

# China and CAT – From Implementation Issues to Institutional Analyses

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Abstract	973
I. Introduction	974
II. The Definition of Torture	976
1. The Disparity Between China's Legislation and CAT	976
a) The Definition of Torture in Art. 1 (1) of CAT	976
b) Severe Mental Pain or Suffering	976
c) The Subject of Crime of Torture	980
d) The Purposes of Torture	980
2. The Obligation to Include a Comprehensive Definition of Torture in Legislation	981
III. The Problem of Impunity	982
1. The Disparity between China's Judicial Practice and CAT	982
2. The Phenomenon of Impunity in China	984
3. The Causes of Impunity in China	986
IV. Investigation Mechanisms	987
1. The Obligations to Establish Effective and Impartial Investigation Bodies	987
2. Lack of Independent Investigation Bodies in China	989
V. Complaints Mechanism	991
1. Individual Complaints as the Right of Victims of Torture	991
2. Lack of Protection for Complaints in China	992
VI. Redress Mechanisms	996
1. Substantive Redress and Procedural Redress	996
a) Substantive Redress	997
b) Procedural Redress	997
2. The Progress and Gaps of Redress in China	998
VII. The Institutional Reasons for Unjust Cases	1000
1. The "Trinitarian" System of Police Agency, Procuratorate and Court	1000
2. The Role of Party Organs in Criminal Cases	1003
3. The Influence of the Soviet Mode	1006
VIII. Prohibition of Torture: There Is Still a Long Way to Go	1009

## Abstract

Although China's law prohibits torture, even official government documents have acknowledged the pervasiveness of torture in China. Many fac-

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tors contribute to this phenomenon. One of the important aspects is that the provisions of the Convention against Torture have not been implemented effectively and fully in China. There is no comprehensive definition of torture in China's legislation; an independent investigation mechanism is lacking; the right of a victim of an act of torture to complain is not acknowledged; impunity still exists; and so on. The key factor behind the continuing practice of torture lies in the judiciary system. The unjust, false and erroneous cases disclosed by the media in recent years have exposed the defects of the Chinese criminal justice system, such as the "trinitarian" system of public security organs (police agencies), procuratorates and courts, and the lack of judicial independence. In order to really prevent torture, China should implement the Convention consequently and deepen judicial reform. China should therefore get rid of the negative influence of the Soviet mode on its judicial system and start the transition from rule by law to rule of law.

## I. Introduction

On 12.12.1986, the Chinese Government's representative signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention against Torture or CAT), and made two reservations: (1) The Chinese Government does not recognize the competence of the Committee against Torture as provided for in Art. 20 of the Convention. (2) The Chinese Government does not consider itself bound by para. 1 of Art. 30 of the Convention.

Under Art. 67 (14) of China's Constitution and Arts. 3 and 7 of the Law on the Procedure of the Conclusion of Treaties, the competence to ratify treaties belongs to the Standing Committee of the National People's Congress (NPC). Unlike Western democracies, there have never been parliamentary debates about the issues of ratification and reservation of international treaties in the Standing Committee of the NPC. On 5.9.1988, it ratified the Convention against Torture and confirmed the ratifications made by the Chinese Government. China did not make reservations about substantive provisions of the Convention.<sup>1</sup>

Partly due to the influence of the Soviet constitutional model, although four Constitutions have successively been enacted in China since 1949,

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<sup>1</sup> Art. 20 of CAT provides the competence of the Committee against Torture, to examine information, make an inquiry and so on. Para. 1 of Art. 30 of the CAT is a dispute resolution clause.

none of them has provisions on the relationship between international treaties and municipal law. Neither the approach of *transformation* nor the approach of *incorporation* have been adopted by China. As a result, there are no uniform rules on the legal status of international treaties and the applicability of international treaties within the jurisdiction which depends on specific provisions of the laws in different fields. For now, there is no legal basis of direct application of human rights treaties in Chinese courts.<sup>2</sup> Nevertheless, according to Arts. 26 and 27 of the Vienna Convention on the Law of Treaties, as a State party to CAT, China has the obligation to perform it in good faith, and may not invoke the provisions of its internal law as justification for its failure to perform the convention.

