee has found violations of Article 9(3) in several cases. In one instance it found a three-month detention without trial too long. In another case, however, the detention lasted for eight years.[38] In 1982 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities suggested that when the accused was in pre-trial detention the case should be tried within three months.[39]

Neither the European Human Rights Convention nor the European Court of Human Rights has established a fixed limit for the maximum time that an accused may be held in pre-trial detention. The Court's approach is to weigh various factors in its decisions in order to balance the interests of the administration of justice and the accused's right to liberty and the presumption of innocence. In four leading cases, the Court has found a violation of Article 5(3) of the European Convention. In one case the Court concluded that a pre-trial detention of 26 months was too great.[40]

The Chinese Criminal Procedure Law provides no fixed time limit for pre-trial detention. The length of pre-trial detention is controlled by the

[37] *See supra* note 25, p. 225.

[38] Cook, *supra* note 29, P.23. *See also* Communication No.84/1981, HRC Report 1983, Communication No 14/63, HRC Report 1982.

[39] UN Sub-Commission Resolution 1982/10, UN .Doc.E/CN.4/1983/4 at 80.

[40] *Neeumeister v.Austria,* Series A No.8, June 27,1968, *Matznetter v.Austria,* Series A No.10, November 10, 1969, *Stogmuller v.Austria* Series A No.9 November 10,1969 and *Ringeisen v.Austria,* Series A No.13,July 16,1971.

time required to complete the criminal proceeding. The Criminal Procedure Law, however, does specify time lengths for the investigation,[41] the prosecution,[42] the first instance of trial,[43] and the second instance of trial.[44] Under normal circumstances, the trial should begin within three and a half months. This means that any detention prior to the trial should normally be no longer than three and a half months. Under normal circumstances, the entire duration of criminal proceedings from the time when the accused was detained until court's final decision would be from five to eight and a half months. The normal detention would therefore be within this same range. When there are exceptional circumstances, the time periods specified in the Criminal Procedure Law may, with approval by the higher court, be extended.[45] In practice, however, the various agencies treat many ordinary cases as exceptional without adequate justification. In considering the ICCPR, the legislature should reconsider the system for control and supervision of both pre-trial detention and delay.

5. Right to Challenge Unlawful Arrest and Detention

Article 9(4) of the International Covenant on Civil and Political Rights guarantees persons who have been arrested or detained the right to challenge the legality of their arrest or detention. This right is not limited to persons who are arrested or detained in criminal proceedings. It applies to all kinds of arrests and detentions. This right has been regarded as a very important safeguard against unlawful arrests and detentions.

This right is drawn from the Anglo-American doctrine of *habeas corpus*.[46] This right should be distinguished from the right of the accused to be brought before a judge promptly after arrest or detention. The right to be brought promptly before a judge is mainly the obligation of executive organ. It does not require any action by the accused. The right provided by Article 9(4), however, is different. If the person who has been arrested or detained wishes to challenge the arrest or detention as unlawful, that person must initiate the challenge. It is not the obligation of the executive or the judicial organs to initiate the challenge.

Article 9(4) requires that any challenge brought by person who has been

[41] Article 124 of CPL.
[42] Article 138 of CPL.
[43] Article 168 of CPL.
[44] Article 196 of CPL.
[45] Article168 of CPL.
[46] Nowak, see *supra* note 1, p.178.

arrested or detained by considered by a "court." It is thus different from Article 9(3), which requires that the accused be brought promptly before judge or some other judicial officer. In one case the UN Human Rights Committee has ruled that the purpose of Article 9(4) is to ensure that it is a court that considers the challenge, not merely any authority regulated by law. Under Article 9(4) the authority that considers the challenge must possess a degree of objectivity and independence in order to exercise adequate control over the detention issue.[47]

The ICCPR does not specify any particular procedures as to how challenges concerning illegal arrests and detentions should be made. That is considered to be a matter for the domestic law of the state to decide. Whatever the procedure, however, it should cover not only situations in which the arrest or detention is claimed to be unlawful from the outset but also situations in which it is claimed that a lawful detention or arrest has become by virtue of changed conditions or the passage of time unlawful.

Another important point concerns timing. Article 9(4) requires courts to make decisions on challenges to the lawfulness of arrests and detentions "without delay." Some countries take this to require an urgent procedure; that courts should deal with the issue even when courts are not normally sitting. The UN Human Rights Committee has held that a court's delay of seven days in reviewing the lawfulness of an arrestee's detention was a violation of this safeguard. In the same case the Committee also noted that a delay of three months was "in principle too extended".[48]

It is clear that review required by Article 9(4) concerns the "lawfulness" of the arrest or detention. It is not clear, however, whether the review should examine both the grounds for detention and the procedures used or whether it is permissible to look only at the procedures used in effecting the detention. Some human rights experts argue that the review should "encompass both procedural and substantive elements, such as the grounds for detention as well." In some countries, however, reviews consider only whether the procedures used satisfy due process standards.[49] Limiting the review in this way would appear, however, to defeat the original purpose of this guarantee. Under Article 5(4) of the ECHR, the European Court has held that the procedure must extend to a review of the substantive grounds.[50]

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[47] *Supra* note 10, p.40, *Vuolanne v.Finland,* Communication No. 265/1987.
[48] *Torres v. Finland* , Communication No. 291/1988.
[49] Cook, *supra* note 27, p. 28.
[50] *Winterwerp v.The Netherlands,* Series A No.33, October 24,1979. *De Wilde Ooms and Versyp v.Belgium,* Series B.

Article 9(4) clearly allows the person arrested or detained to challenge the legality of the arrest or detention. It says nothing, however, about whether some other person, such as a lawyer or a family member of the detainee might initiate the procedure on behalf of the detainee. Allowing third parties such as lawyers or family members to institute challenges to the legality of arrests and detentions could be an important additional safeguard as some detainees will have difficulty gaining access to a lawyer or will not be familiar with legal proceedings. Allowing third party challenges would be particularly important in cases in which there is no information as to where or by whom the person is being detained. For reasons such as these, the UN Human Rights Committee has argued that the right to apply for remedy of *habeas corpus* should be extended to the detainee's family and friends.[51]

In China, the Criminal Procedure Law allows suspects, defendants and their law representative, relatives, or their lawyers to challenge the police, prosecutor's offices, or courts concerning unlawful compulsory measures such as short-term detention and pre-trial detention. Such challenges may ask for the release of the suspect or defendant or a change in the nature of the detention measure. The present law, however, applies only to unlawful extensions of detention. It does not apply to other unlawful elements, such as substantive elements. Even with respect to unlawful extensions, the Criminal Procedure Law does not spell out in detail how challenges should be made. The law indicates that complaints should be sent to the court. This does not mean, however, that the court has jurisdiction to investigate temporary detentions or pre-trial detentions made by the police or the prosecution. The law authorises the court only to review its own decisions concerning compulsory measures, such as pre-trial detention and bail. Decisions made by the police or the prosecutor can be reviewed only by these agencies themselves. In practice, successful complaints are seldom made. We could say that in China an efficient judicial control system has not yet been established. The fact that these issues are being discussed, however, gives reasons for optimism.

[51] *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40* (A/44/40), para.207 (Netherlands).

6. Right to Compensation

Article 9(5) of the International Covenant on Civil and Political Rights provides that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." The European Covenant on Human Rights provides a similar right to compensation for unlawful arrest and detention. The other regional covenants, however, do not.

Article 9(5) guarantees all victims of unlawful arrest and detention the right to receive compensation.[52] "Unlawful" encompasses not only violations of Article 9(1) to Article 9(5) but also violations of domestic law.[53] This is made clear both by the International Covenant and the decisions of the UN Human Rights Committee in particular cases. It sometimes happens that the victim of an unlawful arrest or detention succeeds in a claim made under his or her domestic law, but fails to receive compensation. Under Article 9(5), the victim may send a claim to the Human Rights Committee alleging a violation of Article 9(5).[54] This approach is broader than that of the European Convention of Human Rights. Article 5(5) guarantees compensation only when Article 5 itself has been violated; not when there is a violation of domestic law.

Article 9(5) relies on the domestic compensation system for its implementation. It is the state parties' obligation to implement the system.[55] The UN Human Rights Committee has no authority to enforce compensation by itself. It relies on the state concerned. In addition, the Human Rights Committee does not even suggest the amounts that should be paid as compensation. That is also the responsibility of the state parties, and is generally drawn from their domestic law.

Chinese law provides for the compensation of persons who have been wrongfully arrested or detained. In 1994, after several years' efforts, the Chinese legislature adopted a State Compensation Law. This came into force in 1995. Chapter 3 of this law provides compensation for criminal cases. Article 15 (1) (2) governs compensation for erroneous arrests and detentions. It limits compensation to cases in which there is no criminal conduct and no evidence to suspect that the person arrested or detained has committed a crime. These provisions are much stricter than Article 9 of the International Convention.

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[52] General Comment 8. §1.

[53] See *supra* note 25, p.241. See also Nowak, *supra* note 1, p.181.

[54] As regards the violation of domestic law, as it was mentioned earlier in this paper that, under the principle of legality which provided in article 9(1), the last sentence, the violation of domestic law is also included.

[55] Article 2 (3) of the ICCPR.

Conclusion

Since the International Covenant on Civil and Political Rights was adopted, it has been ratified by 149 state parties. There are in addition eight states that have signed the Covenant but not yet ratified it.[56] As one of the core instruments of human rights, the International Covenant safeguards have been accepted by the majority of countries around the world. Most of the provisions in Article 9 concerning arrest and detention discussed above relate to criminal justice. This Article, and its counterparts, in the regional human rights instruments, regulate the protection of personal liberty in a detailed way. International and national judicial and quasi-judicial bodies have developed these international standards on the protection of personal liberty even further in a large quantity of judgments and decisions. In some instances international norms have been enacted into the national laws. In other instances states have simply made the International Covenant itself applicable to its own citizens.

In general Chinese law guarantees that any deprivations of personal liberty that take place will be accomplished under the principle of legality. The Constitution, the Criminal Procedure Law, and other laws provide the principles, rules, grounds, and procedures governing deprivations of personal liberty in the criminal justice process. Ratification of the International Covenant on Civil and Political Rights would be a further step in the great efforts that China has been making to reform its laws. This step will not be easy, however, because Article 9 raises issues concerning the people's ideology and the structure of authorities such as the police and the prosecutor. Introducing judicial control and supervision of deprivations of personal liberty in the criminal justice process is a hotly debated question. Implementation of the International Covenant would present additional problems and difficulties, particularly as to how to guarantee that the laws adopted will be carried out in practice. China is aware that a few states parties have made reservations concerning Article 9. As Article 9 is the minimum standard necessary to safeguard against illegal and arbitrary deprivations of personal liberty, it is the author's hope that the Chinese government will not find it necessary to make reservations.

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Procuratorial Supervision on Criminal Detention and Arrest

LI ZHONGCHENG

The Supreme Procuratorate

In China criminal detention refers to a compulsory measure that public security organs, State security organs and the People's Procuratorates use to temporarily deprive criminals or criminal suspects of their personal freedom in accordance with law. Arrest refers to a compulsory measure that the public security organs or judicial organs deprive criminal suspects or defendants of their personal freedom and send under guard to a certain place for custody within a specified period of time according to law. As compulsory measures that deprive people of their personal freedom before trial, detention and arrest are directly linked to the smooth operation of criminal prosecution and the protection of personal freedom of citizens. Procuratorial supervision must be reinforced in order to ensure the proper application of detention and arrest, which involve personal freedom of citizens.

I. Status quo of procuratorial supervision on criminal detention and arrest in China.

The *Constitution of the People's Republic of China* and the *Organic Law of the People's Procuratorate* identify the people's procuratorates as the organ executing legal supervision. The procuratorial authority is the only organ that participates in criminal prosecution from start to finish, which provides necessary conditions for it to assume legal supervision. In a broad sense, the procuratorial authority carries out supervision on detention and arrest mainly through the following ways:

1. Supervising detention by examining the means of arrest: The procuratorial authority supervises the justification of detention by making decisions to arrest or not to arrest and supervises the justification of cancelling

a detention by redressing the escaped arrest. In 1998, 94,047 persons were not approved arrest; the figures were 104,199 and 110,992 respectively in 1999 and 2000. In the aspect of escaped arrests, the figure was 7,023 in 1998, 9,083 in 1999 and 10,937 in 2000.

2. Conducting supervision by redressing the improper modification of compulsory measures made by investigatory organs or departments: The modification of compulsory measures are directly linked to the smooth progress of criminal prosecution and the protection of citizens' rights and interests. Therefore, the procuratorial authority has to conduct supervision on the modification of compulsory measures after detention or arrest. Some provincial public security organs or judicial organs order that the investigatory organs or departments shall notify the procuratorial authority of the modification of compulsory measures. Upon discovering improper modification, the procuratorial authority shall make suggestions on correcting it. The procuratorial authority in a certain province approved 33,704 arrests, arresting 47,603 persons in 2001. After arrest, 114 cases involving 128 persons were modified, among which, 79 cases involving 88 persons were notified to the procuratorial authority. The procuratorial authority considered the modification of 6 cases involving 7 persons to be unjustified and make suggestions on correction in written form. In addition, the procuratorial authority also supervises the implementation of the decision on arrest carried out by public security organs so as to safeguard the seriousness of the decision made by the organ. This is mainly because public security organs do not forcefully implement the decisions made by the procuratorial authority to arrest or not to arrest. For example, among the 33,704 cases of arrest involving 47,603 persons handled by the procuratorial authority in a certain province, 32,888 cases involving 43,356 persons were carried out by the public security organs within three days and 607 cases involving 756 person were carried out four days later; among the 1,141 cases of arrest involving 1,755 persons with respect to which the public security organs submitted a request for approval of arrest but was not approved by the procuratorial authority, decisions not to arrest for 31 cases involving 39 persons were carried out by the security organs four days later.

3. Conducting supervision on redressing the mistakes made by the investigatory organs or departments in cancelling cases: Article 130 of the *Criminal Procedure Law* provides: "If it is discovered during investigation that a criminal suspect's criminal responsibility should not have been investigated, the case shall be dismissed; if the criminal suspect is under arrest,

he shall be released immediately and issued a release certificate, and the People's Procuratorate which originally approved the arrest shall be notified". The cancellation of cases by investigatory organs or departments means the termination of detention and arrest. The justification of cancellation is directly linked to the justification of the termination of detention and arrest. It is also associated with the justification of the original application of detention and arrest. So the procuratorial authority should supervise the cancellation of cases. On the one hand, it helps to find out if there is misjudgement in cancelling a case and ensure the case proceeds to the prosecution procedure so as to safeguard the seriousness of law. On the other hand, it helps to summarise experiences and lessons in which detention and arrest are carried out improperly so as to improve the enforcement and protect the legitimate rights and interests of citizens. Cancellation of cases which the procuratorial authority directly receives to investigate is as follows: 3,871 cases were cancelled in 1998, accounting for 13% of the total; 2,001 cases were cancelled in 1999, accounting for 6.6% of the total; 1868 cases were cancelled in 2000, accounting for 5.4% of the total. The investigatory organs or departments usually do not notify or do not notify in time the people's procuratorate, who originally approved the arrest of the cancellation of the case. And the procuratorial authority fails to conduct in-depth supervision of the cancellation of cases.

4. Supervising the application of arrest by examining the means of prosecution. Article 137 of the *Criminal Procedure Law* provides that one of the contents that the people's procuratorate must ascertain is "whether the investigating activities are lawful or not" when examining cases. Investigating activities include the application of detention and arrest. The public prosecution department of a people's procuratorate decides whether or not to bring forward public prosecution after examining cases involving detention and arrest. To some extent, the decision not to prosecute is a negative evaluation of the detention and arrest. Moreover, even prosecution is decided, there is also a question of supervising the justification of the means of detention and arrest.

5. Procuratorial departments of prisons and detention houses of a people's procuratorate supervise the justification of the detention activity and the time limit of detention and arrest: Supervision of detention activity means that the procuratorial departments of prisons and detention houses send procuratorial staff to supervise whether the officers of prisons and detention houses lawfully detain, administer and release the detainee or the

arrestee or not. Such activities as groundless detention, non-compliance of the conditions of the detainee with the detention certificates, detention when the detention certificates lose legal validity and corporal punishment or maltreatment of the detainee should be investigated and dealt with according to law. Supervision of the detention time limit means that the procuratorial departments of prisons and detention houses of a people's procuratorate carry out supervision on the case-handling department that detains a criminal suspect or defendant beyond the prescribed term. In 1998, the procuratorial authority made suggestions on correction of 70,992 person-time involving term-exceeding detention and corrected 69,154 person-time with the correction rate of 97.4%. In 1999, the procuratorial authority made suggestions on correction of 80,167 person-time involving term-exceeding detention and corrected 74,051 person-time with the correction rate of 92.4%. In 2000, the procuratorial authority made suggestions on correction of 74,065 person-time involving term-exceeding detention and corrected 64,254 person-time with the correction rate of 86.8%. In 2001, the procuratorial authority made suggestions on correction of 66,196 person-time involving term-exceeding detention and corrected 56,389 person-time with the correction rate of 85.2%; and in 2002, the procuratorial authority made suggestions on correction of 48,959 person-time involving term-exceeding detention and corrected 44,330 person-time with the correction rate of 90.5%. The absolute numbers of term-exceeding detentions is declining, yet the correction becomes more difficult, and the correction rate is decreasing.

We can see from the above analysis that the supervision of the procuratorial authority on detention and arrest bear the following features:

1. Supervision is based on a restriction mechanism. According to provisions of the *Criminal Procedure Law*, the procuratorial authority shall decide to arrest or not to arrest after examining the cases submitted by public security organs to request an approval of arrest, and decide whether or not to bring forward public prosecution after examining cases transferred by public security organs to prosecute. These provisions are designed from the prospective of restriction. And this restriction mechanism provides necessary guarantee for the procuratorial authority to carry out supervision. It not only serves as the channel of obtaining information on illegal activities, but also supplies necessary systematic guarantee for supervision. It is in this sense that we list the examination on arrest and on prosecution in the scope of supervision. As a matter of fact, pure supervision (or supervision in its

narrow sense) merely refers to the making of the Notification on Correcting Illegal Activities. However, without a restriction mechanism, supervision can hardly be conducted, for a restriction mechanism is an inflexible regulation.

2. Measures of supervision are weak with unsatisfactory results. The *Criminal Procedure Law* clearly provides that supervision of procuratorial authority is to make decisions whether or not to arrest and whether or not to prosecute. In addition to that, the only means of supervision is to make the Notification on Correcting Illegal Activities. But in practice, there still exists the fact that the investigatory organs or departments do not carry out the decisions immediately made by the procuratorial authority to arrest or not to arrest; there still exists the fact that the investigatory organs or departments do not notify the people's procuratorate which originally made the decision to arrest. Sometimes the Notification on Correcting Illegal Activities can hardly be effective. The supervised units attach little importance to the suggestions of supervision. The Notification has no corresponding power of implementation, and consequently becomes some kind of advice on correcting illegal activities. For units with strong legal awareness, they will value and improve accordingly once suggestions are made. Whereas for units with weak legal awareness, if they do not adopt the suggestion, the procuratorial authority will have nothing to do. One example is the supervision of term-exceeding detention.

3. Concrete supervising powers are decentralised into different departments of the people's procuratorate. Supervision on detention and arrest are carried out not only by the investigatory and supervision department, but also by the public prosecution department and procuratorial department of prisons and detention houses. In particular, the procuratorial department of prisons and detention houses is specialised in supervising the detention in detention houses after detention and arrest.

II. Analysis of the obstacles to supervision on criminal detention and arrest in China

The procuratorial authority has made great achievements in supervising detention and arrest. However, there is still a large gap between supervision and the requirements posed by the *Constitution* and laws, the expectations of the people and the targets of realising social justice and of promoting judicial impartiality. Then what are the obstacles to the prosecutorial super-

vision on detention and arrest? We believe that there are manifold factors that affect supervision on detention and arrest. From the subjective perspective, some supervisors do not dare supervise, are not willing to supervise, have no skill in supervising, supervise inappropriately and do not supervise in time. From the perspectives of legal provisions and mechanism design, there are the following factors on which we will put our emphasis:

1. Inadequate legislative design: Article 129 of the *Constitution* and Article 1 of the *Organic Law of the People's Procuratorate* identify the People's Procuratorate as the State's organ executing legal supervision. But the design of concrete supervision systems in some related laws does not meet the requirements of the nature of procuratorial authority. In particular, the provisions concerning supervision on detention and arrest are insufficient, which is mainly reflected in the following ways: First, there are only three articles in the *Criminal Procedure Law* concerning investigatory supervision, none of which prescribes the obligation of the supervisee. The first article concerned is Article 8 in the General Provisions: "The People's Procuratorates shall, in accordance with law, exercise legal supervision over criminal proceedings". "Exercise legal supervision in accordance with law" can be understood as exercising supervision in accordance with legal procedures. However, there is no clear provision regarding the legal supervising procedures. So "exercise legal supervision in accordance with law" means "supervision can only be exercised when the law provides as such". This wording does not offer sufficient autonomy to the procuratorial authority, compared with Article 14 of the *Civil Procedure Law* "The People's Procuratorate is entitled to exercise legal supervision over civil trial activities". The second provision concerned is Article 76: "If in the process of examining and approving arrest, a People's Procuratorate discovers illegalities in the investigatory activities of a public security organ, it shall notify the public security organ to make corrections, and the public security organ shall notify the People's Procuratorate of the corrections it has made." But what if the public security organ does not correct its activities, or does not notify the People's Procuratorate of the corrections it has made? No elaboration or explanation is made here. The third article concerned is Article 137: "In examining a case, a People's Procuratorate shall ascertain: ... (5) whether the investigation of the case is being lawfully conducted." The provision regarding investigatory supervision in the *Criminal Procedure Law* only raises requirements for the procuratorial authority, yet fails to set up obligatory requirements for the supervised investigatory organs. Al-

though there are corresponding provisions in Article 76 of the *Criminal Procedure Law,* the procuratorial authority does not have the final disposition right or the final suggestion right of disposition. As a result, supervision was negatively influenced. Second, there is no concrete provision concerning supervision on extended custody. Supervision on the time limit of detention is the primary function and power of the procuratorial department of prisons and detention houses. However, the function has not been mentioned in the *Criminal Procedure Law*. Before it was revised, Article 164 of the *Criminal Procedure Law* provided: "The People's Procuratorate supervises the justification of the activities of the detention houses. Upon discovering illegalities, the People's Procuratorate shall notify the executing organ to make corrections." The revised *Criminal Procedure Law* only prescribes the contents regarding criminal executions, ignoring the complexity of the functions of the detention houses, whose function include both the execution of the convicts and the detention of the untried prisoners. The fact that supervision on the enforcement activities of the detention houses is not mentioned in the *Criminal Procedure Law* leads to the lack of legal support for the supervision of time limit of detention by the procuratorial department of prisons and detention houses. Third, disharmony among laws: In the first place, there is disharmony among the *Constitution*, the *Organic Law of the People's Procuratorate* and the *Criminal Procedure Law*. The *Constitution* and the *Organic Law of the People's Procuratorate* identify the procuratorial authority as the body exercising legal supervision. But ways by which legal supervision can be brought into full play have not been prescribed in laws that regulate activities in criminal procedures, so it is difficult to put supervision into practice. In the second place, there is disharmony among the general provisions and the procedural provisions of the *Criminal Procedure Law*. The general provision emphasises that the People's Procuratorate exercises legal supervision over criminal procedures in accordance with law, and there are no concrete measures of supervision in the general provision. The general provision is disconnected with the procedural provisions, so it is difficult to put the general provision into practice through procedural provisions.

2. Lack of matching measures: The internal matching measures of the public security organs and the judicial organs are necessary to make up for weak legislation. But the current matching measures are imperfect, which are reflected in the following problems: First, there is no provision concerning how to accept supervision. In the *Procedural Regulations on How*

to Deal with Criminal Cases by the Public Security Organs, there is no provision concerning how the public security organs deal with suggestions on investigatory supervision made by the procuratorial authority. Neither does the *Rules on Criminal Procedures of the People's Procuratorate* provide the measures that can be adopted when the supervision fails to be accepted by the supervisee. In practice, the procuratorial authority performs its function by making supervision suggestions, whereas the effectiveness of supervision is decided upon the self-consciousness of the supervisee. Second, there is no corresponding responsibility system. Without a corresponding responsibility system for the lawbreakers, supervision does not mean anything. With regard to the correction of extended custody, the Supreme People's Procuratorate recommended to formulate a *Measures on Investigating Responsibilities in Extended Custody*, according to which, the persons responsible for the extended custody of criminal suspects or defendants due to major faults shall be investigated for their legal responsibilities. But the *Measures* were unable to be established due to dissension among experts. At present, some measures concerning investigating responsibilities in extended custody have been issued in some provinces in the name of the Politics and Law Committee or the Public Security Organs and the Judicial Organs, which helps to propel the correction of extended custody, and in some places has solved the problem. Third, there is little systematic guarantee for the improvement of the law-enforcement personnel. A high-quality law-enforcement team is essential for promoting the enforcement level. Such measures as strict recruitment, professional training, mechanism of selection are needed to invigorate the law-enforcement team. As far as the current conditions are concerned, necessary systematic guarantees are demanded to promote the quality of the law-enforcement personnel. Fourth, internal co-operation is weak. Supervision of the procuratorial authority should be accomplished through co-operation among different departments. Without co-operation, supervision will be negatively influenced. Take the correction of extended custody for example. It appears to be the task of the procuratorial department of prisons and detention houses. But its task could not be fulfilled without the co-operation of the investigatory supervision department or the public prosecution department. That is because the procedures of a case are mainly dominated by the examination of arrest conducted by the investigatory supervision department and the examination of prosecution conducted by the public prosecution department. The decisions whether or not to arrest or prosecute are not only deci-

sions on the case, but also decisions on the parties to the case, which concerns the continuation of the detention. If the decision-making organs did not notify the related departments of the decision that was made, the latter could not perform their functions such as supervising the time limit of detention, executing decisions on whether or not to arrest or prosecute. Paragraph 2 of Article 382 of the *Rules regarding the Criminal Prosecution of the People's Procuratorate* (hereinafter referred to as the *Rules*) provides: "Upon discovering any violation of laws in time limits of detention and case-handling, the prosecution department shall make suggestions on correction of the illegalities according to law." But how does one discover these violations? Article 108 of the *Rules* provides: "With regard to cases submitted by public security organs to request for approval of arrest, the department of examining the arrest shall notify in writing the prosecution department of prisons and detention houses of the approval, modification and cancellation of arrests." Article 119 of the *Rules* provides: "With regards to cases that the People's Procuratorate directly files to investigate, the investigatory department shall notify in writing the prosecution department of prisons and detention houses under the same People's Procuratorate of the decision, modification and cancellation of arrests." Despite explicit provisions in the *Rules*, in practice, some departments of examination of arrests (investigatory supervision departments) and public prosecution departments do not notify the prosecution departments of prisons in writing in accordance with provisions. Neither is there any relevant provision in their internal documents. Consequently, departments within the procuratorial authority cannot form a composite force on the issue of supervision.

3. Too many procedural requirements combined with too little substantive power of the right to disposition. The supervision of procuratorial authority is generally confined to procedures, whereas substantive supervision is not carried out successfully. First, there are many procedural requirements of supervision, most of which are confined to procedures. Both the general provisions of the *Criminal Procedure Law* and the provisions of the investigatory supervision are procedural, only requiring for the making of suggestions on corrections. Neither of them prescribes the measures that can be taken when the supervisee refuses to accept supervision. Such procedural provisions are not practicable. Effective supervision demands the support of substantive power, otherwise the procedural requirements will lose forceful backup. As a consequence of too many procedural requirements, the realisation of supervision depends on the consciousness of the

supervisee. If the supervisee refuses to correct mistakes, the supervisor has nothing with which to try to remedy the situation. Second, there is little substantive power of a right to disposition. The procuratorial authority has no other disposition power except that they can investigate the criminal responsibility of the lawbreakers whose activities constitute crimes. Even worse, the power of suggestion on disposition is not prescribed in any laws. In fact, it is by no means easy to perform supervision in judicial practice. Supervision often brings negative influence to units or personnel. The relevant persons will express their repulsion or unhappiness out-right. Without the corresponding right to disposition, the supervisee will transform their repulsion or unhappiness into ultra-statements and actions. More importantly, it will become difficult to accomplish the task of supervision, thus influencing the uniform and proper enforcement of law.

III. The systematic design of procuratorial supervision on criminal detention and arrest in China

As an organ exercising legal supervision, the procuratorial authority should improve its own supervising level in order to supervise criminal detention and arrest. Besides, it is also very significant to provide a more complete systematic guarantee for the procuratorial authority. This is the impetus for the sound development of legal supervision. The design of the supervision systems of criminal detention and arrest is a very complicated project. It deserves serious study and reasoning. We hold the view that three principles and four combinations should be adhered to when designing the system.

Three principles:

The first principle is to stick to the constitutional principles and embody the constitutional essence. The *Constitution* is the fundamental law of the State, which lays the foundation for the formulation of laws and regulations. Therefore, the perfection of the supervising systems of detention and arrest must abide by the constitutional principles. Provisions of the *Constitution* should be observed. With the absence of concrete provisions in the *Constitution*, the constitutional essence should be observed. Article 129 of the *Constitution* provides: "The people's procuratorates of the People's Republic of China are the State's organs for legal supervision." This is the position of the procuratorial organ prescribed in the *Constitution*. The functions of the procuratorial authority must be designed on the basis of this

precondition. Paragraph 2 of Article 37 of the *Constitution* provides: "No citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court and arrest must be made by a public security organ." The reason why the *Constitution* empowers the people's procuratorates to perform the arrest right which concerns the personal freedom of citizens is that the people's procuratorates can better supervise the application of arrests through examination of arrests, so as to protect the legitimate rights and interests of citizens. Restriction of power is reflected in the following ways: the department in a people's procuratorate responsible for examining arrests does not participate in the investigation and prosecution of a case; the justification of arrests are subject to the decision on guilt or innocence made by a people's court; and the decision-making rights of arrest and compensation belong to two different organs. All of the above-mentioned measures contribute to the safeguarding of the legitimate rights and interests of citizens.

Supervision on detention and arrest should represent the constitutional essence. On the one hand, the *Constitution* identifies the people's procuratorate as the organ for legal supervision. On the other hand, the *Constitution* stresses the protection of the citizens' rights and interests with the provision "unlawful deprivation or restriction of citizens' personal freedom by detention or other means is prohibited, and unlawful search of the person of citizens is prohibited." The *Constitution* does not endow the procuratorial authority with the power of detention approval, which the public security organs have, but the people's procuratorate should be entitled to examine in a timely way the justification of the application of detention power from the perspective of legal supervision. At least records should be kept for the procuratorial authority to examine and supervise afterwards. Upon discovering any mistake, the procuratorial authority will make suggestions on correction. As a consequence, the detention measures before a trial can be controlled and the damages incurred by detention will be minimised. The most effective way to supervise arrest is that a department who is not responsible for investigation, prosecution or trial should be responsible for supervision. But in reality, it is impossible to set up such a neutral department. Then the best way of governing applications of arrests is that the department responsible for the examination of arrests under a people's procuratorate should take charge of examining the decision on arrest, but meanwhile it should be restricted by the public prosecution department and the trial department. This not only complies with the essence of the *Constitution* to establish su-

pervision mechanisms, but also reflects the restriction of powers, which helps to ensure the proper execution of power and protect the legitimate rights and interests of citizens.

The second principle is to focus on perfection of the statute with the supplement of formulating matching regulations. The supervision on detention and arrest should be acknowledged in legal forms. Meanwhile, the public security organs or judicial organs may establish matching measures internally with regards to those that are too inconvenient to be included in laws so as to effectively supervise the detention activities before trial. The lagging problem of legal regulations must be resolved in order to further proceed the operation of supervising. Judicial practices propose a higher demand for supervision on detention and arrest. Yet the weak statute becomes the bottleneck that hinders the development of supervision. Therefore, the focus must be placed on the perfection of the statute, which means there must be relevant legal provisions concerning supervision on detention and arrest. (1) Provisions concerning supervision of applications of detention: First, the problem that no supervision is exercised on the decision power in applications of detention has to be resolved. The problem has already led to disadvantageous results in practice. Some investigatory organs use detention measures to intervene in economic disputes; some use detention measures to deal with administrative cases, such as the case involving pornographic VCD in Shaanxi Province. Therefore supervision on the applications of detention is essential, which requires relevant provisions that should be included in the *Criminal Procedure Law*. The second problem to be resolved is supervision on the right of modifying detention. In detention cases, detention measures are to be modified when there is no necessity of arrest or when approval of arrest is granted. If detention measures are not modified when there is no necessity of arrest, the personal freedom of citizens will be infringed on. If detention measures are not modified when approval of arrest is granted, it will directly influence the calculation of the detention limit of the prosecuted, because in the *Criminal Procedure Law* the detention limit is counted from the date after the execution of arrest. The final problem to be resolved is extended custody, especially in cases other than the three cases（of committing crimes by going from place to place, committing crimes several times and committing crimes by ganging up）when the detention period exceeds 30 days. (2) Supervision on applications of arrest: The first problem is the supervision on the execution of decisions to arrest or not to arrest. The second is the supervision on the

time limit of detention. It should be clarified in statutes that supervision on the time limit of detention should be executed by the procuratorial department of prisons and detention houses under a people's procuratorate, thus solving the problem that the legal provisions are in disharmony with judicial practices.

The formulation of matching regulations as a supplement to statutes is one of the indispensable measures for improving the supervisory system. Legal provisions rely on concrete matching systems to guarantee their implementation. All the regulations, rules and explanations made by public security organs and judicial organs on how to implement the *Criminal Procedure Law* are powerful measures that guarantee the implementation of the *Criminal Procedure Law*. Therefore, even if there are provisions about the supervision on detention and arrest in the *Criminal Procedure Law*, the public security organs and judicial organs should also implement them in the matching measures. The public security organs and the judicial organs should co-ordinate with each other when formulating such matching measures to prevent contradictions and to ensure the harmonisation of matching regulations with laws and the harmonisation among the matching regulations.

3. We should concentrate on the consolidation of supervision and take operable provisions as guaranteed. We should treat supervision as the main melody of procuratorial work, which is decided by the nature of procuratorial work. It is the demand of the rule of law and the desire of the people. The consolidation of supervision requires that the procuratorial authority exercise all-around and thorough supervision on applications of detention and arrest. The main thread of consolidation of supervision should guide the concrete operable provisions. In order to realise the aim of consolidation of supervision, the operability of supervision must be strengthened. Every supervising measure should be pertinent and operable. So provisions concerning supervision must be operable. First, both straightforward requirements and direct handling are needed. For example, the time regulation of executing arrests not only requires immediate execution, but also includes the result of not executing immediately – taking corresponding responsibilities. With regards to extended custody, not only suggestions of correction but also the suggestion on disposition should be made when extended custody is not corrected. The second is to transform scattered regulations into centralised ones. It is necessary to prescribe the supervision in criminal procedure laws in a concentrated way, yet the degree on concen-

tration is subject to further study. At least articles may be added after the Chapter "Compulsory Measures". The third is to clarify the supervising responsibility of the supervisor. In addition to making suggestions of correction, supervisors should also make suggestions within a certain period of time. They should not prolong working time on purpose. The fourth is to clarify the time limit for the supervisee to accept supervision and correct mistakes and the time limit for appeal when it is believed the supervision is mistaken. The supervisee cannot refuse to correct or bring forward opposition on the ground that supervision is considered to be incorrect.

Four combinations:

The first is the combination of supervising provisions with a restricting mechanism. In criminal procedures, the procuratorial supervision is based on the division of functions, co-operation and mutual restriction between public security organs and judicial organs. Without a restricting mechanism, the procuratorial authority is unable to obtain information on illegal activities in a timely way, let alone supervision. Without a restricting mechanism, the procuratorial authority does not have corresponding procedural decision-making power, then the erroneous activities of the supervisee can not be effectively controlled. With a restricting mechanism, the procuratorial authority can supervise the justification of investigations conducted by investigatory organs or departments through examining the arrest and then make suggestions on correction; it can supervise arrest and cancellation of cases through examination. At the same time, the justification of the prosecution conducted by the procuratorial authority should be subject to the reconsideration and re-examination of the investigatory organs or departments and subject to the restriction and verification of the decisions made by a people's court. Decisions on innocence or compensation are effective restrictions to the procuratorial authority in its examination of arrest. Without the restriction mechanism, supervision will be disconnected with proceedings and will become groundless.

The second is the combination of the procedural correction with substantive punishment. In order to change the situation of weak supervision, the procuratorial authority must be given the right to conduct substantive punishment while the procedure is under correction. The procedural correction is necessary and the launch of supervision should follow corresponding procedures. For example, the way to make a correction suggestion and the legal procedure to be fulfilled must follow some criteria. However, practice has proved that the procedural rules are not enough without the

right to conduct substantive punishment, which can guarantee the force of supervision and achieve the anticipated effect. We think that the procuratorial authority should be given the right to conduct substantive punishment in the following aspects: First, with respect to the person who has broken law more than three times, the procuratorial authority should propose the punishment while proposing the correction, making suggestions such as disqualifying the offenders from executing the law. Second, with respect to the person who causes severe damages in law-breaking activities that do not constitute crimes, the procuratorial authority should propose the punishment while proposing the correction, making suggestions such as disqualifying the offenders from executing the law. Third, with respect to the person who has not improved in accordance with the requirements, the suggestion of disciplinary punishment should be proposed. Fourth, to the person who has not replied to the correction in accordance with the time requirement, the suggestion of disciplinary punishment should be proposed. Fifth, with respect to detention cases in which the detention time has already approached to the possible term of punishment of the detainee, the procuratorial authority should have the right to make decisions on release and inform the related undertaking organs to implement them. Sixth, the procuratorial authority should make the decision on compulsory medical treatment or release for the person who has no capacity for action. The above-mentioned four substantive rights of punishment may be called indirect rights of punishment because they are rights of suggestion on punishment. The latter two may be called direct rights of punishment because they directly make corresponding decisions on punishment. The judicial investigation should be included in the procedural supervision right of the procuratorial authority while we strengthen the substantive rights of punishment. Regarding the appeal on detention and application for changing the custody measures made by the detainee, the prison supervision department under the procuratorial authority should undertake the judicial investigation, investigating the reason for custody and the necessity and validity of custody, making decisions of changing measures of detention and arrest with the approval of the chief procurator when there is no necessity for custody, and informing the undertaking organs to implement the measures.

The third is the combination of professional operation with supervision. The supervision of the procuratorial authority is, in essence, supervision on lawsuits, which cannot be conducted without lawsuits. In order to ensure the uniform implementation of law, the procuratorial authority must take

part in the lawsuits to find out the illegal activities in the lawsuits, and give corresponding suggestions on correction or make a decision of punishment according to the procedures provided by law. The main way for the procuratorial authority to participate in the lawsuits is to handle the cases or solely conduct the supervision, like reviewing the arrest and litigation, accrediting the procuratorial supervision and so on. To find out the illegal activities in the detention and arrest through reviewing the arrest and litigation, and make rectifying proposals to the improper detention and arrest; to send procurators to the prisons to find out illegal activities through examining the detention, administration and release operations of the prisons, and make rectifying proposals; to protect the legal rights of the detainee through investigating the cases of corporal punishment and maltreatment of the detainee. Supervision and professional operation are closely interconnected.

The fourth is the combination of strengthening supervision with accepting supervision. While optimising the legislation of supervision on detention and arrest, the procuratorial authority has to promote its own law-enforcement level. The procurators should improve their quality and enhance the awareness of supervision so as to put supervision into practice. Without good quality, they cannot determine the problems, not to mention supervision. Supervision will mean nothing if they are afraid of offending persons in supervision or they are lazy or reluctant to supervise. Therefore, the procuratorial authority should set up the necessary mechanisms, such as personnel management, operation, training and performance appraisal, in order to strengthen supervision.

Supervision should be fulfilled through the efforts by all the departments under the procuratorial authority. Based on the current mechanism the responsibility system should be established, under which corresponding punishment should be imposed on the person who does not report when they should do so according to regulations. For instance, the departments that are responsible for investigation and arrest will assume corresponding responsibility if they fail to report to the procuratorial authority within prescribed time of the arrest and the alteration of compulsory measures. Some rules are just rules on paper if there are no corresponding provisions about responsibility, which is harmful to supervision.

The procuratorial authority should accept supervision. They can determine the problems, promote efficiency and improve supervision quality through accepting supervision. The procuratorial authority should accept

supervision from the organ of state power, organs of the Party, the people, social opinion and public media, and listen to and accept the suggestions and opinions of the supervisee. In this way innovation and breakthroughs can be made, and supervision can keep the pace with the times.

Theoretical introspection of Pre-trial Detention system

CHEN RUIHUA[1]

I. Foreword

Ever since the revision of Criminal Procedure Law in 1996, obvious changes have taken place in the Chinese criminal compulsory measures system. On the one hand, custodial interrogation, as an administrative compulsive means, is no longer legally in existence. The applicable scope, condition and time limit for criminal detention have been changed accordingly making custodial interrogation finally to "be absorbed into Criminal Procedure Law" instead of being the means of public security organs in detaining criminal suspects. On the other hand, conditions of arrest have been changed to a certain extent, a property bail system established, applicable procedures for residential surveillance or obtaining a guarantor pending trial perfected, and the time limit for custody is more definite than before.

However, in less than three years after the introduction of the system, many questions arise in practice with issues like "extended custody", "covert custody" and "long custody without decision" the most noticeable. A large number of compulsory measure abuse cases related to public security organs procuratorial organisations were disclosed by news media and drew attention from the highest legislature. In the "inspection of enforcement of criminal procedure law" organised and implemented by the National People's Congress Standing Committee's internal judicial committee in 2000, issues of extended custody, extorting confession by torture and professional risk of a defence attorney were taken as important content in "law enforcement inspection".

