



Reforms to China's pretrial detention system: the role of the procuratorate

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Abstract

Pretrial detention in China is not subject to judicial review. The suspect is usually detained through the whole pre-trial and trial stages in the criminal proceeding. China's ongoing criminal justice reform attempts to change this practice in order to offer more protections to suspects through revising the Criminal Procedure Law. This article, framed in the theory of “living law”, takes an insider approach by looking into the demarcation of power and interest among various criminal justice authorities and internal units within the People's Procuratorates along with China's detention reform. The empirical findings based on intensive interviews of “insiders” show a different picture from what outsiders may expect. The power struggles among criminal justice authorities and internal units within the procuratorate failed to achieve the purpose of detention reform. Although there have been some positive changes in Province AH's pilot project, such changes are unsustainable due to the uncertain institutional arrangement.

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1. Introduction: the post-arrest detention review system in China

In criminal proceedings, pretrial detention or other coercive measures often unwarrantedly damage a citizen's personal freedom. There is growing literature on the comparative study of

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pre-trial detention system.¹ However, little attention has been paid to China.² Existing literature on criminal justice in China focuses on criminal trial,³ investigation⁴ and lawyers.⁵ There has been little research conducted on the role of the procuratorate in arrest and detention,⁶ which is a stark contrast to the relevant research on the public prosecutor's office in other jurisdictions.⁷

Different from Western countries, detention in China is neither an independent, coercive measure nor constrained by the principle of “arrest before detention”. Prior to the amendments made to the Criminal Procedure Law in 2012 (the CPL),⁸ the decision-making agencies, the People's Procuratorates, were under no legal obligations to review the necessity of continued detention of the accused after the decision to arrest had been made. The arrest system is originally put in place to ensure that the defendants can attend the subsequent trial rather than to punish the defendants in advance without a trial. The People's Procuratorate has a stake in prosecuting criminal offences. When the Procuratorate makes a decision on arrest and detention in the pretrial phase, the key factor taken into account is whether the arrest is beneficial to the criminal investigation and prosecution.⁹ Therefore, as shown in Section 2, as long as the evidence is satisfactory for the purpose of prosecuting a crime, the suspect is to be arrested and detained even if he commits a minor crime or has a low risk of escape when he/she is

¹See P. H. P. H. M. C. Van Kempen (ed.), *Pretrial Detention: Human Rights, Criminal Procedural Law and Penitentiary Law*, Comparative Law, Intersentia Publishing Ltd (2012); European Commission, “Accompanying Document to the Proposal for a Council Framework Decision on the European Supervision Order in Pre-trial Procedures between Member States of the European Union: Impact Assessment”, (29 August, 2006), http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/docs/sec_2006_1079_en.pdf.

²Limited but helpful studies include Mike McConville et al., *Criminal Justice in China: An Empirical Inquiry*, Edward Elgar Publishing (2011). In this book, Chapter 3 discusses the police powers in relation to detention and arrest. However, the study here only focuses on the police power and rarely touches up the role played by the procuratorate. Elisa Nesossi, *China's Pre-Trial Justice, Criminal Justice, Human Rights and Legal Reforms in Contemporary China*, Wildy, Simmonds & Hill Publishing (2012); Yanyou Yi, “Arrest as Punishment: The Abuse of Arrest in the People's Republic of China”, 10 *Punishment & Society* 2008 (1): 9. These two studies were made before the amendment to the Criminal Procedure Law and therefore are outdated and less relevant to the latest development in this field.

³For an account on China's court system, see generally Tom Ginsburg, “Judicial Independence in East Asia: Implications for China”, University of Chicago Public Law & Legal Theory Working Paper No. 295, 2010; Randall Peerenboom (ed.), *Judicial Independence in China*, Cambridge University Press (2010); Ni He, *Chinese Criminal Trials: A Comprehensive Empirical Inquiry*, Springer (2014).

⁴For an account on China's police and police power, see generally Kam C. Wong, *Police Reform in China*, CRC Press (2012); Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China*, Cambridge University Press (2007).

⁵On China's lawyers, see Ethan Michelson, “Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism”, 113 *American Journal of Sociology* 2007 (2): 352–414; Ethan Michelson, “The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work”, 40 *Law & Society Review* 2006 (1): 1–38; Sida Liu & Terence C. Halliday, “Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers”, 45 *Law & Society Review* 2011 (4): 831–865.

⁶Keith Hand, “Watching the Watchdog: China's State Compensation Law as a Remedy for Procuratorial Misconduct”, 9 *Pacific Rim Law & Policy Journal* 2000 (1): 95–138.

⁷On the prosecutorial system in the EU, the US and Japan, see Katalin Ligeti (ed.), *Toward a Prosecutor for the European Union*, Beck/Hart Publishing (2013); Joan E. Jacoby, *The American Prosecutor: A Search for Identity*, Lexington Books (1980); David T. Anderson, *The Japanese Way of Justice: Prosecuting Crime in Japan*, Oxford University Press (2001) (which applies a law and sociology analytic approach to compare the role of the public prosecutor's offices in the US and Japan).

⁸Unless otherwise stated, the CPL throughout the article refers to the Criminal Procedure Law 2012.

⁹Article 3 of the PRC CPL 2012. In practice, the pretrial stage includes such steps as filing a case, investigation, and institution of prosecution, and both detention and arrest take place in this stage, which is different from the Western countries. Jianfu Chen, *Chinese Law: Context and Transformation*, Martinus Nijhoff Publishers (2008), 304.

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