Despite CAT having come into force in China on 3.11.1988, the incidence of torture has not decreased notably. According to a survey of the Office of Discipline Inspection of the Supreme People's Procuratorate of the years 1990 to 1996, 2,943 cases of extortion of confession by torture were filed for investigation and 5,922 persons were involved.<sup>3</sup> According to the periodic reports submitted by the Chinese Government to the Committee against Torture in the years since 1997, many unjust cases or wrongful convictions caused by torture have occurred in China.<sup>4</sup>

Different factors contribute to the pervasiveness of torture in China, such as the tradition of heavy reliance on confessions, the policy of periodic "strike hard" campaigns against crime, arbitrary detention and arrest, the lack of a system of bail, the lack of a neutral place of detention or custody, denial of criminal suspects' right to silence, a right in name only to audiotape and videotape the entire process of police interrogation, the lack of national compensation for criminal victims, etc. Chinese legal experts and scholars have conducted many discussions about these issues.

The object of this article is to compare the gaps between China's legislative, judicial practices and the provisions of CAT, and taking the problems in the Convention's implementation as the factual basis, to analyze further the institutional reasons for the pervasiveness of torture and for the difficulty in correcting a wrongful conviction in China.

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<sup>2</sup> R. Gong, The Problems of Application of International Human Rights Treaties in China, Public Law Review of China (in Chinese) 1 (1999), 286 et seq.

<sup>3</sup> G. Wang (ed.), The Crime of Extortion of Confession by Torture (in Chinese), 1997, 9.

<sup>4</sup> See the periodic reports submitted by the Chinese Government to the Committee against Torture in 1999, 2006 and 2014, paras. 37 and 38 of CAT/C/39/Add.2, paras. 108 and 117 of CAT/C/CHN/4, para. 74 of CAT/C/CHN/5.

## II. The Definition of Torture

### 1. The Disparity Between China's Legislation and CAT

#### a) The Definition of Torture in Art. 1 (1) of CAT

Article 1 (1) of CAT defines torture so:

“For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

The definition of torture in Art. 1 (1) of CAT is widely recognized in the international community. Accordingly, torture contains three essential criteria: infliction of severe physical or mental pain or suffering; with intention; and for a specific purpose, such as extracting a confession or information.

In addition, there is another criterion, namely that the act of torture is committed by a public official or other person acting in an official capacity.<sup>5</sup>

The term torture is usually expressed as “extortion of confession by torture” (刑讯逼供) under Art. 247 of China's Criminal Law and Arts. 50 and 54 of the Criminal Procedure Law. Nevertheless, there is no legal definition of “extortion of confession by torture”. Regarding the definition of torture, there are the following serious discrepancies between China's current law and Art. 1 (1) of CAT.

#### b) Severe Mental Pain or Suffering

Under Art. 1 (1) of CAT, torture means “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person”. In fact, most physical torture will also cause mental pain or suffering

<sup>5</sup> *M. Nowak*, What Practices Constitute Torture? US and UN Standards, HRQ 28 (2006), 817.

and might bring about lasting mental injury or sequela.<sup>6</sup> There are also some acts of torture that do not cause severe physical pain or direct suffering but that do cause a person severe mental pain or suffering, leading the person to make a confession against his or her will. In his famous book *The Gulag Archipelago* (1973), Russian writer *Aleksandr Solzhenitsyn* enumerated 31 methods of interrogation in Soviet forced labor camps. These included foul language, psychological contrast, preliminary humiliation, intimidation, the lie, playing on one's affection for those one loved (the most effective of all methods of intimidation), sound effects (the accused is forced to speak more and more loudly and to repeat everything), being clapped into a "box" (amounts to a closet or packing case), sleeplessness, punishment cells or being locked in an alcove, etc.,<sup>7</sup> i.e. methods that are mostly "mental torture" and that might not cause severe physical pain or suffering. During the reign of *Joseph Stalin*, threatening to arrest and execute the prisoner's wife and children was not only a typical form of mental torture, but also a typical part of criminal trials in the Soviet Union. For example, all the defendants in the notorious Moscow Trials during the Great Purge (1936-1938), many of whom were former Bolshevik party leaders and top officials, confessed willingly to their "crimes" and finally eulogized *Stalin*. For these defendants, fear for family members' life and safety was the main reason for admitting to false allegations.<sup>8</sup> The main charge was forming a terror organization with the purpose of killing *Stalin* and other members of the Soviet government, dismembering the Soviet Union, and restoring capitalism. As shown below, Soviet Union's criminal law model has a far-reaching impact on China, and similar "mental torture" still exists in Chinese judicial practice today.