As a new attempt in the study of compulsory measures, analysis in this article focuses on the issue of "unsettled custody". The so-called "unsettled

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custody" refers to the state in which the criminal suspect or defendant is deprived of personal freedom before the effective judgment of a court. In western legal work, pre-trial detention is usually called "pretrial detention". Considering the "pretrial detention" could be easily misunderstood as "detention in initial stage of trial" excluding detention out of the trial stage, thus the author uses the expression of "pre-trial detention". No doubt, during the whole course of criminal proceeding, detention is the strictest form of limiting citizens' personal freedom. In some senses, the compulsory measures in criminal proceedings consists of detention measures and non-detention measures while non-detention measures like residential surveillance and obtaining a guarantor pending trial have the function of replacing detention measures to a different extent. Therefore, the state of pre-trial detention, in terms of its system design and actual implementation, can reflect the level of law in a country's criminal compulsory measure system on the whole.

II. Nature of Pre-trial detention

In Chinese criminal proceedings, there are five kinds of legal compulsory measures, among which criminal detention and arrest are mostly related to detention. Generally, detention is a compulsory measure taken by public security organs and procuratorial organs to temporarily deprive active criminals or major suspects of their personal freedom in urgent situations. An arrest is a compulsory measure decided and taken by the procuratorial organisation and court to take personal freedom away from suspects where there is proven evidence of criminal involvement, a fixed-term imprisonment may be imposed when using compulsory measures would be insufficient to protect society from danger. Compared with criminal detention and arrest, detention is not a kind of legal compulsory measure but the consequent state and necessary result brought about by the application of criminal detention and arrest to continually limit personal freedom of the suspect and defendant.

On the whole, Chinese criminal detention in certain aspects is similar to emergency arrest or temporary arrest in Western legal systems, because such detention is usually regarded as a criminal compulsory measure to temporarily limit personal freedom of criminal suspect under urgent circumstances. It is mainly applicable to active criminals or "major suspects" and the public security organ or procuratorial organisation responsible for investigation will authorise and apply the measures by itself. But, different

from the emergency arrest and warrantless arrest of western countries, the time limit for detention of China's criminal detention is not a short period of 24 hours or 48 hours but a period of 14 to 37 days. In some exceptions, the public security organ also has the right to extend the time limit of criminal detention by itself that such time limit can be as long as several months. It can be said that the link of applicable procedure of criminal detention, detention and detention afterward are one in the same, and such detention is automatic and concurrent. If making a comparison, it should be the retention exercised by the Chinese public security organ that is similar to emergency arrest and warrantless arrest of western countries. Criminal detention on the whole is equivalent to the total of arrest without warrant and detention.

If criminal detention on the whole is equivalent to the total of arrest without warrant and detention of western countries and could directly bring about a long detention state, is the arrest in Chinese law equivalent to general arrest or arrest with warrant in western countries? The answer is negative, because general arrest or arrest with warrant in western countries is only the measure to force the suspect or defendant to appear before the court. Being different on judicial officer's authorisation for implementation from arrest without warrant or emergency arrest, it has no essential difference with the latter in nature. By this comparison, arrest in Chinese law is not merely an act to force the suspect or defendant to appear in court but rather directly causes long personal detention of the suspect or defendant. According to the provision in the criminal procedure code (Article 124), the time limit for investigation after arrest is two months, which means that once the procuratorial organ has made a decision or approved the decision about arrest, the suspect or defendant will be put in a state of detention for at least two months. It can be said that arrest in Chinese law has both functions of forcing the[2] defendant to appear in court and continual deprivation

[2] Of course, according to provision in China's current Police Law, before using criminal detention, the public security organ also has the right to carry out retention measures. Generally, the purpose of applicable retention is not necessarily to ensure the progress of criminal investigation but for "maintenance of public order." However, after on-the-spot questioning and checking, where the suspect is found "being accused of crime", "suspected of committing crime on the spot", "suspected of committing crime and unclear Identity" or "carrying possible stolen goods", police may take the suspect by force to the public security organ for further interrogation. In this way, when the interrogated person is found obviously a criminal suspect, police may confine the personal freedom of such person. Normally time for retention of the interrogated person at public security organ shall not exceed 24 hours. However, under special circumstances,

of the suspect's personal freedom. On the whole, it is equivalent to the total of arrest with warrant and detention in Anglo-American law.[2] By this token, arrest in Chinese law itself includes detention and has no separation from detention on applicable procedure.

Formally, there is at least the system of superior-level and provincial-level procuratorial organs examining and approving the extension of time limits for detention in the investigation stage. However, once a case enters the review and prosecution stage, on the issue of detention of the suspect and defendant, even the minimum review procedure does not exist. Judicial practice indicates that detention in the review and prosecution and trial stage basically is the natural continuation of detention in the investigation stage, and there is no need for going through a special review and approval procedure of any form. In the review and prosecution stage, the procuratorial organ generally does not conduct a review of any kind on the issue of whether to continue the detention of suspect. For an application that may be made by the suspect and his defender about relieving the detention state or changing the compulsory measure, the procuratorial organ can reject it entirely by way of a secret and unilateral decision. As for first and second instances, before the court starts the trial procedure, it is not necessary to hold a judicial hearing or hearing of any form on the legality of detention and even to start special review procedure. For the application or appeal on legality of detention made by defendant and his defender, the court usually rejects it in a secret or unilateral way. Only in extremely special exceptions will the court relieve the state of detention or change it to another non-detention compulsory measure according to its authority[3].

It is not hard to see that Chinese pre-trial detention is only the consequent state brought about by the implementation of criminal detention and arrest to deprive the suspect or defendant of personal freedom. Since detention attaches itself to criminal detention and arrest, both on procedure and

with the approval of the person in charge of the public security organ of county-level or above, retention may be extended to 48 hours. Obviously, such retention actually is a detention measure before the application of criminal detention.

[3] According to Chinese criminal procedure code and provisions of relevant judicial interpretation, no special detention review system has been established in stages of review and prosecution, first instance and second instance. And that in Chinese judicial practice, if no exception occurs, detention at these stages basically does not need special review and can continue accordingly following the progress of litigation activity. It can be said that the extension of detention in stages of review and prosecution, first instance and second instance is normal. And cancellation of detention or change it to other compulsory measure is special exception and rare.

reasons, and has to follow the need of penal prosecution activities like case-solving investigation and prosecution in actual application, the modern pre-trial detention system independent from arrest or of prepositive-arrest style has not been established in Chinese law. As a result, during the entire course of the criminal proceeding, detention has to heavily attach itself to penal prosecution activities like investigation, review and prosecution, and public prosecution support that special applicable procedure is unable to be formed.

III. Time limit of Pre-trial detention and extension

In the entire criminal proceeding, pre-trial detention has neither applicable procedure independent from criminal detention and arrest nor special "reasons for detention", so the so-called "time limit for detention" is basically equivalent to the time limit for criminal detention and detention after arrest.

This is also the direct result caused by inseparate criminal detention, arrest and pre-trial detention. But, except time limit for retention is strictly limited to within 48 hours, the time limit for detention[4] in cases of both criminal detention and arrest can be extended. In Chinese criminal proceeding, such an extension is subject to several situations and complex.

Whether it is the time limit for criminal detention or after-arrest detention, despite specific limitation in law, a series of extensions still exist. These extensions of the time limit for detention have substantially formed the precondition of investigation difficulty and adopted the internal examination and approval mode of the public security organ in procedure or the administrative examination mode of application by the public security organ and examination and approval by the procuratorial organ. On this issue, not only is there no judicial hearing activity presided by a judicial officer, but also the participation of detainee and defense lawyer cannot be guaranteed. Therefore, the extension of the time limit for detention is highly influenced by a super doctrine of function and power or administration.

Extension of Chinese pre-trial detention has one clear characteristic – from the review and prosecution stage to the forming of effective juridical conclusions, the determination of time limit for detention will no longer

[4] For system of arrest with warrant and warrantless arrest, please refer to John Sprack, *Criminal Procedure*, published by Blackstone Press Limited, 1997, p.8-29. And refer to John Hatchard and others, *Comparative Criminal Procedure*, published by the British Institutional and Comparative Law, pp.192-194.

receive examination of any form but be extended accordingly following the extension in case handling. You can say that whether the detention is pre-trial detention or a trial-stage detention, unless the public security organ, procuratorial organ or court initiates termination or changes it to other non-detention compulsory measure, such detention will last to the producing of effective juridical conclusion by court or to the termination of legal action by the procuratorate and police agency. For this reason, detention of the suspect or defendant actually has no minimum or maximum time limit. Whether detention happens before or in the trial stage, it's time limit has the characteristics of uncertainty and unpredictability.

IV. Ways of remedy for Pre-trial detention

There are two main forms of legal remedy for pre-trial detention in Chinese law: one is the remedy carried out by public security organs according to authority, also called "active remedy"; the other is remedy solicited by detainees, called "solicit remedy" for short.

The so-called "active remedy" refers to that if the public security organ, procuratorial organ or court discovers inappropriate criminal detention or arrest have been taken against a suspect or defendant for criminal cases they are handling. The organs should cancel or change such action in time; where measures like criminal detention, arrest or detention is found exceeding the legal time limit, the detainee should be released immediately or other compulsory measure should be taken instead according to law.

"Solicit remedy" refers to that if the criminal suspect, defendant and his defender or legal representative considers that detention has exceeded the legal time limit after the public security organ or procuratorial organ has taken compulsory measures such as detention or arrest, they have the right to ask for the release of the detainee or change of the compulsory measure. Upon such an application, the public security organ or procuratorial organ may examine the legality of such detention and make a decision of whether to release the detainee or change the measure.

For the remedy of pre-trial detention, whether it is carried out by public security organs or applied by the party of the detainee, typical administrative remedy mode has been adopted. We can take pre-trial detention as an example for explanation. First of all, during the initial stage of trial, the institution responsible for the re-examination of the legality of detention is still the original public security organ or procuratorial organ, it evidently falls into the category of "self examination" and "self-judgement". Not

only the court responsible for criminal trial does not accept such appeal or application, even the procuratorial organ as "legal supervisor" has no right of examination afterward of any kind of detention decisions made by public security organs. Second, the institution that received the application or appeal from the detainee can either make a decision of rejection or maintenance, or does not make any decision at all. Finally, where the public security organ or procuratorial organ has made a decision of maintenance for a detainee who does not agree with re-examination, such a detainee has neither the right to appeal or to apply for reconsideration to the superior institution of the public security organ, nor the right to solicit legal remedy from the court.

Of course, there is also a kind of special mechanism of legal remedy in Chinese law, namely the administrative litigation system. The court may accept a counterpart's prosecution for specific administrative action of administrative institution, but according to relevant judicial interpretation made by the supreme court, actions taken by the public security organ or procuratorial organ according to specific authorisation of criminal procedure law do not fall into the scope of accepting cases.[4] The court refuses to accept any appeal or application concerning this aspect. Therefore, decisions of extension of criminal detention and detention made by public security organs do not fall into the scope of legal remedy of the court. Moreover, the procuratorial organ is not part of the administrative body in the constitution. Any of its action is not in the scope of accepting cases of the court's administrative litigation.

V. Place of Pre-trial detention

China's pre-trial detention is mainly carried out by a detention house under the control of the public security organ. According to the current Rules for Detention House, the detention house is set up in the administrative area at the county-level or above and administered by the public security organ on the same level.

The detention house administration of detainees is within the adjustment scope of administrative law and has little connection with the issue under study in this article. What we are concerned with is the relation between detention houses and investigation departments. Inside public security organs of all levels, the detention house is a functional department parallel to criminal investigation departments like departments of criminal police and preliminary inquiry. Detention houses and criminal investigation depart-

ments are all set up inside public security organs at the same level and under joint command and leadership, which makes detention at a detention house have contact with criminal investigation activity and even directly serve the need of criminal investigation. Yet, the closer the relation is between the detention house and criminal investigation department, the greater the risk that the rights and freedom of the detainee is infringed. This is the most basic institutional logic. After all, comparing judicial administrative body with criminal detained in prison, the public security organ generally has a certain "request or even attempt" on the suspect or defendant detained in the detention house. Whether investigation personnel want to obtain an oral statement, collect evidence of guilt, "uncover remaining quilt and complice" or prevent a defense lawyer from providing legal aid, they can achieve various objectives by applying strict control on the detainee through the detention house.

Just because of this, a series of actions infringing upon citizen's rights and freedom that happened[5] in the pretrial stage mostly have countless ties with the detention house. For example, the occurrence of extorting confession by torture, investigation personnel's "unhurriedness and having their own way" in extorting oral statements, and why most Chinese suspects give a statement admitting guilt in the investigation stage, all of these are just because investigation personnel can apply psychological and physiological control on suspects in the detention of the detention house.

Again, occurrence of "extended detention" is also directly related to this. Because as long as a detention house is in the grip of a public security organ, even the procuratorial organ has made a decision of disapproval of arrest, the public security organ still can take other administrative detention means against the suspect or even maintain the detention state of the suspect without any legal basis.

Again, lawyers engaged by suspects generally complain about "difficulty of meeting", and even if an opportunity for meeting is granted, there will be unreasonable limits from the detention house and investigation personnel on aspects of number of times, hour, articles taken and content of discussion. The reason here is that the detention house is the functional depart-

[5] On November 24, 1999, the Supreme People's Court issued Explanations on Several Issues in Implementing the Administrative Procedure Law of PRC. In Article 1 clause 2 (2) of this law, "action implemented by public and national security organs according to specific authorization in criminal procedure law" has been specifically excluded outside the scope of accepting cases for administrative proceedings.

ment of the public security organ and should serve the need of successful criminal investigation. The limit on a lawyer's right obviously can weaken a suspect's ability of counter-investigation.

Again, recently someone called for granting the right for the suspect and defendant to keep silent and asking for the establishment of a rule allowing the "presence" of a defence lawyer when police are conducting an interrogation. The realization of these reform measures would play a positive role in improving the rights of the suspect or defendant and environment. However, if the detention house continues to be controlled by the public security organ and be responsible for implementing detention of the suspect and defendant all the time, any reform measures aimed at improving the place of the detainee would be destined to be avoided by the detention house and the detainee would be in a more unfavourable situation.

VI. Overall thoughts about control of Pre-trial detention

Issues existing in China's pre-trial detention system indicate that the level of rule of law of this system is comparatively low. In fact, regardless of measures such as pre-trial detention or criminal penalty and administrative punishment, substantially, it is the public agency of power that in the name of the state or government to limit and deprive individual rights and freedom, which actually all come down to the conflict between public right and individual right---the issue of constitutionalism. For this reason, we need to break through that narrow boundary of knowledge to integrate compulsory measures (especially pre-trial detention) in criminal proceeding with criminal penalty and administrative punishment to think about China's pre-trial detention from the angle of constitutionalism and position of public law.

Generally speaking, according to the principle of the rule of law, "without authorization, any official action is prohibited; without prohibition, all individual actions are allowed." From this point of view, the principle of a legally prescribed punishment for a specified crime is obviously the concrete embodiment of the principle of the rule of law in the field of criminal law. Secondly, the principle of the rule of law also asks a country not to arbitrarily and unlimitedly do it when making any decision that infringes upon individual rights and interests, but rather to limit such infringement to the most necessary scope and extent. The principle of suiting punishment to a crime in criminal law is actually a kind of limit for kinds of punishment and the extent of punishment. Thirdly, the principle of the rule of law requests that before a court makes a legal judgment for anyone to be guilty

and passes sentence, the court must respect a basic legal presumption---this person is legally innocent. According to this doctrine of the presumption of innocence, a criminal suspect or defendant is not criminal legally and should not be subject to treatment similar to a criminal; suspect or defendant should get the most basic defence opportunity, among which the most important is that before court makes an unfavourable decision for the person, the person must be given the opportunity for an impartial hearing presided by a neutral judicial body so that a judge can listen to the opinion and explanation of the person whose rights and interests have been deprived and that legality and justifiability of the decision can stand the argument of the parties. It is obvious that the modern judicial decision system and system of advocacy are established in accordance with this principle. Finally, according to the principle of the rule of law, any person deprived of rights and freedom must be given an opportunity for applying for judicial remedy, i.e. referring the issue to a neutral judicial body that such deprived legality and necessity obtain continuous judicial review and ensure the person deprived of rights and interests fully exercise the right of action in order to carry out rational "struggle" for rights. This is also a theoretical basis for establishing the system of appeal and applying for retrial system in criminal proceedings.

The above well-known principle of the rule of law has reflected in modern criminal law and criminal procedure law and formed the basic framework and theoretical basis of criminal law. Nevertheless, let us not talk about courts representing the State to convict the individual and pass sentence at first, should those compulsory measures that occur in litigious process and sufficient to deprive the suspect and defendant of basic rights be limited by the above principle of the rule of law? For example, police can search a citizen's domicile, withhold his belongings, letters and articles as criminal evidence, and carry out secret monitoring and eavesdrop on his domicile and business place to collect criminal evidence. Should such search, withholding and eavesdropping be limited by law? Again, police need to order the arrest of a criminal suspect at large in order to track down the suspect, which would put a citizen in a situation of being hunted nationwide. Should such an action of ordering an arrest necessary for investigation be limited?

If observing from the legal consequences, as compulsory and punishment measures respectively, criminal detention or arrest and imprisonment sentences have hardly any substantial difference on the deprivation of the individual's basic freedom. Besides, criminal detention and arrest are aimed

at those suspects and defendants who are legally presumed innocent. Only those persons who have been legally declared criminals are subject to restriction of imprisonment punishment. To prevent the country from arbitrarily determining a person as criminal, or to prevent the arbitrary conviction and criminal punishment of criminal, we should give them full substantial and procedural assurance. Well then, should the law not provide more sufficient, rigorous and perfect guarantee for the personal freedom of suspect and defendant?

The principle of the rule of law in controlling pre-trial detention is actually the organic part of the modern principle of constitutionalism. Nearly all countries' constitutions will list the general basic rights and freedom of citizens. You cannot say that these authorising constitutional articles are not important. However, to prevent these rights including civil liberty, property rights and right of existence from becoming empty words on a sheet of paper, public agencies of power must be strictly restricted by the constitution in their actions of limiting and depriving attainder and freedom. In the same time, right to remedy application should also be given to citizens whose rights have been limited. The kernel of the principle of the rule of law is actually reflected in these two aspects.

For instance, according to the requirement of German basic law, a limit on any basic rights must be based on law promulgated in advance; all legal rules aimed at limiting basic rights must pursue objectives consistent with basic rights and use appropriate and necessary means to minimise the limit on basic rights. Both requirements substantially constitute actions of limiting the State in depriving individual rights. If a state organ has deprived a citizen of his right, how will the citizen be engaged in procedural defence activity? According to a provision of German basic law, any citizen who has been deprived of rights by a public organ shall have the right to refer the legality of this deprivation to a court which can decide upon the issue through a judicial hearing. Hence, the deprived person has actually obtained the right to solicit judicial remedy.

According to the principle of the rule of law, detention, as the act of public power that severely deprives civil liberty, should also be limited by the above substantial principle of legality and proportionality and give the detainee the opportunity to obtain a judicial hearing in applicable procedure.

In substantial formation, the application of pre-trial detention must be practiced in strict accordance with authorisation of current law and implement the principle of legal prescription of detention on a series of links of reason, necessity, time limit, place, authorisation, review, remedy and de-

fence. In terms of reason for detention, it should be strictly prohibited to use detention as punishment by taking the existence of obstruction of a smooth investigation and trial as the precondition for the application of detention to sufficiently prevent occurrence of a danger to society. When applying pre-trial detention, the principle of proportionality must be strictly implemented. The principle of proportionality has three basic elements: the first is purposiveness, namely the application of detention may not deviate from legal reason for detention; the second is necessity, namely detention must be taken as an exception on the choice between detention and non-detention measures by trying to select those non-detention measures in sufficient replacement of detention such as bail; the third is appropriateness, namely when applying measures of pre-trial detention, time limit of detention must correspond with the severity of suspected crime and possible sentencing, or be in direct proportion.

Moreover, in applicable procedure, pre-trial detention must be separated strictly from arrest, independent from the course of penal prosecution and forming a relatively independent and close judicial control system. Therefore, the principle of judicial authorisation must be implemented in applying pre-trial detention, namely the judicial body without investigation and prosecution responsibilities decides the application of measures of pre-trial detention by judicial review of the reason for detention. Upon the decision of detention, the suspect must be specifically notified of the reason for detention so that the suspect can make a timely judgment about the legality of the detention and put forward an application for judicial remedy at any moment. In addition, all suspects and defendants in detention should be provided with full rights to solicit a judicial remedy, i.e. application for review of the legality of detention will be filed with a special court that will listen to opinions and arguments of both prosecuting and defending parties by way of a judicial hearing to make a decision.

VII. Major difficulties in the reform of the Pre-trial detention system

Low level of the rule of law of the Pre-trial detention system firstly has direct relation to the Chinese constitutionalist system. On the issue of legal control of Chinese pre-trial detention, the lack of constitutional limitation and remedy is an extremely important but difficult topic. The Chinese constitution itself is not litigable, remediable and hard to become a direct legal basis for a court's decision; the constitution has no official limit on citizen's

basic rights and freedom and has not established specific controlling principles; the absence of a state special constitutional judicatory organ has made review of constitutionality an ideal out of reach in the Chinese rule of law. Under such circumstances, it would be hard for the control of pre-trial detention to have a constitutional basis that the most solid constitutionalist foundation has been lost.

The second difficulty in reforming China's pre-trial detention system is *the issue of functional orientation of jurisdiction.* At present the Chinese judicial system, though a court is named as a state judicial organ, it is primarily engaged in the activity of substantial judicial decision. In criminal proceedings, the court does not participate in pre-trial litigious activities but only examines if the defendant is guilty in courts trial stage and passes sentence on a guilty defendant. Yet, for a series of procedural questions such as whether the suspect has been extorted by torture for a confession, whether evidence presented by public prosecutor is legally qualified, whether a search, withholding or eavesdropping done by police is legal, and whether the obtained evidence has admissibility, there has been no special procedural judicatory mechanism established in Criminal Procedure Law. And the court rarely holds special judicatory activity for this purpose. As for whether criminal detention, arrest and after-arrest detention is legal, the court never conducts a judicial review. It can be said that in Chinese criminal proceedings, except substantial activity pertinent to the issue of a suspect's criminal responsibility, no procedural judicatory mechanism pertinent to legality of detention has been established. Whereupon, similar to the most primitive inquisitional proceedings, judicial decisions in Chinese criminal proceedings has maintained the ancient form of "judge's interrogation of defendant". And the litigation form of "defendant's asking the judge for review of legality of detention" that is generally established in modern legal society has never been built and has not been able to evolve from the ancient litigation form.

As a result, for a series of illegal acts that have occurred in penal prosecution such as extorting confession by torture, illegal evidence taking and extended detention, the court has scarcely ever started a judicial review procedure like administrative proceedings. This has put the reform of the Chinese pre-trial detention system in an embarrassing situation---can a court's jurisdiction extend or spread to the issue of legality of detention at present?

The third difficulty in reforming the pre-trial detention system is that *China's public security organs have super powerful legal status.* As stated

earlier, the public security organ is the main criminal investigation organ and the administrative organ responsible for maintaining public order as well. As the public security and administrative organ, the public security organ has a series of rights to administrative detention including labour education and rehabilitation, take-in education and administrative detention. As an investigation organ, while having a series of rights of compulsory investigation, the public security organ has the power for independently taking compulsory measures, except arrest, and can directly make relevant decisions in aspects of retention, criminal detention and extension of after-arrest detention. Whether in the field of public security administration or in the scope of criminal investigation, the public security organ has the authority of self-authorisation and self-examination and –approval in deprivation of citizen's personal freedom. You may say that in the aspect of deprivation of citizen's personal freedom, the judicial and forceful police authority is one of the biggest obstacles in China's move to a legal state.

As a matter of fact, the core in the reform of the pre-trial detention system is to bring a good many of the links such as authorisation, review and remedy of pre-trial detention into the control of jurisdiction. This is almost the only way to improve the level of the rule of law in the aspect of pre-trial detention control. But the legal practice of a police state and public security organ's rejective stand against all reform efforts in the non-administration of detention control are enough to show the difficulty the reform of pre-trial detention system is going to face.

The fourth difficulty in reforming the pre-trial detention system is that a *procuratorial organ has a special status of a judicial organ.* Viewing from the actual effect of legal enforcement, a procuratorial organ has no "legal supervision" whatsoever on measures of pre-trial detention taken on its own, because the so-called "self-supervision" is just a "fairy tale" and a kind of "Utopia" institutionally designed. Regarding the procuratorial organ's supervision of retention, criminal detention and extended time limit of detention by a public security organ, since there is no legal corrective means and authority against law breaking, it has been in existence in name only for a long time.

From the point of view of human basic constitutionalist experience, only a judicatory organ can take on the mission of control of public power and consequently provide judicial remedy for individual rights, but not that kind of procuratorial organ that takes punishment of crimes as its duty. From the angle of comparative law, procuratorial organs of countries of continental law usually have certain control power over police, but such

control usually has the implications of the public prosecution checking investigations with the purpose of bringing investigations onto the track of public prosecution. Almost all organs that are really responsible for judicial authorisation and review and providing judicial remedy are judges or courts.

Perhaps the existence of the procuratorial organ's status of legal supervision has considerably hampered the establishment of the mechanism of Chinese judicial review. Without doing away with the procuratorial organ's "fairy tale" on the legality of detention control, it would be impossible for us to realise the regression of litigation form on legal control of pre-trial detention and be unable furthermore to introduce a genuine judicial review system.

The fifth difficulty in reforming the pre-trial detention system is China's existing investigation mode of "oral-confession-centred doctrine" and litigation formation of "investigation-centred doctrine". In the oral-confession-centred investigation mode and investigation-centred litigation structure, all efforts that could possibly result in more difficulty obtaining oral confessions may seem to suffer severe impediment. For a long time, issues of right to silence, exclusion of illegal evidence, and the establishment of the rule of witness privilege widely under discussion of legal scholars have all been considerably rejected for the possible result of inefficient investigation or even the strengthening of counter-investigation power. Also, in the reform of the pre-trial detention system, any effort for pro rule of law could bring along shortening of the time limit of detention, stricter conditions for detention, termination of random detention and expanding of detainee's judicial remedial rights. Any of the above would be an obstacle in obtaining an oral confession that the delicate balance based on the oral-confession-centred doctrine would break. Maybe on the issue of the reform of China's pre-trial detention system, it is not hard to determine the direction and target. But how to overcome a series of system obstacles and concepts is a tremendous task in the course of realising the direction and target.

Substantial Standards of Compulsory Measures and Related Issues of State Compensation

WANG SHIZHOU & XIANG ZEXUAN*

In the Chinese legal system, compulsory measures refer to the statutory regulated measures that the public security organ, the people's procuratorate and the people's court (hereafter the judicial organ) can according to the law take against the criminal suspect or the accused person to temporarily restrict or deprive his freedom of person, in order to ensure the smooth proceeding of activities in the criminal procedure.[1] According to the Law on State Compensation of the People's Republic of China (hereafter the Law on State Compensation) promulgated on May 12, 1994, judicial organs shall undertake the liability of state criminal compensation, when they wrongly take any compulsory measure and therefore cause the individual citizen, legal person or other organisation to suffer damages. This article shall explain and explore the substantial standard of the compulsory measures in Chinese criminal procedure and the related issues of state compensation. The authors would like to discuss them with the foreign and Chinese experts participating in the International Workshop on Compulsory Measures in Criminal Investigation in China and Germany.

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[1] Cf.: Chen Guangzhong (Ed.), "Criminal Procedure (New Edition)", Press of the China University of Political Science and Law, 1996, p. 202. In the Chinese criminal proceedings, the compulsory measures might be taken by the people's court or other judicial organs after the first instance has begun. However, that is very unusual in the legal practice. Theoretically, that has little difference between the compulsory measures taken before the first instance. By this reason, this article does not make a strict difference for the compulsory measures before and after the first instance.

I. The General Principle of State Compensation in PR China

The Law on State Compensation provides the legal basis in present China for state criminal compensation. Article 2 of the Law on State Compensation stipulates that where state organs or state functionaries, in violation of the law, abuse their functions and powers infringing upon the lawful rights and interests of the citizens, legal persons and other organisations, thereby causing damage to them, the victims shall have the right to state compensation in accordance with this law.[2] Accordingly, the general principle of the compensation stipulated by the Law on State Compensation is the principle of compensation because of illegality and statutory regulation.

The principle of compensation because of illegality means that the criminal compensation liability, which the judicial organ shall undertake, shall have the fact of illegally abusing functions and powers as its prerequisite. As long as the judicial official's conduct is in keeping with the requirement of the legal regulation, there will be no state criminal compensation. The purpose of the Law on State Compensation and the principle of compensation because of illegality is "to promote the exercise by state organs of their functions and powers according to law."[3] For instance, in the case where the people's procuratorate failed in prosecution because the medical conclusion of the expert evaluation, which had been the basis for the approval of the arrest, was overturned by the new expert evaluation of the defender in the court. What shall be examined is the fact if the prosecutor shall be responsible for the change of the evidence. When the institution for the expert evaluation invited by the people's procuratorate belongs to the hospital designated by a people's government at the provincial level, as is required by the Criminal Procedure of the People's Republic of China, the case will be the typical one where the people's procuratorate shall not undertake the liability of compensation.

The principle of compensation because of statutory regulation is also named as the principle of compensation with limits. It means that the state compensation shall be made by the way, for the interests and with the amount stipulated by the law. Indeed, there are not any countries in the

[2] English translation of the legal text see *The Laws of the People's Republic of China (1994)*, Vol. 6, compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, Science Press, Beijing, China, p. 42.

[3] Art. 1 of the Law on State Compensation.

world that can afford any compensation required by any citizen for any damages the state caused to him. As the largest developing country and the country just at the beginning of her extensive legal construction, China can only afford state criminal compensation at a very basic level. Therefore, Article 15 of the Law on State Compensation explicitly stipulates the scope of compensation for violating the right of person and Article 16 provides the area for the compensation for the violating the right of property. In the case where the related damages are not in the scope of the statutory regulated interests, the people's procuratorate will not undertake the liability of criminal compensation. For instance, the attorney's fee raised in the relevant case is a kind of direct damage for the citizen. However, it does not fall into the scope of the right of property stipulated by Article 16. The rights of property in Article 16, which shall be compensated when infringed, are only limited to the following: (1) unlawfully taking measures such as sealing up, distraining, freezing or recovering property; or (2) innocence is found in a retrial held in accordance with the procedure of trial supervision, but the fine or confiscation of property in the original sentence has already been executed.

It is noticeable that Article 29 of the Law on State Compensation stipulates that compensation expenses shall be entered in the financial budget at various levels of government, where, however, it does not prohibit using other resources for the state compensation. The local people's procuratorates will not be at the position against the spirit of the law, when they raise the level of the state compensation with the local financial support for the local cases as an experiment.

In understanding and following the basic principle of the Law on State Compensation, it is also important to notice the regulation of Article 17 that provides the regulation of exemption for the liability of state compensation. Completely speaking, the Chinese criminal state compensation can only be correct, when it is carried out under the conditions that the illegally abusive functions and powers of the judicial organ has been ascertained, the requirement of the claimant to compensation conforms to the regulation of the law, and there are not any circumstances to exempt the state from liability.[4]

[4] Cf.: Shizhou Wang, "Certain Issues on the Liability of Criminal Compensation by the People's Procuratorate", in People's Procuratorate, No. 11, 2001.

II. The Scope of State Compensation for Compulsory Measures in China

In accordance with Chapter 6 of the Criminal Procedure of the PRC, there are five types of compulsory measures in Chinese criminal proceedings, i.e., summons to compel appearance, order to obtain a guarantor pending trial, order to subject to residential surveillance, warrant to detain and warrant to arrest.

For the violation of the rights of person, Article 15 of the Law on State Compensation provides the scope of criminal compensation as follows: "The victim shall have the right to compensation if an organ in charge of investigatory, procuratorial, judicial or prison administration work, or its functionaries, infringe upon his right of person in the exercise of its functions and powers in any of the following circumstances:

(1)Wrong detention of a person without incriminating facts or proof substantiating a strong suspicion of the commission of a crime;
(2)Wrong arrest of a person without incriminating facts;
(3)Innocence is found in a retrial held in accordance with the procedure of trial supervision, but the original sentence has already been executed;
(4)Extortion of a confession by torture or causing bodily injury or death to a citizen by using or instigating the use of violence such as beating one up; or
(5)Causing bodily injury or death to a citizen by the unlawful use of weapon or police restraint implements."

In the meanwhile, Article 17 stipulates "the state shall not be liable for compensation in any of the following circumstances:

(1)The taking into custody or sentencing being due to a citizen's own intentionally made false statements or fabricated evidence of guilt;
(2)The person taken into custody being one not liable for criminal responsibility in accordance with Art. 14 and 15 of the Criminal Law[5];
(3)The person taken into custody being one who shall not be investigated for criminal responsibility in accordance with Art. 11 of the Criminal Procedure Law[6];

[5] The numbers are listed according to the Criminal Code of 1979. However, the numbers shall be Art. 17 and 18 in the Criminal Code of 1997. Art. 17 is about the regulation of age for undertaking criminal liability while Art. 18 is about the mental patient and intoxicated person.

[6] The numbers are listed according to the Criminal Procedure Code of 1979. However, the numbers shall be Art. 15 in the Criminal Code of 1997. Art. 15 is about the regulation of the circumstances not prosecuting criminal liability.

(4) Individual acts of functionaries of organs in charge of investigatory, procuratorial, judicial or prison administration work of the state, which have nothing to do with the exercise of their functions and powers;
(5) Damage being caused by intentional acts of a citizen such as self-wounding and self-mutilation; or
(6) Other circumstances as stipulated by law."

In accordance with these regulations in the Law on State Compensation, the following characteristics can be found for the scope of state compensation for compulsory measures in Chinese criminal procedure:

Firstly, there is no state compensation for the compulsory measures without depriving the right of person. Among the five types of the compulsory measures stipulated by the Criminal Procedure of the PRC, summons to compel appearance, order to obtain a guarantor pending trial and order to subject to residential surveillance are not of depriving the right of person[7] and will not produce the issue of state compensation.

Secondly, only the compulsory measures of depriving the right of person can produce the issue of state compensation, i.e., only a wrong warrant to detain and a wrong warrant to arrest can produce the issue of state compensation. The issue of state compensation for compulsory measures of depriving the right of person might be raised at the time when the wrong compulsory measure is corrected or when the wrong judicial judgement is corrected. Article 19, par. 2, 3, 4 of the Law on State Compensation stipulates that "if a person is wrongly detained without incriminating facts nor proof substantiating a strong suspicion of the commission of a crime, the organ deciding on the detention shall be the organ liable for compensation. If a person is wrongly arrested without incriminating facts, the organ deciding on the arrest shall be the organ liable for compensation. If a person is adjudged not guilty in a retrial, the people's court passing the originally effective sentence shall be the organ liable for compensation. If a person is ad-

[7] Warrant to compel the appearance is a type of compulsory measure, which the judicial organ can use to compel the criminal suspect or the defendant who has not been detained or arrested to appear and to be interrogated. Art. 92, para. 2 of the Criminal Procedure of the PRC stipulates that "the time for interrogation through summons or forced appearance shall not exceed 12 hours. A criminal suspect shall not be detained under the disguise of successive summons or forced appearance." Order to obtain a guarantor pending trial and order to subject to residential surveillance are also the compulsory measures, which only limit the freedom of person, in order to ensure the smooth proceeding of the criminal procedure. Cf.: Chen Guangzhong, Id. P. 206 ff.

judged not guilty by a court of the second instance, the lower court passing the original sentence and the organ deciding on the arrest shall be the organs jointly liable for the compensation."

Thirdly, the judicial organ shall undertake the liability of state compensation for violation of the right of the citizen's life and health by unlawfully using violence, weapons and police restraint implements. In addition, the judicial organ shall undertake the liability of state compensation for violation of the right of property by unlawfully taking measures such as sealing up, distraining, freezing or recovering property during the process of taking the compulsory measures.

Fourthly, the unlawful compulsory measure cannot be caused by the citizen's own fault, the reason to which the law has granted exemption, or the personal conduct of the judicial organ. Otherwise, the state shall not undertake the liability of compensation.

The regulations of the scope of criminal compensation in the Law on State Compensation are generally in keeping with the situation of social security and the financial situation, as well as the level of legal development in current China.

III. The Concept of the Wrong Warrant to Detain and to Arrest in the Context of State Compensation

The freedom of person is the basic human right of a citizen. It is the basic condition for a citizen to have his freedom of person inviolable, so that he can go on with his social communication and do his normal work of his own will, as long as it is within the scope provided by law. Article 37 of the Chinese Constitution stipulates that "freedom of the person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ. Unlawful detention or deprivation or restriction of citizens freedom of the person by other means is prohibited, and unlawful search of the person of citizens is prohibited." Article 41 par. 3 also stipulates that "citizens who have suffered losses as a result of infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with the law."

The warrant to detain and the warrant to arrest are two types of the criminal compulsory measures that might be able to cause the liability of state compensation. It is essential that they shall be carried out according to

law. Wrong detention and wrong arrest will not only violate the freedom of a citizen but also cause the liability of state compensation. Therefore, it is important to define the concepts of wrong detention and wrong arrest, so that the compulsory measures can be correctly carried out and the liability of state compensation can be avoided.

1. The Concept of Wrong Detention and Liability of State Compensation

According to Article 61 of the Criminal Procedure of the PRC, "public security organs may initially detain an active criminal or a major suspect under any of the following conditions:

(1)if he is preparing to commit a crime, is in the process of committing a crime or is discovered immediately after committing a crime;
(2)if he is identified as having committed a crime by a victim or an eyewitness;
(3)if criminal evidence is found on his body or at his residence;
(4)if he attempts to commit suicide or escape after committing a crime, or he is a fugitive;
(5)if there is likelihood of his destroying or falsifying evidence or tallying confessions;
(6)if he does not tell his true name and address and his identity is unknown; or
(7)if he is strongly suspected of committing crimes from one place to another, repeatedly, or in a gang."

Usually, a warrant to detain is decided and carried out by the public security organ in China. However, Article 18, par. 2 of the Criminal Procedure stipulates that crimes of embezzlement and bribery, crimes of dereliction of duty committed by state functionaries, and crimes involving violations of a citizen's personal rights such as illegal detention, extortion of confession by torture, retaliation, frame-up and illegal search and crimes involving infringement of a citizen's democratic rights, as long as they are committed by state functionaries by taking advantage of their functions and powers, shall be placed on file for investigation by the people's procuratorates. If cases involving other grave crimes committed by state functionaries by taking advantage of their functions and powers need to be handled directly by the people's procuratorates, they may be placed on file for investigation by the people's procuratorates upon decision by the people's procuratorates at

or above the provincial level. But, Article 132 of the Chinese Criminal Procedure limits the power of the people's procuratorate to decide the warrant to detain only on the circumstances described in items 4 and 5 of Article 61.

Since the warrant to detain is a type of quite serious compulsory measure which can temporarily put a citizen into custody, the Criminal Procedure provides not only substantially the strict regulation on the applying condition for the detention but also legally the procedure to carry out the detention. When detaining a person, the public security organ must produce a detention warrant. Within 24 hours after a person has been detained, his family or the unit to which he belongs shall be notified of the reasons for detention and the place of custody, except in circumstances where such notification would hinder the investigation or there is no way of notifying them.[8] A public security organ shall interrogate a detainee within 24 hours after detention. If it is found that the person should not have been detained, he must be immediately released and issued a release certificate.[9]

Only strictly following the procedure stipulated by the law could the detention be lawful. The detention that neither conforms to the condition nor follows the procedure stipulated in the Criminal Procedure shall be the wrong detention. Therefore, the wrong detention includes the substantial wrongfulness and procedural wrongfulness in accordance with the Criminal Procedure of the PRC. However, in accordance with the Law on State Compensation, only the wrong detention caused by substantial wrongfulness can produce the liability of state compensation. The detention wrongly conducted only because of failure in completing the legal formalities has not yet been included in the scope of the state criminal compensation liability, as long as the facts and evidence of the case will finally support the detention. It is only a procedural violation.

In Chinese legal practice, the wrong detentions in the context of state compensation are principally the following types[10]: the detention that is decided and carried out with the knowledge that the detained person has not committed a crime or the evidence to incriminate him is still lacking; the organ to conduct the detention makes a mistake and detains the wrong person; the detained person is not released or not timely released after he is

[8] Art. 64 of the Criminal Procedure of the PRC.
[9] Art. 65 of the Criminal Procedure of the PRC.
[10] Cf.: Yin Yijun (Editor) and Xiang Zexuan (co-editor), The Theory and Practice of Criminal Compensation, the Mass Press, 2001, p. 210.

interrogated within 24 hours and identified that he is not the person who shall be detained; after the people's procuratorate has disapproved the application for arrest within the time limit stipulated by the law, no change of the compulsory measures is made and an illegal extended detention is still carried out, however, the detained person is finally proved to be innocent.

2. *The Concept of Wrong Arrest and Liability of State Compensation*

Article 60 of the Criminal Procedure of the PRC stipulates that "when there is evidence to support the facts of a crime and the criminal suspect or defendant could be sentenced to a punishment of not less than imprisonment, and if such measures as allowing him to obtain a guarantor pending trial or placing him under residential surveillance would be insufficient to prevent the occurrence of danger to society, thus necessitating his arrest, the criminal suspect or defendant shall be immediately arrested according to law."