Under Art. 247 of China's Criminal Law, the meaning of "extortion of confession by torture" does not include severe mental pain or suffering. Both the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) have competence to issue "judicial interpretations", which have quasi-legal effect. In their recent interpretations, the SPC and the SPP mentioned "mental pain or suffering" caused by acts of torture for the first

<sup>6</sup> For example, in the "*Du Peiwu* case" in Yunnan Province in 1998, *Du Peiwu*, a former police officer, developed encephalopathy from an act of physical torture. *D. Wang/Y. Zeng*, *The Pursuit of Justice: Compare American O. J. Simpson Case and Chinese Du Peiwu Case* (in Chinese), 2003, 215.

<sup>7</sup> *A. Solzhenitsyn*, *The Gulag Archipelago 1918-1956: An Experiment in Literary Investigation*, translated from the Russian by *T. P. Whitney*, 1992, 2007, Vol. 1, 103 et seq., 89 et seq., 93, 132 et seq., 274 et seq., 313 et seq., 321 et seq.

<sup>8</sup> *A. M. Орлов*, *Тайная история сталинских преступлений*, 1973, translated into Chinese by *Z. Peng*, 1992, 49 et seq.

time. For example, under Art. 65 of the Rules on Criminal Procedures of the People's Procuratorates revised by the SPP on 9.10.2012, "extortion of confession by torture" means the acts of using corporal punishment or corporal punishment in disguise, inflicting severe physical or mental pain or suffering on a criminal suspect to extort confession.

Similarly, the Application of the Criminal Procedure Law of the SPC on 20.12.2012 states that

"where corporal punishment or corporal punishment in disguise, or other methods causing the defendant to suffer any intense pain or torture, physically or mentally are used to force the defendant to make a statement against his will, it shall be deemed as an 'extort[ed] confession by torture and other illegal methods' as stipulated in Art. 54 of the Criminal Procedure Law".

As to "other methods", the SPC Notice in 2013 explains that these are

"the confessions of a defendant which are collected through illegal means such as extorting confessions by torture, making the defendant cold or hungry, drying, baking or gruelingly interrogating the defendant".<sup>9</sup>

All of these methods still belong to physical torture.

Nevertheless, "mental pain or suffering" in the judicial interpretations of the SPC and the SPP is limited to the issue of the exclusionary rule of illegally obtained evidence, and the meaning of "extortion of confession by torture" in China's law has not changed. Moreover, the interpretations state that "mental pain or suffering" is mainly the result of using "corporal punishment or corporal punishment in disguise". This understanding is, as noted, too narrow, because the methods causing "mental pain or suffering" are not necessarily limited to "corporal punishment or corporal punishment in disguise". In addition to the aforementioned "mental torture" listed in *The Gulag Archipelago*, there are many other acts inflicting severe mental pain or suffering. Examples include the victim being made to believe that he will be killed, or the victim being forced to witness events such as the execution or the torture of other detainees or of his own family members.<sup>10</sup> A female detainee was threatened that she and family members would be raped and was subjected to insults and obscenities, which caused mental

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<sup>9</sup> Art. 8 of the Notice of the SPC on Issuing the Opinions on Establishing and Improving the Working Mechanisms for the Prevention of Miscarriages of Justice in Criminal Cases (No. 11 [2013] of the Supreme People's Court).

<sup>10</sup> *H. Burgers/H. Danelius*, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, 1988, 118.

suffering.<sup>11</sup> Being held “incommunicado” for a long time also constitutes “mental torture”. Although these acts or methods have nothing to do with “corporal punishment or corporal punishment in disguise”, they do cause severe mental pain or suffering.

Moreover, the term “corporal punishment or corporal punishment in disguise” used by the SPP and the SPC is not accurate. In Chinese history, “corporal punishment” means the punishment of damaging the body, and it is usually characterized by cutting off limbs and trunk, splitting skin and damaging body organs, thereby causing irreversible corporal damage and permanent disgraceful stigma. Almost all victims of “corporal punishment” became disabled or physically handicapped.<sup>12</sup> Although corporal punishment is part of acts of torture, torture includes further cruel acts or methods of interrogation, and not all victims of torture become disabled or physically handicapped. (For instance, the *Emperor Wen* of the West Han Dynasty abolished corporal punishment [tattooing in the face, cutting off the nose or the feet] in 167 BC, but he did not abolish the cruel methods of interrogation such as whipping and flogging.<sup>13</sup> These methods were widely used by all Chinese dynasties until the early twentieth century.<sup>14</sup>) The definition of torture in Art. 1 (1) of CAT is evidently wider than the definition of torture in China’s legislation and the judicial interpretations of the SPP and the SPC.