Arrest of criminal suspects or defendants shall be subject to approval by a people's procuratorate or decision by a people's court and shall be executed by a public security organ.[11] The Criminal Procedure of the PRC allows any citizen to seize outright those and deliver them to the judicial organ, who is committing a crime or is discovered immediately after committing a crime, those who are wanted for arrest, those who have escaped from prison, and who are being pursued for arrest[12], however, this type of seize and deliver is not an arrest. The wrongfulness in this type of seize and deliver shall not produce the issue of state compensation.

Warrant of arrest is the most serious compulsory measure because it deprives the freedom of a person. The Criminal Procedure of the PRC stipulates the strict condition for the application of arrest. For instance, when making an arrest, a public security organ must produce an arrest warrant; within 24 hours after an arrest, the family of the arrested person or the unit to which he belongs shall be notified of the reasons for arrest and the place of custody, except in circumstances where such notification would hinder the investigation or there is no way of notifying them[13]; interrogation must be conducted within 24 hours after the arrest, by a people's court or people's procuratorate with respect to a person it has decided to arrest, and by a

[11] Art. 59 of the Criminal Procedure of the PRC.
[12] Art. 63 of the Criminal Procedure of the PRC.
[13] Art. 71 of the Criminal Procedure of the PRC.

public security organ with respect to a person it has arrested with the approval of the people's procuratorate. If it is found that the person should not have been arrested, he must be immediately released and issued a release certificate.[14] All these regulations guarantee the correct application of arrest in procedure. The arrest not following these procedural regulations is also a wrong arrest. So, the wrong arrest also includes the substantial wrongfulness and procedural wrongfulness in accordance with the Criminal Procedure of the PRC. However, in accordance with the Law on State Compensation, only the wrong arrest caused by substantial wrongfulness can produce the liability of state compensation. The arrest wrongly conducted only because of procedural wrongfulness has not yet been included in the scope of the state criminal compensation liability.

IV. Certain Issues in the Standards of the Wrong Warrant to Detain and to Arrest

In the legal practice of recent years, the following attention has been paid to the issues of the standards of the wrong warrant to detain and the wrong warrant to arrest.

1. The Standard of "Incriminating Fact" in the Condition of the Wrong Detention and Wrong Arrest

In Article 15, item 1 and 2 of the Law on State Compensation, both conditions of wrong detention and wrong arrest refer to the requirement of "incriminating fact". "Wrong detention of a person without incriminating facts" and "wrong arrest of a person without incriminating facts" fall into the scope of the liability of state compensation. However, shall it depend on the judgement given by a people's court to determine whether there is "an incriminating fact" or not?

It is true that in Article 12 of the revised text of the Criminal Procedure of the PRC of 1996, there is a provision that "no person shall be found guilty without being judged as such by a people's court according to law". The revised Criminal Law of the PRC of 1997 abolished the system of analogy and established the principle of legality[15] explicitly. Accordingly, it is indeed that we cannot legally say that conduct is a crime without the

[14] Art. 72 of the Criminal Procedure of the PRC.
[15] Art. 3 of the Criminal Law of 1997.

judgement of a people's court. But "all of the concrete regulations in the law can be understood only in the context of the historical development of the legal system."[16] It is noticeable that the current Law on State Compensation of the PRC was enacted on May 12, 1994 and came into force on January 1, 1995. At that time, detention and arrest were regulated according to the Criminal Procedure promulgated in 1979, in which Article 41 stipulates that public security organs may initially detain an active criminal deserving arrest or a major suspect under certain conditions.[17] In addition, Article 40 stipulates that when the main facts of a crime have been already ascertained and the offender could be sentenced to a punishment of not less than imprisonment, and if such measures as allowing him to obtain a guarantor pending trial or placing him under residential surveillance would be insufficient to prevent the occurrence of danger to society, thus necessitating arrest, the offender shall be immediately arrested according to law. Although the Criminal Procedure of 1979 used the term "facts of crime", it did not mean that "an arrest could not be made until all of the facts of crime were ascertained"[18], i.e., the term of "facts of crime" need not a judgement of a people's court to be constituted.

The confusion in understanding the legal term is produced by the fact that the Law on State Compensation has not been timely revised after the related law has done so. However, the meanings of the related concepts in the past and current Criminal Procedures are identical in fact. Because of this reason, it is not necessary to take the judgement of a people's court as the precondition for the judicial organs to undertake the liability of state compensation for wrong detention and wrong arrest. The case where there is not any fact of crime proved by the judgement of a people's court, might produce the liability of state compensation; the case where, though no trial was made in a people's court, a detention or an arrest was conducted without fact of crime, might produce the liability of state compensation, too.

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[16] Cf.: the Chinese version of the Lehrbuch des Strafrechts, AT, by Hans-Heinrich Jescheck & Thomas Weigend, 5. Auflage, translated by Xu Jiusheng, The Legal System's Press of China, 2001, p. 3.

[17] These conditions have generally been included into the current Criminal Procedure.

[18] Cf. Zhang Zipei (Editor), *The Textbook of Criminal Procedure*, The Mass Press, 1982, p. 128-129.

2. *The Standard of "Without Proof" in the Condition of Wrong Detention*

"Without proof substantiating a strong suspicion of the commission of a crime" is a type of wrong detention to undertake the liability of state compensation, which is stipulated in the Law on State Compensation. The state shall undertake the liability of compensation for detaining the person who did not commit a crime. The state shall also undertake the liability of compensation for detaining the person without proof substantiating a strong suspicion of the commission of a crime, which is also a wrong detention according to the Criminal Procedure. Without proof substantiating a strong suspicion of the commission of a crime is the same as without evidence substantiating a strong suspicion of the commission of a crime.[19] The main issue in this aspect in the recent Chinese legal practice is that whether the judicial organ shall do the state compensation for the case where there were evidence substantiating a strong suspicion for the decision of detention, but the criminal suspicion was later excluded and the person was released in a timely manner. There is controversy on this issue. The argument against compensation says that the detention does not violate the duty of the judicial organ but tallies with the legal conditions, while the argument for the compensation points out that the later treatment of innocence shows the former detention was illegal and wrong.[20]

The key point of the issue is actually that whether evidence substantiating a strong suspicion and supporting the decision of detention can be finally proved to be true and objective. If the evidence supporting the decision of detention was proved to be false or not true, state compensation shall be given. For instance, a public security organ decides to detain A as the suspect of a theft according to a report by someone. During the detention conducted, some instruments for the theft and some of the stolen goods were found in the residence of A. However, all of these were proved to be a scheme organised by B in order to make a false charge against A for personal resentment. It is no problem for B to undertake his personal liability for this case, but what about the public security organ? Now, the common understanding is yes, because the decision of the detention was not based upon the true and objective evidence. If, however, the original evidence for

[19] Cf.: Yin Yijun (Editor) and Xiang Zexuan (co-editor), The Theory and Practice of Criminal Compensation, the Mass Press, 2001, p. 212.
[20] Id.

the detention was true, the final judgement of innocence is made because of the change of expert evaluation[21] or the findings of the circumstances, which the law stipulates to bear no criminal liability,[22] state compensation shall not be given.

3. The Standard of Constituting Wrong Arrest

The Criminal Procedure of 1996 has changed the condition of arrest stipulated in the Criminal Procedure of 1979 from that "the main facts of a crime have been already ascertained" to "there is evidence to support the facts of a crime". What "there is evidence to support the facts of a crime" stresses is the evidence a warrant of arrest must have and not that the criminal facts have been ascertained. However, the condition of compensation for the wrong arrest has not correspondingly changed. Therefore, the arguments come out on how to define the term of "no facts of crime" according to the revised Criminal Procedure.

One argument believes that it shall take the result of the proceedings as the standard for determination: as long as the final judgement is innocent, it shall be inferred that the warrant of arrest was wrong and the state shall therefore undertake the liability of compensation.

Another argument believes that it shall take the condition of arrest as the standard for determination: as long as the warrant of arrest conforms to the condition of arrest, the warrant shall be correct and no state compensation liability shall be produced, though the final result of the proceedings is innocent.

According to the basic rule of criminal proceedings and the general principle of the liability of state criminal compensation, it shall be held that the condition of arrest as the standard for determination is more suitable for the original meaning of the law. The Chinese people's procuratorate has been generally following this standard in practice, though the people's court sometimes takes the result of the proceedings as the standard to determine the liability of state compensation. According to the standard of the condition of arrest, wrong arrest with liability of state compensation can be found in the following types of circumstances: (1) The arrest is decided without facts of crime at all or there are only minor circumstances which

[21] The example is given in the former part of this article.

[22] For instance, the mental ill person shall not bear criminal liability, see, Art. 18, para. 1 of the Criminal Law of 1997.

obviously produce no criminal liability. (2) After arrest and interrogation, it is found that the arrestee is not the right person to be arrested, however, the arrestor refused to release him. (3) It was believed that there were facts of crime before the warrant of arrest was given, however, it is found that there was no crime after arrest and interrogation. The arrestor neither released the arrestee nor changed the compulsory measure to a non-in-custody one. But the final treatment is still innocent. (4) Other circumstance in which there is no fact of crime.

The discussion will become even more complicated because of the complicated regulation in the Criminal Procedure for the innocent result, if the result of the proceedings as the standard is taken to determine the issue of wrong arrest. Article 140, par. 4 of the Criminal Procedure of 1996 stipulates that "with respect to a case for which supplementary investigation has been conducted, if the people's procuratorate still believes that the evidence is insufficient and the case does not meet the conditions for initiation of a prosecution, the people's procuratorate may decide not to initiate prosecution." Article 162, item 3 stipulates that after deliberations, the collegial panel of the people's court shall render such a judgement: "if the evidence is insufficient and thus the defendant cannot be found guilty, he shall be pronounced innocent accordingly on account of the fact that the evidence is insufficient and the accusation unfounded." The decision not to initiate prosecution according to Article 140 is called the decision not to initiate prosecution with suspicion. The judgement of innocence according to Article 162 is called the judgement of innocence with suspicion. For these cases that are closed with suspicion, there are three arguments on the issue whether they shall be compensated, if the accused raises the application for compensation for wrong detention and wrong arrest:

The first argument is that the case with suspicion shall be compensated, because the final result is innocent.

The second argument is that the case with suspicion shall not be compensated, because there was evidence when the arrest was conducted. The current innocent result is only because "the evidence is insufficient". If the judicial organ finds any new facts or evidence in the investigation later, the prosecution can be still initiated.[23]

The third argument is that it shall be on a case by case basis to decide whether compensation shall be given. For the cases where the detention

[23] Cf.: Art. 117, item 3 of the Explanation for Certain Issues in the Implementation of the Criminal Procedure of the PRC, issued by the Supreme People's Court.

and arrest were in keeping with the condition stipulated by the Criminal Procedure, we cannot say that they are wrong detention and wrong arrest, even though it is found later that the evidence is insufficient and the accused person is finally treated as innocent with suspicion. Conversely, the compensation shall be given to the person who was detained or arrested, which was not in keeping with the legally defined condition, but later was pronounced as innocent for insufficient evidence.[24]

It shall hold the position to take the condition of arrest as the standard to decide whether the cases of conclusion with suspicion shall be compensated. According to the relevant regulation,[25] the requirement that "there is evidence to support the facts of a crime" stipulated by the Criminal Procedure refers to "having the following circumstances simultaneously:

(1) there is evidence to support the occurrence of a crime;
(2) there is evidence to support the commitment of a crime by the suspect;
(3) some of the evidence has been ascertained to support that the crime was committed by the suspect.

And the fact the crime might be one of the several criminal activities committed by the criminal suspect." During the arrest is conducted, what the people's procuratorate shall examine is whether there is evidence to support the facts of a crime and it is impossible to guarantee that the criminal prosecution will certainly reach the guilty result of the accused person. After the case of criminal compensation is filed, what shall be examined is the relevant material in the original criminal case, especially the evidence supporting the decision of issuing the warrant of arrest, was true and objective. If the evidence was finally proved not to be true, it shall then be examined whether it was possible for the people's procuratorate to find out the fault at the time to approve the arrest, especially whether the people's procuratorate provides due diligence for making the decision of arrest, i.e., whether there was a subjective fault leading to the wrong decision of the arrest. As long as the evidence supporting the approval of arrest is true and objective, the

[24] Cf.: Yin Yijun (Editor) and Xiang Zexuan (co-editor), The Theory and Practice of Criminal Compensation, the Mass Press, 2001, p. 212.

[25] Cf.: Art. 26 of the Regulation for Certain Issues in Implementation of the Criminal Procedure of the PRC, issued by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of the Public Security, the Ministry of the State Security, the Ministry of Justice, the Legal Affair's Committee of the Standing Committee of the National People's Congress.

responsible prosecutor has correctly exercised his duty in examining the evidence, the decision of arrest is in keeping with the condition provided by the Criminal Procedure, the decision of the warrant to arrest made by the people's procuratorate shall be deemed as correct and no state compensation shall be given, though the final judgement is innocent because of insufficient evidence, since the prosecutor could not collect enough evidence to prove that the arrestee was guilty. Therefore, either to say that all of the cases with suspicion shall be compensated or all shall not is problematic and does not fit the rule of the criminal proceedings.

V. Conclusion

In accordance with the general principle of compensation because of illegality and statutory regulation stipulated by the Law on State Compensation, only the compulsory measures depriving the freedom of person can produce the issue of state compensation, i.e., only the wrong detention and the wrong arrest can have the issue of state compensation. The regulations of the scope of criminal compensation in the Law on State Compensation are generally in keeping with the situation of social security and the financial situation as well as the level of legal development in current China. According to the Criminal Procedure of the PRC, the wrong detention and the wrong arrest might happen in the circumstances of procedural illegality and substantial illegality. According to the Law on the State Compensation, however, only the detention and arrest with the substantial wrongfulness might produce the liability of state compensation and the procedural wrongfulness alone cannot have detention and arrest undertake state criminal compensation.

The element of "incriminating fact" in the condition of wrong detention and wrong arrest does not need the trial and judgement of a people's court to be constituted; the element of "without proof" in the condition of wrong detention is vital for the fact that the evidence substantiating the criminal suspect, which supports the decision of detention, can be finally proved as true and objective; the constitution of wrong arrest shall insist in taking the condition of arrest as standard. To check whether the evidence for the decision of arrest was true and objective and whether the people's prosecutor conducted the wrong arrest because of subjective fault, is the key point for the determination of whether state compensation shall be given.

Pondering the Regulation and Enforcement of Criminal Detention and Arrest in the People's Republic of China

ZHOU[1] XIN & WANG[2] DAWEI

There are five compulsory measures in Chinese Criminal Procedure Law, therein; criminal detention (detention for short) and arrest are the sternest custody measures, which deprive the freedom of the citizen. Therefore, once they are wrongly used, not only the citizen's human rights are assaulted directly, but also it easily results in disablement or death. From the view of China's law-enforcement practice, detention and arrest are used frequently and widely when a case is handled. In the course of application, a great many problems arise, for example, abused detention and arrest, extended custody, covert custody etc. No doubt it relates to the low-quality law-enforcement personnel, however, the main root is that some defects still exist in the legislature frame. This paper focuses on the problems that have emerged, consults the minimum limit guaranteed standards of the United Nations International Covenant on Civil and Political Rights (ICCPR), contrasts it with China's system, and provides some suggestions on how to improve the detention and arrest system. Before discussing the existing problems with detention and arrest, we need to clarify a few relative concepts.

I. Definition of the Concepts Concerned

Firstly, the meanings of detention and arrest prescribed in Chinese Criminal Procedure Law and the ICCPR differ mainly in two aspects: 1. The former

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is only provided in criminal procedure law but not the other laws; however, the latter is provided in the ICCPR. To the contracting countries, "the treaty must be abided by". Except some articles necessarily kept or announced, any one which is against or inconsistent with the ICCPR should be amended if possible. If it is difficult to amend, the international treaty has priority over the domestic. Therefore, from the view of legal validity if the provisions of these two laws conflict it is the validity of the ICCPR that takes precedence over the Criminal Procedure Law of the PRC. 2. The former belongs to criminal compulsory measures; administrative detention, judicial detention and lien are not included. The content of the latter one is more extensive, can be applied not only for various compulsory measures depriving the freedom of the citizen provided by criminal procedure law, but for the punishment depriving the freedom of the citizen set by criminal law, the imprisonment provided by the Prison Act, and the administrative detention, compulsory medical treatment, compulsory instruction imprisonment set in law or not.[3] So the concepts of detention and arrest in the ICCPR are wider than in criminal procedure law. Besides, in the ICCPR, detention and arrest are sometimes lumped with constraint.

Secondly, custody in this paper has a specific meaning: 1. Custody is different from detention and arrest. Custody is neither a compulsory measure nor a punitive instrument, but a state still going on after depriving the freedom of a citizen by detention and arrest. This state has no independent status, which is one of the key points to be probed into latter. 2.Custody in this paper only refers to the pretrial custody, but not the post-trial.

Finally, the provisions in the ICCPR are just the minimum limit guarantee standards. The reasons are as follows: 1. The political background of each contracting country differs greatly, so the coming forth of the ICCPR must be a concessive result of them. Therefore, the involved standards cannot be set too high and should be based on the premise that each part accepts them. 2. The contracting countries are from a different genealogy of law, have different judicial systems and different laws, thereby, even if the contracting countries have the same litigious principle, the exact provision and interpretation might be different. For example, at present, most countries provide the principle of open trial in their criminal procedure law, however, the provisions in each country's criminal procedure law differ on cases which are or cannot be open-trial, and the extent of openness, etc.

[3] Weiqiu Chen et al., (eds.), *Training Handbook of Convention of Civil and Political Right* (B.J.: Chinese Law and Politics University, 2002.12), p.35.

Therefore, to establish common standards in the criminal judicial field, the only way is to set down minimum guarantee standards based on the principle of seeking common points while reserving difference. 3. All of these standards have been verified regularly during the long practice of each country's criminal judicial activity. As a result, they are advanced as international legal norm and recognised by contracting countries. It shows that these norms have been well rounded, either embody basic human needs or fulfil legal restraint. Therefore, these basic litigious rules, recognised by so many countries and set as an international treaty, should be absorbed and used as reference.

II. Defects in Criminal Detention and Arrest of the PRC and the Relative Minimum Limit Guarantee Standards in the ICCPR

This paper will contrast the ICCPR and Chinese Criminal Procedure Law, then probe into the regulation and enforcement of criminal detention and arrest in China in six aspects:

1. The reasons of detention and arrest warp in practice

There is no direct provision of detention and arrest in the ICCPR, that is to say the ICCPR evades doing so. Each country sets the reasons of detention and arrest in their respective national law according to the fact. However, Article 9 (3) of the ICCPR clearly provides that: it shall not be the general rule that persons awaiting trial shall be detained in custody. It means that release may be subject to guarantee to appear for trial in any phase of judicial procedure and if it is needed the accused should check in and wait for a sentence.[4] This shows that detention and arrest should be on the premise of some need, and should be used at a minimum limit.

From the view of legislative original intention, the reasons of detention and arrest are close to the standards in the ICCPR. The detention in criminal procedure law of the PRC is a specific power of handling emergency aiming to control the spread of harm, prevent the continuing of crime, and capture the active criminals. Article 61 of the Criminal Procedure Law provides seven situations of detention, if a person has one of these situations, detention would be applied to him. Meanwhile, for the sake of ensuring the

[4] Ibid. p.375.

smooth progress of the cause of criminal procedure activity, arrest is a controlling measure put on the persons who are likely to elude and block investigation, prosecution, and trial, or to commit crime continually and be a suspect of severe crime. Article 60 of the criminal procedure law defines three conditions of applying arrest. On this basis, detention should be used only if an emergency occurs for sure. The arrest should be applied according to Article 60 of the criminal procedure law provided that it is needed to arrest.

However, in the practice of law enforcement, some reasons of detention and arrest have gone beyond the legislative original idea, and have gone far away from the basic request of the ICCPR. In the course of case investigation, the efficient use of detention and arrest is very high and the range is becoming wider and wider. Detention and arrest have become main instruments of investigators to control suspects, while detention has become the put-forward process of arrest. Investigative request is the real reason to start detention and arrest up. The so-called investigative request is manifested as: firstly, controlling the suspects for good. The reason of using detention and arrest is to control suspects absolutely for fear that the suspect cannot be caught later. Secondly, it is easy to interrogate at any moment. For the suspects are controlled, investigators can interrogate at any time. The examination and approval can be spared and the supervision can also be left out. Thirdly, it can make up the deficiency of a case-handling limit. Making detention the put-forward process of arrest, we can fully utilise the legal extended limit and gain time for evidence detection and search. Fourthly, it is a symbol of severity of case and concern of judicial authority. Having major suspicion is one of the reasons for applying detention and arrest. If the case is severe, the way of investigative authority to show attitude is applying compulsory measures like detention and arrest. Therefore, even if the suspect gives himself up to the police voluntarily and is not on purpose trying to evade investigation, however, if the influence of the case is so great that it catches the attention of some authorities, or the case is very severe, the suspect will certainly be the object of detention and arrest.

2. The start-up procedure of detention and arrest is so simple that it shows it unilateral

Article 9 (1) of the ICCPR only provides principles of examining and approval of detention and arrest, i.e. no one shall be arbitrarily arrested or imprisoned. No one shall be deprived of his liberty except on such ground and

in accordance with such procedure as are established by law. In China, although constitution, criminal procedure law and other correlative law have set down regulations, the start-up procedure designed by legislators is so simple that it shows it unilateral.

The application and approval processes of detention and arrest are basically progressing within the system, so a strict judicial examination process is absent. Criminal procedure law has prescribed strict application and approval procedures of detention and arrest, especially the approval procedure of arrest. For example, if a public security organ deems it is necessary to arrest somebody, it has to submit the request for approval of arrest, file, and evidence to the same level Procurator to examine. But the procedure of the cases public security organ and the Procurator need to approve detention, and for the Procurator's self-investigation cases need to approve for arrest, are entirely progressing within the system. And the examination and approval procedure is too simple, i.e. if the public security organ makes a request for detention within itself, it just needs to fill in the written report submitted for approving detention, attached with relative evidence and suspicion basis, and it only needs the public security principal at and above the county level to approve. When the self-investigation cases of the Procurator is requested for detention and arrest, what it has to do is to make a request to the internal examining and approving authority, and there is no external restriction and supervision. Furthermore, this request and decision are entirely unilateral. The Procurator only examines the written material and estimates whether it is up to the applicable conditions just according to the investigation organ's statement. There is no chance for the detainee and his defender to excuse himself. It is well known that public security organ and Procurator represent state prosecution organs; the only difference is their division of functions in the criminal procedure activity. The public security organ is responsible for preparatory investigating and obtaining evidence, while the Procurator takes charge of further prosecution. Therefore, on the premise of the same purpose of action, the supervision of the Procurator on the public security organ is certainly with orientation at some extent and it is hard to be non-aligned.

3. The content to be informed is absent during the enforcement of detention and arrest

In order to prevent arbitrary detention and arrest, Article 9 (2) provides: Any detainee shall be informed of the reasons why he is arrested, and of

any accusation against him. These two informative rights are derived from the right that the detainee is free from arbitrary detention and arrest. Specific content is as follows. The executive organ is not permitted to simply announce to the detainee and arrestee: "you are detained/ arrested", even though they are told: "you are detained/ arrested for suspicion", this way is considered too simple. The executive organ should show the detention warrant and arrest warrant on the spot, and clearly inform them of the four aspects of content in a written or oral way. Firstly, to inform of the reason of detention and arrest on the spot (as specified in the article of law); secondly, to inform instantly of any accusation against the detainee and arrestee; thirdly, offer immediately the material of his rights (including the right to an attorney); fourthly, explain his rights and how to exercise them so that these rights can be truly acquired and fully exercised.

From the view of Chinese law and specific regulations, detention and arrest are executed by the public security organ. Some processes are in accord with the standards of the ICCPR. For example, the public security organ should show the detention warrant and arrest warrant, declare detention and arrest, order the detainee and arrestee to add a signature to it or provide fingerprints, if the detainee and arrestee turn down the request. After a person has been detained or arrested, his family or the unit to which he belongs shall be notified of the reasons for detention and the place of custody, except in circumstances where such notification would hinder the investigation or there is no way of notifying them.

However, there is a long distance between these and the standards of the ICCPR about the informed objects and content. First, from the point of view of informed objects, according to the above provision, the detainee and arrestee are not informed directly of the reasons for detention and arrest and the place of custody, but his family or the unit to which he belongs. Because the detainee and arrestee are not permitted to contact the outside world for a long time after being detained and arrested, the informing actually does not take effect. The detainee and arrestee cannot know any information in time, and then cannot make judgment or decisions of his latter conduct. Second, the content is limited to the reasons of detention and arrest and the place of custody, excluding the next three items of the ICCPR. The detainee and arrestee are utterly ignorant of the reasons, the accusation against him, his rights and how to exercise these rights, so it is impossible for him to know what to do next, not to mention defending himself against detention and arrest.

4. It is hard to keep legal control over the custody after detention and arrest

The process of examining and approval of detention and arrest is devoid of an open counterview mechanism, and it is hard to restrict and supervise the custody after detention and arrest. This is one of the main problems existing in the compulsory measure system.

The minimum limit guarantee standards, Article 9 (3) of the ICCPR provides: anyone who has been detained or arrested for criminal accusation, shall be brought to see a judge or other officer authorised by law to exercise judicial power promptly, and has the right to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantee to appear for trial at any phase of judicial procedure, and if it is needed the accused should check in and wait for a sentence. This is a restrictive supervision mechanism against the abuse of custody, covert custody, arbitrary custody, and extended custody, including the following meanings: Firstly, to separate the police power and jurisdiction. The executive organs should be supervised over its detention and arrest action by an independent judicial organ. The supervision should involve bringing the detainee and arrestee before a judicial organ and officers for examination. And they would decide whether or not to continue custody. If the reason is not enough, the judicial officer has power to make a decision for release. Here is a point to be emphasised. The examining and approval organ and officers are requested to be independent in the ICCPR, the police and Procurator cannot substitute. Secondly, the content examined is the validity and necessity of detention and arrest and the reason of further custody. Judicial officers examine the detainee face-to-face on whether the detention and arrest are progressing according to the legal procedure, whether there is an illegal act or not, and whether it is possible to have bail. In this way, they can know the detainee's situation and listen to his exculpation and complaint. Thirdly, bringing the detainee before a judicial officer is on the principle of "promptly". Although the specific time of "bringing promptly" is different in each country's law, the UN Human Rights Committee points out that the delay cannot exceed several days.[5] Fourthly, the detainee and arrestee should be tried within reasonable time or be released. This restrictive provision is made to solve the problem of extended custody. The *International standard hand-*

[5] *General Comment*, 8(2).

book of custody of pretrial: human right and custody of pretrial suggests that each country should provide clearly that the pre-trial custody cannot exceed the maximum term.[6] Fifthly, it shall not be the general rule that persons awaiting trial shall be detained in custody. This indicates that custody can only be a measure by necessity in the ICCPR. If only the detainee is guaranteed to appear for trial at any phase of the judicial procedure, and check in to wait for a sentence if it is necessary, the non-custody measure should be taken, such as the bail system of some countries.

In China, detention plays both the role of restricting freedom of a person pro tempore in emergency, and the role of controlling the suspect and ascertaining the basic facts of the case. Therefore, the detention term provided by law is not on the principle of restricting freedom of person pro tempore, but depriving the freedom of in a period of time. The maximum length of a detention term for common criminal cases is 14 days. As to the detention of a major suspect involved in crimes committed from one place to another, repeatedly, or in a gang, the time limit for detention may be extended to 37 days (except special circumstances). The main purpose of arrest is to control the suspect firmly until the end of trial, which is convenient for a lawsuit. Therefore, the term for detention is commonly 2 months; the maximum is 7 months (except recalculating the term and supplementary investigation).

Thus it can be seen, there is a more important state hidden behind the detention and arrest procedure, which is custody (called unsettled custody by some scholars[7]). This state would last to the end of trial. In other words, the suspect might be detained from one moment of investigation, then be arrested after the custody, and after this post-arrest custody, he has to wait until the end of the trial to see whether he can be released. But the point is in the course of custody, no organ would examine the possible series of problems in custody. The problems may be: 1. Whether the detainee is mistreated during the custody; 2. the reason why the modification, cancellation, and extension are needed; 3. whether the modification, cancellation, and extension of the term for custody are needed; 4. whether the custody is legal; such kind of problems related to substantive rights.

From the view of the legislative situation of China, it has only provided

[6] See *International standard handbook of custody of pre-trial: human right and custody of pre-trial*, p.11.

[7] Ruihua Chen, "Theoretical Afterthought of Pretrial Custody", ***Studies of Law*** 5(2002), p.60.

the examination and approval of the start-up procedure of detention and arrest, but has not set any examination upon the continuous custody after arrest, which is managed by the decision-making organ. Take the extension of the term for the self-investigative cases of the Procurator for instance, if the arrest procedure is started, the suspect would be detained for 2 months. When the case cannot be concluded within the time limit, the end of the custody is decided with the examination and approval of the People's Procurator at the next higher level of at the province level. If the term for the custody needs to be extended, this examination can be used 3 times, and the extension may be 5 months. Again, if the public security organ has to recalculate the term, they only need to get the approval of the principal at and above the county level.[8] In another example, if the Procurator needs to recalculate the term for custody, the internal investigative department submits the request for examination to the examining department, who will submit this to the chief procurator to make a decision.[9] As to such measures related to the freedom of person as the extension of custody term and recalculating of the term, traditional examination should be used, namely principal reading, signing and approving. The detainee and his defender have no right to see the examining officer, not to mention the right to speak, even the right to be informed of the reasons for the extension of custody. In China, during the course of custody, there is no judicial examination measure of the ICCPR, so in practice, extended custody, abuse of custody, and covert custody are common occurrences and fail to be forbidden.

5. No limitation is put on the term for custody

As to the term for detention and arrest, the ICCPR only provides in principle that the detainee shall be tried within reasonable time. Meanwhile, the *International standard handbook of custody of pr-trial: human right and custody of pretrial* suggests that each country should provide clearly that the pre-trial custody cannot exceed the maximum term. The principle is that each country clearly sets the maximum length of term for custody, and shortens the term for custody the best it can, so that the society is easy to supervise the custody action of executive organs, then the custody would

[8] *Regulation of Handling Criminal Case Procedure of Police* (Issued and implemented on 5.14, 1998), Article 112.

[9] *Regulation of Criminal Procedure of the People's Procurator* (Revised on 12.16, 1998), Article 229.

not become a covert punitive measure and an end would be put to the extended custody.

However, to insure the task of punishing the criminals, the newly revised Criminal Procedure Law of China abolished the system of "detention for investigation", at the same time, the term for custody of detention and arrest is extended. This revision not only sat heavily on the lawsuit cost of the specialised organs, and influenced the human rights protection function of criminal procedure negatively, but also acted against the minimum limit guarantee standards of the ICCPR, which is indicated in three aspects: firstly, the stretch term and accumulative total custody term are too long. The so-called stretch term refers to an agile implement beyond the basic term, that is to say, continuing to extend the custody for some special reason. Criminal Procedure Law provides several "stretch terms" under special circumstances. For example, after the arrest, if the case is complex and cannot be concluded within the time limit, an extension of one month may be allowed with the prescribed procedure of authorised organs.[10] This provision can make the custody term accumulate to 7 months.[11] Besides, criminal procedure law provides an accumulation method of recalculating, i.e. if other major crimes of the suspect are found out during the course of investigation, the time limit for investigative custody shall be recalculated from the right day. An unsure-claimed time limit may make the investigative custody limit to accumulate another 7 months beside the 7 months.[12] Similarly, if the identity of the suspect is not clear, the time limit for the investigative custody shall be calculated from the day when his identity is found out.[13] The above provisions are very infrequent in each country's law. In fact, these provisions are makeshift by the legislator, aimed at solving the deficiency of the time limit for conducting a case. In other words, to ensure the quality of conducting a case, the legislator gives up protecting citizen's basic rights, this tropism of value objects to the ultimate aim of criminal procedure. Secondly, the time limits of conducting a case and custody are nearly one in the same. The above extension of the time limit for custody, and recalculating only apply for the phase of investigation. When the case is at the stage of examination and prosecution, procedure of first instance, procedure of second instance, and procedure for review of death sentences,

[10] See *Criminal Procedure Law* (revised in 1996), Article 124.
[11] Ibid. Articles 124,125,126 and 127.
[12] Ibid. Article 128.
[13] Ibid. Article 128.

the suspect will be in the state of custody with the progress of the case until the end of the trial. For example, if the time limit of procedure of first instance is one month and a half, the accused will be possibly detained for one month and a half. During the procedure of first instance, if the Procurator requests for supplementary investigation, the accused will be detained extensively for one month. According to the relational provisions of criminal procedure law, the basic time limit for examination and prosecution of the Procurator is one month, and an extension of a half-month can be allowed, during which supplementary investigation may be conducted twice, one month for each time. Furthermore, when supplementary investigation is completed and the case is transferred to the People's Procurator, the time limit for examination and prosecution shall be recalculated. The time limit for custody can be as long as six and a half months.[14] Thirdly, the minimum time limit is too long. According to the relational provisions of criminal procedure law, the time limit for detention can be 37 days and the time limit for arrest can be extended to 7 months (excluding recalculating under special circumstances).[15] Apparently, the power of executive organs vested by law is too broad, which goes greatly beyond the minimum rules of the international justice.

6. Matching judicial remedy procedure is absent

Article 9 (4) of the ICCPR provides: any person who has been deprived liberty by detention and arrest, is entitled to initiate a proceeding in court, so that the court can decide whether the detention is unlawful and to release him if it is unlawful without delay. Meanwhile, Article 9 (5) of the ICCPR provides also: Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. This is a remedial measure after the unlawful arrest and detention. These two judicial remedy procedures caused by the application of the detainee can be called "procedure of solicit remedy". One point should be paid attention to: the remedy procedure in the ICCPR is put forward by an individual to a judicial organ, the administrative appeal requested to the police organ, the Procurator or organ at higher level is not included. In defining the matching judicial remedy procedure, some scholars deem that the bail system, and the judicial examination system towards custody are both judicial remedies. The author

[14] Ibid. Article 140.
[15] Ibid. Articles 69, 124, 125, 126 and 127.

thinks that the ultimate aim of these four measures are guaranteeing the right application of detention and arrest and remedying the damage in time and effectively, so that the damage can be reduced. Therefore, on the basis of the minimum standards of the ICCPR, as long as there is condition, the native law should design effective remedy measures of multiple level and channel.

From the view of Chinese Law and regulation, remedy measure only has two forms: first, compensation for the erroneous detention and arrest. Article 41 (3) of Constitution stipulates: citizens who have suffered losses through infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with the law. To guarantee the implementation of the Constitution, on May 12, 1994, the standing Committee of the People's Congress passed the State Compensation Law. Article 15 (1) and (2) of it provides the wrong detention and arrest clearly. But the range of wrong detention and arrest is limited to without proof or without proof substantiating a strong suspicion of the commission of a crime, that is to say, only the innocence or the person who is not substantiated a strong suspicion of crime have a right to compensation. Second, asking the original organ for application of removal. Article 75 of the Criminal Procedure Law stipulates: the detainees and their legal personal representatives have the right to ask for removal of compulsory measures taken by the people's court, the procurator or public security organs exceeding legal duration. However, the applicant should apply to the organ that has made the decision of detention or arrest, and the organ would examine in an administrative way, in close circumstances, examine and make a decision only by itself. The applicant would have no right to appeal or to ask for administrative review to the police organ or the procurator at the next higher level, because the judicial interpretation made by the Supreme People's Court stipulates that the action which is authorised by the Criminal Procedure Law of the public security organ does not belong to the court's scope of accepting cases.[16] Thus it can be seen that the remedial measures of detention and arrest are not powerful enough and the channel is not fluent.

[16] According to *Explanation on Certain Problems in Implementation of the Administrative Procedure Law of PRC* (Issued by the Supreme People's Court in 11.24, 1999) Article1(2) 2 : "actions which are authorized by the Criminal Procedure Law of the Police and National Security and other organs "are excluded to the court's scope of accepting cases.

III. Some suggestions for enhancing the detention and arrest system

The author thinks some of the above problems can be solved by enhancing the legislature and supervision mechanism; some need to strengthen the propaganda function to make the spirit of the ICCPR lying embedded in every person's mind, especially needs to consolidate the consciousness of human rights protection of the law enforcement personnel to make them to handle cases in conformity with law; and some problems deal with the whole criminal judicial system. Therefore, the original legal regulation cannot be denied or overthrown entirely just for the existing problems in the detention and arrest enforcement, the state judicial system cannot request to be changed thoroughly in a short period of time, and it can only be renewed and enhanced gradually on the basis of the primary law.

In order to solve the problems really, based on the further analysis, the author offers the following suggestions for the detention and arrest enhancement of China.

Firstly, on the basis of keeping current regulation, publicity and openness shall be added to the start-up of examination and approval of detention and arrest. The specific points are: to establish a hearing system like some countries and the examination and approval organs would take charge. The content of examination only deals with whether the reasons of detention and arrest are enough and necessary. The examination is half-open, i.e. only the start-up personnel of application, the requested organs and the examination and approval organs shall take part in, if necessary, the witness and expert appraiser can also attend the hearing. If the suspect of some cases cannot appear in court, it is permitted that his defender can be his substitute. The purpose of this design mainly judicialises the examination of detention and arrest to turn the administrative examination and approval pattern.

Secondly, procedure of notification shall be added to the execution of detention and arrest. It should be an indispensable part of the detention and arrest system. The content of notification should be in accordance with the relational regulations of the ICCPR. Meanwhile, a supervision mechanism and punitive measures should be established. The law can be put into effect only in this way.

Thirdly, to establish judicial examination organs to take charge of examining the existing problems in detention, arrest and custody, includes: 1. Judicial officers should assume the subject of examination. 2. There are

two approaches of start-up of examination procedure: one is active examination of judicial officers, i.e. to examine all of the detainees who are up to the conditions regularly. The other is soliciting examination put forward by the detainee and his defender. 3. The examination takes the mode of half-open (same as the above-mentioned). 4. The place of examination should be set in the area controlled by judicial organs. 5. The place of custody should be independent of executing organs, and be managed by judicial organs. 6. The content of examination includes: reasons of custody, whether the informative obligation is fulfilled, reasons of extension of custody, treatment during the custody, whether the appeal is needed, whether the detainee is interrogated promptly after the detention and arrest, whether his human rights are infringed during the interrogation, whether his health should be examined and appraised. This is the most effective system to protect the detainee's right of person from unlawful infringement.

Fourthly, all examinations relative to extended custody and recalculating should be examined and decided by judicial officers, and take the mode of half-open. The provision "it shall not be the general rule that persons awaiting trial shall be detained in custody" of the ICCPR would be put into effect only in this way.

Fifthly, a judicial remedy system shall be added to the criminal procedure law, which includes: 1. Reconsidering proceedings of the detainee when he refuses to accept the decision of detention and arrest. The detainee directly puts forward to the original decision-making organs, if he still refuses to accept the reconsideration result, he can appeal to the judicial examination organs, and the decision will be the final order. 2. If the detainee refuses to accept the extension and recalculating of the time limit for custody, he can appeal to the judicial examination organs, and the decision made shall be the final order. 3. If the detainee deems the action of executive organs during the execution to be illegal, he can appeal directly to the judicial examination organs, and the result has the ultimate effectiveness. 4. The judicial remedy system stimulated in the Criminal Procedure Law should be matched with the relational provision of the State Compensation Law, which would be more specific and have more manoeuvrability.

From a long-term view, to turn the scale of extended custody, covert custody and abused custody, the current investigative pattern should be changed, an intact evidence system should be established and enhanced. Great efforts need to be made to realise the independence of jurisdiction, only in this way a permanent cure can be affected.

Pre-Trial Detention in Germany – The Empirical Situation

HANS-JÖRG ALBRECHT

1. Introduction: The Legal Framework of Pre-Trial Detention

Pre-trial detention has always received attention from policy makers, lawyers and criminologists. This attention is due to the precarious compromise emerging with pre-trial detention between the principle of *nulla poena sine culpa* (also enshrined in the European Convention on Human Rights, Art. 6 II) [1], which says that before the finding of guilt in a court of law punishment must not be enforced on the one hand and the evident necessity to guarantee a proper criminal process and trial in the presence of the accused, and with that ultimately to guarantee the rule of law, on the other hand. However, in order to implement the rule of law and in order to ensure a criminal trial a person may in principle be detained before a finding of guilt. But, the conditions set in §§ 112-130 German Criminal Procedural Code (GCP) for pre-trial detention demonstrate that neither the goal of carrying out a proper trial nor the principle of *nulla poena sine culpa* are absolutely protected; both goals are to be weighed against each other and §§112-130 GCP reflect the (changing) outcomes of this process of weighing interests during the course of legislation.

Pre-trial detention, moreover, receives particular attention because immediate arrest and detention symbolise evidently in a very efficient way pursuit of general deterrence and public safety [2]. Pre-trial detention concerns a rapid and visible response to crime and therefore is perceived to

[1] Hassemer, W.: Die Voraussetzungen der Untersuchungshaft. StV 4(1984), pp. 38-42, pp. 40.

[2] Schöch, H.: Der Einfluß der Strafverteidigung auf den Verlauf der Untersuchungshaft. Baden-Baden 1997, p. 13.

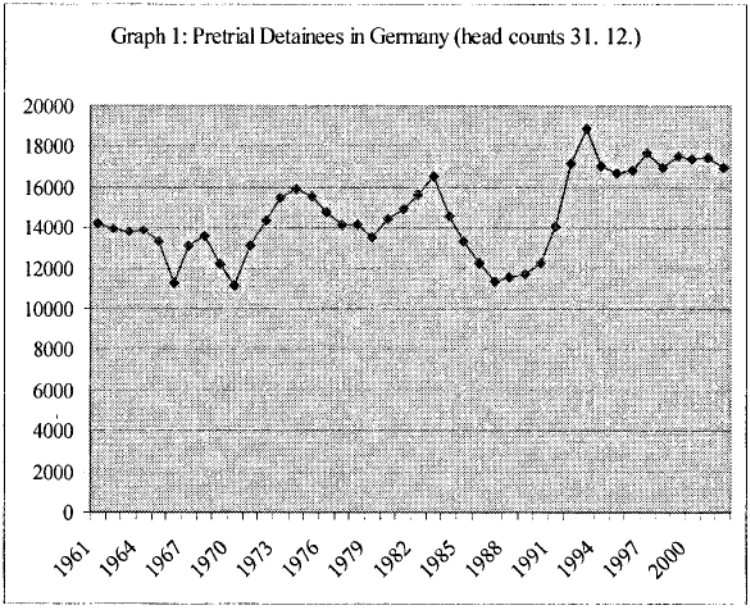
demonstrate in a unique way the relationship between crime and punishment. Though pre-trial detention should pursue mainly the goal of carrying out a criminal trial, there are other goals that have been evenly accepted as legitimate aims of pre-trial detention. The statutory conditions authorising pre-trial detention point to, besides escape risk and obstruction of justice, to a risk of relapse into crime (§112a GCP); pre-trial detention insofar may be imposed also in order to protect society from serious recidivists. Moreover, in case of the most serious violent offences, that is in particular murder, the law (§112 III GCP) allows for immediate pre-trial detention even if escape risk or the risk of obstruction of justice can be ruled out[3]. This means that positive general prevention is endorsed as a goal whereby pre-trial detention certainly reflects in such cases also an attempt to respond to the public respectively to the communities' feelings after a murder has been committed. The legal framework of pre-trial detention thus displays a mix of preventive and procedural considerations. But, the last decades have seen a move towards prevention as a major goal of pre-trial detention due to dramatic changes in the composition of offenders and the structure of crimes. Pre-trial detention, however, remains a flexible instrument as those conditions allowing imposition of pre-trial detention leave considerable space for discretionary decision-making. Except for imposing pre-trial detention because of the seriousness of the offence, the other reasons of detention point towards the precarious task of predicting absconding, obstructing justice or relapse into serious crime.

Especially the developments in the nineties and here German reunification, the tumbling of the iron wall between the East and West of Europe, the continuing process of immigration into Europe and the European Unions response in terms of policies of internal security [4] point to significant trends which make theory and practice of pre-trial detention today again today an important field of criminal policy. It is in particular questions of patterns of application of pre-trial detention as well as possible alternatives that demand answers[5].

[3] See also decisions of the Federal Constitutional Court (BverfGE) 19, pp. 342.

[4] Fijnault, C., et al. (Eds.): Changes in Society, Crime and Criminal Justice in Europe. Volume II. International Organised and Corporate Crime. Antwerpen 1995; Wittkämper, G.W., Krevert, P., Kohl, A.: Europa und die innere Sicherheit. Wiesbaden 1996; Bundesministerium des Innern: Texte zur Inneren Sicherheit. Vol. I, II. Bonn 1997.

[5] Reindl, R., Nickolai, W., Gehl, G. (Eds.): Untersuchungshaft. Stiefkind der Justiz. Weimar 1995; Geiter, H.: Untersuchungshaft in Nordrhein-Westfalen. Eine empirische



Graph 1 shows the developments in figures of pre-trial detention for the last four decades. It is evident that at the end of the eighties and at the beginning of the nineties the process of opening borders and growing mobility has driven the number of detainees[6]. This might indicate that pre-trial detention fulfils the function of a last resort in times of a penal crisis [7]. However, what becomes visible concerns a differentiation of the functions of pre-trial detention. Prevention as an important goal of pre-trial detention is given more weight, the goal of carrying out a criminal trial steps back. Although the history of pre-trial detention in Germany shows clearly that

Untersuchung zur Beurteilung der Chancen einer Haftvermeidung durch Sozialarbeit. Berlin 1998.

[6] This becomes also visible when comparing the data for the eighties presented by Schöch, H.: Wird in der Bundesrepublik Deutschland zu viel verhaftet? Versuch einer Standortbeschreibung anhand nationaler und internationaler Statistike. In: Küper, W. (Ed.): Festschrift für Karl Lackner zum 70.Geburtstag. Berlin, New York 1987, pp. 991-1008, p. 1004 with data for 1993/1994 as made available by the Counsel of Europe: Penological Information Bulletin. Strasbourg 1994-1995.

[7] Dünkel, F.: Praxis der Untersuchungshaft in den 90er Jahren – Instrumentalisierung strafprozessualer Zwangsmittel für kriminal- und ausländerpolitische Zwecke? Strafverteidiger 1994, pp. 610-621, p. 610.

the law of pre-trial detention already in the sixties has been amended as to be able to consider seriousness of the criminal offence and risk of recidivism when deciding on pre-trial detention [8], the move towards prevention certainly gains momentum at the beginning of the nineties. Changes in the structure of crime and changes in the structure of criminal suspects have fuelled the move towards prevention. When looking at the development in crime over the last decades we observe two major trends.

First, new types of crime emerge that can be called transaction crimes as they are part of a market process (i.e. drug trafficking or trafficking in humans). Transaction crimes are well suited to the model of the rational criminal, which carries also an element of dangerousness, and moreover is associated with a need for control.

Second, the share of foreign or immigrant suspects has increased substantially, in particular since the fall of the Iron Wall in Europe. The increase in the share of immigrant suspects brought also an increase in the number of those immigrants with a precarious legal position. While until the early eighties most of the immigrants were regular labour immigrants a majority of those immigrating to Germany since the end of the eighties are asylum seekers, fugitives and illegal migrants[9].

However, it is not only prevention that characterised the debate on pre-trial detention in the last decades. From the viewpoint of a rehabilitative system of criminal sanctions [10] and in particular from the viewpoint of youth criminal law which is guided by educative needs alone [11] pre-trial detention is certainly counterproductive as time served in pre-trial detention is deducted from the sentence and thus cannot be used for rehabilitation or education [12]. In fact, significant parts of the sentence are served through pre-trial detention. With that short term imprisonment had entered the sys-

[8] Schöch, H.: opus cited 1987, p. 993.

[9] Albrecht, H.-J.: Ethnic Minorities, Crime, and Criminal Justice in Germany. In: Tonry, M. (Ed.): Ethnicity, Crime, and Immigration. Comparative and Cross-National Perspectives. Chicago, London 1997, p. 31-100.

[10] Kaiser, G.: Kriminologie. 3. ed. Heidelberg 1996, p. 990.

[11] Jehle, J.-M.: Entwicklung der Untersuchungshaft bei Jugendlichen und Heranwachsenden vor und nach der Wiedervereinigung. Bonn 1995.

[12] Vgl. hierzu Kury, H. (Ed.): Prognose und Behandlung bei jungen Rechtsbrechern. Ergebnisse eines Forschungsprojekts. Freiburg 1986.

tem of criminal sanctions again after short term imprisonment was abolished in 1969 because of its alleged negative impact on the offender [13].

After all, different demands are put forward to policy makers as regards pre-trial detention. Demands to facilitate imposition of pre-trial detention in order to make crime control more efficient contrast with demands to reduce the use of pre-trial detention in order to give more respect to the principle of presumption of innocence as to the principle of proportionality and to reduce the risk of recidivism.

2. Developments in the statutory basis of pre-trial detention

Reforms of the statutory basis of pre-trial detention during the last decades oscillate between strict understanding as a device to secure the criminal trial on the one hand and exploitation of its potential of prevention and repression [14]. But, amendments in 1994 and 1997 certainly can be interpreted as reducing the weight of the principle of presumption of innocence and the principle of proportionality in favour of the goal of securing the criminal process and promoting prevention of crime. The 1994 amendment brought an expansion of those criminal offences, which are regarded to be that serious that pre-trial detention should be imposed without regard of risk of absconding or obstruction of justice. Furthermore, it was facilitated to establish the remand ground of relapse into serious crime. In 1997, another procedural law amendment introduced what is called "trial detention" (Hauptverhandlungshaft, §127b). Here, the conditions under which a suspect can be detained prior to trial are less strict if the trial is held within 7 days following onset of detention.

Although in adult pre-trial detention law remand grounds have been expanded and another approach has been adopted in the Youth Court Law for pre-trial detention of juvenile suspects. In the 1st Law to Amend Youth Court Law of 1990 the legislator expressed its will to reduce remand prison for juvenile offenders. Since 1990 the juvenile court has in the case of juvenile remand decisions to consider explicitly the particular hardship caused by detention for juveniles. In the arrest warrant the judge has to jus-

[13] Heinz, W.: Recht und Praxis der Untersuchungshaft in der Bundesrepublik Deutschland. Zur Disfunktionalität der Untersuchungshaft gegenüber dem Reformprogramm im materiellen Strafrecht. BewH 34(1987), pp. 5ff

[14] Paeffgen, U.: Vorüberlegungen zu einer Dogmatik des Untersuchungshaft-Rechts. Tübingen 1986; Jabel, H.-P.: Die Rechtsiwrklichkeit der Untersuchungshaft in Niedersachsen. Lingen 1988, pp. 20.

tify explicitly why alternatives to pre-trial detention (i.e. placement in a foster home) do not suffice to secure the trial. Pre-trial detention then has been restricted further for 14 and 15 year old suspects. Risk of absconding may be assumed for this age group only if the suspect had already tried to escape or if the suspect has no permanent place of residence in Germany. Then, the juvenile court aide has to be informed in case of any arrest warrant issued against a juvenile suspect that should enable the aide to prevent enforcement of such warrant [15]. Finally, a defence counsel has to be appointed for any juvenile against whom an arrest warrant is to be enforced.

3. The Practice of Pre-Trial Detention

Trends in the use of pre-trial detention can be observed on the basis of several indicators. First, headcounts of pre-trial detainees are available as are counts of admissions of suspects to pre-trial detention facilities per year. Then the proportion of individuals adjudicated and detained prior to adjudication can be calculated as can be determined the kind of decisions following pre-trial detention. Of particular importance should of course be information about the type of criminal sanctions that are imposed after pre-trial detention had been served.

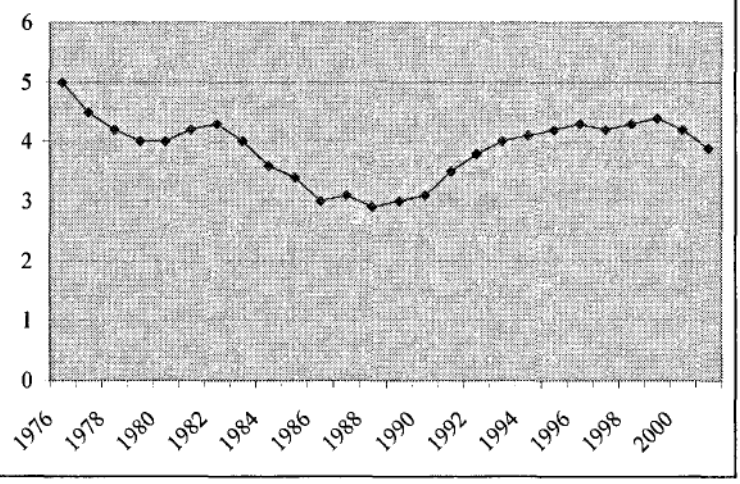
The information on display in graph 1 covers pre-trial detention figures for the last four decades. From these data two conclusions can be drawn. First, the absolute number of detainees has increased significantly over the last decades (although some of this increase is due to re-unification 1990); second, the discussion about the problem of unnecessary detention and about alternatives to pre-trial detention evidently did not have those consequences that had been expected, namely a reduction in the number of detainees.

The increase in the number of pre-trial detainees at the end of the seventies and at the beginning of the eighties was paralleled by a corresponding increase in the number of sentenced prisoners. The increase in the number of sentenced prisoners slowed down then and was reversed since the mid-

[15] Walter, M.: Untersuchungshaft und Erziehung bei jungen Gefangenen. Monatsschrift für Kriminologie und Strafrechtsreform 1978, pp.337; Dünkel, F., Meyer, G.: Jugendstrafe und Jugendstrafvollzug. Vol. 1, Freiburg 1985; Albrecht, P.-A., Jugendstrafrecht, 2. ed. 1993, pp. 230; Matenaer, H.: Haftentscheidungshilfe im Jugendstrafverfahren in Nordrhein-Westfalen. DVJJ-Journal 3-4/1995, pp. 354.; Bindel-Kögel, G., Heßler, M.: Vermeidung von Untersuchungshaft durch Jugendhilfe. DVJJ-Journal 1997, pp. 297-307.

eighties. The trend in the numbers of pre-trial detainees followed [16]. The same developments can be observed when looking at the rate of adjudicated persons who had been detained prior to trial. The rate fell from 4% (of all adjudications) in 1983 to 3% in 1988 (graph 2). However, since the end of the eighties the numbers of remand and sentenced prisoners are on the increase again as is the rate of adjudicated persons detained prior to the trial. The ups and downs that can be observed in this period are not explained by changes in the law. It is changes in decision-making or changes in the case structures alone that explain why the numbers decrease or increase.

Graph 2: Rate of pretrial detention at total adjudications



Source: Statistisches Bundesamt: Rechtspflege. Strafverfolgung 1976-2001. Wiesbaden 1978-2003.

Table 1 gives some insight into the forces that have driven the ups and downs of pre-trial detention during the last 15 years. In table 1 information is summarised about the rates of adjudication with pre-trial detention as well as rates of adjudication at large with 1983 representing the base line (100) and 1988, 1993 and 1996 the follow ups. Between 1983 and 1988 all

[16] Dünkel, F.: Praxis der Untersuchungshaft in den 90er Jahren – Instrumentalisierung strafprozessualer Zwangsmittel für kriminal- und ausländerpolitische Zwecke? Strafverteidiger 1994, pp. 610-621.

offence types display a decrease in both the rates of adjudications with pre-trial detention and adjudication at large. The period 1988-1993 shows a dramatic increase in both rates, in particular for those offence types where asylum seekers and other immigrants were most likely to be involved. After 1993, when asylum law had been amended [17] and numbers of asylum seekers fell significantly, the decrease is correspondingly high.

Table 1: Rates of Detainees and Adjudicated Persons Broken Down along Offence Types

Year/Offence	1983	1988	1993	1996
Simple Theft Detention	100	- 43%	**+ 46%**	- 16%
Simple Theft Adjudication	100	- 18%	+ 16%	- 9%
Total Theft Detention	100	- 38%	+ 34%	- 10%
Total Theft Adjudication	100	- 15%	+ 9%	- 7%
Robbery Detention	100	- 31%	**+ 42%**	+ 6%
Robbery Adjudication	100	- 14%	+ 30%	+ 32%
Rape Detention	100	- 22%	+ 2%	0%
Rape Adjudication	100	- 17%	- 5%	+ 1%
Aggravated Assault Detention	100	- 32%	**+ 24%**	**+ 27%**
Aggravated Assault Adjudication	100	- 11%	+ 5%	+ 17%
Fraud Detention	100	- 41%	+ 13%	+ 2%
Fraud Adjudication	100	+ 24%	- 1%	+ 12%
Forgery Detention	100	- 20%	**+ 112%**	- 4%
Forgery Adjudication	100	+ 14%	+ 28%	+ 3%
Drug Offences Detention	100	- 15%	**+ 55%**	**+ 6%**
Drug Offences Adjudication	100	+ 24%	+ 37%	+ 26%
Immigration Law Detention	100	- 13%	**+ 51%**	**+ 37%**
Immigration Law Adjudication	100	- 11%	+ 93%	+ 16%
Adjudication Total Detention	100	- 34%	+ 39%	+ 3%
Adjudication Total	100	-10%	+ 5%	+ 2%

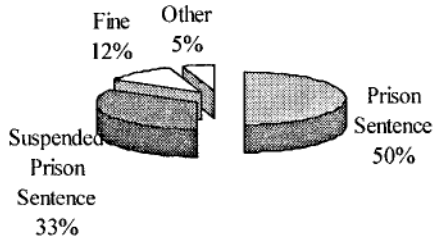
Source: Statistisches Bundesamt: Strafverfolgungsstatisiken 1983, 1988, 1993, 1996.

Information displayed in table 1 suggests that changes in the use of pre-trial detention at the end of the eighties and in the first half of the nineties are (at least to a substantial extent) explained by the particular response to (suspect) immigrants where pre-trial detention is imposed also in non-serious cases (in particular simple theft, forgery and immigration offences).

[17] Albrecht, H.-J.: Fortress Europe? – Controlling Illegal Immigration. European Journal of Crime, Criminal Law and Criminal Justice, 10(2002), pp. 1-22.

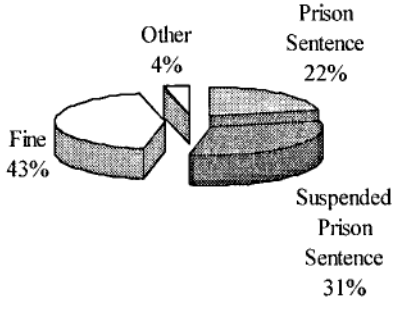
When taking into account the structure of criminal sanctions imposed after pre-trial detention had been served we observe – comparing the total of convictions and sentences with immigration offences where immigrants of course have the biggest share – that immigration offences result after pre-trial detention in far fewer cases in immediate imprisonment (graphs 3, 4). This means that the average immigration offence having resulted in pre-trial detention is regarded to be far less serious than the average criminal offence at large.

Graph 3: Sanctions Imposed After Defendant Was Held in Prettrial Detention 2001 (Total)



Source: Statistisches Bundesamt: Strafverfolgung 2001. Wiesbaden 2003

Graph 4: Sanctions Imposed for Immigration Offences After Defendant Was Held in Pretrial Detention 2001



Source: Statistisches Bundesamt: Strafverfolgung 2001. Wiesbaden 2003

A higher risk of being held in pre-trial detention with respect to foreign suspects can also be demonstrated on the basis of data collected from Northrhine-Westfalia and Hesse at the beginning of the nineties. While the relationship between sentenced prisoners and pre-trial detainees is 3.3 to 1 for German prison inmates, the corresponding relationship in the group of immigrant prison inmates amounts to 0.8 to 1 [18]. Correspondingly, data from Hesse [19] point to the fact that the general tendency of increasing rates of sentenced and unsentenced prisoners is based on two diverging trends. The rates of detention are on the decrease for German citizens while they are on the increase for immigrants (or foreign nationals).

In the face of immigration trends at large and in the face of the remands grounds established in German criminal procedural law such trends can be expected. The distribution of remand grounds shows that 95% of all arrest warrants in 2001 that are enforced are justified with the risk of absconding (including also a tiny share of cases where an arrest warrant has been issued because the suspect actually absconded). Some 4% of pre-trial detention decisions are based upon (the risk of) obstruction of justice. The remaining 1% is justified with offence seriousness and risk of relapse into serious crime[20]. Risk of absconding therefore is the leading remand ground and immigrant populations therefore are prone to this remand ground. It might be even said that certain groups of immigrants are subject to group discrimination because the group at large is exposed to being judged as escape risks. Elevated rates of pre-trial detention among immigrants indeed can be expected as the normative framework considers first of all the type and intensity of incentives for escaping the criminal trial. Besides the possible size of the criminal penalty that can be expected variables like the nature and the intensity of bonds to society and the territory of the jurisdiction where the criminal trial will be held guide decision-making in this field. So, in cases of immigrant suspects legal conditions of pre-trial detention certainly are more likely to be established than in other populations. Corresponding data can be confirmed for other European countries. The share of foreign nationals at those entering pre-trial detention facilities was approximately 40% in 1993 while their share at those entering prisons for sentenced offenders amounted to 12% [21]. Similar data demonstrate for Belgium that evidently there the same phenomenon can be observed [22].

[18] Landtag Nordrhein-Westfalen. Drucksache 11/5139, 26.2.1993 and unpublished prison statistics.

[19] Hessian Ministry of Justice unpublished prison statistics 1994.

[20] Statistisches Bundesamt: Rechtspflege. Strafverfolgung 2001. Wiesbaden 2003, p. 78.

[21] Tournier, P.: Nationality, Crime, and Criminal Justice in France. In: Tonry, M. (Ed.): opus cited, 1996, pp. 523-551, p. 543.

[22] Brion, F.: Chiffrer, dechiffrer. Incarceration des etrangers et construction social de la criminalite des immigres en Belgique. In: Palidda, S. (Ed.): Delit d´ immigration. Immigrant delinquency. Brüssel 1996, pp. 163-223.

It is in particular with a view to such vulnerable groups that the role of the judiciary in controlling pre-trial detention becomes of paramount importance. Judicial control is introduced in the German criminal procedure through entrusting the power of issuing an arrest warrant solely to the judge on motion by the public prosecutor. According to §114 GPC an arrest warrant has to be justified in written form. Requiring written justification in written has the aim to ensure that the judge when issuing an arrest warrant considers carefully the arguments that speak against and in favour of pre-trial detention. Furthermore, the defendant and the defence counsel are informed about the grounds that have led to an order of pre-trial detention. Finally, written justification in written facilitates control of arrest warrants in appeal procedures. However, research has shown that in practice judges tend to completely reproduce the justification that is found in motions of the public prosecutor [23]. Such patterns lend support to the assumption that in practice it is the public prosecutor who ultimately plays the decisive role in pre-trial detention procedures [24] and that the role of the judge is reduced to the function of a mere notary [25].

While routine decision-making in the criminal justice system may account for higher rates of pre-trial detention in general, it should not be neglected that regional particulars may account for particularly high shares of certain foreign nationalities and thus account also for a particular use of pre-trial detention.

A study on pre-trial detainees in the Frankfurt region during 1992 came up with the - not unexpected - finding that the sharp increase in pre-trial detention figures in the year 1992 is due to an increasing number of foreigners being held in pre-trial detention[26]. Among the group of pre-trial detainees Moroccans had the biggest share with some 15% (although Moroccans represent a rather small group in the state of Hessen, accounting for some 0,4% of the population). The data have been interpreted as displaying a side function of pre-trial detention in cases of foreign suspects, that is,

[23] Langner, S.: Untersuchungshaftanordnung bei Flucht- und Verdunkelungsgefahr. Baden-Baden. 2003, p. 208.

[24] Langner, S.: opus cited, 2003, p. 209.

[25] See also Bundesverfassungsgericht in: Neue Juristische Wochenschrift 1982, pp. 29-30 where it was held that the use of pre-designed and identical forms and justifications of arrest warrants may be used for large groups if it was secured that cases have been individually considered by the judge.

[26] Gebauer, M.: Untersuchungshaft - „Verlegenheitslösung" für nichtdeutsche Straftäter? Kriminalpädagogische Praxis 21 (1993), pp. 20-26.

according to this view pre-trial detention serves to keep foreigners in secure facilities in order to allow for administrative decision-making and action with respect to deportation. This might be one plausible explanation for the heavy share of foreigners in pre-trial detention facilities. But, the high proportion of Moroccans serving time in detention centres can be explained by other processes, too. During the period when the said research on pre-trial detention was carried out Frankfurt police had established a special task force to crack down on Moroccan drug trafficking groups that since the beginning of the nineties had managed to set up a large drug distribution network in the region of Frankfurt (involving mainly cannabis) [27]. This task force (*Arbeitsgruppe Marokko*) followed up those Moroccan groups closely over an extended period of time monitoring movements as well as sell and buy operations and busted the networks after enough evidence was available. It could be shown that among Moroccan drug suspects the rate of pre-trial detention was rather high amounting to approximately 50% of all Moroccan suspects [28]. Furthermore, there exists evidence that pre-trial detention is used as a deterrent in order to discourage certain offender groups. In 1989, when Senegalese still were involved heavily in the small-scale distribution of heroin in the city of Frankfurt, virtually every Senegalese drug suspect was brought to pre-trial detention (independent of the amount of drugs found on him or her) which lead to certain peaks in the number of Senegalese being detained in the Frankfurt pre-trial detention facility (up to 150) [29]. This example demonstrates that pre-trial detention may adopt various functions. Pre-trial detention may be used as an instrument in disrupting retail markets (in particular drug markets). Insofar, pre-trial detention is also used to generate general deterrence.

4. Legal and Extralegal Remand Grounds

The use of pre-trial detention as described above leads to a most important question related to pre-trial detention, that is to what extent extralegal grounds influence the decision to remand a suspect to a detention facility prior to the trial. Certainly those remand grounds as outlined above as legal

[27] See Kriminalabteilung Frankfurt a. M.: Lageberichte Rauschgift 1991. Frankfurt 1992, p. 10; Kriminalabteilung Frankfurt a. M.: Lageberichte Rauschgift 1992. Frankfurt 1993, p. 7.

[28] Kriminalabteilung Frankfurt a. M.: Lageberichte Rauschgift 1992. Frankfurt 1993, p. 9.

[29] Kriminalabteilung Frankfurt a. M.: Lageberichte Rauschgift 1989. Frankfurt 1990, p. 41.

conditions of an arrest warrant provide for guidance of decision-makers. However, there is a long debate on extralegal remand grounds which are said to be as powerful as the legal ones. Hidden remand grounds are assumed to play a role in particular in the following situations.

1. A suspect is remanded with the goal to apply a "short sharp shock" and to provide for a taste of prison) without resorting ultimately to a prison sentence.
2. A suspect is detained in order to compel him or her to cooperate and to trigger in particular confessions [30].
3. A suspect is detained in order to deter or to disrupt black market transactions.
4. A suspect is placed in remand detention in order to enforce or to secure immigration decisions, eg. deportation of an illegal foreign national.

- Short sharp shock and taste of prison

The introduction of the remand ground "immediate trial" (Hauptverhandlungshaft, §127b) certainly underlines the attractiveness of the assumption that confrontation with punitive sanctions immediately after a crime has been committed will have deterring consequences [31]. The empirical basis for such assumptions is weak and disputed at best. However, this does not weaken the attractiveness of such assumptions for the judiciary and prosecution services. The fact that most offenders sentenced after being detained in remand prison receive non-custodial sanctions (graph 2) speak in favour of the practical relevance of the taste of prison approach.

- Pre-trial detention as partially suspended prison sentence

Imposing fines or suspended sentences after being held in remand prison might be explained also by certain deficits of the German system of criminal sanctions. It is evident that there exists demand for partially suspended sentences. But while most European countries allow a partially suspended prison sentence [32] German sentencing law (§56 German Criminal Code) allows only for in or out decisions in terms of completely suspended or completely unsuspended prison sentences.

[30] In particular Art. 14 III, lit g International Covenant on Political and Civil Rights contains the principle of *nemo tenetur ipsum prodere* which prohibits to force a person to provide evidence against him- or herself and with that prohibits also the extraction of confessions by means of coercion.

[31] Dünkel, F.: opus cited, 1994, p. 613.

[32] Kuhn, A.: Le sursis partiel: un moyen de lutter contre les longues peines? Schweizerische Zeitschrift für Strafrecht 113(1993), pp. 173-196.

- *Sentence bargaining and pre-trial detention*

Pre-trial detention and the duration of pre-trial detention are also dependent on whether the suspect confesses to the crime. Insofar, the growing importance of sentence bargaining (*Absprache*) between defence, prosecution and court will influence also imposition and duration of pre-trial detention. Successful sentence bargaining at least will have the consequence of reducing the length of detention as they contain an exchange of confession on the one hand and consent on the sentence on the other hand.

- *Pre-trial detention as an instrument to disrupt drug markets and to enforce immigration laws*

The case study presented above underlines the validity of the assumption that pre-trial detention in some instances is used as a deterrent and as a means of disruption of markets. Furthermore, it is evident that there are significant links between immigration laws and decision making in the criminal justice system. This supports assumptions that

- *Negative consequences of pre-trial detention*

Extralegal and negative impacts though unwanted consequences of pre-trial detention are discussed since quite some time. First, it is assumed that detention prior to trial will damage social bonds of the offender with respect to family, employment and other meaningful ties to society [33]. Second, it is hypothesized that pre-trial detention influences unfairly the sentencing decision itself with exposing pre-trial detainees to a larger risk of being sentenced to immediate imprisonment and of receiving longer prison sentences [34]. Indeed, research carried out as early as in the seventies shows that in particular young offenders are affected by pre-trial detention in a negative way [35]. Pre-trial detention has significant consequences for the actual training and employment situation of offenders as for the future prospects on the labour market [36]. Moreover, being detained prior to trial evidently has a negative psychological impact visible also in higher rates of suicide and suicide attempts [37].

[33] Langner, S.: Untersuchungshaftanordnung bei Flucht- und Verdunkelungsgefahr. Baden-Baden 2003, p. 22.

[34] Langner, S.: opus cited, 2003, p. 23.

[35] Kury, H.(Ed.): Prognose und Behandlung bei jungen Rechtsbrechern. Ergebnisse eines Forschungsprojekts. Freiburg 1986.

[36] Spieß, G.: Probleme praxisbezogener Forschung und ihrer Umsetzung am Beispiel der Bewährungsprognose. In: Kury, H. (Ed.): Prävention abweichenden Verhaltens – Maßnahmen der Vorbeugung und Nachbetreuung. Köln 1982, pp. 571-604.

[37] Seebode, M.: Der Vollzug der Untersuchungshaft. Berlin, New York 1985, pp. 39.

5. How can pre-trial detention be reduced?

5.1 The problem of establishing remand grounds

Approaches to reduce the incidence as well as the length of pre-trial detention are justified and necessary because of the principles of guilt and proportionality. Presumption of innocence, *nulla poena sine culpa* and proportionality demand that the suspect presumed to be innocent can only be exposed to detention if needs for securing a criminal trial in face of an elevated seriousness of the crime in question, qualified and that means strong suspicion as well as facts that justify the assumption of a high probability of absconding or obstruction of justice outweigh the fundamental right of personal freedom [38]. As virtually all arrest warrants are justified with the risk of absconding, it is here where the potential for reducing pre-trial detention is embedded.

In the nineties a quite interesting study was carried out, the results of which demonstrate the potential for reducing pre-trial detention without affecting the rule of law and proper carrying out of a criminal trial. The study analysed all decisions made in the Hamburg High Court in cases of extended pre-trial detention. Criminal procedural law prescribes that pre-trial detention may not be extended over a period of 6 months if there are no compelling grounds for not carrying through a criminal trial before expiration of the 6 months period. The Hamburg High Court found in 23 cases no grounds that would have justified pre-trial detention of more than 6 months. So, 27 suspects had to be set free for whom the risk of absconding had been assumed. However, 17 of these suspects voluntarily showed up for the criminal trial that took place some time after their release. Only six suspects actually absconded and did not comply when summoned to court. Almost all of them were suspected of drug trafficking (and were foreign nationals) [39]. From the viewpoint of accuracy of prediction these results say simply that for any one suspect rightly predicted to represent an escape risk four others are falsely predicted to abscond. This amounts to a rate of false positives of some 80%, a rate that sounds plausible when taking into account the poor performance in criminal justice predictions at large.

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[38] Langner, S.: opus cited 2003, p. 219.

[39] Petersen, E.: Haftprüfungspraxis nach §§ 121, 122 StPO des Hanseatischen OLG Hamburg. Erfahrungen in den Jahren 1990-1996. In: Jehle, J.-M., Hoch, P. (Eds.): Oberlandesgerichtliche Kontrolle langer Untersuchungshaft. Wiesbaden: Eigenverlag Kriminologische Zentralstelle e.V. 1998, pp. 71-78.

However, the study demonstrates with these results also that the potential for reducing pre-trial detention is enormous. Insofar, the amendment of the Youth Court Law mentioned earlier was right in introducing an approach that aims at

1. Reductions in the incidence of arrest warrants.
2. Reductions in the length of pre-trial detention.

The approach was implemented in different ways.

a. Providing for reliable and valid information through integrating social (probation) services in the decision-making process (Haftentscheidungshilfe, support of arrest warrant decisions)

An approach which attempts to provide through juvenile or adult court aides for more reliable and valid information for judges deciding on pre-trial detention evidently play a prominent role. The approach assumes (rightly) that the judge who decides on pre-trial detention regularly has not sufficient information on the personal situation of the suspect, in particular on the social bonds as well as their strength. This is mainly due to the criminal investigation routines that put the emphasis on clearing up the criminal offence and determining its seriousness. Furthermore, police and prosecution services normally do not deal with the question of whether other means than detention are available and feasible to secure the presence of the suspect during trial. It was assumed that systematic introduction of such information would have the effect of reducing the number of arrest warrants [40]. However, research evaluating this approach did not until now come with results that confirm the assumption [41]. Three grounds may explain this outcome. The first reason may be found in deficits in implementing the approach. The second reason may be that thorough investigation of the personal situation of the suspect may not only produce information which speaks against pre-trial detention but also information which speaks in favour of placing the suspect in a remand prison. The third reason reflects the phenomenon that it is – as has been discussed earlier – the public prosecutor who evidently determines the outcome of remand proceedings.

[40] See Seebode, M.: Rechtswirklichkeit der Untersuchungshaft – Alte Gegebenheiten und neue Entwicklungen -. In: Eser, A., Kaiser, G., Weigend, E. (Eds.): Viertes deutsch-polnisches Kolloquium über Strafrecht und Kriminologie. Baden-Baden 1991, pp. 169-185, p. 177.

[41] Geiter, H.: opus cited 1998, pp. 112, 333.

The judge evidently follows the reasoning as submitted in motions of the public prosecutor.

b. Avoiding pre-trial detention through alternatives

Poor results of a merely information based approach leads to attempts to actively neutralising grounds of pre-trial detention (in particular the risk of absconding). Such measures also are necessary as presumption of innocence and proportionality demand for less intrusive approaches than detention that are equally effective in securing the presence of a suspect during trial. This is recognised in §116 German Criminal Procedural Code where a couple of measures are introduced that have to be considered as alternatives to pre-trial detention. Besides bail the law mentions the imposition of orders to report regularly to police or to take residence at a location prescribed by the court. The Youth Court Law moreover allows for replacement of pre-trial detention through placement of the suspect in a foster home or other measures of education (§§71, 72 Youth Court Law). During the eighties various projects have been implemented in pursuing the goal to reduce the risk of absconding through placing for example juvenile suspects in homes supervised by social workers [42]. The results of these projects have been assessed to be promising. That is why the legislator when amending the Youth Court Law in 1990 introduced a statutory basis for such an alternative to pre-trial detention (§§38 II, 72a Youth Court Law) [43]. However, eligibility criteria used in these projects evidently exclude populations in particular at risk of being detained prior to trial, that is subgroups of immigrants and foreign nationals [44].

c. Replacing pre-trial detention through electronically monitored home detention

In recent years electronic monitoring has been discussed as a possible instrument in reducing pre-trial detention. In Hesse an experiment has been

[42] Cornel, H.: Untersuchungshaft bei Jugendlichen und Heranwachsenden. Strafverteidiger 14(1994), pp. 628-631; Dünkel, F.: opus cited, 1994, pp. 618-619.

[43] A pessimistic assessment can be found in Geiter, H.: opus cited 1998, pp. 113-116.

[44] See in this regard Arbeitsgemeinschaft Schöne Aussicht GbR mbh: Projekt Vermeidung des Haftgrundes Fluchtgefahr. Sachbericht 1995. Frankfurt 1996; it is not surprising that this project reached primarily German nationals (75%); European nationals still play some role (20%) , other foreign nationals are marginal (5%) In face of a share of foreign nationals in the Frankfurt region of some 70% it seems clear that such projects aim at a minority of pretrial detainees.

carried out for since two years that implements and evaluates the concept of home confinement and electronic monitoring [45].

d. Reducing the length of detention

Also in the state of Hesse in the nineties a project was implemented which sought to reduce the length of pre-trial detention through the providing access to a defence counsel for every pre-trial detainee. The project was carried out through between October 1, 1991 and September, 30 1994 with assigning defence counsels to a total of 4807 detainees. The costs were borne by the state of Hesse [46]. Comparing groups of detainees who were provided with a defence counsel with groups not represented by a lawyer, an average reduction of the duration of detention of approximately two months could be observed. This was the basis for estimating that in total through systematic access to defence counsels the average length of pre-trial detention can be reduced by some 16% or 24 days [47]. As a day of detention costs some 75 Euro and costs for a defence counsel amount to some 180 Euro per case it seems obvious that also cost-efficiency arguments speak in favour of such an approach. Interviews with judges, prosecutors and defence counsels participating in the project showed that it is in particular sentencing bargaining (*Absprachen*) [48] that proved to be effective in accelerating proceedings and with that reduced duration of pre-trial detention [49].

e. Reducing pre-trial detention through statutory restrictions

In the debates on amending the law on pre-trial detention various proposals are put forward that aim at introducing statutory limitations or restrictions to detention [50]. It is recommended for example to rule out remand grounds such as offence seriousness and risk of recidivism. However, such restric-

[45] Albrecht, H.-J., Arnold, H., Schädler, W.: Der hessische Modellversuch zur Anwendung der "elektronischen Fußfessel". Zeitschrift für Rechtspolitik 33(2000), pp. 466-469.

[46] Schöch, H.: Der Einfluß der Strafverteidigung auf den Verlauf der Untersuchungshaft. Erfahrungsbericht über ein Projekt der Hessischen Landesregierung zur "Entschädigung von Anwälten für die Rechtsberatung von Untersuchungsgefangenen". Baden-Baden 1997.

[47] Schöch, H.: opus cited 1997, p. 73.

[48] Schünemann, B.: Absprachen im Strafverfahren? Grundlagen, Gegenstände und Grenzen. Gutachten B für den 58. Deutschen Juristentag. München 1990; Weigend, Th.: Eine Prozeßordnung für abgesprochene Urteile? NStZ 19(1999), pp. 57-63, p. 57.

[49] Schöch, H.: opus cited 1997, p. 72.

[50] See with a summary Dünkel, F.: opus cited 1994, pp. 619-620.

tions evidently would not have any serious impact on the practice and use of pre-trial detention which is determined solely through assumptions on the risk of absconding. Other proposals point to a stronger position of the principle of proportionality through strengthening alternative means, making representation through a defence counsel mandatory in case an arrest warrant is considered and in particular reducing the maximum detention time allowed.

However, the proposals obviously do not contain answers to the problems that currently emerge with the use of pre-trial detention. That is why even if such proposals would be introduced the effect would be negligible. This is in particular true for the proposal to reduce the maximum detention period allowed. The bulk of pre-trial detention cases fall within relatively short periods of detention. Some 30% of pre-trial detention cases fall within the category of up to one month, another 27% fall in between one and three months. 23% last for up to six months. Cases with periods of detention of more than 6 months are concentrated in serious offence categories such as murder, rape, robbery and drug trafficking [51]. Alternatives as suggested in various proposals and as provided already today in practice and in the law (as is the case with alternatives to imprisonment at large) obviously present alternatives for offender populations that are settled down and in principle integrated. Such approaches do not solve the problem how to respond to unsettled groups of suspects that are still increasing in size.

7. Summary

1. Statistical data on pre-trial detention show a sharp increase of its use at the end of the eighties and the beginning of the nineties. This trend has come to an end around the new millennium.
2. Insofar as efficient approaches to reduce incidence and duration of pre-trial detention are necessary for reducing the economic burden associated with detention, reducing the impact on proportionality and presumption of innocence and reducing the impact pre-trial detention has on detainees in terms of social alienation, loss of employment etc.
3. The practice of pre-trial detention is characterised through
   - ▶ rather short periods of detention
   - ▶ the dominance of risk of absconding as remand ground

[51] See Seebode, M.: opus cited 1991, pp. 171.

- ► the fact that the majority of pre-trial detainees receive a non-custodial sanction.

4. Research demonstrates that the decision to impose pre-trial detention on the basis of a prediction of absconding implies an extremely high rate of false positives.
5. Research shows then that judicial control of pre-trial detention is poorly implemented and weakened as judges tend to simply reproduce the justification that was forwarded in the motion of the public prosecutor.
6. It is in particular the group of unsettled offenders that poses problems in the attempt to reduce pre-trial detention.
7. However, there exist promising ways, in particular with providing
   - ► for alternative placements outside remand prisons
   - ► for access to a defence counsel.

The Law of Pre-Trial Detention*

HANS-ULLRICH PAEFFGEN

A. Introduction

Pre-trial detention *(Untersuchungshaft)*[1] is, apart from temporary commitment to a psychiatric hospital in order to verify the suspect's responsibility (§ 126a StPO),[2] the harshest compulsory measure available to criminal justice *before* the imposition of punishment. First-time detainees tend to experience pre-trial detention even as more onerous than a prison sentence because of the inherent uncertainty of their situation—i.e. the uncertain duration of custody and the uncertain final result of the investigation.[3]

In German criminal procedure, pre-trial freedom is taken as the rule, and pre-trial detention is considered an exception to necessitate special justification. Thus, our normative scheme operates in the opposite way of, for instance, Anglo-American criminal procedure, where arrest represents a normal step in the criminal process following which a judicial officer decides on pre-trial release.

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* I want to express my thanks to Dr. *Stuckenberg* for translating the difficult German text, and to Ms. Knop, Ms. Lobanova and Mr. Barth and Dr. Stuckenberg for the translation of the footnotes.

[1] Note: The terms "custody" and "detention" are treated as synonyms in this text.

[2] Provisions cited hereafter without the name of a statute are such of the German *Strafprozeßordnung* (*StPO* [Code of Criminal Procedure]).