In its concluding observations on the fourth periodic report of China on 21.11.2008, the Committee against Torture was concerned

“that the provisions relating to torture refer only to physical abuse and did not include the infliction of severe mental pain or suffering. So the Committee suggested China should include in its legislation a definition of torture that covers all the elements contained in Art. 1 of the Convention.”<sup>15</sup>

In its concluding observations on the fifth periodic report of China on 3.12.2015, the Committee appreciates that the SPC recognizes the use of other methods that cause the defendant to suffer severe mental pain or suffering as torture. However, it remains concerned that the Court’s interpre-

<sup>11</sup> *Saadia Ali v. Tunisia* (Communication No. 291/2006), CAT/C/41/D/291/2006, 26.11.2008, para. 3.8.

<sup>12</sup> *L. Jin*, *Torture and Chinese Society* (in Chinese), 1991, 24.

<sup>13</sup> *Criminal Annals of Hanshu* (the History of the Han Dynasty), Vol. 23, and *Criminal Annals of Jinshu* (The History of the Jin Dynasty), Vol. 30.

<sup>14</sup> *J. Shen*, *Study of the Criminal Law of Chinese Successive Dynasties* (in Chinese), Vol. 1, 1985, 355 et seq.

<sup>15</sup> CAT/C/CHN/CO/4, 12.12.2008, para. 33.

tation applies to questions regarding exclusion of evidence rather than criminal liability.<sup>16</sup>

### c) The Subject of Crime of Torture

Under Art. 1 (1) of CAT, an act of torture is committed not only by public officials, but also by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Under Art. 247 of the Criminal Law, the subject of the crime of “extortion of confession by torture” is restricted to judicial officers only. The term “judicial officer” or “judicial personnel” in the Criminal Law means the police, prosecutor, judge and prison guard.<sup>17</sup> Another person committing an act of torture at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity will, under the Criminal Law, not be liable of the crime of torture. For example, in the “*Zhang Gaoping and His Nephew Zhang Hui case*” in Zhejiang Province, a well-known unjust case, the two innocent men were forced to confess to a crime due to torture by fellow inmates and jailhouse bullies at the police’s instigation. Under Arts. 1 and 4 of CAT, both the police and jailhouse bullies should be punished by appropriate penalties. Nonetheless, after the event, nobody was subjected to criminal penalty for acts of torture; on the contrary, at least one jailhouse bully, a key figure in the torture, earned his remission and release.<sup>18</sup>

### d) The Purposes of Torture

Article 1 (1) of CAT lists four purposes, namely:

- “(1) obtaining from him or a third person information or a confession;
- (2) punishing him for an act he or a third person has committed or is suspected of having committed;
- (3) intimidating or coercing him or a third person;

<sup>16</sup> CAT/C/CHN/CO/5, 3.2.2016, para. 8.

<sup>17</sup> Art. 94 of the Criminal Law provides that the term “judicial personnel” in this Law refers to personnel engaged in the functions of investigating, prosecuting, adjudicating, supervising and controlling offenders.

<sup>18</sup> See <<http://news.163.com>>.

(4) for any reason based on discrimination of any kind.”<sup>19</sup>

These four purposes stipulated in Art. 1 (1) of CAT are also regarded as the most decisive criteria that distinguish torture from cruel or inhuman treatment.<sup>20</sup>

While the purposes of torture under Art. 247 of the Criminal Law are limited to extortion of testimony and collection of evidence, there are neither provisions on punishing the criminal suspect and on coercing him or a third person, nor provisions for any reason based on discrimination of any kind.

## 2. The Obligation to Include a Comprehensive Definition of Torture in Legislation

To sum up, there is no comprehensive definition of torture in China’s legislation, which means that the definition of torture in Art. 1 (1) of CAT has not been reflected in Chinese laws. As a State party to CAT, China has the obligation to include a comprehensive definition of torture in its legislation.