[3] See *Paeffgen,* Vorüberlegungen zu einer Dogmatik der Untersuchungshaft (hereinafter: U-Haft), 1987, at 265; *Seebode,* Vollzug der Untersuchungshaft, 1985, 36 (at 37), both with further references. – This picture might be distorted by the prejudice of a – put trenchantly – "jolly jail" based on some privileges pre-trial detainees still enjoy (additional amount of food, private clothes etc.) and the lack of any duty to work. Thus, experienced detainees prefer to have their time of pre-trial detention extended, as *they* regard it as the lesser of two evils.

In comparison to the meticulous attention to detail with which the legislature and the courts elaborated and refined the legal requirements for punishment, the prerequisites for pre-trial detention appear primitive. They are similar to the dangerousness requirement—occasionally accompanied by definitions of mental illness and a proportionality clause *(Erforderlichkeit)*—contained in the civil commitment legislation of the *Länder* (states of the Federal Republic of Germany) for the institutionalisation of the mentally ill.[4]

Looking more closely at the rules governing pre-trial detention in German criminal procedure law, we encounter two types of arrest or detention warrants:[5] one intended to safeguard the integrity of investigation and trial, the other to secure the execution of a (prison) sentence. The distinction formally reflects the different procedural stages when an arrest warrant can be issued, and substantively the different tasks the detention is meant to serve: Only the first type of detention warrant shall secure that an effective trial can be had at all and thus merits the name *pre-trial* detention proper (more precisely: detention *before* and *during* trial), whereas the second type could be termed *post-trial* detention and shall secure that a final judgment is executed effectively (§ 457).[6] In the limited time available, I will treat the first type of detention only.

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[4] E.g. *Unterbringungsgesetz* of Baden-Württemberg of April 11, 1983 (GBl. [state official gazette] 1983, at 133); *Unterbringungsgesetz* of Bavaria of April 20, 1982 (GVBl. 1982, at 202); *PsychKG* of North Rhine-Westphalia of December 2, 1969 (GVBl. 1969, at 872). These laws provide safeguards in the form of personal control ("*Richtervorbehalt*" – judicial approval is necessary; one or two [psychiatric] experts' reports [the first expertise is due at the time of the application]; mandatory presence of an attorney) which ensures a certain degree of accuracy albeit often after the fact. The controls are repeated regularly after certain periods (in the older law of Hesse after two years [of May 19 1952, GVBl. 1952, at 443], in the more recent Berlin law after two months [of March 8, 1985, GVBl. 1985, at 586], but mostly after one year).

[5] Note: The terms "arrest warrant" and "detention warrant" will be used interchangeably hereinafter.

[6] Due to its special position the last type will be neglected here although it raises some interesting questions (among others, how a detention warrant is transformed into an enforcement order without being explicitly enacted as it is foreseen in § 457. *See* the different proposals of "construction" by different *Oberlandesgerichte* (OLG [Court of Appeals]), all of which are subject to criticism: OLG Hamburg JZ [Juristenzeitung] 1977, 528; OLG Hamm JZ 1967, 185; OLG Düsseldorf StV [Strafverteidiger] 1989, 118; *contra Seebode,* StV 1989, at 118; *Paeffgen,* NStZ [Neue Zeitschrift für Strafrecht] 1989, 514 (at 520 et seq.). – In addition, this enforcement warrant is issued by a subordinate judicial official called *Rechtspfleger* (§ 31 para. 2 RPflG [Rechtspfle-

B. Legal Requirements for Pre-trial Detention

The German Criminal Procedure Law sets out three cumulative requirements for pre-trial detention:
(1) strong suspicion
(2) grounds for detention
(3) proportionality (negatively formulated: "not out of proportion").[7]

I. Strong Suspicion

It is difficult to give a precise definition of the "strong suspicion" requirement (*dringender Tatverdacht*) although the term is traditional and widely used in procedural law, in particular as a prerequisite for harsh compulsory measures. Semantically, the term refers to the past and means nothing more than that the defendant is likely to have committed a criminal offence. The prevailing view (among academic writers and courts) holds that a prognosis is needed in addition, viz. that the defendant, given our *present* knowledge of the case, is likely to be held criminally responsible for this offence at trial, in other words: that the trial is likely to end with a verdict and sentence. If the defendant is justified or excused, one may, retrospectively, say that there was no (criminal) "offence" but the prevailing opinion also accords relevance to other grounds for irresponsibility that have little to do with the offence itself[8] like permanent procedural obstacles (lack of jurisdiction, e.g. diplomatic immunity). Therefore, the notion of "suspicion" in the context of a detention warrant means not only the likelihood that the defendant is guilty of the offence in question, but also that the *totality of legal requirements for punishment* is going to

gergesetz]). Mandatory judicial approval *(Richtervorbehalt)* of an arrest as required by art. 104 para. 2 (1) of the German Constitution is – according to the prevailing opinion – complied with because the legal basis of the detention – the sentence – is a judicial act, *see Meyer-Goßner*, StPO[46] [Strafprozeßordnung, 46th ed., 2003], § 457 no. 10. Besides there is the "*Sicherungshaftbefehl*" [preventive enforcement order] according to § 453c. This particular arrest warrant can be issued if probation of a final suspended prison sentence or commitment order (§ 67b and c of the Criminal Code) is expected to be revoked based on "sufficient reasons". For the possibility of a judge to choose among §§ 112 and 453c in the case of new crimes, *see Burmann*, StV 1986, at 80.

[7] § 112 para. 1 (2): "It [pre-trial detention] must not be ordered if out of proportion to the importance of the matter and the expected penalty or measures other than punishment."

[8] I.e. if the victim is unwilling to institute criminal proceedings, cf. § 130.

be met, that is, "suspicion" requires the *likelihood of punishment in due course of procedure* as a justificatory basis for the severe intrusion on fundamental rights which lies in the deprivation of individual freedom.[9]

> The adjective "strong" is usually understood as a relational term and an intensification of the "sufficient" suspicion (*hinreichender Tatverdacht*, roughly equivalent to "probable cause") contained in § 203 as a general prerequisite for the opening of criminal proceedings in court.[10] Yet the idea of intensification may be misleading. An arrest warrant may be issued at a very early stage of an investigation because of strong grounds for suspicion, although the opening of court proceedings would be unthinkable at this moment. Vice versa, if an arrest warrant is issued after the commencement of a court session, it need not be based on a greater amount of suspicious circumstances than was needed for the initiation of court proceedings, since a further intensification may neither be likely nor possible, for instance in the case of a credible and corroborated confession. (Instead, the need for an arrest warrant may result from circumstantial evidence that the defendant is planning to escape or hide.) Rather, the distinctive feature is a heightened degree of subjective probability, in comparison to the "simple" or unqualified degree of suspicion—which is the general condition for the opening of a case for criminal investigation —, in the eyes of the prosecutor and the judge approving the warrant that, given the present knowledge and usual course of procedure, the suspect will

[9] Methodologically, this line of argument (*cf. Kleinknecht/Janischowsky* [*K/J*], Das Recht der Untersuchungshaft, 1977, no. 14; Karlsruher Kommentar (KK)-*Boujong*, 4th ed. 1999, § 112 no. 4; *Meyer-Goßner*, StPO[46], § 112 no. 5) is a harbinger of the functional integration of pre-trial detention into the principle of guaranteeing the integrity of the criminal process and at the same time an expression of the principle of proportionality: Criminal proceedings which cannot lead to a criminal sanction do not permit violations of fundamental rights. Yet, the fact to be strongly suspected of a crime, if made public, blemishes a citizen's honor and thus constitutes already a (albeit justified) violation of fundamental rights. – Partially, even a high probability of conviction is demanded; OLG Köln JMBl. NW [Justizministerialblatt Nordrhein-Westfalen] 1968, 235; *Kühne*, Strafprozeßrecht, 5th ed. 1999, no. 337; *Löwe/Rosenberg* (LR)-*Hilger*, 25th ed. 1997, § 112 no. 17; *Paeffgen*, U-Haft, at 194; *Parigger*, NStZ 1986, 211. This interpretation is motivated by the wish to give adequate weight to the qualifier "strong" (*dringend*). The underlying conception marks a significant factual difference albeit one of limited procedural impact because the term ("strong") involves an essentially subjective evaluation and hence is irresolubly opaque. – The prevailing opinion holds that the mere possibility of a guilty verdict is sufficient for "suspicion", *see Meyer-Goßner*, StPO[46], § 112 no 5. The *BGH* (Federal Court of Justice) (*Pfeiffer*) NStZ 1981, 94 differentiates between the (*un*necessary) probability of conviction and the (necessary) probability of "the accused being guilty". This decision does not explain why the requirements for retrospective part of the concept of suspicion (did he do it?) should differ from the prospective one (will he be convicted?).

[10] KK[4]-*Boujong*, § 112 no. 6; LR[24]-*Wendisch* (1989), § 112 no. 22; *Meyer-Goßner*, StPO[46], § 112 no. 6. – More similar to the following text above: LR[25]-*Hilger* (1997), § 112 no. 17.

be convicted and punished.[11] As a rule of thumb, a "strong suspicion" lies when the prognosis appears irresistible that the defendant will be convicted at trial.[12,13]

II. "Classic" Grounds for Detention

The objectives of pre-trial detention as expressed in the Criminal Procedure Law can be divided in two or three[14] sub-groups:

First, the "classic", i.e. traditional, grounds for detention:

- escape,
- danger of escape,
- danger of suppression of evidence (§ 112 para. 1 and 2).[15]

I have characterised such behaviour of the suspect, to be averted by detention, as "sabotage of the trial".[16] These grounds for detention were already included in the original version of the current Criminal Procedure Law,

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[11] For the question of subjective probability, in particular in delimitation to other criteria of evidence (objective, i.e. statistic or logical probability), *see* in detail *Paeffgen*, U-Haft, at 183 (186 et seq.). – For the lack of prognostic accuracy *see also Hamm*, StV 1986, 449 (450) (with due scepticism). It may be recalled that there is a discrepancy between the committal for trial and the sentence. (*Jabel*, Rechtswirklichkeit der U-Haft (1988), 108 et seq., states that the accusation was void or the counts reduced in one out of six cases.). *Gebauer*, Rechtswirklichkeit der U-Haft (1987), 368 et seq., presents an instructive statistic based on interviews with judges, public prosecutors, police officers and attorneys, half of which believed that they could predict the sentence at the time when the arrest warrant was issued. Only one third of the public prosecutors and only one fifth of the judges dared predict a sentence between "less than one year" and "one to two years with or without probation".

[12] *Paeffgen*, U-Haft, at 194.

[13] The argument put forward by some theorists (*Schmidt-Leichner*, Neue Juristische Wochenschrift [NJW] 1959, 841 [at 842]; *Parigger*, NStZ 1986, 211) that fragmentary evidence is no basis for a "strong suspicion" is not convincing. Evidence always is incomplete – up to the moment when the court decides it to be complete. Even a confession is no guarantee for completeness. More than criminalistic, i.e. normative as well as psychological and empirical plausibility cannot be demanded. But this criminalistic plausibility has to be demanded.

[14] The count of these sub-groups depends on further assumptions yet to be expounded, so the question of the correct number cannot yet be answered.

[15] *Compare* art. 61 nos. 4–5 Chinese Criminal Procedure Law of the People's Republic of China (as amended March17, 1996).

[16] *Paeffgen*, U-Haft, 81 et seq. – There is growing acceptance of the idea that this task is one of prevention of dangers and thus a kind of police protection of the proceedings, *see* Systematischer Kommentar (SK-) StPO-*Rudophi*, Vor § 94 no. 10; *Krauß* in: Müller-Dietz (ed.), Strafrechtsdogmatik und Kriminalistik, 1971, 153 (at 167 et seq.).

the *Reichsstrafprozeßordnung* of 1877,[17] and are to be found in most criminal procedure laws of the states of the former German Federation as well as, today, in the criminal procedure legislation of almost every foreign state if grounds for detention are specified at all.[18]

Secondly, danger of rearrest or recidivism as a grounds for detention (§ 112a). Here it is, mildly put, at least doubtful how this kind of detention helps to secure the integrity of the criminal process.

Thirdly, and in between the preceding two, the seriousness of the offence as grounds for detention (§ 112 para. 3). Though equally traditional as the first group,[19] seriousness of the offence does not easily fit in. Historically based on a presumption of escape—like the denial of bail in capital cases in Anglo-American law—which still surfaces occasionally in contemporary discussions, the function of this type of detention to *secure* the trial is dubious.[20] Thus, it will be treated separately.

1.° There is little to say about *escape*[21] as grounds for detention (§ 112 para. 2 no. 1): Its underlying rationale is to secure the defendant's attendance at the proceedings against him, since his absence hampers investigative activity and the conduct of the trial. In principle, with only minor exceptions,[22] German criminal procedure law requires the appearance of

[17] More precisely of February 1, 1877, RGBl. [Reichsgesetzblatt] 1877, at 258 (as one of four "Reichsjustizgesetze" [Imperial laws on court organization and procedure], as GVG [Gerichtsverfassungsgesetz], ZPO [Zivilprozeßordnung], KO [Konkursordnung]), entered into force on October 1, 1879.

[18] *Cf.* the overview on comparative law in the classic book by *Jescheck/Krümpelmann* (eds.), Die Untersuchungshaft im deutschen, ausländischen und internationalen Recht, 1971; *Krümpelmann*, ibid., 591 (612 et seq., dealing with some older rules of criminal procedure in Swiss cantons) and, *see* generally on other European states, *Jescheck*, Zeitschrift für die gesamte Strafrechtswissenschaft [ZStW] 82 (1970), 1052 (1076).

[19] § 112 para. 2 RStPO (1877): "Danger of escape is established if
a) the object of the investigation is a felony;
b) the defendant is stateless or a vagrant or unable to identify himself;
c) the defendant is a foreigner and there are justified doubts that he will not follow the writ of summons and submit to the sentence." § 112 para. 2 StPO (1950) equals § 112 para. 2a and b RStPO.

[20] *See infra* sub III.

[21] Alternatively: *"Sich-Verborgen-Halten"* (hiding).

[22] *Compare* §§ 205, 285 para. 1 (2), 286 et seq.: proceedings *in absentia* merely serve to secure the evidence. For petty offences (when the expected punishment does not exceed a fine of 180 daily rates) a trial in absence is possible, § 232 para. 1; equally in the case of willful absence etc., § 231 para. 2, or in the case of obstruction of the trial out of pure mischief, § 231a and b.

the defendant (§ 231)[23]. However, mere absence does not justify an arrest warrant,[24] because "absence" is not coextensive with "escape"[25]. Rather, the defendant's behavior must give evidence of his will to obstruct the investigation. Residence abroad alone is not sufficient for arrest but provides a mere (rebuttable) indication for the relevant state of mind.[26]—Moreover, pre-trial detention must not be misunderstood as a means to punish absenteeism: There is no automatism to arrest a defendant who finally surrenders.—In practice, 10 to 20% of all arrest warrants, that is the second largest percentage, are based on escape.[27]

2.° *Danger of escape* (§ 112 para. 2 no. 2), the most important ground for detention in practice with a share of over 70% of all arrest warrants,[28] encompasses the preparation and attempt stages of obstruction of justice by escape. This ground presents some difficulties: Because there are no clear-cut and easily identifiable act-types of "escaping", even seemingly innocuous behavior may trigger an arrest. Hence, the mental state of the defendant becomes critical—is he intent to flee or is he not? The difficulty then shifts to the determination of the relevant state of mind from outwardly ordinary behavior. This kind of assessment of human disposi-

[23] §§ 205 (1), 285 para. 1 (1) in conjunction with § 276. –§ 127b provides for pre-trial detention of "traveling criminals", homeless persons and foreign nationals to enable summary (accelerated) proceedings (§§ 417 – with a maximum sentence of one year imprisonment).

[24] If necessary there is the possibility to compel the attendance of an accused who is in default, § 230 para. 2 1st var. This has priority anyway due to the principle of proportionality.

[25] One could rather think of default. In such a case, a summons to appear in court, § 230 para. 2 1st var., is possible. This summons becomes obsolete when the accused shows up. Besides, as a harsher measure, an arrest warrant is available, § 230 para. 2 2nd var. It does not require any ground for detention like those in §§ 112 et seq., only the statement of a valid writ of summons and defendant's non-appearance without sufficient excuse. This particular arrest warrant becomes obsolete as soon as the trial ends.

[26] It is not sufficient that the defendant starts working abroad and moves there, OLG Munich StV 2002, 205.

[27] *Schöch*, in: Lackner-Festschrift (1987), 991 (at 1007). In detail: *Gebauer* (footnote 11), at 232: 8,6% or, in combination with other grounds for detention, 12,2%; *Jabel* (footnote 11), at 127: 22,3%. – These statistics are preferable to the official prosecution statistics because they are more detailed and more precise. The official statistics do not include cases in which detention ends as a result of prosecutorial decisions (e.g. due to findings according to §§ 153, 170 para. 2; *compare Gebauer* [footnote 11], at 149, refers to samples of only 3,9%).

[28] *Compare Schöch* (footnote 27), at 1007; in detail: *Gebauer* (footnote 11), at 232: 66% or in combination with others 81,7%; *Jabel* (footnote 11), at 127: 69,6%.

tions[29] is nothing else than the formulation of a suspicion. The crucial question is now how to divide the risk of error. The law is satisfied when the determination of danger of escape rests on "particular facts" with "due regard to the particulars of the individual case". The prevailing view is that the probability of escape must be higher than the probability of the defendant presenting himself to court.[30] In my view, it is a normative requirement that the judicial officer who approves the arrest warrant must base his decision on a *high* subjective probability of imminent escape, because otherwise the generally unavoidable subjectivity of the evaluation "danger of escape" would be wholly uncontrollable.[31] This understanding accords to the interpretation of "suspicion" given above.[32]

So far with the theoretical framework. In practice, the lack of precision inherent in the "suspicion" criterion[33] leads to stereotypical arrest orders. Admittedly, there are cases of a stereotype nature. Also, there are recurrent elements in the grounds of arrest warrants so that prefabricated text blocks may be used again and again. However, all this does not justify the set phrases overly common in arrest warrants and insufficiently censured by review instances.[34],[35] For example, it would be inadmissible to use

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[29] For the theoretical background of the concept of "disposition" *see Hassemer*, in: *Lüderssen/Sack* (eds.), Vom Nutzen und Nachteil der Sozialwissenschaften, 1980, p. 229 (at 243 et seq.); *Paeffgen*, U-Haft, at 196–197; for prognostic difficulties *see Krümpelmann*, ZStW 82 (1970), 1052 (at 1071 et seq.).

[30] *Cf.* OLG Köln StV 1997, 642; 544; Heidelberger Kommentar (HeiKo), 4th ed. (2002), § 112 no. 17; KK[4]-*Boujong*, § 112 no. 15; *K/J* (footnote 9), nos. 26 et seq.; *Meyer-Goßner*, StPO[46], § 112 no. 17; *Schlüchter*, Das Strafverfahren, 2nd ed. 1983, no. 211.2 (all in accord that 'the probability of escape has to be greater than the probability of standing trial'). – *Contra Kühne*, Strafprozeßrecht, 5th ed. 1999, no. 418 (strong suspicion); LR[25]-*Hilger* (1997), § 112 no. 32; LR[24]-*Wendisch* (1984), § 112 no. 35; SK-StPO-*Paeffgen* (1992), § 112 no. 24: „high probability".

[31] LR[23]-*Dünnebier* (1978), § 112 no. 44; *Paeffgen*, U-Haft, 195 (at 198); *Schlüchter* (footnote 30), no. 209 note 145a; *de lege ferenda*: Arbeitskreis Strafprozeßreform – U-Haft (1983), § 6 III Nr. 2: „substantial danger ", *see* the commentary, ibid. at 66 et seq.

[32] Also in the case of danger of suppression of evidence or gravity of the offence (§ 112 para. 3) – this is just the result of systematic interpretation.

[33] One might conceive of an evaluation of grounds for suspicion modeled after the evaluation of evidence, so that when a certain threshold of suspicion is reached ("suspicion" criterion, "point of suspicion"), this suspicion is sufficiently probable to allow the detention judge (*Haftrichter*) to assume a ground for detention. For the advantages and disadvantages of this model, *see Paeffgen*, U-Haft, 189 et seq., 192 et seq.

[34] This problem is discussed in the context of "danger of escape" as the main reason for arrest warrants (about 70%) without being confined to it.

blank forms of arrest warrants where only the name of the defendant is left open. On the other hand, it has to be conceded that both aforementioned criteria, "on the basis of particular facts" and "with due regard to the individual case", can be met even by the laxest imaginable reasoning accompanying an arrest order because the warrant is founded on estimates about dispositions of persons who are often little known, and who, for obvious reasons, refuse to co-operate with the prosecution (in contrast to experimental or therapeutic situations), and with whom the police frequently do not try to co-operate in order not to spoil the chances of surprise.—If one reads the paragraphs of § 112 in systematic order, and requires, as proposed above, a "high" subjective probability, then a set phrase like "A maximum penalty of ten years imprisonment causes the danger that defendant will escape from trial"[36] is insufficient to meet the high threshold of inner conviction that this danger really exists. With some good will, one could also bring the criterion of "particular facts" (which establish the danger of escape) into position against the oft-deplored stereotyped reasoning because these "facts" are clearly not the same facts used to establish probable cause or "suspicion".—Contrary to frequent critiques, the indication of lack of residence, family ties or employment is not *per se* of a dubious nature.[37] Formerly recognised by law as a sufficient basis for arrest,[38] and now as such rightly abolished,[39] these indications nevertheless point to situations where the defendant tends to be more inclined to flee than to stand trial. There is some psychological plausibility here[40]—

[35] *See Parigger*, NStZ 1986, 211 (212). One has to distinguish formally inadmissible laconism from substantively unfounded affirmations of the elements of the offence.

[36] AG Hannover, December 29, 1978 – 44 Gs 441/78. Superficially, one might say that the relevant "facts" here are probable cause and the expected penalty, and that the evaluation of the particular case lies in the statement that *this* defendant is suspected of escape. The prevailing view favors this kind of laconic argumentation by accepting the expected amount of punishment as sufficient reasoning, unless particularities of the case demand for an assessment of adverse indications, OLG Frankfurt, StV 1985, 463; KK[4]-*Boujong*, § 112 no. 18 (if stiff punishment can be expected); more cautious LR[24]-*Wendisch*, § 112 no. 38. See OLG Bamberg StV 1991, 167.

[37] *Parigger*, NStZ 1986, 211 (at 212).

[38] Until the detention reform act of 1964, StPÄG December 19, 1964, BGBl. 1964 I, 1067.

[39] Hence I conclude that the lack of permanent residence alone is insufficient a reason to assume danger of escape. This is the true kernel of the position cited *supra* in footnote 37.

[40] E.g. assets or contacts abroad, unusual language proficiency etc.; yet, as consequences of international tourism and improved language instruction at school, such aspects

unfortunately no empirical research—which of course needs further corroboration in the individual case. In contrast, a phrase like "defendant sympathises with the squatter scene" is obviously not a reasonable ground for an arrest warrant[41] because there is no comprehensible connection with the motivation to escape.

3. ° The difficulties are even greater with the ground of 3. *danger of suppression of evidence* (§ 112 para. 2 no. 3), which statistically plays only a minor role (3–5%),[42] because its conformity with protected rights of the accused (like *Nemo tenetur seipsum prodere*, International Covenant on Civil and Political Rights [ICCPR], art. 14(g)) is not quite clear. This ground refers to several types of behaviour that are deemed so dangerous as to justify detention: direct manipulation of factual evidence (§ 112 para. 2 no. 3(a)) and testimony (§ 112 para. 2 no. 3(b)) as well as (indirect) instigation of such manipulation (§ 112 para. 2 no. 3(c)). Some writers proposed to read the requirement that the manipulation of evidence be "dishonest" (§ 112 para. 2 no. 3(b): *unlauter*) as meaning "prohibited by (criminal) law".[43] I would prefer to read "dishonest" as "contrary to (procedural) obligations", a blank concept which concededly corresponds largely to the notion "prohibited by (criminal) law".[44] In any case, this excludes permissible forms of (procedural) self-defense, like instigating a witness to make use of his *privilege* – e.g. as spouse, child etc. – to remain silent. Thus, not every act which thwarts the search for truth can be regarded as a ground for detention. This holds true for any subsection dealing with suppression of evidence, irrespective of the precise definition of "dishonest". In addition, the suspected act of sabotage

cannot justify the assumption of danger of escape (exception: sizable foreign financial resources with no comparable assets in Germany, also proficiency in a language spoken in a country which has no extradition treaty with Germany).

[41] *But see* AG Nürnberg, March 6, 1981 – 66 Gs 13112/81.

[42] *Compare Schöch* (footnote 27), at 1007; because of the cumulation of grounds for detention, *Gebauer* (footnote 11), at 230, 240 et seq., indicates a percentage of 9,3%. Cases based exclusively on the danger of suppression of evidence amount to only 1,3%. *Jabel* (footnote 11), p. 127, counts 8,1% (using the same method as *Gebauer*). This ground for detention is used worldwide, *cf. Krümpelmann*, ZStW 82 (1970), 1052 (at 1084).

[43] E.g. *Rosenberg*, ZStW 26 (1906), 339 (at 364); LR[25]-*Hilger* (1997), § 112 no. 48; *Wolter*, ZStW 93 (1981), 452 (at 453 note 4). – The prevailing view is verbally similar, but unclear in scope, e.g. *Kleinknecht*, JZ 1965, 113 (116); LR[24]-*Wendisch* (1984), § 112 no. 46.

[44] *Paeffgen*, U-Haft, at 102, 110–111.

must cause the danger of destroying or impairing evidence (this coincides with the aptitude test as part of the general proportionality test).[45] After all pieces of evidence are secured no detention for this ground is permissible. The dispute between courts and prosecution officials on the one hand, and defense attorneys on the other hand, focuses not only on the very vague conceptual requirements but mainly on the standard of proof needed to establish "suspicion" and the plausibility of respective court findings.[46] Some phrases encountered in arrest warrants are patently illegal if taken alone, like "danger of suppression of evidence is obvious",[47] or a reasoning often associated with economic crimes[48] that the offence charged "is conditioned upon the suppression of evidence and the entire criminal scheme requires the subsequent suppression of evidence"[49]. These allegations do not express more than probable cause without specifying why the

[45] *K/J* (footnote 9), no. 50. The suggestion of the Arbeitskreis Strafprozeßreform – U-Haft [working group on criminal procedure – pre-trial detention] in § 6 IV (footnote 31), p. 68, goes too far in assuming that only the risk of *thwarting* the search for truth should be sufficient. *Accord*, § 112 para. 2 no. 3 draft bill of the *Grünen* (Green Party), BT Drs. 11/2181, p. 3. Although the conception is laudable that pre-trial detention does not serve the goal to merely facilitate the prosecution's work, it is *ex ante* hardly foreseeable when tampering with the evidence reaches such a degree that total loss of (incriminatory) evidence will result. The alternative "hampering or thwarting [the search for truth]" can only be decided in hindsight. The desired tendency could be sufficiently expressed by a qualifier (e.g. "substantially" complicated). (Furthermore the discussion concerning § 258 Criminal Code [hindering apprehension] should warn of such [alleged] intensification, *see* on the one hand SK-StGB-*Samson*, 4th ed. 1990, § 258 nos. 25, and, on the other hand *Schönke/Schröder/Stree*, StGB, 23rd ed. 1988, § 258 no. 16).

[46] *See supra* footnote 33.

[47] Summarising reproach by *Panier*, NStZ 1986, 211 (213 left column); he relies on a decision by the regional court of Hanover which justified the danger of suppression of evidence with the argumentation that "it was obvious", October 6, 1978 – 2 Qs 237/78. Still, in such cases idleness in presentation has to be distinguished from illicit unfoundedness. The assumption that the defendant will continue tampering with the evidence as he did and as was set out before may be equally justified and evident. Preferably, the court should make clear why the tampering with the evidence is "contrary to duty" and why the body of evidence still can be jeopardised (*see* above). Even if one can find hints for these aspects in the facts stated, the undutifulness and the danger of loss of evidence have to be checked formally in order to guarantee a better (self-) control.

[48] *See Dahs jr.*, in: Dünnebier-Festschrift, 1982, 228 (at 234 et seq.) with further references; *Krekeler*, wistra [Zeitschrift für Wirtschaft, Steuer, Strafrecht] 1982, 8 (10); *Parigger*, AnwBl. [Anwaltsblatt] 1983, 423 (at 425–426).

[49] OLG Cologne, December 1, 1967 – Ws 654/67.

defendant is also suspected of tampering with the evidence.[50] Another frequent line of critique argues that this ground for detention is based on presumptions only.[51] This is true but not necessarily a point for critique. On the contrary, it would be a misconception to require full proof of the facts on which the arrest warrant is based. At this stage of the process, "proof" is always relative, preliminary and reversible should indications to the contrary surface – and insofar cannot lead to more than a prediction or presumption.[52] It has to be conceded, however, that the determination of the relevant circumstances, especially of mental states, is often doubtful and often proceeds on a tenuous factual basis.

III. Seriousness of the Offence as a Ground for Detention

Seriousness of the offence charged[53] as a ground for detention was introduced to provide an automatic link between the suspicion of certain, enumerated very grave offences and detention of the suspect[54]. The Federal

[50] *Contra Dahs jr.* (footnote 48); *Krekeler*, wistra 1982, 10; Parigger, NStZ 1986, 211 (at 213).

[51] *Dahs sen.*, NJW 1965, 889 (891); *Hengsberger*, JZ 1966, 209 (210); KMR-*Müller*, 7th ed. 1980, § 112 no. 15; *Krekeler*, wistra 1982, 9; similar Arbeitskreis Strafprozeßreform – U-Haft (footnote 31), p. 61: "certain *already* determined facts".

[52] Apart from the fact that these are presumptions concerning a subjective disposition which are difficult to prove (compare the difficulties to prove mental elements of an offence: *Loos*, Rechtswissenschaft und Rechtsentwicklung, 1980, p. 261 [at 268, 271]), these dispositions, even if they exist, may become extinct anytime by an arbitrary decision of the accused.

[53] The increase of enumerated offences ("catalogue offence") (§§ 211, 212, 220, later § 311 para. 1–3 [in the case of danger for life or health] StPÄG 1972 ["a false step", so *Krümpelmann*, in: Kriminologie und Strafverfahren, 1976, p. 44 (47)] and finally § 129a para. 1 of the Antiterrorismus-Gesetz of August 18, 1976, BGBl. I, 2181) – paralleled by a digressive tendency concerning the sentencing ranges – is problematic, especially with regard to the huge scope of § 129a. (Originally, detention was possible for suspicion of any felony: § 112 para. 2 in the version of 1877 and in the version of the Vereinheitlichungsgesetz of September 12, 1950, BGBl. I, 455, 629.) I doubt that this is possible with regard to the increasing protection of the fundamental rights.

[54] Thus erroneously the member of parliament *Jahn* in the 3rd hearing of the bill, Verh. BT, Sten. Ber. [Verhandlungen des Deutschen Bundestages, Stenographische Berichte], 132th session, 4th legislative period, vol. 55, p. 6443 (A). The provision, read carefully, merely dispenses with the need to show a specific ground for detention but *does not mandate* to issue an arrest warrant. Nevertheless, this understanding seems to be prevalent still today, obviously accompanied by some unacceptable conceptions voiced in earlier parliamentary debates (e.g., that the population cannot be

Constitutional Court rejected this automatism but nevertheless accepted the underlying idea: Although neither the gravity of the offence nor the degree of guilt nor public outrage, taken alone, suffice to warrant arrest, it may be sufficient in these cases involving grave crime that the danger of escape or suppression of evidence,[55] even if unsubstantiated by competent evidence, *cannot be ruled out* according to the particularities of the case. This kind of "reversal of the burden of prognosis" is questionable,[56] though the courts and the majority opinion unhesitatingly agree with the Constitutional Court[57]. Neither respect for legally protected interests[58] nor

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reasonably expected to tolerate that a murderer is at large; that it should be avoided that judges resort to apocryphal grounds of detention, MP *Güde*, p. 6441 [D]); *contra Paeffgen*, U-Haft, at 112 dd.; *Wolter*, ZStW 93 (1981), 452 (at 483–484). – Remarkably, *Buchner*, then minister of justice, asserted that the federal government is "innocent" with regard to this provision (as well as to the criterion of danger of repeated commitment of crimes), p. 6438 (A)!

For the legislative history and correction of distorted historiography *see Dünnebier* NJW 1966, at 231; *id.* in: LR, 22nd ed. 1971, § 112 no. 16.

[55] BVerfGE 19, 342 (at 349 et seq.) (= NJW 1966, 243) concerning the former version of § 112 para. 4 (which resembled the current § 112 para. 3). The decision seems to be inspired by an (unquoted) idea of *Kleinknecht*, MDR [Monatsschrift für deutsches Recht] 1965, 781 (783 left column). *See also* MP *Amdt* and *Benda*, RA Prot. [Rechtsausschuß des Bundestages, Protokolle] 4th legislative period, doc. no. 37/10. The decision does not refer to the reasoning put forward by the Hamburg Court of Appeal which had proposed to lower the requirements for an arrest warrant in the case of genocide, NJW 1961, 1881 (= JR [Juristische Rundschau] 1962, 27) with critical notes by *Dahs sen.*, NJW 1961, 1881 and *Eb. Schmidt*, JR 1962, 28.

[56] *Contra Anagnostopoulos*, Haftgründe der Tatschwere und Wiederholungsgefahr, 1984, 31 et seq., 61 et seq.; *Baumann*, JZ 1962, 649, 689, and *id.* in: Pfeiffer-Festschrift, 1987, p. 255 (at 259 note 21); *Dahs sen.*, NJW 1966, 761 (at 763–764); *Grünwald*, RA-Prot., 7th legislative period, 95/14; *Kohnke*, Neuformulierungen zum Haftrecht im Strafprozeßänderungsgesetz 1964, 1972, at 121 et seq.; *Paeffgen*, U-Haft, 114 et seq.; *Eb. Schmidt*, Lehrkommentar StPO II, Nachtrag-1 (1967), § 112 no. 28d; *G. Schmidt*, in: Jescheck/Krümpelmann (footnote 18), p. 45 (at 50); *Schmidt-Leichner*, NJW 1966, 425 (428 left column); *Seebode* (footnote 3), at 73; *Wolter*, ZStW 93 (1981), 452 (482 et seq.); very critical also *Roxin*, Strafverfahrensrecht, 25th ed. 1997, § 30 B II 2c. Even some judges favor the abolishment of the provision, e.g. *Mosch*, in: Sicherheitsstaat und Strafverteidigung, 13. Strafverteidigertag 1989, p. 65 (67).

[57] *Compare Kleinknecht/Meyer*, § 112 nos. 36 et seq.; KMR-*Müller*, § 112 no. 20; *Kühne* (footnote 30), no. 192; *Schlüchter* (footnote 30), no. 208; *Rüping*, Das Strafverfahren, 2nd ed. 1983, p. 67; *accord* LR-*Wendisch*, § 112 no. 52. – A recent frustrating example is presented by § 112 para. 3 SPD-draft, pp. 3 and 8, which simply repeats the reasoning of the BVerfG despite the critique by the academic literature.

[58] *See* MP *Kanka*, report of the RA, BT-Drs., IV/1020, p. 2 concerning the legally protected right – life! It is utterly unclear how an arrest could protect this legally protected

political dangerousness (whatever that may be) provide an indication how such an extreme intrusion on personal liberty could be justified. The idea of "public outrage" is obviously inapt to legitimise detention, not only because the idea is discredited as having been a legal ground for detention during the Third Reich,[59] but because it would violate the proportionality principle and the presumption of innocence[60]. Furthermore, the Constitutional Court's methodology employed to the interpretation of this provision of the Criminal Procedure Law in an effort to save its constitutionality gives rise to the gravest (and to my mind: conclusive) doubts which are themselves of a constitutional nature: The Court disapproved of what the legislature wanted but approved of what it did not want—in disregard for the clear wording![61] In practice, this ground for detention seems to function exactly as the kind of "automatism" declared unconstitutional by

right unless the danger of recidivism is obvious or pre-trial detention is understood as a means of deterrence.

This line of reasoning has become obsolete anyway after the insertion of § 129a Criminal Code into the offence catalogue because tangible assets and the freedom from coercion are also protected (§§ 305a, 315b, 316a Criminal Code). Warnings against this slippery slope had been issued quite early, e.g. *Krümpelmann* (footnote 53), 44 (at 47), also *Dencker*, StV 1987, 117.

[59] Added to § 112 para. 1 by the law of June 28th, 1935 (RGBl. I, 844 [847]): "... or if it would be intolerable, with respect to the gravity of the offence or the resulting public outrage, to leave the defendant at large." This ground for detention is neither a Nazi "invention" nor unknown to contemporary (Western) European legal orders, *see Paeffgen*, U-Haft, p. 129 note 528.

[60] For further details *see*: *Paeffgen*, U-Haft, 134 et seq.

[61] Critical statements dominate, *see* footnote 54 and *Arbeitskreis Strafprozeßreform – U-Haft* (footnote 31), at 33. For the constitutional difficulties *see Paeffgen*, U-Haft, 119 et seq. The decision also found some approval, e.g. *Dietrich*, Wiederholungsgefahr bei Sittlichkeitsverbrechen, 1970, p. 72, usually in the sense of the prevention of even worse provisions like a ground of detention "for the protection of public order", *Jescheck/Krümpelmann* (footnote 18), p. 953; though with some doubts concerning § 112 para. 3, *Peters* (Strafprozeß, 4th ed. 1985, § 47 A II 2 at the end [p. 423]) agrees on the interpretation leading to conformity to the constitution. *Accord Henkel*, Strafverfahrensrecht, 2nd ed. 1968, p. 278 note 11. – The proposal in the draft of the *Greens* (footnote 45), at 3 and 10 et seq., to insert §§ 211, §§ 220, 311 para. 1–3 into the ground of detention of the danger of rearrest is interesting. Despite a clear recognition of the main problem they believe that they cannot do without this preventive instrument because of popular anxieties.

the Constitutional Court[62]. Statistically, "seriousness of the offence" is unimportant (1985: 1,2%).[63]

IV. Danger of Rearrest as a Ground for Detention

Whereas all the grounds for detention discussed so far can, with some restrictions, be understood as devices to safeguard the integrity of the criminal process, "danger of rearrest" (§ 112a) is alien to this objective.[64] Rather, its obvious rationale is to prevent future criminal conduct. Originally designed to seize sexual[65] offenders,[66] the area of application of this ground for detention has continually been expanded to other offences[67]. It is sufficient for an arrest warrant to show "suspicion" of a serious sexual offence (no prior conviction needed) and the determination, based on "particular facts", that this could happen again. Additionally, detention must be apt to prevent a repeat offence. If the charge does not involve a sexual offence, then a showing of persistent or continuous perpetration of the offence in question is necessary. In practice, this ground for detention is little utilised (1986: 1,9%),[68] probably not because it is a residual clause applicable only when other grounds for detention[69] are not but because the

[62] *Deckers*, AnwBl. 1983, 420 (at 422). The courts should not use this ground of detention any more. Its modest benefits like easing the paperwork for an arrest order are outweighed by manifold constitutional problems.

[63] *Gebauer* (footnote 11), p. 68.

[64] This is recognised in the academic literature, yet with different consequences, *cf. Seebode* (footnote 3), at 74 note 108.

[65] Detention was intended to be available in the cases of §§ 173 para.1, 174, 175a, 176 and 177 StGB in an older version, *cf.* § 112 para. 3 as amended by StPÄG 1964. For the legislative history *see Kohnke* (footnote 56), 77 et seq.

[66] The presumption of innocence still protects the defendant, even after a credible confession, although this is quite often forgotten in the – often sloppy and legally not overly knowledgeable – media coverage of spectacular trials. – The danger of rearrest as a ground for detention does not violate the presumption of innocence anyway, *see Stuckenberg*, Untersuchungen zur Unschuldsvermutung (1998), at 562–563, neither does the confinement of mentally ill persons pursuant to the *Länderunterbindungsgesetze* (civil commitment legislation).

[67] §§ 223a–226, 243, 244, 249–255, 260, 263, 306–308, 316a StGB, § 29 para. 1 nos. 1, 4, 10, para. 3, § 30 BtMG [Betäubungsmittelgesetz – Prohibited substances legislation].

[68] *Gebauer* (footnote 11), p. 68; *Schöch* (footnote 27), p. 1007.

[69] Which is overlooked in one third of all cases, *see Gebauer* (footnote 11), 231–232.

burden of production is higher since more information has to be supplied[70].

Without doubt, this ground for detention is the most contentious of all in academic discussions: Because of its preventive nature, the question is if it is correctly located in the context of criminal procedure law. Thus, its legitimacy has been challenged and, because of its insertion into the RStPO in 1935, it has been regarded as a concept typical of National Socialism, and likened to past forms of police totalitarianism, namely "*Schutzhaft*" (protective custody) and "*Vorbeugehaft*" (preventive custody).[71] The Federal Constitutional Court held it constitutional with reference to its original rationale to protect (prospective) victims of sexual offenders,[72] yet without discussing the problem of legislative authority (jurisdiction)[73]. This latter question is not just a concern of legislative esthetics and consistency. In a federal state, the lack of legislative authority renders a provision null and void. In the Federal Republic of Germany, the federal legislature has jurisdiction to legislate on criminal law and criminal procedure, whereas the legislative authority for the prevention of dangers at large is almost exclusively vested in the states (*Länder*). In academic literature, most writers do not see a problem with § 112a at all,[74] whereas a few critics tend to reject this ground for detention entirely[75] or

[70] The police tend to excessively assume the risk of suppression of evidence and the danger of rearrest as a ground for detention (in 23,8% of all cases examined by *Jabel* [footnote 11], p. 190). Consequently, the police's authority to curtail fundamental rights should not be extended. In a federal system this question is also a problem of the distribution of legislative authority between the federation and the *Länder*, *see* in detail *Paeffgen*, JZ 1991, 437.