In his report on 10.3.2006, the UN Special Rapporteur on Torture *Manfred Nowak* noted that the Criminal Law does not clearly reflect the following elements of torture defined in Art. 1 of CAT: mental torture; the involvement of a public official directly or at the instigation or consent or with the acquiescence of a public official or another person acting in an official capacity; infliction of the act for a specific purpose (such as extracting a confession, obtaining information, punishment, intimidation, discrimination).<sup>21</sup>

In its concluding observations between 1993 and 2015, the Committee against Torture also suggested repeatedly that China included a comprehen-

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<sup>19</sup> In its General Comment No. 2 in 2008, the Committee against Torture emphasizes that “the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture”; “the protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment”. CAT/C/GC/2, 24.1.2008, paras. 20-21.

<sup>20</sup> *M. Nowak/E. McArthur*, *The United Nations Convention Against Torture: A Commentary*, 2008, 74.

<sup>21</sup> The Special Rapporteur suggested to China that, as a matter of priority, the crime of torture should be defined in accordance with Art. 1 of the Convention against Torture, with penalties commensurate with the gravity of torture. E/CN.4/2006/6/Add.6 (March 2006), 8, 23, paras. 17 and 82.

sive definition of torture that was in full conformity with the Convention and that covered all the elements of Art. 1 in its legislation.<sup>22</sup>

### III. The Problem of Impunity

#### 1. The Disparity between China's Judicial Practice and CAT

Article 4 of CAT reads as follows:

“1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”

In its General Comment No. 2, the Committee against Torture notes that a State party must make the offence of torture punishable as a criminal offence, at a minimum in keeping with the elements of torture in Art. 1 of the Convention and the requirements of Art. 4.<sup>23</sup>

In fact, the criminal offences in China's justice system omit many acts of torture. For example, the SPP successively passed three judicial interpretations on the criteria for filing cases relating to crimes from 1999 to 2006, of which the interpretations on the “extortion of confession by torture” are obviously inconsistent with Art. 4 of CAT. All three judicial interpretations are effective today.<sup>24</sup>

First, the criteria for filing cases in these judicial interpretations are excessively narrow. According to Art. III 3 (3) and (4) of the criteria on the filing of cases of 1999, only when an act of torture led to “suicide” or “serious injury or mental derangement” can the criteria for filing cases of the crime of extortion of confession by torture be satisfied. According to Art. 36 (2)

<sup>22</sup> A/48/44 (SUPP) (1993), para. 394. A/51/44 (SUPP) (1996), para. 150 (a). A/55/44 (SUPP) (2000), para. 123. CAT/C/CHN/CO/4, 12.12.2008, para. 33. CAT/C/CHN/CO/5, 3.2.2016, para. 9.

<sup>23</sup> General Comment No. 2 (19), para. 8.

<sup>24</sup> (1) The Regulations on Criteria for Filing Cases Directly Accepted, Filed and Investigated by the People's Procuratorates (Trial) in 1999;

(2) The Criteria for Serious and Especially Serious Cases Involving the Crimes of Dereliction of Duty and Infringement Directly Accepted, Filed, and Investigated by the People's Procuratorates (Trial) in 2001;

(3) The Regulations on Criteria for Filing Cases Involving the Crimes of Dereliction of Duty and Infringement in 2006.

and 37 (2) of the criteria for serious and especially serious cases of 2001, only when an act of torture “results in death or involved the use of torture to extort a confession seven or more times or in relation to seven or more persons”, can the criteria for filing “especially serious cases” be satisfied. These criteria on the filing cases go even further than the notorious “Bybee Memoranda”, which provided a “legal basis” for the *Bush* administration’s policy on torture after the “9.11” terror event.<sup>25</sup>

Second, the three judicial interpretations on criteria for filing cases have requirements of quantity, namely the number of times the acts of torture were committed or the number of victims of torture who were involved. For example, under Art. II 3 (6) of the regulations on criteria for filing cases in 2006, a case of “torturing three persons or more to extort confessions” shall be filed for investigation and prosecution. If the number of times or victims is less than three, even if there has been an act of torture, the case may not be filed for investigation and prosecution. This requirement of quantity is ridiculous and obviously violates Art. 4 and other CAT provisions.

Third, according to the three judicial interpretations on criteria for filing cases, one criterion is that an act of torture led to a conviction of an innocent person. For example, under Art. II 3 (5) of the regulations on criteria for filing cases of 2006, a case of “extorting a confession by torture and resulting in the misjudgment of a case” shall be filed for investigation and prosecution. If it did not cause the case to be misjudged, commission of an act of torture would not suffice for filing a case. As a result, this criterion will leave room for the “legitimacy” of torture. The SPP’s judicial interpretations clearly violate CAT’s object and purpose: under Art. 2 (2) of CAT, the prohibition against torture is absolute and non-derogable, and no exceptional circumstances whatsoever may be invoked by a State party to justify acts of torture in any territory under its jurisdiction.<sup>26</sup>

Curiously, in the fourth periodic report submitted by the Chinese Government to the Committee against Torture in 2006, these judicial interpretations as “new measures and progress relating to the implementation of the Convention”, were written into the report.<sup>27</sup>

In addition, because there is no comprehensive definition of torture in China’s law, not all acts of torture such as the infliction of severe mental

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<sup>25</sup> K. J. Greenberg/J. L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib*, 2005, memo. 14, 172, 176, 183. See also R. Gong, *The US Government’s Policy on Torture and Its Impact after 9/11*, *Social Science in China (Chinese magazine)* 8 (2012), 132 et seq.

<sup>26</sup> General Comment No. 2 (note 19), para. 5.

<sup>27</sup> CAT/C/CHN/4, 27.6.2007, (Original: Chinese, 14.2.2006), para. 20.

pain or suffering are included in the “crime of extortion of confession by torture” in Art. 247 of the Criminal Law. A method of interrogation that caused severe mental pain or suffering on a detainee intentionally will not constitute the crime of torture, as long as the method does not cause severe physical pain or suffering. As the Committee against Torture notes in its General Comment No. 2: “serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity.”<sup>28</sup>

## 2. The Phenomenon of Impunity in China

Under Art. 247 of China’s Criminal Law, an act of torture is a punishable offence;<sup>29</sup> in reality, impunity for acts of torture is common. According to the survey of the Office of Discipline Inspection of the SPP in 1997, even in serious cases of extortion of confession by torture that caused death or disablement, the procuratorates usually decided to exempt the perpetrator from prosecution. If the procuratorates prosecuted, the sentencing of courts usually was too lenient, e.g. one or two years’ imprisonment and suspended sentences of two or three years. There were many cases of extortion of confession by torture that were merely dealt with inside the police agencies according to the Communist Party of China (CPC).<sup>30</sup> The situation has not changed since then.

In recent years, many criminal unjust cases disclosed by the media attracted national attention. Nevertheless, even after the correction of unjust cases, the phenomenon of impunity persists. For instance, among the ten best-known unjust cases caused by torture during last decades, only in three cases (“*Zhao Zuohai case*”, “*Xiaoshan Five Youths case*” and “*Yu Yingsheng case*”) investigations of acts of torture were started. Of the three cases, only in one case (“*Zhao Zuohai case*”) police officers who had extorted a confession by torture were sentenced; in the other two cases, nobody has been subjected to a criminal penalty.<sup>31</sup> In the majority (such as the “*She Xianglin case*”, “*Li Huailiang case*”, “*Zhao Yanjin case*”, “*Wang Benyu case*”, “*Nian*

<sup>28</sup> General Comment No. 2 (note 19), para. 9.

<sup>29</sup> Art. 247 of the Criminal Law provides that “any judicial officer who extorts confession from a criminal suspect or defendant by torture or extorts testimony from a witness by violence shall be sentenced to not more than three years of fixed-term imprisonment or criminal detention. If he causes injury, disability or death to the victim, he shall be convicted and given a heavier punishment in accordance with the provisions of Arts. 234 or 232 of this Law.”

<sup>30</sup> G. Wang (note 3), 9, 175 et seq., 253 et seq.

<sup>31</sup> The Beijing News, 18.12.2014, A18.

*Bin case*”, “*Xu Hui case*”, “*Zhang Gaoping and his nephew Zhang Hui case*”), investigations of acts of torture were never started.