[71] *See Paeffgen*, U-Haft, 140–141 note 481; for more details on preventive police custody in the organizational context of judiciary and police, *see Werle*, Justiz-Strafrecht und polizeiliche Verbrechensbekämpfung im Dritten Reich, 1981, at 499 et seq., 533 et seq.

[72] BVerfGE 19, 342 (at 349–350) – obiter dictum.

[73] BVerfGE 35, 185.

[74] *Meyer-Goßner*[46], § 112a no. 1; KK[4]-*Boujong*, § 112a no. 2, 5; KMR[8]*Müller*, § 112a no. 1; *Kühne* (footnote 30), no. 193; LR[24]-*Wendisch*, § 112a no. 13; *Müller/Pieroth*, in: Hoffmann-Riem (eds.), Sozialwissenschaften im Öffentlichen Recht, 1981, 228 (at 230); *Peters* (footnote 62), § 47 A II 2b (p. 422); *Schlüchter* (footnote 30), no. 215. – Critical: *Henkel* (footnote 62), at 278 note 10; *Roxin* (footnote 56), § 30 B 2d (p. 195); *Rüping* (footnote 58), 67–68; *Wolter*, ZStW 93 (1981), 452 (at 484).

[75] Arbeitskreis Strafprozeßreform – U-Haft (footnote 31), 33, 44; *Jung/Müller-Dietz*, Reform der U-Haft, 1983, p. 11; *Krümpelmann*, ZStW 82 (1970), 1052 (at 1095).

at least as part of criminal procedure law[76]. Since I belong to those few, let me briefly address some of these issues here. One argument says that since such a detention warrant is issued during an ongoing criminal investigation or trial, this ground for detention is correctly incorporated into the criminal procedure legislation—this argument is misplaced and confuses occasion and objective. The objective of the detention clearly is aversion of future dangers. What we have got here is the "freakish creature of a procedural device serving no procedural purpose".[77] Moreover, the question remains whether this kind of pre-trial detention that is limited to one year (§ 122a)[78] does not counter-act the abolition of short term imprisonment. Also, we have no reliable empirical data on the frequency of recidivism,[79] [80]. Therefore, the prediction that a defendant "could do it again", i.e. is likely to be rearrested, amounts to little more than folk psychology and reading tea leaves (and this although defendant is still presumed innocent!). Finally, the offences enumerated in § 112a para. 2 no. 2 are exceedingly frequent and everyone in the community at large could be a victim—this is a far cry from what the Constitutional Court had in mind when it upheld the provision as constitutional.

One could object that this dispute is a typical "querelle allemande": of little practical relevance (concerning only a small percentage of cases), but discussed with a lot of energy and doggedness. But I have got to contradict vigorously: What is at stake here is the crucial determination of what the State, through its legislature and its judiciary, may legitimately do. What is needed is a maximum of rationality in order to ban any kind of illegitimate considerations whether they are overtly expressed or come in disguise. This is the only way to combat "apocryphal grounds for de-

[76] *See* e.g. *Baumann*, JZ 1962, 689 (694); *idem*, JZ 1969, 134 (138); *Klug*, ZRP 1969, 1 (2); *Seebode*, ZRP 1969, 25 (26). In detail *Anagnostopoulos* (footnote 56), 81 et seq.; *Paeffgen*, U-Haft, 138 (at 149 et seq.), each with different proposals how such a preventive protection by the police should be proceduralized based on relevant empirical, statistical research.

[77] *See Sax*, in *Bettermann/Nipperdey/Scheuner* (eds.), Grundrechte, vol. III/2, 1959, 909 (at 980), on the parallel case of § 126a (interim detention in a psychiatric hospital or in a treatment centre).

[78] Why this limit? Does the defendant cease to be dangerous thereafter? One should not be too proud of this limitation as a consequence of the principle of proportionality, because it is too far-reaching.

[79] *See Roxin* cited by *Meyer*, ZStW 82 (1970), 1117 (at 1125).

[80] *See* Dessecker, Gefährlichkeit und Verhältnismäßigkeit, Berlin 2004.

tention"[81] that is, grounds which are not contained in the statute book but act as subliminal motives for an arrest[82].

V. Proportionality

1. Substantive Elements of the Proportionality Principle

The legislature has underscored the third requirement, proportionality, by inserting it twice in the relevant provisions: Pre-trial detention has to be put to the proportionality test for the first time when an arrest is ordered (§ 112 para. 1) and again, when the arrest warrant is subject to review proceedings (§ 120 para. 1). In theory, "proportionality of detention" means that the arrest order has to be *apt* to reach its objective as well as *necessary*—meaning that no less burdensome alternative is available—and, finally, after weighing the totality of circumstances, *proportionate* in the narrower sense of *reasonable.*[83] This standard is further specified and illustrated by two criteria: "significance of the case" and "severity of the prospective penalty or preventive measure". Therefore, a common view is

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[81] *See* for example *Dahs Jr.* (footnote 48), p. 227; *Gilde*, Verh. BT (footnote 54), p. 6441 (D). I have seen this expression for the first time in the protocols of the *Rechtsausschuss* by *Bader* and *Baldus*, 4th legislative period, doc. nos. 23/26 and 23/29. *Cf.* the cafeteria-type pearl of wisdom circulating in Moabit (criminal court of Berlin): "pre-trial detention engenders final conviction", reported by *Geppert.*

[82] These come to surface when a chief public prosecutor explains the increase in criminality by the lack of possibilities to achieve confessions and to facilitate the investigations by pre-trial detention, or when the president of a Court of Appelas complains that pre-trial detention lacks a deterrent effect, and that professional criminals now can calculate the risk of arrest (since the StPÄG 1964), report by the secretary of justice to the *Rechtsausschuß*, February 4, 1971; *see* also *Krümpelmann* (footnote 53), p. 48. *Compare* a couple of interesting statistics based on interviews with judges, public prosecutors, police officers and lawyers who sympathise with some of those practical (but illegal) ideas (crisis intervention, general prevention), *Gebauer* (footnote 11), p.357 (364). *Seebode* confirms this impression based on numerous conversations with judicial officers and points out that prison sentences often used to be as long as the duration of pre-trial detention (e.g. a sentence of 91 days in prison).

[83] *See* the exemplary definition of these concepts in BVerfGE 30, 292 (316) (*Erdöl-bevorratungs-Urteil* – judgment on the storage of oil). For a detailed discussion of the – not only terminological – problems with this concept, *see* e.g. *Lerche*, Übermaß und Verfassungsrecht, 1961; *Grabitz*, AöR [Archiv für öffentliches Recht] 98 (1973), 568 et seq.; *Schlink*, Abwägung im Verfassungsrecht, 1976, at 15 et seq., 48 et seq., 143 et seq.; for a summary *see Paeffgen*, U-Haft, 165 et seq.

that pre-trial detention is not permitted if the defendant faces only a short prison term or a fine.[84] The prevailing view, however, is to the contrary.[85] I have serious concerns that the presumption of innocence may be violated by taking into account the amount of punishment likely to be meted out to the defendant.[86]

In addition, the earlier an arrest warrant is sought, the bolder a prediction about the final verdict and sentence becomes, in particular concerning the *mens rea* requirement.[87] But "significance of the case" is dubious insofar it opens the gates to considerations of general or special deterrence which do not conform to the presumption of innocence.[88] The thrust of

[84] *Dünnebier* in *Lüttger* (ed.), Probleme der Strafprozeßreform, 1975, 29 (at 36); *Roxin* (footnote 56), § 30 A III; *Wolter*, ZStW 93 (1981), 452 (at 469–470); *Wolter* wants to extend the scope of application of § 113 to all cases in which a suspended prison sentence is prognosticated. Similar Arbeitskreis Strafprozeßreform – U-Haft (footnote 31), § 5 no. 2, 4, 61–62: executable prison sentence of one year has to be expected.

[85] KK-*Boujong*, § 112 no. 48; § 113 no. 1; *Kleinknecht/Meyer*, § 112 no. 1; LR-*Wendisch*, § 113 no. 1. – It is incomprehensible that an arrest warrant can be issued for violation of the immigration legislation (*Ausländergesetz*) or for fare dodging (§ 265a StGB), *see Schöch* (footnote 27), at 1007.

[86] Assuming that the presumption of innocence is an unwritten constitutional principle, *see Paeffgen*, U-Haft, at 64 et seq. This hypothesis is supported by the fact that some of the *Länder* have integrated such a fundamental procedural right into their constitution: art. 65 para. 2 constitution of Berlin; art. 6 para. 3 constitution of Bremen; art. 20 para.2 (1) constitution of Hesse; art. 6 para. 3 (3) constitution Rhineland-Palatinate; art. 14 para. 2 constitution of Saarland. Furthermore, I understand this principle in a very strict (and extremely counter-factual) way: Until the judgment becomes final, this principle consists of the irrefutable presumption *sui generis* so that all state authorities have to regard the defendant's innocence as established. The trial court is bound by this presumption only until it enters into the deliberation of judgment, *see* generally *Paeffgen*, U-Haft, 42 et seq., 50 (referring to the *Drittwirkung* – binding effect on citizens, 52 footnote 190). – This contradicts modern tendencies to submit this presumption to the principle of proportionality, thereby loosening its strictness. – *See also* the more cautious interpretation given in the fundamental work, based on extensive historical and comparative research, by *Stuckenberg*, Untersuchungen zur Unschuldsvermutung (1998), 530 et seq. (prohibition to disavow and subvert the proceedings). *Stuckenberg*, p. 562, in contrast thinks that the orientation on the prospective sentence is "advisable".

[87] The statistics by *Gebauer* (footnote 11), at 239, and *Jabel* (footnote 11), 140–141 and 137–138, show that the prognosis "expectation of severe punishment" in 52,9% or 60% of all cases proved incorrect because sentences of one year imprisonment without probation were not passed (only in 43,9% or 49,1% punishment of one year or more was imposed at all). *See also supra* footnotes 12 and 29.

[88] *E.g.* "frequency of commitment", "danger of imitation", "danger of slipping into serious criminality". However, for the possibility of considering these aspects (at least

this approach is nonetheless correct in trying to formulate objective standards and seeking support in the statutory text. An example for this can be found in the criterion of "gravity of offence"[89] adopted by the Federal Constitutional Court[90]. One may also cite the abstract definition of the offence charged whose abstract sentencing scale indicates not only how energetic the prosecution should be but also to what embarrassment the defendant can reasonably be subjected.[91] In any case, the determination of guilt should not be anticipated,[92] even though it was explicitly permitted by the legislature and the defendant may benefit therefrom[93]. Another possibility would be to interpret the provisions of §§ 112 et seq. as prohibiting pre-trial detention in cases involving offences with a maximum penalty of two or three years imprisonment.[94] This, of course, is not attainable

for repeat offenders or defendants who have been severely punished previously but not for the same offence; all this even if only a fine can be expected), *see Wagner*, NJW 1978, 2002 (2005). – The fact that it is illicit to take into account the last aspect proves that "protective formalities" can also be burdensome to the individual.

[89] Part of the literature regards the expression as a synonym to "significance of the case", *e.g.* K/J (footnote 9), no. 110; *Kühne*, NJW 1979, 617; *Wagner*, NJW 1978, 2002 (at 2004).

[90] BVerfGE 16, 194 (at 202).

[91] This criterion is not totally free from tensions with the presumption of innocence which is also a *presumption of non-illegality* (of defendant's conduct). Yet, methodically, the assumption in the text is doubtlessly correct since it refers to the basis of suspicion and each legal presumption is conditioned upon such a factual basis, *see generally Paeffgen*, U-Haft, at 49 et seq. The objection that such strict premises would even hinder the formulation of a suspicion is unfounded because it is only the suspicion which gives rise to the "presumption of innocence". Unsuspected citizens – although there is certain percentage of offenders among them, as we know from criminological research – do not need the protection of the presumption of innocence as long as they are not subject of a criminal investigation. Here, the general modes of protection of the personality are sufficient, e.g. §§ 185 et seq. Criminal Code.
Consequently, there is no conflict between such a reading of the presumption of innocence and compulsory measures triggered by a criminal prosecution. These procedural measures merely aim at the prevention of interferences with the proceedings, *see supra* footnote 16. This approach which does not refer to the personality of the accused is also acceptable from a pragmatic point of view because it leads to comprehensible criteria of limitation. – But compare also with the partly different view of *C.-F.Stuckenberg* (note 87), 448 et seq.

[92] *See e.g. Paeffgen*, U-Haft, 198 et seq.; *contra Krauß* (note 16), at 174.

[93] Although any benefit which is not distributed evenly may be seen as a deprivation by those who do not profit from it.

[94] § 113 para. 2 SPD-draft (footnote 57), 3, 8, supports the two-years-limit. One may also consider that attempts are not always penalised and that sometimes an

by a simple teleological reduction within the powers of the judiciary, because this proposal is not in harmony with the wording of § 113 which authorizes pre-trial detention in minor cases leading to a maximum penalty of six months' imprisonment or fine of 180 daily rates if defendant is likely to escape. Thus, it is a task for the legislature to help the presumption of innocence to undiminished respect.

Furthermore, since the Criminal Procedure Amendment Act of 1964, the entire criminal procedure legislation is interspersed with proportionality clauses. Apart from the aforementioned (and utterly insufficient)[95] restriction of detention in minor cases (§ 113), § 116 has to be mentioned which authorises the suspension of an arrest warrant and exemption from custody if other suitable but less onerous measures are at hand to secure defendant's appearance in court—a seemingly contradictory rule because an arrest warrant is not the mildest measure if there are viable substitutes. However, the prevailing view does not contest this because of the formal

investigation is conditioned upon the victim's consent, all of which reduces the weight of the offence. Very critical *Jabel* (note 11), 213 et seq. With a two-years-limit, a reduction of only ten percent of the cases investigated by *Jabel* would occur, more than half of which were violations of § 47 AuslG, i.e. illegal immigration. The SPD-draft includes an exception from the exception for the lack of "permanent residence" (in the same vein: § 113 para. 2 of the unpublished pre-draft of the Ministry of Justice, as quoted in *Jabel* [note 11], 216 et seq.; *Rössner*, JZ 1988, 116 et seq.). *Jabel* fears that a three-years-limit might severely disturb the functioning of the criminal justice system. These doubts stem from the legal schematism that detention substitutes and other compulsory measures ("wanted" posters, § 131) are usually – but necessarily – subject to similar conditions as pre-trial detention.

[95] Danger of escape is a ground for detention available for *every* criminal offence if the defendant tries to escape, has no place of residence or is not able to verify his identity, § 113 para. 2. The fact that pre-trial detention for danger of suppression of evidence is excluded for five (!) offences with a maximum penalty of six months (§ 113 para. 1) is not worth mentioning. (*Jabel* [footnote 11], p. 213 and appendix 4, lists cases of pre-trial detention for §§ 184a, 284a Criminal Code, offences punishable by not more than six months imprisonment.). It is disconcerting that in cases of § 265a Criminal Code (fare dodging) and other offences with a maximum penalty of less than one year or in cases with minimal damage (under 50 Euro), pre-trial detention is imposed in a sizable percentage (about 5 %), *see Gebauer* (footnote 11), p. 17 (a lesser percentage in *Jabel* [footnote 11], p. 91). – The proposal of the Ministry of Justice for § 113 para. 2 (inadmissibility of pre-trial detention based on the danger of escape in the case of an expected penalty of one year on probation, with an exception of the exception in the sense of the current § 113 para. 2) leads (with small steps) into the right direction, *see* pre-draft (footnote 94), at 1 et seq., 14 et seq. – critical to § 113 also *Wolter*, ZStW 93 (1981), 452 (466 et seq.).

order of the process—arrest warrant first, release afterwards. In substance, the rationale embodied in § 116 to avoid unnecessary arrests by providing for alternative measures to prevent the accused from thwarting the proceedings, to my mind represents the most important achievement of the proportionality doctrine. All the same, there is still much to be improved.[96]

2. Formal Elements of the Proportionality Principle

One of the most important areas of application of the proportionality principle is represented by formal procedural guarantees and rights to review. Partly, these formalities can be traced back to traditional institutions like judicial approval of an arrest warrant which can already be found in the precursors of the RStPO and which is a descendant of the *Habeas corpus* doctrine. At present, the requirement of judicial approval of detention has been elevated to constitutional rank by the clear wording of Basic Law Article 104 para. 2. In reality however, given the high case load and docket pressures of the judiciary today, this requirement has quite often degenerated from a bulwark of individual liberty to a mere ceremonial component, especially in very large cases involving economic crime, terrorism, or organised crime. Here, more than a plausibility check is not feasible. It could not be different since the judge is presented with a prepared case file—which consists often of mountains of papers. In these cases, the judge approving an arrest warrant merely functions as a "notary

[96] *See* the detailed and very debatable proposals on "house arrest" or "custody by third persons" in *Seebode* (footnote 3), 56–57; and in: *Koop/Kappenberg* (eds.), Praxis der U-Haft, 1988, 28 (at 43–44) or for a "promise of punishment", *see Paeffgen*, U-Haft, 170 note 26. A proposal laudable for the emphasis of the primacy of softer means with a list of additional options is contained in § 116 SPD-draft (footnote 57), at 3 and 8–9; similar § 114 draft of the *Grünen* (footnote 44), at 3–4 and 11–12. § 116 pre-draft of the Ministry of Justice (footnote 94) is inferior to these proposals for using the old technique of substitution. Although this technique might have stood the test of practice it should not distract from paying close attention to constitutional demands (principle of the mildest intervention). Additionally, it is said that otherwise there is a risk of an increase of orders of such "substitute measures" (because of the lesser incriminating effects), even in cases in which an arrest warrant would not have been issued since its preconditions eemd dubious (p. 38–39 of the commentary) (similar *Jabel* [footnote 11], p. 217–218). This supposes a "disposition" of the judiciary to apply existing law in an illegal way—maybe a realistic but contra-normative point of view.

public".[97] All the same, judicial approval is not superfluous and I will certainly not propose to do away with it. It does provide at least in theory a control[98] of the overzealous prosecutor and serves as an effective psychological barrier against rash arrests.

VI. Judicial Control

1. Regular Remedies

A more effective control than the initial judicial approval of the arrest warrant is procured by the elaborate system of judicial review following the arrest, a system so complicated that I can describe it only in broad outline. In essence, judicial review of detention is bifurcated: On the one hand, there are general forms of applications for review of interim judicial orders like (formal) "complaint" (*Beschwerde*, § 304) and "further complaint" (*weitere Beschwerde*, § 310)—if the *iudex a quo* does not grant relief then the court of next instance will decide.[99] The defendant remains in custody during this interim proceedings. Alternatively, there is a special remedy for detention review: "*Haftprüfung auf Antrag*" (§ 117 para. 1). If this application for review is filed before the opening of court proceedings, a single judge ("*Haftrichter*", § 126 para. 1) decides, afterwards the trial court decides on the petition (§ 126 para. 2). The interim procedure can feature a hearing either on a defendant's motion or at the judge's or court's discretion, or can otherwise be conducted *in camera* (§ 118 paras. 1, 2). The judge has the power to conduct further investigations, he has to

[97] *See Paeffgen*, U-Haft, at 271. Often the judge has only 30 minutes per case, *Dünnebier* (footnote 84), at 43. Sceptically towards the efficiency of this control also *Hamm*, in: Bürger im Ermittlungsverfahren, 1988, p. 61 (67); *Morawetz/Stangl*, U-Haft in Österreich, 1984, at 5. This applies particularly to the case of working with (in my opinion: illegally) "cleaned" documents which hide the ill repute of the sources, e.g. reported by *Meggers* in: Koop/Kappenberg (footnote 96), 114 (at 121).

[98] *Jabel* recognized that in 29,8% of all the 143 cases surveyed in which detention was approved by the police and/or the public prosecutor ("Beinahehaft-Fälle" [i.e. cases in which the accused was nearly arrested]), the arrest warrant was not issued. – Due to interviews of involved personnel *Gebauer* (footnote 11) 344 (at 346) is skeptical: only in 10% (max. 10–20%) of the cases the judge does not follow the police's opinion (a percentage which I deem not insignificant – this stresses the importance of the "Richtervorbehalt" – the need of judicial approval). *See generally Rabe von Kühlewein*, Richtervorbehalt (1999), and *idem*, GA [Goltdammer's Archiv] 2002, 637.

[99] In exceptional cases, a hearing is optional (§ 309 para. 1).

hear the prosecution (§ 33 para. 2) and also the defendant if he wants to utilise evidentiary facts against him (§ 33 para. 3).

If three months after the arrest, the defendant has not challenged his remand in custody and is not represented by counsel, the judge will initiate review proceedings *ex officio/proprio motu* (§ 117 para. 5) and appoint counsel if the detainee so motions.

All rulings on application for review or review *ex officio* are subject to appeal and further appeal.

Both types of judicial control procedures trigger a complete review of the factual and legal prerequisites of the detention warrant. Therefore, the existence of two basically identical types of review proceedings is a waste of scarce personnel resources. Regrettably, it is only academic writers who advocate more expedient solutions like earlier appointment of counsel and earlier *ex officio* review.[100]

2. Extraordinary Review of Detention

A particularity of the system of judicial control is the *ex officio* review that the competent court of appeals has to undertake when the duration of custody reaches six months.[101] The court of appeal will consider statements of the detainee and his counsel, either in written form or, optionally, in a hearing (§ 122 para. 2). If relief is denied, review proceedings have to be repeated every three months (§ 122 para. 4) as long as the defendant remains in custody. Although relief is granted only in a small percentage of cases,[102] this additional review procedure exerts a notable educational

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[100] *See e.g. Paeffgen*, U-Haft, at 208; *Wolter*, ZStW 93 (1981), 452 (at 463). The appointment of counsel already at the first hearing is demanded by § 41 no. 2 *Arbeitskreis Strafprozeßreform – Verteidigung*, 1979, at 4, 59–61, and § 141 para.1 *Entwurf Grüne*, BT-Drs. [Bundestags-Drucksache] 11/2181, at 6 and 12, 16. Similar some attorneys, e.g. *Meggers* (footnote 97), at 115–116. The defendant faces the dilemma that his confession leads on the one hand to his release from detention and on the other hand assures his conviction. Consequently, advice of counsel is indispensable, *see generally Hamm* (footnote 97), 68 et seq.

[101] The liberal spirit of the amendment of 1964 is evidenced by the explanation for the six-months-limit given by the secretary of justice: 92,1% of cases were concluded within this time, *see Vöcking*, Die oberlandesgerichtliche Kontrolle der Untersuchungshaft gem. § 121 StPO, 1977, at 224 note 1 with reference to an unpublished letter to the head of the *Rechtsausschuß*.

[102] *Happel*, StV 1986, 501, found out for the OLG Frankfurt that in 8 years, 5729 cases were subject to extraordinary review of detention, and relief was granted only in 40 cases (0,7%)! *Jabel* (footnote 11), at 172, counts 3 out of 22 cases (13,6%) for the

function[103] (comparable to the *ex officio* review after three months): half the detainees are released after three months, another 25% before the six months limit[104].

The prolongation of detention beyond the time limit of six months poses additional legal problems: According to § 121 para. 1, the defendant may now be remanded to custody "for the same offence" only if

(a) the exceptional complexity of the investigation or
(b) the exceptional scope of the investigation or
(c) some other important reason

do not allow to conclude the proceedings and enter judgement, and thus "justify the extension of detention". Obviously, the concepts "some other important reason" and "for the same offence" are highly controversial.

The notion "same offence" is of utmost a) importance in the context of pleading (§§ 155 para. 1, 264 para. 1), *res iudicata* and double jeopardy protection. Apart from the question whether "same offence" has a uniform meaning in all procedural situations—which I would deny—the problems with § 121 para. 1 are difficult enough: The prevailing opinion equals "same offence" with "same proceedings".[105] Therefore, if the investigation

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OLG Celle in 1981. *Vöcking* (footnote 101), 218 et seq., arrives at a quota of 3% for three courts of appeals in North Rhine-Westfalia in the years 1965 to 1973. *See* also *Gebauer* (footnote 11), at 295: in 42 cases prolongation of the detention was ordered. – A exception was made by *Carstensen*, Dauer der U-Haft, 1981, at 115, for the OLG Schleswig: relief quota of 28% for only 25 cases.

[103] *Compare Rieß* in: *Jehle/Hoch*, Oberlandesgerichtliche Kontrolle langer Untersuchungshaft (1998), 15 (at 25).

[104] *Baldus* in *Meyer*, ZStW 82 (1970), 1131–1132; *Vöcking* (footnote 101), 52–53; *Jabel* (footnote 11), 164–165 (for the OLG Celle): with a continuous distribution in the first month, and the following rhythms of every two weeks: first week: 64; second: 30; third: 46; fourth: 55; one and a half month: 67; second month: 67; second and a half month: 50; third month: 48 – then in a month's rhythm: fourth month: 75; fifth month: 65; sixth month: 43. Similar data: *Gebauer* (footnote 11), 158: the graph divided in weekly subdivisions shows two maxima on a low level. *Gebauer* is tempted to view this as a confirmation of the educational effect. Due to the constant data I think this is quite trenchant. You can see a plateau between week two and week thirteen as well as between week thirteen and twenty-six. It it remarkable that there is no maximum before the date of detention review. This shows that the above opinion is a benevolent interpretation. Nevertheless, one may hold the thesis correct, given the importance of time limits in bureaucratic organizations.

[105] OLG Celle NJW 1966, 1574; 1969, 245; MDR 1984, 774; StV 1989, 255; OLG Braunschweig NJW 1967, 363; OLG Düsseldorf StV 1986, 345; OLG Hamm MDR

discovers new evidence that the defendant may have committed another offence or other offences, a new arrest warrant does not start a new six-month period.[106] Academic writers prefer an intermediate position and claim that the generally accepted meaning of "same offence" extends to § 121 but that the new six-month period begins to run as soon as a new arrest warrant *could* have been issued.[107] The motive for giving "same offence" another sense in the detention context than in the double jeopardy context is to prevent manipulation by police and prosecution, for instance, by holding back incriminating material in order to circumvent the review procedures and to hold the defendant in custody as long as possible. Although I subscribe to this motive, I do not think that the judiciary may amend perceived legislative deficiencies in disregard for the clear statutory wording. Hence, it is inadmissible to treat "offence" and "proceedings" as equivalent, for the same reason that led *Eb. Schmidt* to ridicule such ventures over 20 years ago: It can be assumed that the legislature was well aware of the difference between those two concepts.[108] Also, the prevailing view is likely to produce extreme results as evidenced by a ruling[109] which subjected a new arrest warrant issued for a new offence (rape, § 177 StGB [Criminal Code]) committed during court-ordered suspension of the detention warrant (§ 116) to the six-month period of the original warrant. Even the most scrupulous prosecutor could not have discovered the new "offence" before it had been committed. There was no danger of manipulated extension of detention periods here[110] and thus no

1977, 426; OLG Schleswig StV 1983, 466; K/J (footnote 9), no. 246; KK-*Boujong*, no. 10.

[106] *See* OLG Karlsruhe NJW 1966, 464; OLG Koblenz MDR 1982, 953; *Gössel*, Strafverfahrensrecht, 1977, § 5 D IV a 2,3 (p. 81–82); *Rebmann*, NJW 1965, 1752 (at 1753).

[107] *Rosenthal*, § 121 StPO, 1975, p. 127 et seq.; *Roxin* (footnote 52), § 30 F I 3; *Schlüchter* (footnote 30), no. 244.4; *Eb. Schmidt*, NJW 1968, 2209 (at 2211 et seq.). Slightly different LR-*Wendisch* who does not refer to the moment in which the arrest warrant could theoretically have been issued on the grounds of new facts. Instead, he refers to the moment from which on the "facts" have been detected. (Maybe the other authors mean the same as *Wendisch*: Not to date back to the moment at which one has had to have the new suspicion [and at which one could have had the new arrest warrant], but at which one has had the new suspicion and at which one has had to have the arrest warrant. This is unclear since these short remarks are unprecise.)

[108] NJW 1968, 2209 (at 2213 note 30).

[109] OLG Celle StV 1989, 255.

[110] *But see Paeffgen*, NStZ 1989, 514 (at 515–516).

reason to contort the words of the statute. Before the legislature chooses to amend the statute, I would prefer a proposal submitted by *Vöcking* who distinguishes between offences closely related to the offence charged—any new arrest warrants for those cognate offences do not extend the six-month period—and offences wholly unrelated to the offence charged—which start a new six-month period.[111]

A "long runner" among the legal problems b) surrounding detention is the question what constitutes "another important reason" to extend the six-month time limit. It is undisputed that avoidable delays and impediments caused by prosecution or court officials do not count as "important reason". When a personnel shortage is in sight, civil court judges have to be brought in to guarantee a speedy disposition of detention cases.[112] It seems entirely convincing that maladministration, i.e. defects and inefficiencies in the organisation and functioning of the judiciary (personnel shortage, failure to provide for duplicate or triplicate files etc.) must not be detrimental to the defendant. There is disagreement, however, as to whether minor mistakes of the prosecution warrant extension and if the gravity of the offence charged is a relevant factor.[113] A systematic interpretation reveals that in requiring exceptional complexity for an extension the legislature accepted minor mistakes that, especially in complicated cases, are the necessary concomitant of the fallibility that affects us all.[114] Gravity of the offence, however, does not constitute a ground for extension recognized by law. Also, the courts of appeal are not authorised to base their rulings on free-floating considerations of proportionality. The legislature did determine the factors to be weighted and did provide clear guidelines for the determination of proportionality in the individual case that the courts of appeal have to utilise: "exceptional complexity", "ex-

[111] *Vöcking* (footnote 101), p. 188 et seq. *See also* SK-StPO-*Paeffgen* (1992), § 121, nos. 10–11.

[112] This is probably the prevailing view, *e.g.* KG StV 1985, 116; OLG Frankfurt StV 1982, 584; OLG Karlsruhe Justiz 1986, 28; OLG Köln NJW 1973, 912; OLG Schleswig StV 1985, 115; KK-*Boujong*, § 121 no. 20; K/J (footnote 9), no. 257; *Roxin* (footnote 52), § 30 F 13 (p. 204).

[113] In the case of major mistakes (the benchmark being the "dutifully diligent official") there is no debate, *see* KG StV 1983, 111; OLG Frankfurt StV 1984, 123.

[114] The *Bundesverfassungsgericht* stresses in BVerfGE 36, 264 (at 275) (= NJW 1974, 307 [309]), that not every avoidable mistake by the authorities that prolongs the proceedings prevents the extension of detention. The Court assumed that despite the breach of duty there might be "other important reasons" which justify a prolongation of the detention.

ceptional scope of the investigation" and "other important reasons".[115] The last concept has to be interpreted in light of the first two. One of these requirements must be fulfilled by showing that circumstances within the definition of those terms hindered the conclusion of the case and therefore warrant the extension of the time limit.[116] The wording of the provision (§ 121) and its legislative history[117] unambiguously indicate that there is no authority for a free-floating, *ad hoc,* assessment of what an "important reason" for remand in custody could be.

If one of the three requirements is satisfied then and only then one may ask whether the prosecution or the judiciary are wholly or partly to blame for the delay with the consequence that an extension may be denied. The law says that these requirements must "justify the extension" and the word "justify" is the textual basis to take into account the share of responsibility of state officials. The normative factors to be weighed here are the general rules of "objective imputation" and the constitutional rights of the defendant like the right to a speedy trial (art. 6 para. 3 European Convention on Human Rights).[118, 119]

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[115] This is controversial. *See* in support *Dünnebier*, JZ 1966, 251 (at 252); *Paeffgen*, NJW 1990, 537 (at 541 note 54 with further references). *Contra* the prevailing opinion: KK-*Boujong*, § 121 no. 15; K/J (footnote 9) no. 252.

[116] This may become possible once the absence of an important reason has been acknowledged, *e.g.* OLG Düsseldorf StV 1989, 113. – *Compare* the new tendency among courts of appeal, *e.g.* OLG Düsseldorf StV 1989, 113; OLG Frankfurt StV 1988, 439; OLG Hamm JMBl. NW 1971, 283; *cf also* KMR-*Müller*, § 121 no. 7; *strictly contra Paeffgen*, NJW 1990, 537 et seq.; *Prittwitz*, StV 1988, 440 et seq.; *Seebode*, StV 1989, 118 et seq.

[117] For more detail *see Paeffgen*, NJW 1990, 541 et seq.

[118] On the attribution of "third-party-intervention" in the context of the theory of "objective attribution" in criminal law, *see Frisch*, Tatbestandsmäßiges Verhalten und Zurechnung des Erfolgs, 1988, p. 230 et seq.

[119] Of all current reform suggestions, only § 21 of the *Arbeitskreis Strafprozeßreform – U-Haft* (footnote 31) and § 121 draft of the *Grünen* (footnote 45), 4, 14, propose to tighten the requirements of the extraordinary review of detention: The draft of the *Grünen* demands (in my opinion this is too strict) a reduction of the time limit to three months, replacement of "same offence" by "same procedure" (para. 1), automatic invalidation of the arrest warrant when its prolongation has not been ordered in time (para. 3). The *Arbeitskreis Strafprozeßreform – U-Haft* keeps the six-months-period, but intensifies the formal safeguards. The individual rights are mainly protected by the proposed early review after 14 days and then in a two months interval, § 25 para. 1 (similar § 117 para. 5 draft of the *Grünen*) and 2.

VII. Time Limits

Finally, some words about time limits. There are no absolute time limits on pre-trial detention in German Law with one exception: Detention based on the danger of rearrest must not exceed one year, § 122a. In all other cases, the defendant must be released after six months unless an exemption of detention has been ordered or the time limit has been extended by the appellate court (§§ 121, 122).[120] The time period does not run during court proceedings, § 121 para. 3 (2). These time limits can only be called inadequate. Although the cases are fortunately rare[121] that defendants are held in custody for several years, the considerable leeway accorded to the prosecution has to be curtailed[122]. Before presenting some proposals to this effect, let us have a brief look at the practice: Whereas in recent years the number of detainees declines, the duration of detention increases but with remarkable local variations.[123] Undeniably, the practice is starkly incongruent. This calls for limitations like absolute time limits.[124] If they are

[120] The *Arbeitskreis Strafprozeßreform – U-Haft* (footnote 31) and § 121 para. 3 draft of the *Grünen* (footnote 45) provide an automatic expiration of the arrest warrant in case of non-prolongation. This will necessitate more accurate file-keeping (especially if detainees are shuttled back and forth between detention facilities and courts). In the presence of a clear limitation an *actus contrarius* is unnecessary.

[121] *Compare Jabel* (footnote 11), at 164, who counts two cases of more than two years' detention out of 751 detainees in the districts of three regional courts (already 21 of over one year and six of over 1,5 years); these might be cases of detention during appeal. Compare the cases cited in BVerfGE 20, 40 (five years), or BVerfG JZ 1980, 350 (12–13 years)!

[122] *Compare Hilger*, NStZ 1989, 107 (at 108–109).

[123] *Gebauer* (footnote 11), 158 (at 167), analyzed detention cases in eight districts of regional courts in several states and found differences of 70 to 156 days, in average 114 days, after exclusion of detention during appeal: 85 days (at 162). However, the duration of pre-trial detention depends mainly on the nature of the offence charged and the resulting duration of court proceedings (at 197, 163–164). For newer figures *see Dünkel*, in: Dünkel/Vagg (eds.), Untersuchungshaft und Untersuchungshaftvollzug I (1994), at 67 et seq. [English translation at 131 et seq.].

[124] *Pro:* § 22 para. 1, 2 *Arbeitskreis Strafprozeßreform und U-Haft* (footnote 31), at 11, 113 (two thirds of the expected punishment, maximum two years before trial); § 23 para. 2 – detention during appeal: two thirds of the imposed punishment. Draft of the *Deutscher Anwaltsverein*: one year. *Bundeszusammenschluß für Straffälligenhilfe*, 1983, at 15: three months with the possibility of extension. More radically (and, under current conditions: unrealistically), § 122a draft of the *Grünen* (footnote 45), at 5, 14: six months (!) before trial. – *Contra*: SPD-draft (footnote 57), at 4, extends § 122a to the detention on the grounds of danger of suppression of evidence (with exceptions). Another possible solution would be to specify a certain fraction of the

to be effective, they have to be strict. Strict limits, however, may impede the search for truth and the quest for justice. There seems to be no viable alternative, yet, to my mind, a more effective possibility would be to allow a deal between judge, prosecutor and defendant (aided by counsel)[125] in combination with very restricted options for extension.

C. Other Forms of Detention

Although we were talking about pre-trial detention so far, it may be useful to turn an eye to police detention. The idiosyncrasy of the aforementioned distribution of legislative authority in Germany between the federal legislature and the states *(Länder)* leads to a strict conceptual and normative separation of detention as a compulsory measure in the context of criminal proceedings from detention based on police authority. In the *Länder*, the police are authorised to detain persons in order to avert dangers to the community at large (and unrelated to the criminal process). Police custody is equally subject to the constitutional restrictions set out in Basic Law art. 104 para. 2 and the principle of proportionality which the courts are prone to emphasise very clearly. The police may detain a person only until the end of the day following the arrest and have to seek judicial approval for any desired extension. After any arrest, the detainee has to be presented to a judge without undue delay. The maximum duration of police

maximum penalty provided by law, *e.g.* a tenth (in case of a imprisonment "for life", the period should refer to the 15 years of § 57a para. 1 StGB.). Another measure should be selected for detention during appeal. – Especially in the case of legal remedies invoked only by the accused, an orientation on §§ 57 para. 2, 51 Criminal Code merits consideration.

[125] *Pro: G. Schmidt,* in: *Jescheck/Krümpelmann* (footnote 19), at 551 (567–568); *Krümpelmann* (footnote 54), at 52; *Rosenberg,* ZStW 26 (1906), 339 (at 395); *Paeffgen,* U-Haft, at 208–209; G. *Schmidt,* ZStW 74 (1962), 623 (at 647); *Vöcking* (footnote 101), at 252; *Wolter,* ZStW 93 (1981), 452 (at 463). – It is questionable if the five-day-limit (similar to the Swedish model) proposed by *Wolter* is compatible with German procedural conditions. This risks to end up with mere ceremonial hearings and incites evasive strategies of the officials involved. In my opinion, after a period of fourteen days there should be enough evidence for a reliable prognosis on the duration of further investigations; for a review of remand in custody after fourteen days, § 117 para. 5 *Entwurf der Grünen* (draft by the Green Party). However the concrete provisions may be formulated, it is important to set shorter time limits for obligatory detention review.

detention varies in the *Länder* from 48 hours to 14 days.[126] The general rule is that such preventive detention is permitted only as long as necessary to avert a certain danger and only if there are no other, less embarrassing alternatives.

The primary objective of police detention is to prevent the commission of criminal offences (drunken husbands' cruelty to wife and children; drunk football/soccer fans' hooliganism etc.). But not only the time limits differ from *Land* to *Land* in a confusing way, the legal requirements do, too: Whereas the Hamburg Court of Appeals approved of the detention of a petty drug dealer to stop an imminent transaction,[127] the Berlin District Court[128] denied the request for detention in a similar case because taking the dealer into custody would not prevent drug addicts from buying pro-

[126] For a maximum of 24 hours: § 17 no. 3 PolG (Police Law) of Rhineland-Palatinate; 48 hours (more precisely: until the end of next day): § 33 para. 1 no. 3 ASOG (Law for the Protection of Public Security) of Berlin; § 35 para. 1 HSOG (Law for the Protection of Public Security) of Hesse; § 38 para. 1 no. 3 PolG of North Rhine-Westphalia; longer than four days: *e.g.* more than ten days: § 22 no. 3 PAG (Police Law) of Thuringia; up to fourteen days: art. 20 no. 3 PAG of Bavaria; § 28 para. 3(3) PolG of Baden-Wurttemberg, § 22 para. 7(3) PolG Saxony. Some *Länder* have no limitations: e.g. § 18 para. 1 PolG Bremen, § 55 para. 5 SOG of Mecklenburg-Vorpommern or § 204 VwG (Law on Administrative Procedure) of Schleswig-Holstein. But it is of common opinion that detention of more than fourteen days for preventive reasons only is unconstitutional (violation of the principle of proportiona-lity); even fourteen days are constitutionally suspect, *see Blankenagel*, Die öffent-liche Verwaltung (DÖV) 1989, 692; *Denninger*, Normbestimmtheit und Verhältnis-mäßigkeitsgrundsatz im Sächsischen Polizeigesetz (1995), at 17; *Lisken*, Zeitschrift für Rechtspolitik (ZRP) 1996, 332 (at 334); *Rachor* in: *Lisken/Denninger* (eds.), Handbuch des Polizeirechts, 3rd ed. 2002, part F no. 341. *Contra:* Bayerischer Ver-fassungsgerichtshof (BayVfGH [Bavarian Constitutional Court]) NVwZ [Neue Zeitschriftz für Verwaltungsrecht] 1991, 664, and the prevailing opinion: *Beckstein*, ZRP 1989, 287; *Knemeyer*, NVwZ 1990, 138 (at 141); *Schmitt Glaeser*, Bayrische Verwaltungsblätter (BayVwBl) 1989, 129 (at 134); *Stoermer*, Der polizeiliche Gewahrsam... (1998), at 214–215 with 198 et seq. – *Compare also* Sächsischer VfGH Deutsches Verwaltungsblatt (DVBl.) 1996, 1423 et seq. (= Juristenzeitung [JZ] 1996, 957 et seq.); critical: *Gusy*, Polizeirecht[4] (2000), no. 245; *Paeffgen*, Neue Justiz 1996, 454 (at 456); *Paeffgen/Schumer*, Das Sächsische Polizeigesetz (1997), S. 175 et seq., 433 et seq. – A piquant aspect is often overlooked: even the Nazis had a limitation of seven days for their "Schutzhaft" ("protective custody") (*see Spohr*, Das Recht der Schutzhaft [1937], 120 [until confirmation by the highest state authority and with a later possibility to extend the time limit by the police, *see* SK-*Paeffgen*, Vor § 112 no. 115a]).

[127] OLG Hamburg NJW 1998, 2231.

[128] LG Berlin NJW 2001, 162.

hibited drugs but make them switch to another dealer. Furthermore, if this kind of preventive detention were permissible then any career criminal and persistent offender could be detained again and again for indefinite time without ever instituting criminal proceedings.[129], [130]

D. Conclusion

As you might have expected of Germany, the picture of our legal landscape I had to unfold before you is full of nuances and cluttered with controversy. This complexity is rather a burden than a blessing for legal scholars and practitioners alike. The desire for an effective protection against dangers to the integrity of the criminal process calls for an easily available and flexible instrument of pre-trial detention. The need to protect and strengthen the rights of the individual against the overwhelming power of the state calls for the opposite. This reflects the "eternal" antagonism inherent in the rule of law. State officials need not only be aware of the ensuing problems and have the determination to solve them, but also be impregnated with the ethos to bring these antagonistic forces into equilibrium. This holds true for the executive branch as well as for the judiciary but also for the legislature whose activity, I think, leaves much to be desired.

[129] BVerwGE 45, 51 (at 63).
[130] *Gusy*, Polizeirecht[4] (2000) no. 245.

The Institute for Release on Bail and Other Less Incisive Measures According to the German Code of Criminal Procedure

WOLFRAM SCHÄDLER

I.

Section 116 of the German Code of Criminal Procedure provides the possibility to suspend the execution of pre-trial detention if less incisive measures are sufficient to guarantee the presence of the accused during the execution of the criminal procedure.

This Institute for Suspension of the Execution of Detention shall reduce the cases of pre-trial detention and the period of pre-trial detention within the realms of possibility.

In practice, less use is made of this legal institute than originally expected by the legislator. One reason may be that due to the increase of mobility of the population there are often no suitable contingency measures. On the other hand, the short-term inquiry of effective detention surrogates are usually extremely difficult and costly for the public prosecutor's department and the police. This is equally true for the defence attorney, who endeavours to avoid pre-trial detention for his client, or to shorten it after review of the detention order before the competent custodial judge. The possibility of suspension of the warrant of arrest can be seen as a special characteristic of the principle of proportionality, according to which means can be applied that are less incisive for the accused and still sufficient to guarantee criminal procedure. If a pre-trial detention can be suspended and replaced by less incisive measures, must therefore be considered at every decision of detention when a warrant of arrest is issued or is held up.

As resulting from the formulation "less incisive measures", such measures must be a smaller interference for the accused compared to pre-trial

detention, and may not have the character of an anticipated sentence, as pre-trial detention does. Similar to a prison sentence that is suspended on probation, these measures mainly consist of instructions for the way of life of the accused during the time of suspension of the warrant of arrest. They may therefore contain obligations but also restrictions of freedom in form of prohibitions. As can be seen from the example of release on bail, the release of the accused can, last but not least, depend on an advance performance.

If the custodial judge only considers pre-trial detention because he fears that the accused absconds from further criminal proceedings, he has the obligation to prove if less incisive measures are sufficient.

If there are reasons to fear that the accused, for example tries to influence other witnesses, or to destroy criminal evidence, it is within the discretion of the custodial judge to make use of less incisive measures.

If the custodial judge decides to do so, it has to be proved in the frame of a so-called expectation prognosis: In all cases, the application of Section 116 Code of Criminal Procedure is subject to a sufficient justification of the expectation that the reason of detention becomes inapplicable through the contingency measures. The existence of such prerequisites mainly depends on the character of the accused, his former behaviour in similar situations, but also on how good he can be controlled through other measures outside pre-trial detention. It is also possible that a combination of different measures is necessary to achieve this effect. And, of course, the measure has to be suitable to abolish the respective reason of detention: i.e., in case of a warrant of arrest for risk of collusion, the obligation to report weekly to the police would be ineffective and thus also unallowable.

If even more than one reasons of detention come together, all of them have to be abolished by the respective contingency measures.

Equal to the obligations after suspension of a sentence on probation, the obligations according to Section 116 Code of Criminal Procedure may not impose unreasonable obligations or restrictions upon the accused that intervene with his basic rights. For example the obligation to go back to his wife would be inadmissible if the accused was separated from her and he or she did not accept this obligation.

Due to the fact that the suspension of the warrant of arrest results from the principle of proportionality (as explained above), the approval of the accused is not necessary. Only if the obligation imposed consists of an advance performance, e.g. of a release on bail, the prisoner awaiting trial has

the possibility to prevent the realisation of the suspension of pre-trial detention, because only the payment of a bail has laid the foundation for it. Basically, however, we can assume that the accused always gives his approval, and not only because it prevents him from a further execution of pre-trial detention, but also because a basis of mutual trust has to be created justifying that the judge can expect him to follow the instructions.

In principle, a temporary suspension is not admissible, because it is incompatible with the purpose of pre-trial detention. Finally, it is essential that the decision of suspension informs the accused in detail about his tasks in order to avoid the risk of a cancellation of the suspension. Apart from that, an exact description of the instructions will be necessary to enable the custodial judge to determine when and at what scope the accused has grossly offended against the tasks or restrictions imposed upon him. In this case, the warrant of arrest has to be executed again, and the accused taken into be taken into pre-trial detention.

Which less incisive measures does the law offer to the custodial judge? The law names four measures:

1. The instruction to regularly report to the judge, an authority or a department: In practice, this so-called obligation to register with the police is the most frequent of the following measures. The custodial judge especially considers the regular report to police departments, due to the fact that this is the best measure to ensure the control of registration and the prompt communication of violations to the public prosecutor's department or the custodial judge, and tracing can be soon initiated.
2. The second measure is the instruction to not leave the domicile or residence or a certain area without the permission of the judge or the prosecutor. In practice, however, this measure is rarely applied, because it is difficult to control.
3. The third measure the law mentions is the instruction to only leave the house under the supervision of a certain person. The courts make hardly any use of it, because it is difficult to get supervisors to agree to play a part in the control of pre-trial detention. In practice, this is only considered in cases of pre-trial detention of juveniles.
4. The fourth measure is a release on bail according to Section 5 par. 3 sent. 3 Convention of Human Rights. In practice, the payment of a bail by the accused or another person is of great significance. It shall not only guarantee the participation of the accused in the criminal proceedings but also, if necessary, the beginning of imprisonment. This regulation seems to be a privilege of the wealthy among the accused. However, it does not violate the principle of equality of Section 3 par. 1 of the Constitution of the Federal Republic of Germany, due to the fact that, similar to a fine, the amount of bail has to be adjusted to the income and the estate of the accused. Bailment can also be combined with other contingency measures.

Of special interest is the possibility according to Section 116 a Code of Criminal Procedure for a third person to pay the bail or to pay the bail through a suretyship: In this manner, the bail socially integrates the accused and reduces the risk of escape.

The formulation of the law makes clear that the measures presented have not exhaustedly been named. The custodial judge can chose other possibilities of control. These four contingency measures, however, prove that the means of the custodial judge to abandon pre-trial detention, if necessary, are quite restricted.

Thus, according to the last figures at our disposal, the custodial judges have rarely used these less incisive measures: According to Professor Schöch, release on bail has been granted in less than a fourth of the cases of pre-trial detention, although only 8 % of the accused tried to escape.

II.

In Hesse, the custodial judges now have a new option enabling them to control an accused outside pre-trial detention, the means of control being a lot tighter than the obligation to register with the police: the so-called electronic monitoring.

How does electronic monitoring work?

The judge determines a period of time during which the accused wears a transmitter around his ankle. The court decides upon a weekly schedule considering the working and training hours of the accused. This schedule exactly determines at what times the accused has to be in his home i.e. outside his home. A receiver in the home of the test person shows if the person is at home or not.

Every test person is assigned to a probation officer. Apart from that, a standby duty makes sure that a contact may be reached around the clock. The standby duty can immediately react in case of the accused violating the schedule, and, if necessary, clarify technical problems with the accused.

This already makes clear that electronic monitoring might be especially effective if the electronic control is employed in order to reliably ascertain the presence or absence of the accused in his home at any time of the day or the night. Electronic monitoring, however, cannot locate the accused outside his home.

Since May 2, 2000, a pilot project in the court district of Frankfurt/Main has examined if it makes sense to employ electronic monitoring as a less incisive measure for the suspension of the execution of pre-trial detention.

Until the end of 2002, the court district of Frankfurt/Main executed 74 cases of electronic observation. At the end of 2002, 12 test persons were subject to electronic monitoring, three of them because of a suspended pre-trial detention.

In the 17 cases in which electronic monitoring was applied for pre-trial detention, the accused were mainly suspected of drug offences, incendiarism, robbery and fraud. In two of these 17 cases, the warrant of arrest had to be executed again, and the accused had to be taken into custody pending trial, because they did not follow the orders made by the judge. Two of the accused withdrew their consent, and therefore the electronic observation had to stop.

In seven cases, the trials of the accused are still pending. In three cases, the courts sentenced the accused to probationary custody, in three other cases to imprisonment. In one case, electronic monitoring was stopped after a period of six months because the court dropped the case against the accused. As of the deadline on December 15, 2002, a total of 2234 days of pre-trial detention did not have to be executed against the accused because the custodial judges accepted electronic monitoring as a less incisive measure.

This shows that electronic monitoring enables the custodial judges to employ the most incisive possibility of control apart from pre-trial detention in connection with intensive assistance by the social workers employed in the project. Nevertheless, the custodial judges have made relatively little use of it. During the course of the project, it became clear that the aspect of control was in the fore when employing electronic monitoring to avoid detention. Accordingly, the competent custodial judges employed electronic monitoring especially in order to avoid the risk of escape. The accused, however, were trained to settle their personal matters, their family and social environment to be, if necessary, ready to unconditional imprisonment. It was important that the use of electronic monitoring was not a reason for the test person to expect probationary custody. On the other hand, the results so far have shown that conforming conduct of the accused during the period of electronic monitoring was a good starting position for the trial leading to conditional prison sentences in 50 % of the cases already decided upon. According to an investigation of the Max-Planck-Institute, the accused that were subject to electronic monitoring because of a suspended pre-trial detention committed far fewer offences against the weekly schedules imposed upon them than normally convicted persons.

A special problem arose because the period of monitoring of some test persons was longer than six months but still there was no date appointed for trial. Due to the fact that the public prosecutor's department does not work as quickly towards an indictment as in the cases in which the accused is in pre-trial detention, the custodial judges agreed upon a report after a period of six months on the basis of which it was decided whether the test person was kept under electronic observation or had to cope with less intensive measures because he had proved his reliability under electronic observation. In four cases, and after the respective project reports, the court considered it sufficient to impose the obligation to register with the police after the end of electronic monitoring although a date for the trial was not yet appointed. It was, however, important for the courts that the employees of the project who had been in charge of electronic monitoring observed the obligation to register with the police and continued to assist the accused until his trial.

In summary, on the one hand, it is quite doubtful whether the courts and public prosecutor's departments will make full use of the possibilities of Section 116 in order to reduce the execution of pre-trial detention in cases where there is a risk of escape. On the other hand, the prognosis is also justified that after a period of time necessary for the routine of the competent courts and public prosecutor's departments, electronic monitoring closes a gap between the most controlling measure so far – the obligation to register with the police – and pre-trial detention: Electronic monitoring is by far the most precise and reliable instrument of the less incisive measures to avoid the execution of pre-trial detention. That remains to be seen.

The Law of Search and Seizure, and the Law of Arrest and Short-Term Detention, in Germany: A Critical Assessment

SUSANNE WALTHER

I. Introduction

Any system of administration of justice needs tools of investigation that allow law enforcement agencies – prosecutors and police – to find out the truth about an emerging suspicion of crime. At the same time, in democratic states founded upon the rule of law such a system of investigative tools must reasonably ensure fairness to suspects and nonsuspects, and the protection of basic civil and human rights. Over time, investigative systems have become technically quite sophisticated. Oftentimes, they can be operated in ways that go entirely unnoticed by the suspect or other targeted person (for instance, audio-visual surveillance measures, or casual collection of hairs or tiny cell samples for DNA-analysis). Nonetheless, at the core of law enforcement tools we traditionally look at a set of measures that are not only intrusive but compulsory in a physical sense. When we speak about the scope of basic rule of law standards in criminal investigations, these tools deserve primary and heightened attention. In the following, I will limit myself to an overview of selected standard compulsory measures and to how they are dealt with in German criminal procedure law.

II. Search and seizure of premises and belongings

1. Constitutional aspects

Among the most important – and most intrusive – powers of the state is that of *search and seizure.* For good cause the U.S. Bill of Rights of 1789/91 has made this subject of highest constitutional concern for the pro-

tection of persons. Search and seizure may, in principle, not be effected but upon a judicial warrant based on probable cause, lest fundamental rights be violated. The 4th Amendment guarantees that:

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

Evidence in violation of this Amendment is subject to exclusion in state and federal courts. Bitter historical experience with shocking abuse of police powers during colonial times explain the high rank of the U.S. Constitution's 4th Amendment rights. Under English rule, the power to effect searches had been, among else, „long used as a means of restricting freedom of the press."[1] During the 16th century, vast powers of search based on a concept of „general warrants" were conferred upon law enforcement officers, but despite the arbitrariness of the practice, it took more than a hundred years until the courts and parliament in England started to protest and act against general warrants. Often cited, the famous plea of one of the most eloquent opponents of the practice, William Pitt, deserves to be remembered:

> The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.[2]

As the American colonies of the 18th century prepared for independence and the drafting and ratification of a constitution, it was, remarkably, the universally recognised need for a constitutional provision dealing with searches that prevailed in heated arguments over whether a "bill of rights" should be codified at all.[3]

In Germany as well, it is beyond dispute that searches are among the most intrusive investigative measures. Although not explicitly mentioned in the very first, highest ranking rights guarantees of the *Grundgesetz* of 1949 (Basic Law, constitution), it is understood that the constitutional protec-

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[1] LaFave, Search and Seizure, Vol. 1 (3rd. Ed. 1996), § 1.1(a).
[2] See N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937), p. 49-50; cited after LaFave (supra n. 1), § 1.1(a), p. 4.
[3] See LaFave (supra n. 1), § 1.1.(a), p. 5.

tions of human dignity, of personal liberty and even of security in life and limb (Art. 1 I, Art. 2 I, II GG) are at stake and require particularised, constitutionally viable legitimations for the law of search and seizure. Similarly, searches and seizures often, if not regularly, affect the freedom of profession as well as property rights (Art. 12 I, 14 I GG). The only provision expressly related to the citizen's protection against searches is, however, contained in Art. 13 I GG. In part comparable to the U.S. Bill of Rights, this constitutional provision proclaims a prohibition of *searches of homes* without a judicial warrant. However, compromise is right at hand. The text of Art. 13 I allows searches by other officials – prosecutors and police - in case of exigent circumstances (*Gefahr im Verzug*, Art. 13 II GG). No particularised threshold requirement such as "probable cause" appears in the constitution. Thus, as far as effecting searches in practice is concerned, only the general constitutional standard of *Verhältnismässigkeit* applies (proportionality).

In practice, for decades the constitutional protection against searches of homes was virtually nil, since the power to define what constituted an "emergency" essentially rested with the police. The constitutional exception – search without a warrant – had thus become the rule. Recently, however, the Constitutional Court (Bundesverfassungsgericht) criticised this practice and demanded a return to the original constitutional rule.[4] To this end, the term *Gefahr im Verzug* (exigent circumstances) must be interpreted narrowly. Its requirements are fulfilled if the seeking of a judicial warrant would jeopardise the success of a search. Whether this is so must be alleged by case-specific facts: speculations, hypothetical considerations or assumptions based on general criminalistic experience are insufficient. Courts and prosecutors must provide organisational and procedural precautions, so that the constitutionally prescribed warrant requirement will be observed under the circumstances of everyday practice. Whereas formerly, the interpretation and application of the term *Gefahr im Verzug* was virtually uncontrollable by the courts, the Constitutional Court made a point of declaring that control via the courts is not subject to inherent limitations. The Justices admitted that in cases where the law grants an emergency competence, the law enforcement authorities naturally "rule themselves" on whether they are authorised to effect an immediate search or not. The immanent risks must, however, be counterbalances by particular measures to

[4] BVerfG, opinion of Feb. 20, 2001 (2 BvR 1444/00), NStZ 2001, 382.

ensure the primacy of the judicial warrant requirement. Among else, the police must, if they want to effect a search based on *Gefahr im Verzug,* immediately document the grounds for the decision in the docket so that their actions remain controllable by a higher court. The type of suspicion must be specified as well as the evidence searched for and the circumstances establishing the danger of loss of evidence.

2. *Types of searches*

These constitutional requirements aside, the law in Germany distinguishes between four types of searches. First, § 102 German Criminal Procedure Code (*Strafprozessordnung,* StPO) allows searches where the target is suspected of having committed a crime – as perpetrator or aider and abettor – and may be effected for the purpose of either turning up evidence, that "presumably" will be found upon the premises, or of seizing the person of the suspect. The search may cover the premises and his or her belongings. This type of search, termed "search of the suspect", requires only a low substantive threshold. While it has been emphasised in recent years – again upon appeals to the Constitutional Court – that a "suspicion" requires *facts* supporting a *probability* that a *certain* crime was committed[5], it is clear that standards such as mere "suspicion" and "presumption" do not provide much protection for the individual.

The second type of search is the "search of other persons", defined in § 103 StPO. The threshold of protection here is somewhat higher. The premises of "other persons", i.e., non-suspects or persons who cannot be legally prosecuted (which in Germany includes legal entities such as corporations) may only be searched for certain enumerated purposes: 1) to seize "the defendant", 2) to pursue "traces of crime", or 3) to seize "certain objects". The law then makes explicit that a search for these purposes may be effected only if "facts" sustain the inference that the person, trace or object searched for is present.

The third type of search is aimed at defendants charged with membership in a terrorist organization (§ 129a German Penal Code) or with the commission of a serious felony (as listed in § 129a German Penal Code; for instance, genocide, murder, kidnapping and extortion, or crimes dangerous to

[5] BVerfG NJW 1991, 690; StV 1994, 353 w. comment. Streck and comment. Otto StV 1994, 409, BVerfG NJW 1995, 2839.

the public). In such a case, the Criminal Procedure Code allows a "search of the building": *all* apartments and other rooms within a compound may be searched if there is a factual basis to "assume" that the defendant is present somewhere in the building (§ 103 I 2 Criminal Procedure Code).

Finally, the fourth type of search applies to rooms where the defendant has been seized or have been entered by him or her while being pursued by the police. Such rooms may be searched *without* any particularised restrictions, subject only to the general constitutional rule of proportionality (§ 103 II Criminal Procedure Code).

The central problem common to all four types of searches is the very practical danger that searches may be used for mere fishing expeditions by the police. Any legal system that wants to maintain efficient ways of collecting important evidence is faced with the problem of how to secure *effective* citizens' protection against overbroad state powers. The German Criminal Procedure Code provides a number of well-meaning checks and balances to ward off some of the most obvious dangers, yet in theory, as in practice, their effectiveness is limited in many ways. For instance, searches *at night* may only be effected under narrow circumstances (in hot pursuit, under exigent circumstances, or to reapprehend an escaped prisoner; § 104 I Crim. Proc. Code). Yet even this restriction comes with a large loophole: the special nighttime requirements do not apply to rooms that are "accessible to the public" or known to the police "as shelters or meeting places of convicted persons", as "deposits of illicitly obtained goods", or as "hideouts of illegal gambling, drug and arms trade, or prostitution" (§ 104 II Crim. Proc. Code). Second, when a search is executed without a judge or prosecutor being present (which is usually the case), the police must – "if possible" – involve so-called "search witnesses", i.e., members of the community where the search takes place (§ 105 I, II). In addition, the owner or occupant of the searched premises or objects has the right to participate. Yet if he or she is absent, this does not forestall the search; it is sufficient, "where possible", for his or her representative or an adult relative, cohabitant, or neighbour to participate (§ 106 I).

3. Seizure, Inspection of Papers

Where the police effect a search for the purpose of finding evidence (the typical case), the law of search links up with the law of seizure. The Code of Criminal Procedure states that "objects which may be relevant for the investigation are to be taken into custody, or otherwise secured" (§ 94 I

StPO). A formal act of seizure is necessary if the object is in the custody of a person who refuses voluntary surrender (§ 94 II StPO). A person's duty to surrender an object which is subject to seizure may be enforced by contempt orders (§§ 95 II, 70 StPO). Difficult conflicts of interest arise where the evidence sought falls – generally speaking - into the category of "privileged communications". German criminal procedure law draws a parallel to testimonial privileges. Objects which fall into this category are, in principle, exempt from seizure. Testimonial privileges may roughly be divided into three types of protected relations: personal relations, professional relations, or public relations. The husband-wife or brother-sister relation are examples of the first type; the doctor-patient, attorney-client or therapist-client relation are illustrative of the second. The third type applies to members of parliament and of the media and protects relations between citizens and – in a broad sense - public representatives (§§ 97, 52, 53, 53a StPO).

Just as for searches, the law of seizure provides that, as a rule, official orders may only be issued by a judge. In practice, however, seizures are mostly effected by the police, based on exigent-circumstance competencies (of prosecutors and police, § 98 I StPO). One important exception exists, however, with regard to the premises of media organizations: no exigency powers of the police and prosecutor apply here; thus, only a judge can issue seizure orders (§ 98 I 2 StPO). Special rules apply to seizures effected upon the premises of the military (§ 98 IV StPO).

More importantly in practice, be it the "normal" type of investigation, such as in cases of theft, robbery or murder, or investigations involving crimes that typically leave "paper trails", such as organised and white collar crime, the law provides special rules for the inspection of papers. This is a matter of particular constitutional concern, as it is practically impossible to execute a search "with eyes closed", which means that it is impossible to inspect papers or other data carriers and *not* violate the individual's (personal or professional) privacy. This said, the law's only realistic objective can be to try and minimise the *intensity* of the violation. The German Code of Criminal Procedure tries to do that, yet – as even judges decry – the gap between theory and practice is tremendous. The Code's concept has remained largely ineffective, and in some cases even turned out to be counterproductive.[6]

[6] Instructively *Dauster*, StraFo 1999, 186 ff.

The lawmakers "basic model" of the investigative and prosecutorial process – in general, and in particular with regard to search and seizure – is perhaps nowhere else as clear as in this context. The prosecutor, who belongs to the judiciary branch, is the governor of criminal investigations; not the police. In taking up this concept, § 110 I Criminal Procedure Code provides that "papers" found in the custody of a person subject to a search may only be inspected by a prosecutor. Only if the custodian consents may other officials – namely, the police – execute an inspection (§ 110 II 1 StPO). Otherwise, the police must wrap and seal the papers in question and deliver them to the prosecutor. The term "papers" is interpreted broadly, covering, for instance, letters, diaries, accounting records, inventories, or any other type of writing, but also records that are not fixed on paper but on other materials, such as tapes or computer diskettes. In the latter case, the data contents of a personal computer may be inspected as well. The breadth and scope of an inspection is, however, inherently limited by its – constitutionally restricted – purpose: In its original meaning, "inspection of papers" is not an investigative measure in its own right, but only an auxiliary in the decision-making process on seizure. Its purpose is to "look through" a paper in order to determine whether the paper is of probative value and thus subject to seizure or whether it is exempt from seizure, based, perhaps, on the rules of privileged communication.

In practice, however, legislative intent proved to be hard to implement. The rule that only a prosecutor may "inspect papers", a rule that was meant to protect the ordinary citizen against random police searches of highly personal objects, turned out to be a mixed blessing. The law's silent assumption that *prosecutors,* perhaps even supervised by an accompanying judge (magistrate), would actually execute searches is wholly unrealistic. It is the police who in all but a few scenarios do the search work. Therefore, the individual who is faced with a search of his or her premises will be virtually forced to consent to immediate police inspection: Otherwise, he or she will face the sealing and removal of the papers to secure them for inspection back in the prosecutor's office. This oftentimes means having entire shelves of files and large units of computer equipment taken away for days or even weeks, by a measure which is not even considered to legally constitute a seizure.[7] Another method of preempting the prosecutor-privilege is the so-called anticipated seizure warrant: *Jointly* with a judicial search war-

[7] See Dauster StraFo 1999, 186; Burhoff Note 291a.

rant, the police obtain a seizure warrant for objects "expected" to be found.[8] Subsequently to seizure, the act of inspection is *executive*, rather than preparatory; and the *execution* of searches of seizures is the domain of the police! This trick has, of course, worked so far only because the letter of the law has not been taken very seriously. "Anticipated" seizure warrants often if not typically violate the statutory duty of specification. The combination of a search warrant with a seizure warrant is, therefore, a highly dubious construct.[9] Finally, special problems arise with regard to papers that may contain privileged communications. The Constitutional Court has opined that where papers may be exempt from seizure (and, therefore, excluded from evidence), such as, for example, personal diaries, the police (and prosecutors) have to proceed with the "greatest reserve".[10]

As long as violations of such procedural protections generally do not lead to an exclusionary rule on the level of evidence (as in Germany), it is hard if not impossible to enforce the law's protections. For these reasons, the standard way of providing realistic mechanisms to prevent undue exercise of state powers in democratic states is to secure the participation of an attorney. It is important therefore to examine the law of search and seizure from the defense perspective, which leads me to the next chapter.

4. Typical defence problems

It is clear that searches are among the most powerful investigative measures. Aside from the exigent-circumstances powers of the police, several distinctive features account for this. First, searches may be carried out not only in the early stages of an investigation but during the entire course of the prosecution and even during trial. Second, no prior announcement or warning must be provided. The Code contains no such obligation, not even where the search is directed against a suspect who has already obtained counsel. In practice, counsel normally learns of the search only *after* it has been executed and thus has no means of protecting his or her client preventively. Even on the matter of information upon *execution* of a search, the law is ominously silent. Only where the search targets "other", non-suspect persons does the Criminal Procedure Code establish a duty to inform the

[8] See *Dauster*, StraFo 1999, 186 ff., 189.
[9] Critically *Kramer*, Grundbegriffe des Strafverfahrens (5th. Ed. 2002), Note 190b.
[10] BVerfGE 80, 367, 375.

owner/occupant or, in case he or she is absent, other persons called to participate, of the *purpose* of the search prior to its beginning (§ 106 II; exception: search of "ill-famed" places named in § 104 II). Third, the law is entirely silent regarding the citizen's right to *contact* counsel upon being faced with police ready to effect a search and with regard to counsel's right to be present during a search. According to commonly held opinion, while, on the one hand, no such rights exist, there are, on the other hand, no legal means to prohibit counsel's participation if the suspect whose premises are being searched authorizes counsel's presence. In practice, the presence of counsel is regularly accepted; however, the police will not wait to begin a search until counsel has arrived.[11] Where the search is effected on the premises of a third person – for instance, the bank of a suspect or accused -, neither counsel nor suspect/accused have a right to be present unless the owner consents.

Clearly, counsel's involvement at the time of search is of eminent importance to protect basic individual's rights. Although the officials who conduct the search are legally bound to inform the target of what they are doing and why, the legal mechanisms to enforce this duty are, under the typical circumstances, weak or even non-existent. It is therefore elementary for counsel to step in and provide information on rights and duties. Without this information, the potential dangers inherent to the search scenario will be enhanced. For instance, under the stress or even shock of police intruding into one's premises the suspect/accused may be tempted to speak to them or even to get involved in "informal talks". He or she may also wrongly assess the duty to tolerate a legal search, and may make things worse by resisting and thereby provoking the use of force. Where the goal of the search is to find and seize evidence, the citizen should know that he or she can avert (further) search by a voluntary surrender. The constitutional principle of proportionality mandates that the police abstain from (further) search when the searched-for piece of evidence has been turned over. In any event, surrender may be the wisest move, given that police and prosecutors usually have a natural motive to "look beyond" their primary search goal for so-called "lucky finds". According to the German law, such finds may, if they "indicate" the commission of another crime, be seized and, used as legal evidence later in the proceedings (§ 108 I StPO). Yet

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[11] Burhoff, Handbuch für das strafrechtliche Ermittlungsverfahren (2nd Ed. 1999), Note 276.

where a search is carried out *after* the target has offered to surrender the sought-after items, the lucky-finds rule does not apply and any suspicious objects that may be found will be excluded as evidence at trial.

This leads to the issue of the "exclusionary rule" in general, i.e., the question of whether in case of a wrongful search counsel may, at trial, move to have objects turned up during a search suppressed as evidence. Again, the German Criminal Procedure Code is silent on the point. So far, leading opinion holds that only where the transgression was severe, and where the individual's interests in being protected from illegal searches prevail over state interests in effective prosecution may evidence obtained by means of a wrongful search be excluded.[12] In the wake of the latest Constitutional Court jurisprudence, however, it is to be expected that the German law of search and seizure will be changed in favour of an individuals' protection. Practitioners' commentaries and handbooks recommend that citizens (and counsel) ask for attorney participation whenever possible. For instance, in the particularly sensitive area of "inspection of papers", the Code of Criminal Procedure provides that where papers, etc., have been sealed and taken into custody, the owner must be informed and – "if possible" – invited to participate when the objects are "unsealed and inspected". Practice commentaries recommend that counsel press for participation whenever possible, a request that is typically granted.[13] Only where counsel in his or her capacity as legal expert can witness the unsealing and inspection of the papers and immediately oppose any illegal manipulations or "fishing expeditions" can a violation of individuals' basic rights be controlled. Yet counsel's presence at the time of search, and particularly at the time of inspection of papers, is highly important for other purposes as well. It must be kept in mind that, typically, searches are carried out early on in the investigation, at a time when counsel oftentimes has not yet had a chance at discovery. Participation at the time of search and inspection of papers is therefore an invaluable opportunity – and often the very first opportunity – for counsel to study the prosecution's strategy, to learn about the extent to which potentially incriminating evidence has been found, and to get an idea which materials should be secured as evidence in favour of the defence.[14]

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[12] Burhoff, id. Note 279a w. further references.
[13] Burhoff, id. Notes 291, 291a.
[14] Burhoff, id. Note 291a.

III. Search of the person

1. Constitutional aspects

Although the law governing "searches of the person" and other related measures of securing evidence is closely related to the law of search and seizure, which pertains to a citizen's premises and belongings, it is important to differentiate between these two areas. It is immediately clear that the law governing searches of the person is both of the highest practical importance and of particular constitutional concern. A "search" of the person is one of the most intrusive measures of all. Not only does it transgress into the most intimate sphere of a human being, the act of physical search also likens the person (whose body and personality are considered inseparable entities during the person's lifetime) to an object and, for the time being, reduces the person to the realm of things. While a person's body is not considered his or her personal property by traditional legal standards, it is not a public good merely "on loan" during a person's lifetime, either. For these reasons, democratic states rank not only life, but also physical integrity, especially vis-a-vis the state, among the constitutional values with highest status. In Germany the right to be secure in life and limb is guaranteed in Art. 2 II of the *Grundgesetz* (GG, Basic Law), and Art. 1 I proclaims that human dignity is inviolable and that all state power is duty-bound to ensure and respect it.

This area of the law poses a number of difficult questions. First, it is important to distinguish between different scenarios. A "search of the person" can mean:

(1) a simple pat-down of the clothes in order to detect physically suspicious objects (such as weapons),

(2) a search of the clothing, including inspection of pockets in order to detect objects typically not found by a pat-down search,

(3) an inspection of the body surface for visible traces or marks (for instance, tattoos or piercings),

(4) an inspection of body cavities to turn up hidden objects (such as drugs),

(5) an examination of body contents, functions, and individual characteristics (blood-alcohol test, taking of finger prints, facial appearance),

(6) an excorporation of body contents, to turn up swallowed objects.

2. *"Search" as physical examination or inspection of the accused (§§ 81a et seq. StPO)*

Only to a very limited extent does the German law provide explicit rules for these scenarios. In fact, only scenarios (5) and (3) are directly regulated. A "search" in the sense of *physical examination* and related measures is subject to rules §§ 81a et seq. StPO. § 81a StPO addresses the examination of an accused. A specific order is required. Leading opinion distinguishes between "simple" examinations and examinations that entail intrusions into the body (*körperliche Eingriffe*).

a) Again, the law makes *judicial* order the rule, but allows the prosecutor or the police to make the order if the circumstances are exigent (§ 81a II). To guard against random examinations, such an order must state, as its particular purpose, the verification of facts relevant to the proceeding. Generally speaking, physical examinations encompass the process of verifying bodily characteristics, both through „simple" examinations and through operations that may include (minor) injury. The former includes the examination of body cavities, whereas the latter includes the taking of blood samples. Unlike simple examinations and other types of searches, operations may only be performed by a physician in accordance with professional standards (§ 81 a I). Operations which endanger the accused's health are illegal unless he or she consents (§ 81a I). Blood samples as well as other samples of body cells may only be used as evidence in the criminal prosecution in question or in a parallel, pending criminal proceeding; otherwise they must be destroyed (§ 81a III). Photographs and fingerprints of the accused may be taken when necessary for the purposes of criminal prosecution or for purposes of identification (§ 81b).

While at first glance the law of physical examinations of the accused seems to be relatively straightforward, a number of difficulties arise upon closer analysis. It turns out that the Code is silent on many important questions. The flip side of the state officials' authority to order an examination is the citizen's duty to tolerate the necessary acts and procedures. However, quite a number of examinations (and operations) require more than simple toleration; in one way or another, they can only be reasonably performed if the examinee actively cooperates. Viewed from this perspective, it is clear that some physical examinations may be a trifling matter, whereas others are highly burdensome. The crucial point, however, is that duties to actively cooperate conflict with one of the most prominent constitutional guarantees: the privilege against enforceable self-incrimination. In Ger-

many, this privilege is not only part of due-process guarantees (*Rechtsstaatsprinzip,* Art. 20 III GG) but is also protected by such eminent basic rights as human dignity and personal liberty (Art. 1 I, 2 I GG).[15] For these reasons, the entire area of physical examinations is clouded by many issues that remain unclear or are highly controversial. Only the following duties (to tolerate and cooperate) are beyond dispute: 1) to tolerate blood pressure and electrocardiogram examinations; 2) to undress; 3) to make oneself available for examination. [16] In the latter context, § 81a I StPO has been interpreted not only to justify temporary custody ordered and executed by the police in order to perform a blood test upon arrest for drunk driving[17] but also for the purpose of preparing other types of examination, provided that custody does not exceed 4-5 days and a special order is issued by a judge.[18]

All other examinations require consent. Furthermore, custodial observation of the accused for the purpose of investigating his or her mental condition is not covered by § 81a.[19] Such observation may only be performed in a psychiatric hospital and must be ordered by the court; custodial orders may only be issued upon a showing of strong suspicion (*dringender Tatverdacht*) and after consulting both prosecutor and counsel for the accused (§ 81 I, II StPO). Psychiatric custody for investigative purposes may not exceed six weeks (§ 81 V StPO).

b) Examination of a *non-suspect* (without consent) may only be ordered if the person might be relevant as a witness and if the search for truth requires verification of whether his or her body carries "on" it a certain trace, or result, of crime (§ 81c). This means that physical examinations of non-suspects that go *beyond* external inspection of the naked body are not admissible. According to leading opinion, however, law enforcement officials can require non-suspects to undergo physical procedures that can be carried out without a physician's assistance (for instance, the taking of oral or vaginal cell samples, inspection of teeth).

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[15] See Kramer, Grundbegriffe des Strafverfahrensrechts (5th Ed. 2002), Note 30 w. further Ref.; Kramer illustrates, that the core of this "privilege" actually consists of a "principle of passivity", rather than of a prohibition of self-incrimination.

[16] See Burhoff, Note 504a.

[17] Burhoff, Notes 242, 242a; Kleinknecht/Meyer-Goßner, § 81a, n. 28-29.

[18] BayVerfGH NJW 1982, 1583; K/M-G § 81a Note 24.

[19] OLG Celle NStZ 1989, 242; OLG Nürnberg NStZ-RR 1998, 242; LG Gera StV 1995, 631; Burhoff, Note 504.

c) The Code provides special rules for the examination of women (§ 81d) which have been held to apply, by analogy, to men as well.[20] The law has been read to express the principle that physical examinations of women should be performed by women and physical examinations of men by men. Yet as a matter of fact, the language of the Code only addresses the examination of women. In a world that is characterised by sexual dominance of men over women, this makes sense. Under such circumstances, the meaning of a physical examination of a woman by a man is fundamentally different from that of an examination of a man by a woman.

Remarkably, however, the Code does not even fully establish the principle for women and, in addition, uses obsolete, discriminatory language. Taken literally, the special rule applies where the examination "may violate a woman's sense of shame" (*Schamgefühl*). As leading commentaries explain, this is to be interpreted broadly, covering as well "the general rules of decency".[21] Beyond a nucleus of cases, such as complete undressing and examination of breasts and genitals, it remains unclear what this means in practice. In any event, such examinations may only be performed "by a woman or by a physician" and, upon request, another woman or next of kin must be admitted (§ 81d StPO). The Code's language here reflects obsolete societal conditions which, for long, had eliminated women from the medical profession. Yet there is more than one reason why the entire subject should be fundamentally revised. The very concept of "a woman's sense of shame" is grossly outdated and discriminatory and actually constitutes a reason for the legal community to be ashamed of the Code. First, the language transports a repressive image by connecting the idea of "shame" to a woman's body. Second, any performance of a physical examination without the person's consent constitutes a transgression of basic *rights,* not (only) of the *senses* of a person, irrespective of his or her sex. A third reason for revision is the lack of clarity concerning the age at which a person becomes a "woman" for the purpose of the law. Put differently, the present Code reflects not only obsolete attitudes towards women, but also obsolete attitudes towards children and adolescents. For the time being, commentaries fight over the issue of whether a girl must be at least five years, six years, or twelve years old to be a „woman" or whether any female person

[20] Kleinknecht/Meyer-Goßner, StPO (45th Ed. 2001), § 81d Note 1.
[21] Kleinknecht/Meyer-Goßner, id., § 81d Note 3.

regardless of age should be protected by § 81d.[22] Given the virtually absent treatment of all of the above issues in scholarly literature, this subject is obviously so remote from public attention that it has simply been overlooked as a matter for reform.

d) Other searches and search-related measures

Other searches, such as pat-down and clothing searches, are not subject to the (relatively narrow) requirements that apply to physical examinations. For a relatively broad range of practically important settings, the Code contains no particular rules. In addition to the searches just mentioned, this is true for inspections of the mouth for hidden objects, excorporation of stomach content to turn up swallowed objects, and alterations of haircut or beard for purposes of identification. For some of these measures, such as pat-downs, search of clothing, and inspection of the mouth cavity[23], leading opinion applies the general law of search (§§ 102, 103 StPO, see supra). Particular controversy exists with regard to alterations of haircut or beard and excorporations. While the Constitutional Court has ruled that removal of a beard constitutes a physical operation and therefore is (only) admissible within the boundaries of § 81a StPO, some scholars condemn this measure as entirely unconstitutional. In contrast, others believe it to be admissible under the lax requirements for other identification procedures such as photographs and fingerprints (§ 81b).[24]

A literally sickening topic is that of excorporation. For the purpose of recovering objects allegedly obtained by or used for the commission of crime and swallowed by the suspect, he or she is asked to ingest a substance that causes vomiting. The typical case is the alleged concealment of drugs. While the method of excorporation is thought admissible where the person gives consent, the hard question is whether the emetic substance may be administered by compulsion, i.e., by forced infusion through mouth or nose. A particularly gross scenario recently came to the attention of the courts. In the case in question, it had taken several attempts to recover the searched-for objects. It became clear that compulsory administration of emetics (or laxatives) is not only difficult to reconcile with the protection of human dignity and the rule of proportionality but also poses considerable health risks. In December, 2001, a 19-year-old man from Nigeria who was

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[22] See Kleinknecht/Meyer-Goßner, id., § 81d note 2 w. further references.
[23] See OLG Celle NJW 1997, 2463.
[24] Kleinknecht/Meyer-Goßner, id., § 81a Note 23, § 81b Note 10.

subjected to compulsory excorporation measures in Hamburg suffered a heart-arrest in the process, and died. Nonetheless, between December, 2001, and April, 2002, 84 cases of (mostly consensual) excorporations have been reported just for the city of Hamburg.[25] The practice has led to heavy protests by the medical profession. At its May, 2002, meeting, a leading forum of German physicians issued a resolution declaring forced administration of emetics unethical.[26] So far, appellate courts have – with more or less reserve – accepted the procedure in principle.[27] The Constitutional Court has not yet ruled on the issue.[28] Leading opinion still considers § 81a StPO to provide sufficient legal justification for excorporations, yet this is highly controversial; much is to be said for the need of specific legislative regulation and for outright prohibition of the use of force.

IV. Arrest, identification, and short-term detention

Closely related to searches and seizures and comparably intrusive are such measures as arrest, identification, detention, and interrogation. With regard to detention, I will limit myself here to various types of short-term compulsory measures.[29]

1. Constitutional aspects

The German Basic Law (*Grundgesetz*), in contrast to its otherwise sparing utterances on matters of criminal (or civil) procedure, contains an extensive article pertaining to rights guarantees in cases of deprivation of liberty (Art. 104 I – IV GG). This article, in particular, is owed to bitter historical experiences with shocking abuses of police power, especially during the Nazi regime (1933-1945). History teaches that the power of arrest is among the first, and most efficient, instruments of terror in the hands of a dictatorial regime. Unless closely monitored, the power of arrest is easily perverted

[25] www.brechmitteleinsatz.de/presse/fb-uke070702.html.

[26] Beschluß 105. Dt. Ärztetag, Mai 2002, www.bundesaerztetag.de/30/Aerztetag/105_DAET/03Beschluss.

[27] Kramer, Grundbegriffe Note 260; OLG Frankfurt NJW 1997, 1647; Rogall NStZ 1998, 66; Benfer JR 1998, 53; OLG Bremen NStZ-RR 2000, 270.

[28] Cf. BVerfG StV 2000, 1; Pressemitteilung 116/2001 v. 13. Dez. 2001.

[29] The topic of arrest for purposes of pretrial („investigative") detention (*Untersuchungshaft*) will be addressed by Prof. Paeffgen.

into the power of disappearance. Shortly after Hitler came to power, random arrests of opponents and dissidents who were then held incommunicado in police jails for days or weeks – abuses that, relatively speaking, appear mild in hindsight – turned out to be among the simplest and most powerful instruments of terror. From one hour to the next, citizens could "disappear". With this experience in mind, the drafters of our *Grundgesetz* decided to constitutionalise a set of basic guarantees for cases of deprivation of liberty.

Art. 104 GG provides[30]:

Rights guarantees in case of deprivation of liberty

(1) The liberty of the person may not be restricted but upon grounds layed down in statutory law, and in accordance with the procedures proscribed therein. Detained persons must not be abused neither mentally nor physically.

(2) The legality and continuance of a deprivation of liberty may only be ruled upon by a judge. In all cases of deprivation of liberty without judicial order a judicial decision must be secured without undue delay. The police may not, based on their own authorities, detain anyone for longer than until the end of the day after the person was seized. Further particulars must be determined by statute.

(3) A person who has been arrested for suspicion of crime must be presented to a judge on the day after the arrest, at the latest, who must explain to him the grounds for arrest, interrogate him, and provide him with the opportunity to present objections. Without undue delay the judge must either issue a written and substantiated detention order, or a release order.

(4) Any judicial decision ordering or prolonging deprivation of liberty must, without undue delay, be communicated to a next of kin, or confidante, of the detained person.

In addition, the European Convention on Human Rights of 1950 contains an extensive article pertaining to the "right to liberty and security". Summarily speaking, it defines both substantive and procedural requirements to be met in cases of deprivation of liberty.

Art. 5 European Convention provides[31]

1. Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   a) the lawful detention of a person after conviction by a competent court;

[30] Translation by author.
[31] See UNTS Vol. 213, p. 221.

b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of person of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

2. *Arrests and short-term detentions*

Generally, the German criminal investigation process does not *begin* with an arrest of a suspect. It begins when a prosecutor or the police learn – by coincidence, by way of (unregulated, controversial) preliminary investigations, or – in the vast majority of cases – through citizens' complaints – about "sufficient factual leads" that a prosecutable crime may have been committed (cf. § 152 II StPO). A suspect may often learn rather late of a pending investigation. Thus, in the normal course of affairs a suspect will only be arrested under the (narrow) rules established by the law of pretrial detention (§§ 112 ff. StPO), or for purposes of execution of sentence.

This said, early, *arrests* followed by short-term detention will only occur in a limited number of situations. First, the Code provides for a "preliminary arrest" measure that authorises both citizens and the police to detain a suspect (§ 127 StPO). § 127 I provides that *anyone* (citizens or police) who witnesses a person *in flagranti* or follows him or her in hot pursuit may arrest that person without a judicial warrant, provided that it is reasonable to believe that the person will flee, or if he or she cannot immediately be identified. According to § 127 II, prosecutors and police are also authorised to make arrests in cases involving "exigent circumstances", provided that the requirements for an arrest or custody order are satisfied. The sole *purpose* of the "preliminary" arrest is to allow – in the peculiar *in flagranti* or *hot pursuit* situation – the person to be detained while a judicial decision is secured as to whether or not pre-trial (investigative) detention is warranted. Neither punitive, nor preventive, nor investigative purposes may be pursued by means of a preliminary arrest.

Consistent with its limited purpose, this type of arrest is aimed at, and followed up by, an immediate presentation of the arrestee to a judge (magistrate). This must be done without undue delay, at the latest by the end of the day following arrest (§ 128 I). At this hearing, the judge interrogates the arrestee, in order to determine whether he or she ought to be set free for lack of grounds to detain or whether, upon prosecutorial motion, a detention order should be issued (§ 128 II). In practice, the arrestee will be brought to the next courthouse jail, and the prosecutor and judge in charge will be notified. A presentation hearing (*Vorführungsverhandlung*) will be scheduled for the purpose of interrogation; prosecutor and counsel may be present at this hearing. The interrogation starts off with the judge informing the arrestee of the grounds for suspicion and of the charges that are brought against him. In addition, the detainee must be informed of the kind of evidentiary material that is on the table, both inculpatory and exculpatory.[32] Since the questioning at the presentation hearing will usually be the arrestee's first judicial interrogation, the arrestee must be informed of his or her rights (§ 136 I StPO). Most importantly, the judge must instruct the arrestee on her right to respond to the charges or to remain silent, to obtain and consult counsel at any time, even before the interrogation begins, and to file motions for the collection of favourable evidence. If the arrestee re-

[32] From the jurisprudence, see BVerfG NJW 1994, 3219; critiqued by Bohnert GA 1995, 468 ff; Köllner StraFo 1996, 26 in commenting on LG Bonn StV 1995, 632.

quests the consultation and presence of counsel, the presentation hearing must be interrupted and adjourned (briefly, within the time limits of § 115 II which mandates that the interrogation must begin at the latest by the end of the day after the presentation[33]) in order to allow time for counsel to arrive and attend. Yet again, the law leaves much to be desired. In practice, securing the timely attendance of counsel will often be a matter that depends on a reasonably cooperative judge. In particular where the defendant has retained counsel before the presentation hearing is scheduled, the Criminal Procedure Code requires that counsel be *informed* of the date and time. However, the Code betrays any positive first impression it may have made, first by adding a quick exception based on "jeopardized investigation" (*Gefährdung des Untersuchungszwecks*), and second by making it clear that "the persons entitled to participate" are not entitled to have a hearing rescheduled due to conflicting appointments (§ 168c V 3). It seems, however, that in practice sufficient good-will of the judges (still) exists.[34]

At the presentation hearing, counsel's goal will be to avert a pretrial detention order. To this end, counsel will try to dispel either the grounds for (strong) suspicion of crime against his or her client or the particular grounds for detention (namely danger of flight or collusion), for instance by questioning the arrestee or by arranging for an ad-hoc presentation of exculpatory evidence.

3. Detention to secure "accelerated trial" (Hauptverhandlungshaft)

Introduced in 1997, a relatively new addition to the Code of Criminal Procedure is the "trial detention" measure (§ 127b StPO), which authorises prosecutors and the police to arrest and detain a person if the crime allegedly committed by the person in question is a relatively minor one[35] and a

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[33] Which, somewhat oddly, does not begin with the face-to-face meeting with the judge, but at the time of surrender to „power of the court", i.e. the entry into the courthouse jail.

[34] From a sociological and psychological viewpoint, legal systems operate not only on a system of legal rules, but also on a system of practice rules and customs that, in large part, are shaped by the motive of benevolent and prosperous cooperation beyond the particular case in question.

[35] In order to allow a case to be handled by way of accelerated trial based on §§ 417 et seq. StPO, the prosecutor's case must be clear and simple and therefore suited for immediate hearing. In accelerated proceedings, no punishment exceeding a year of im-

judgment by way of "accelerated trial" can be expected. For the initial arrest, the following additional requirements must be met: The arrested person must be caught *in flagranti* or in hot pursuit, and there must be a specific factual basis to believe that the person will not obey a summons to appear at trial. As in other cases of preliminary arrest (cf. § 127 StPO, supra b), further detention may only be ordered by a judge upon a presentation hearing, that must be arranged without undue delay (§ 128 I StPO). In addition to the likelihood that the arrestee would not appear at trial, the judge, before issuing a detention order, must ascertain that facts support a *strong* suspicion of crime and that trial can be expected within a week of arrest (§ 127b II). The detention order must not exceed a week from the day of arrest; the decision shall be taken by the judge who will be in charge of the accelerated trial (§§ 127b II 2, III StPO).

Ever since its introduction, "trial detention" has remained highly controversial for a number of reasons. First, it draws criticism against the concept of "accelerated trial" as such. Second, it has been faulted for breaking with basic constitutional principles by allowing one of the harshest compulsory measures – preliminary deprivation of liberty – in the area of minor crime. Third, constitutionality is further cast in doubt by the fact that "trial detention" affects particular groups of persons – and was even meant to do so. In formulating the provision, legislators had in mind "travelling criminals" such as hooligans, the homeless, and foreigners without in-state domicile, i.e., persons who for social or personal reasons are considered likely not be available for a swift trial.[36]

With regard to defence rights and participation of counsel, the situation is basically analogous to that after preliminary detention based on § 127 StPO (see supra b)). Counsel will try to dispel the grounds for "strong" suspicion and to avert a judicial detention order by offering bail (§§ 127b II, 116 StPO). Where the detainee has not secured counsel yet and a sentence of six months or more is to be expected (with or without probation), the court must assign counsel for the defendant (mandatory representation, § 418 IV StPO), and the prosecutor will ask the court to do so when she files her motion for accelerated trial. The principle of mandatory representation

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prisonment, nor measures of rehabilitation and incapacitation may be ordered; however, revocation of driver's licence is authorized, § 419 I StPO.

[36] Cf. Kleinknecht/Meyer-Goßner, StPO (45th Ed. 2001), § 127b note 2, w. further ref.; Meyer-Gossner, ZRP 2000, 348.

tation also applies when the case is filed in a regional court (Landgericht), or if the suspect is accused of a felony (§ 140 I Nr. 1, 2 StPO).

4. Detention for purposes of identification (§§ 163b, c StPO)

A separate topic is detention for purposes of identification. Section 163b I StPO provides that when a person is *suspected of a crime*, the prosecutor and the police may take measures necessary for identification. The suspect must be informed of the charges against her. She may be detained, if her identity cannot otherwise be ascertained or if ascertainment would be very difficult. In the latter case, the person and belongings of the suspect may also be searched, and special identification procedures may be applied (i.e., fingerprinting and photographs). *Non-suspects* may also be detained for identification purposes, yet the requirements are somewhat more stringent (cf. § 163b II StPO): Identification must be necessary for the investigation of a crime. The person subject to identification measures must be informed of the underlying reason. He or she may only be detained if detention is justifiable in light of the case in question. Searches and special identification procedures are subject to the consent of the detainee.

Detention for identification is subject to particular time limits. Section 163c I 1 StPO emphasizes that the subject must not, "in any case", be detained longer than the identification process requires. In other words, the law establishes the principle of speedy process. As soon as identification is complete, the subject must be released. Unless identification can be achieved swiftly, the police must, without undue delay, present the detainee to a judge who will hold a presentation hearing and rule on further detention (Art. 104 III GG, § 163c III StPO). With or without judicial hearing, however, detention for identification purposes must not exceed a total of 12 hours (§ 163c III StPO). The detainee has the right to have his next of kin or a confidante informed without undue delay (Art. 104 IV GG, § 163c II 1 StPO). This means that the detainee must be provided with an opportunity to contact that person herself, unless she is suspected of a crime and the communication would jeopardise the investigation (§ 163c II StPO). Where the court orders the continuance of the detention, an (additional) *official* duty to inform the next of kin arises.

V. General observations and conclusions

The law of search and seizure as well as the law of arrest and (short-term) detention are central to any legal system of investigative measures. They

define, and limit, key powers of the prosecution in criminal cases. At the same time, these areas of law can be viewed as touchstones for the policy choices made by the legal system in question. To what extent are we ready to provide the police and prosecutors with powers to intrude even into the most personal spheres of individuals for the sake of reasonably efficient investigation and prosecution of crime? Which spheres do we hold as inviolable, or subject only to clearly overriding, higher-ranking interests? Who is to decide upon such balancing issues – police and prosecutors by virtue of their own authority, or do we need ex-ante checks and controls by the judiciary? And how can individuals be adequately protected against abuses of power, if the measures in question are by nature fleeting and cannot be undone retrospectively by means of motions or appeals to a court of law?

These are central concerns to any democratic body of lawmakers. My description of various types of searches, seizures and arrests was meant to give you an impression of how German law makes a bona fide attempt to find adequate solutions. It should be clear, however, that we are far from satisfied when it comes to the protection of constitutionally guaranteed individual rights. Conceptually, the German StPO primarily tries to implement control checks, in the form of a judicial warrant requirement, whenever a measure is considered particularly intrusive. It is clear, however, that the viability of this concept is inherently limited. First, it is simply reality that under certain (exigent) circumstances it would be unreasonable to have to wait for judicial permission – in other words, the concept of judicial ex-ante-control necessitates exceptions that inevitably weaken its bite. Second, even where judicial control takes place, it is a matter of fact that oftentimes, under the pressures of heavy workloads, judges will not reasonably be able to truly probe the legitimacy of the police's investigative strategies and hypotheses. Judicial ex-ante-control must therefore be combined with other concepts. Punishing the police by way of exclusionary rules (illicitly obtained evidence may not be used to prove the prosecution's case in a court of law) is one, but this, too, is a concept of limited value. Exclusionary rules often run counter to another central principle of democratic criminal procedure, which is, within a reasonable framework of procedural rules ensuring lawfulness and fairness, the search for truth. In general there is a great temptation, therefore, both for lawmakers and the courts, to find ways around an exclusionary rule where it is felt that at least under certain circumstances the interests of law enforcement should prevail. Finally, ex-post judicial control is, of course, important; yet for the individual who was

wrongly searched or arrested it can only provide some kind of (symbolic or material) reparation, not preventive protection.

While *all* of these avenues have been historically proven and are indispensable for what they can achieve, it is important to recognize the importance of strengthening the *preventive* side of modern checks-and-balances systems of criminal procedure. No reasonable person would probably object to the assertion that two elements are central to such a preventive concept: First, the involvement, whenever possible, of disinterested third persons at the time the measure is executed (remember the involvement of citizens as "search witnesses" in the German law of search and seizure, supra II.); second, and even more importantly, the notification, consultation, and attendance of counsel whenever an individual is faced with a compulsory measure that bears the risk of compromising the individual's elementary privacy and defence rights, namely, the right to be secure in one's home and to be protected against forced self-accusation or even forced cooperation with the police.

As described above, the German law of criminal procedure makes a couple of bona fide attempts with regard to securing counsel as early as possible in the investigation and particularly before or during the execution of compulsory measures such as searches, seizures, and detentions. Nevertheless, overall there remains much to be desired. At present, counsel's participation, in too many instances, is not a matter of an enforceable individual right but depends upon the good will of our prosecutors and judges. While it seems that for the time being a majority of these practitioners act soundly and ethically enough to keep the reality of criminal procedure within constitutional boundaries of due process and fair trial, it is fairly obvious, too, that the legal safeguards against a potential turn of the tides are weak. In an effort to strengthen those safeguards, the Constitutional Court in its leading judgment of 2001[37] has finally pushed for a fundamental rethinking in the law of searches. I expect that the Court's new willingness to take constitutional protections vis-a-vis the proliferation of law enforcement's investigative powers more seriously will affect other areas of the law of compulsory measures in the near future.

[37] See above n. 4.

Internal Control of Measures of Compulsion within the Public Prosecutor Service and Police

WERNER RÓTH

I have chosen the topic of my lecture for two reasons: on the one hand because I have been dealing with "quality assurance within justice" for quite a while, but on the other hand because I have been asked over and over again in discussions with public prosecutors from China what the German public prosecution would do if the police did not follow their instructions.

The high standard of living in the Federal Republic of Germany, that so many envy us, is based primarily on the export of quality products of our industry. This quality can be attributed to willingness to be innovative, a high standard of organisation, well-educated personnel in addition to continuous control of the manufacturing process.

Let me give you a short example hereof:

Friends of ours are running a medium-sized chemical factory with establishments also in the USA and in Asia. They are manufacturing a product of which little amounts are being added to car tyres. For quite a number of years, the production of this substance has been based on the same process, which is an almost completely automatic one. Although there have never been any irregularities in the production, every single part is being analysed once again, and the manufacturer by a certificate and with his good name guarantees the impeccable final control of his product. Of course such a production has to take place in a way which is economically sensible, that is financially profitable, which again is ensured by the so-called Controlling.

Now, it would be a fallacy though to think that German characteristics necessarily have to result in the manufacturing of quality products. It has to be remembered that for a period of about 40 years there existed a Germany and the then German Democratic Republic, whose products were far from being labelled quality according to Western standards. Furthermore, the

German Democratic Republic's industry production was lacking almost any control of the costs that were actually emerging.

Without doubt it would be ideal if the German legal system also presented a quality product that could be made an export favourite. Although, I occasionally get the impression abroad that German justice is also in some sense is considered a brand-name article, unfortunately this assessment does not - or at least not very often - apply considered from within. In Germany, the State's care for the legal system is described by the somewhat complicated, in the everyday language unusual, term "granting of justice" (*Justizgewährung*) , some mockers say that this term explained exactly what is taking place in the Federal Republic, namely that people were expecting justice in the meaning of fairness from the State but instead were receiving justice in the sense of the law. This might be exaggerated, but the assumption is not completely wrong.

Why is that? Might there be a failure of control, which would be necessary for the manufacturing of the product fairness?

Within the German criminal law system, in jurisdiction but also in criminal prosecution by the public prosecution service and the police, there is a striving for the ideal of justice in each isolated case. This can, in our opinion, only be achieved if the laws allow the judges and public prosecutors a wide margin of discretion in order for them to make the right decision in the isolated case by taking into consideration all relevant circumstances. Only in the area of distinct petty crime, rather in the field of the so-called breach of law and order (*Ordnungsunrecht*), guidelines for the punishment of such offences have been construed which can then be applied in the isolated case regardless of the culpability and motivation of the offender. A typical example thereof is speeding, where only the extent to which the allowed speed is exceeded is relevant for the severity of the penalty. But within the punishment of shoplifting already, even the Federal State of Hessen was not able to agree on a single standard. The German legislator consciously accepts divergent jurisdiction in comparable cases, thereby guaranteeing that the lawyers responsible receive a considerable amount of trust in advance, one is confident that decisions which are taken in awareness of one's own responsibility will have better chances of being "fair". Of course, this is subject to the condition that the personnel which has to "guarantee justice", in the meaning of fairness, is well educated for the task and are provided with sufficient working material. You will understand that these are ideal assumptions, which cannot be completely achieved in reality. In the Federal Republic of Germany also, public prose-

cutors complain, as they probably do all over the world, of too little personnel, and also the aims of the law education are far from being undisputed.

However, if judges and public prosecutors are given a considerable amount of discretion in respect of their decisions, there of course needs to exist some possibility of correction in order to prevent chaos. An internal control of judges does not exist within our legal system due to the highly appreciated independence of judges. In order to achieve a balance, all judicial decisions of importance can be examined by another judge or by a committee of judges by way of appeal. Thereby, flaws and miscarriages of justice are supposed to be corrected, but also a certain homogeneity is supposed to be ensured. Sure enough, with these correcting decisions by superior courts a certain educating effect is achieved for the inferior courts.

Coming back to the topic of control within the public prosecutor's offices. Since public prosecutor's offices are structured hierarchically, that is each superior has the right of instructing his subordinate public prosecutors, - the Secretary of State for Justice (Lord Chancellor) the D.P.P. (Director of Public Prosecution), the D.P.P. the chairmen of the public prosecutor's offices, their chairman of the public prosecutor's office the staff of his authority, - there are no legal objections to an internal control, after all the right of instruction obviously includes the right to control.

Well, control can be exercised in different ways and according to different criteria:

One can compare certain data of one or more public prosecutor's offices, one can examine certain proceedings from their beginning to the end, one can check proceedings of a certain head of department, one can select spot checks, one can control proceedings in a certain stage, or one can check proceedings according to their importance or their frequency of mistakes.

Please let me name only some examples of these single possibilities of control:

With regard to the statistical comparison it is obviously very important that only the comparable is compared and that the differences are taken into account. Still, such control can lead to very revealing results. I can remember that, according to a survey, the public prosecutor's offices all over Hessen have been using telephone interception in their proceedings to a very different extent. The interception of long-distance calls according to the German Code of Criminal Procedure requires judicial grant. One then examined the reasons for such different practice and indeed found out that some public prosecutor's offices have been resorting to this possibility

quite generously, and then one tried to figure out standardised criteria for the use of such measures.

In the course of the departmental examination (*Geschäftsprüfung*) of public prosecutor's offices by the D.P.P., that are conducted approximately every three years, proceedings are being spot-checked in which sources of error frequently.

It is quite obvious that a beginner needs more control than an experienced public prosecutor. This is why a lawyer taking up his job with the public prosecutor's office is assigned to a so-called tutor, most commonly a head of department, whom he has to present all his orders for notice and approval. After a while, when the young public prosecutor has familiarised with his tasks, this duty of presentation is being loosened more and more and he will only have to present important decisions, which especially include the application for the judicial grant of coercive measures.

It is a general principle anyway that in all important matters the respective superior has to be informed and that in these matters significant measures may only be taken after the superior has been informed and by him.

May I in this respect please take account of another fact that, so as to say, is supposed to enable or make easier the control by the inspectors. Each public prosecutor's office is again structured into three parts: head of authority – head of department – public prosecutor. For the whole calendar year, the scope of work of all members of a public prosecutor's office are laid down in a plan for the distribution of tasks according to general criteria, which cannot be derogated from without giving reasons, not even by the head of authority. This is supposed to ensure that also the superior cannot intervene by way of extraordinary and impermissible manipulation, for example by assigning politically extremely charged proceedings to a certain public prosecutor for processing outside this fixed plan of distribution.

All these measures of control that I have just mentioned can be found in German public prosecutor's offices. It would be a great fallacy though to assume the German public prosecutors would be subject to permanent control without any own scope of action. Since, same as for judges, where it is laid down constitutionally though, the statute for the organisation of public prosecutor's offices requires that a public prosecutor principally executes his tasks on his own responsibility, some of this responsibility even is transferred to the other personnel of the public prosecutor's office.

Indeed, the predominant public prosecutor system in Germany was leading to the consequence, as was shown by a research a few years ago, that the decisions of public prosecutor's offices, especially concerning the discontinuance of proceedings due to insignificance, greatly differ from

continuance of proceedings due to insignificance, greatly differ from region to region, and not only from one Federal State to the other but also from one public prosecutor's office to another within the same Federal State, or even within one authority of a public prosecutor's office itself.

Why is this fact accepted in Germany, which undoubtedly also has its negative aspects?

I have now arrived at the truly central issue of my lecture. Too little control can, as already mentioned above, lead to chaos, on the other hand too much control can lead to bureaucracy. The skill of leading a public prosecutor's office is to find a way that keeps the same distance to both these extreme positions. It is characteristic for the predominance of bureaucracy if the sense for one's own responsibility diminishes. The bureaucrat does not think of himself as the one responsible for his actions, in particular he loses sight of the integral whole. He only sees a small sector in which he may act, a typical situation of the alienation of the human being by work, as was defined by Karl Marx once. A reliable test for the question of whether bureaucracy is predominating is when the citizen who has a problem replies to the refusing civil servant by calling into question his decent human intellect and when he on the other hand merely shrugs his shoulders and answers that he was not the one creating the laws to which he is confined. Personally, I am firmly convinced that bureaucracy with the existence of the necessary possibilities of control can only be avoided in a constitutional state and in a democracy, if it can be avoided at all.

Please let me mention another example of German history: the Prussian king Friedrich der Große (Frederic II.), on whom after all many principles of our today's civil service are based, had said once: "The most important thing for a soldier is obedience, but with the general responsibility begins". I do think that even each person that can give orders carries responsibility, but if only a few of Adolf Hitler's Generals had held on to the maxim of the Prussian king, not only Germany but the whole world could have been saved from a lot of suffering.

Coming back to speaking about control within the public prosecutor's offices. The most important authority for control of course is the courts. This is particularly true for the measures of coercion which are especially of our interest, the encroachment on freedom, on the integrity of the body, on property, on the inviolability of housing, on the privacy of telephone calls etc. In Germany, such measures can only be taken after judicial grant has been given, or if they had presented urgent measures that could not have been delayed, they have to be judicially approved of afterwards. I call

this kind of control external only. Of course, the head of a prosecutor's office and in the last instance the responsible Secretary of State for Justice (Lord Chancellor) cannot be indifferent as to whether the applications of the public prosecutor's office will be followed up or not, this is why especially in those cases there is the need for internal control in time. The standard hereof must be the control at that stage which frequently produces mistakes or where mistakes can lead to consequences that cannot be corrected, since a 100 percent control is neither possible nor desirable (because of individual responsibility).

Such consequences can be feared especially for the encroachments mentioned above. So then, if someone is being arrested by mistake, the harm done cannot be compensated, at the most there can be some kind of compensation afterwards by the payment of money. In order to locate such weak spots from the beginning, the public prosecutor's offices are covered with a network of information and reporting duties.

An example that can be given is the control in matters of arrest, i.e. if an alleged offender is taken into custody on the basis of an arrest warrant. The law prescribes that the courts have to re-examine the question of whether the warrant is supposed to be continuous or not within certain periods of time independent of a respective application by the person arrested. It is the public prosecutor's office's responsibility to ensure that the files are with the courts for examination at these points of time, of course it also has to give an opinion concerning the question of arrest. The public prosecutor in charge is the one primarily responsible hereof, but the civil servant of the registry, where the files of the public prosecutor's office are administered, shares this responsibility; the whole proceeding then again has to be controlled by the head of department of the public prosecutor ... [can be continued].

Possibilities of control:

The person that has to control the work of the public prosecutor's offices and of the police in Germany has an excellent basis for the examination, to be precise the files of the proceedings. In the theoretically ideal way of conducting the proceedings, the files contain all the relevant facts concerning the preliminary proceeding.

Since the obligation to give reasons is not only set out for court decisions but also applies for orders by the public prosecutor's office, and also for the applications reasons always have to be given, from the files not only the stage of proceedings can be seen comprehensively, but also the legal considerations and the motivation of the public prosecutor's office. If there

was one thing from the German criminal procedure that I had to recommend without restriction for export, it would be the German technique of filing. In the days of electronic data processing, which has found its way into the occupation of a public prosecutor only quite recently, the profession of both the public prosecution and the police has become much more transparent and can be controlled much more effectively.

This at the same time gives me the opportunity to change topics to the control of police by the public prosecution service.

In Germany, the police are not subject to the Secretary of State of Justice/Lord Chancellor, but are governed by the Secretary of State of the Interior/Home Office. But insofar as the police are performing tasks of criminal prosecution, they are "auxiliary civil servants" of the public prosecutor's office and are bound to follow their instructions. At this point I would like to emphasise again that in Germany there is no separate preliminary proceeding by the police, all actions for disclosure by the police are becoming part of the preliminary proceedings of the public prosecutor's office, all charges by the police are sent to the public prosecutor's office, which in the end take the decision of whether to continue or stop the preliminary proceedings. This is also true for cases in which the police have started and proceeded with charges on their own account. The presentation of the files of the police to the public prosecutor's office of course presents an ideal opportunity to control police work. Insofar, the different governing is of some advantage, since it is by far harder to "hide something" if a different authority has the right to control than if the proceedings stay within the area of competence of the same authority. The question that is of much interest here, what the co-operation of the police and the public prosecution service looks like in the use of measures of compulsion, can be explained by a short example. If an alleged offender is arrested, the police contact the emergency department/urgent [*Eildienst*] of the public prosecutor's office by phone in order to find out whether an application for an arrest warrant can even be considered. If the public prosecutor answers this question positively, the police deliver the files, the public prosecutor comes up with a written application for the issuing of an arrest warrant, the police then transport this file to the judge in charge of arrest at the district court, who does or does not issue the warrant. If an arrest warrant is issued, the police take the warrant with them and execute it.

In connection with control of police by the public prosecution service I would like to mention another relevant aspect. The police do not have the power to give information to the press with respect to preliminary proceed-

ings, without having been empowered by the public prosecution to give such statements. But since in cases such as murder or rape the media calls for immediate information, the police will get into contact with the public prosecutor's office very early in order to enable them to give the press the necessary information. According to the laws governing the press of the federal states of Germany, also the public prosecutor's offices are obliged to give unlimited information to the press, as long as the proceedings would not be endangered by such information.

Please let me mention one last aspect in which external and internal control meet. Each citizen of the Federal Republic of Germany has the right to resort to the media if he wants to raise awareness of deplorable state of affairs in the work of the police or the public prosecutor's office. And since a failure to act within criminal prosecution or the criminal prosecution while breaking the law in any case is interesting for the public, and most of the times even holds a high level of sensation, the press will want to report on this. Each head of department will then start inquiries on whether these accusations are justified; for accusations of some importance the Secretary of State of the Interior/Home Office or the DPP will refer a demand for report to the respective public prosecutor's office anyway. If there indeed has been a mistake, one will try to find the causes thereof, and also try to redress the consequences, maybe officially punish the person responsible for the mistake and take precautions so that a similar incident cannot be repeated in the future. If then the police has made a mistake by acting against or disregarding the orders of the public prosecutor's office, in the end the Home Secretary/Secretary of State of the Interior as the highest official of the police will be politically called to account. This is why every German Home Secretary will endeavour, in order not to be subject to such accusations, and to ensure that the orders of the public prosecutor's offices will be generally respected by the police. Of course in the isolated case discussions between the public prosecutor's office and the police can occur, but the last decision on how to conduct preliminary proceedings is with the public prosecutor's office.

I can only hope that it will perform this right towards the police in a way that the police will neither fall into chaos nor into bureaucracy.

Constitutional and Procedural Questions about the Requirement of Judicial Authority

- A Comparative View on the Responsibilities for Pre-Trial Detention in Germany and the People's Republic of China -

THOMAS RICHTER

I. The Main Principal

The main principle is and should be that men are free and restriction of liberty or even imprisonment can be only a rare exception. This principle is based on various grounds, such as philosophical, religious, political and economic grounds. The People's Republic of China (PRC) and Germany have recognised this principle in their respective constitutions.[1]

In order to severely control the restrictions, both countries have established a state monopoly on the deprivation of liberty. Besides state organs, nobody has the right to restrain someone's liberty and is even threatened by criminal law to do so.[2] The rule of law which is recognised in both countries[3] guarantees that the state organs can only restrict the liberty in the cases provided for by law. Within the state organs, the PRC and Germany give the decision about the detention of a person to the judiciary branch. The judiciary branch – in this context - compound judges and

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[1] Art. 37 Constitution of the PRC of December 4, 1982 (Xianfa), Art. 2 Paragraph 2 (2) German Constitution of May 23, 1949 (GG).

[2] Art. 238 Penal Law of the PRC, revised edition of March 17, 1997 (Xingfa), Art. 239 German Penal Code, revised edition of November 13, 1998 (StGB).

[3] In Germany, the rule of law and the separation of powers are part of the basic principles of the constitution which even the legislative body cannot abolish anymore (Art. 79 paragraph 3 with Art. 20 paragraph 3 GG). In the PRC, the socialist rule of law has been introduced in the amendment of the constitution in 1999, Art. 5 Xianfa.

public prosecutors in both countries.[4] It is the courts who are the sole body to take a definite decision to send someone to prison. Until this judgment all persons enjoy the presumption of innocence.[5]

II. Provisional Measures

But what about a provisional decision about detention, especially in the case of pre-trial detention? As a matter of fact, such a provisional decision has got less importance than a final decision and therefore could be treated with lower standards, perhaps even in the question of responsibility of the decision-maker. In other words, if the judges are responsible for the final decision, would it be sufficient to leave the decision about provisional detention to public prosecutors?

Germany and the PRC differ in the response of this question. Imprisonment is the sharpest form of punishment provided for in German Criminal Law.[6] In the PRC, the death penalty is still provided for in the revised Criminal Law of 1997; this sanction is not only a theoretical one, as in plenty of other countries, but plays still a major role in the Chinese sanction system.[7] As a provisional execution is not possible, pre-trial detention is the strongest form of coercive measure towards the suspect, in the PRC as well.

However, as a matter of fact, if this measure is used, it cannot be undone, the executed detention is irreversable. Life expectance of the detained suspect is unlikely to be extended, if he is acquitted by a court afterwards. Compensation measures for unlawful detention are, theoretically, not able to compensate the suspect for the deprivation of his liberty and, in practise, often even do not cover even the material losses.

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[4] Dissenting opinion Kerbel p. 91 who tends to consider public prosecutors as part of the executive body.

[5] Art. 12 Criminal Procedure Law of the PRC (CPL); for Germany, Art. 6 paragraph 2 European Convention on Human Rights is the explicite rule, cf. Roxin § 11 II..

[6] Art. 38 et seq. StGB.

[7] See Hu Yunteng p. 249.

III. Delegation of Competences

For this reason, the German constitution is very categorical: It establishes a monopoly in favour of the judges to decide even about pre-trial detention.[8] The constitution only allows a maximum delay for custody of 48 hours in urgent cases. The European Convention for the Protection of Human Rights and Basic Liberties also asks for the decision of a judge.[9]

The Chinese constitution establishes a double competence: it fixes the decision about detention in the hands of the courts or the public prosecutors.[10] Both judicial organs are on the same hierarchical level, no organ is called first or has more power towards this decision. The Criminal Procedure Law follows – at least theoretically - strictly the constitution.[11]

IV. Public Prosecutors and Judges

Are there any reasons to focus this competence within the authority of the judges? The main reason for this could be the independence. Here, we have common and different elements in the PRC and Germany.

In Germany – and other Western countries have very similiar reasonings - the independence of the judge is regarded as a basic principle of the constitution and as a very important part of the rule of law in the Federal Republic.[12] The judge shall only follow the law and therefore he or she shall be protected from the interference of other state organs or political parties who might have their own interests. The independence of the judge refers mainly to the professional execution of the judge's duties[13] and to the personal status as a judge within a certain court[14] which protects him or her from being sent to another post against his or her will or even from being degraded. The independence even requires that control over judges remains mainly in the hands of (other) judges.

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[8] Art. 104 paragraph 2 GG.
[9] Art. 5 European Convention of November 4, 1950.
[10] Art. 37 Xianfa.
[11] Art. 59 CPL.
[12] BVerfGE 2, 307, 320.
[13] Art. 97 paragraph 1 GG. In German law, this is called „sachliche Unabhängigkeit", cf. Wassermann p. 70 et seq.
[14] Art. 97 paragraph 2 GG.

In the PRC, the constitution declares the People's Courts, not the single judge independent.[15] This is certainly an important difference, but is not the decisive point to our question. As far as the public prosecutors are concerned, it is important to know that in the PRC, the body of public prosecutors enjoy the same constitutional independence as the courts do.[16] Position and duties of the public prosecutors are rather different in both countries.

In Germany, after the abolition of the inquisitorial judge in the middle of the 19th century, the prosecutor was introduced into the criminal law procedure. This has to be seen as a (negative) reaction towards the former combination of the functions of the investigator and the one who passes judgment on the case.[17] At the very beginning, the new public prosecutors had the power to arrest suspects.[18] The German public prosecutors are civil servants. They are part of a strict hierarchical power[19] whose highest chief is the respective Ministry of Justice which exists in all States, but also on the federal level in Germany. An intervention of the Minister even in particular cases is not a widespread habit in practice,[20] but still exists in the minds as a theoretical possibility.[21] The head of a body of public prosecutors can take over any particular case or give it to any other prosecutor in his or her office.[22] Therefore, there is no comparison to the independence a judge enjoys in Germany.

In the PRC, the function of the body of public prosecutors is larger, because it is considered as the organ who supervises the law in general.[23] Moreover, the public prosecutors who are also divided into different hierarchical levels parallel to the People's Courts, do not belong to any governmental branch. Nor the Ministry of Justice (司法部) neither the Legislative Affairs Office in the State Council (国务院法制办公室) stand at the top of the public prosecutors; however, it is the Supreme People's Procuratorate which is the highest body of all prosecutors and which is

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[15] Art. 126 Xianfa.
[16] Art. 131 Xianfa.
[17] Bietau p. 18.
[18] Art. 23 Bavarian Law of November 23, 1848.
[19] Cf. Art. 146 Gerichtsverfassungsgesetz (GVG).
[20] Various cases collected by Krebs p. 271 et seq.
[21] Kintzi p. 15; Kohlhaas p. 56 et seq.
[22] Art. 145 GVG.
[23] Art. 129 Xianfa.

obliged to give an annual report to the National People's Congress (NPC), the legislative body of the PRC.[24] The organs for public security stand only under the general legal supervision of the public prosecutors and are organized in a separate way. It is the Ministry for Public Security (公安部) which leads the police; public prosecutors cannot command policemen in criminal matters as the system works in Germany. Therefore, it should be noted that, in these days, the position and function of the public prosecutors in China and Gemany are different and this difference might cause different conclusions. We also should be aware that such bodies like public prosecutors and judges do not remain the same over years and decades; not only revisions of the constitution or the laws of procedure, but already amendments of the regulations for civil servants or simply the budget might strongly influence such legal bodies.

If there is a double competence of public prosecutors and judges, who would win the competition in practice? Even if the public prosecutors are not competent to investigate in all criminal cases, but together with the organs for public security they belong to the investigative bodies in the prosecution system. Investigation is (one part of) their job; therefore, they own a certain capacity which a court does not have. Furthermore, the police has almost nothing to do with the courts as the public prosecutor works as some sort of mediator. This means that there is some kind of structural proximity to the public prosecutors which does not exist with the courts. Empirical studies might confirm this idea. So, in practice, the double competence of public prosecutors and courts is likely not to be very useful. Whether it is of harm, is not the question here.

V. Preferences for the Judges?

So, if the public prosecutors have another independent status in the system of the PRC and furthermore, the system tends to have closer relationship between the police and the public prosecutors, the question could be raised if does it matter, whether the arrest is pronounced by an independent judge or by an independent public prosecutor.

My general answer still would be "yes, it does matter". The body of public prosecutors in China has the duty to accuse and - in some legal areas

[24] Cf. Richter p. 28, as far as the relation to the NPC is concerned.

- to investigate.[25] In this position, the public prosecutors are interested in maintaining the suspect or suspects and not losing him or them any more. Therefore, the arrest and detention of the suspect is the easiest way to localise him or her and prevent him or her from fleeing or committing any other crime. However, the detention of a suspect shows that the public prosecutor fixes a certain suspect in a rather early stage. The investigator who, at the same time, has the responsibility to detain the suspect, tends not to be very interested in continuing investigation towards other possible suspects. After having put somebody to pre-trial detention, it is likely to be considered as a big mistake, if another suspect was found who was *not* sent to detention, but someone innocent was imprisoned in his place. The public prosecutors would be obliged to discover their own faults. As this discovery is probably not honoured too much neither by the public prosecutors on a higher level nor by the public, there is a great risk to hide the mistake or - even more likely - to focus all investigation on the detained suspect.

This would be the crucial difference to a judge who is not involved in the investigation himself. He or she just appears in order to solve the question of coercive measure, but then will leave the further investigation to other legal bodies. It is a minor point, if this judge will be involved in the later court trial or not. Following this argumentation it would be preferable not to have this judge as the one who will decide on the later decision, at least not as a single judge. On the other hand, the possibility for appeal will be given in most of the trials, both in China and in Germany.

The main reason to reject the public prosecutor as the responsible for the pre-trial detention was that he or she is the investigor of the case at the same time which tends to be a bad arrangement for the detained suspect. I would see less risk in those cases where it is the police or other organs for public security who lead the investigation. In these situations,[26] the public prosecutors do not directly investigate the cases, but only receive the dossier at the end of the investigation and control, if the results correspond to the legal standards. Here, two different legal bodies, the organs for public security and the body of public prosecutors, would – on the basis of their preliminary results – independently decide about the criminal responsibility of a certain suspect and the necessity to detain him or her.

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[25] Art. 18 paragraph 2 CPL.
[26] Art. 18 paragraph 1 CPL.

Why I still would prefer to see a judge as the deciding body for the question of pre-trial detention, is the argument of the presumption of innocence. Until the court will decide about the guilt of the accused, the latter still enjoys the presumption of innocence. It would be contradictory to lower the standards for pre-trial detention in this sensitive period of time. It is nobody else but the judge who should have the competence to order detention before the conviction pronounced by a court –even if the practice for instance in Germany does not satisfy the need for judicial control.[27]

The right of intervention given to the Chinese People's Courts *after* the execution of the arrest[28] does not seem to be sufficient, because it would shift the burden of proof from the investigating body to the courts who, usually, do not have any information about the arrest and, if so, are not at all prepared for this difficult duty.

VI. Final Remarks

If there is criticism about the existing systems, it should in no way be seen as a lesson given by a teacher. Of course, the implementation of the rule of law in the PRC is relatively new. However, it would certainly be an error to believe that Germany – or any other country in the world – has achieved the level of rule of law and sits in the safe corner, now, and nothing can happen to the rule of law anymore.[29] The rule of law is only a general term and its standards are variable. There is always a danger that - on account of plenty of (good) reasons - standards can be lowered[30] or even given up. Sometimes it is the fight against terrorism, at other times it is only the lack of public money which makes it necessary to rethink the balance of the rule of law. It can and should be helpful for all lawyers to keep in mind the noble idea and the vision of the rule of law.

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[27] Cf. Hans-Ullrich Paeffgen (see his article in this volume), who stresses the point that the current German practice of judges signing stereotyped arrest orders (or other orders for coercive measures) is not satisfying and calls for improvement. However, the mere need of the judge's signature causes a certain psychological pressure on the public prosecutor.

[28] Art. 73 CPL.

[29] Cf. Sarstedt p. 14.

[30] Sarstedt p. 15 f. describing the decline of the standards as regards pre-trial de-tention in Germany in the 20th century.

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