The “*Huugjilt case*” in Inner Mongolia is one of the best-known cases of judicial injustice recently revealed in the media. *Huugjilt* was arrested on charges of raping and murdering a woman in a public toilet in Hohhot on 9.4.1996. *Huugjilt* was forced to confess to the crime under torture and was sentenced to death by the Hohhot Intermediate People’s Court on 23.5.1996. The Higher People’s Court of Mongolia Autonomous Region rejected *Huugjilt*’s appeal and affirmed the original judgment on 5.6.1996. By the way, China has been maintaining the system of judgment of the second instance as final. Five days later, the 18-year-old *Huugjilt* was executed. Doubts about the case emerged in 2005, when another alleged serial rapist and killer, *Zhao Zhibong*, admitted to the police that he was the murderer. Even so, it was not until 15.12.2014, i.e. nine years later, that *Huugjilt* was posthumously acquitted of the crimes. The officials responsible for the wrongful conviction and execution of *Huugjilt* were made public by authorities in north China’s Inner Mongolia Autonomous Region in a statement on 1.2.2016. Of the blacklisted 27 officials, 26 officials received only administrative penalties including admonitions and record of demerit. The exception was *Feng Zhiming*, formerly deputy chief of the Xincheng District branch of the police agency of the regional capital Hohhot.<sup>32</sup> The scope of the investigation and the assignment of responsibility in the “*Huugjilt case*” seem relatively broad, as personnel of the police agencies, procuratorates and courts were involved, but the essential difference between crime and mistake was removed thereby, since most of blacklisted officials received only punishment for mistakes in work. Not surprisingly, the parents of *Huugjilt* objected to the punishment given to the 27 officials involved in their son’s case, saying it was “too light”. The Hulun Buir Intermediate People’s Court sentenced *Feng Zhiming*, who had led the investigation that resulted in the wrongful execution of *Huugjilt*, to 18 years in prison on 10.10.2016. The convictions, however, were just for bribery (taking bribes worth 3.89 million yuan [about 580,000 US\$], and he was unable to account for another 34.4 million yuan [5.13 million US\$] in his possession.), illegal possession of firearms and corruption, whereas the crime of extortion of confession by torture went unmentioned. According to media reports on 6.7.2017, the Higher People’s Court of Mongolia Autonomous Region rejected *Feng*’s appeal and affirmed the first instance judgement.<sup>33</sup> Obviously, despite the torture was the major cause of the teenager’s execu-

<sup>32</sup> The Beijing News, 1.2.2016, A01.

<sup>33</sup> See <<http://nmgfy.chinacourt.org>>, <<http://news.china.com>>.

tion, the act of torture was still regarded as a negligible offence or mistake, nobody was subjected to criminal penalty for acts of torture. The right to life of *Huugjilt* and Art. 4 of CAT were completely ignored.

### 3. The Causes of Impunity in China

First, the aforementioned judicial interpretations of criteria for filing cases issued by SPP in 1999, 2001 and 2006 mean that the majority of cases of extortion of confession by torture are not filed for investigation and punishment. Indeed, it is impossible to know how many cases of torture actually occur in the Chinese criminal justice system.

Second, the police agencies and procuratorates tend to regard an act of torture as just a mistake in work and tolerate it. As the Office of Discipline Inspection of the SPP noted, the police agencies, procuratorates and courts, due to “department’s protectionism” or “regional protectionism”, do not want to file for investigation and punishment of cases of extortion of confession by torture. They use “mistakes in work” and “good intentions gone awry” as excuses. There is therefore the phenomenon of giving unprincipled protection to the crime of torture.<sup>34</sup> No wonder in the “*Huugjilt* case” none of the blacklisted 27 officials was brought to justice for acts of torture and 26 officials received only administrative penalties.

Once again, the relationship of three organs, namely the police agencies, the procuratorates and courts, is excessively cooperative, and the organs fail to supervise each other during criminal proceedings. Accordingly, no organ is willing to investigate and punish the crime of extortion of confession by torture. Using torture means, in short, low cost, high return and minor risk in Chinese judicial practice.<sup>35</sup>

Impunity and lighter penalties for the perpetrators of torture violate Art. 4 of CAT.<sup>36</sup> Under Art. 4 of CAT, torture must be punishable by severe penalties under domestic law.<sup>37</sup> In fact, the phenomenon of impunity and lighter penalties for the perpetrators of torture is an important reason why torture is “frequently prohibited but does not cease” (屡禁不止) in China.

<sup>34</sup> G. Wang (note 3), 9, 175 et seq., 253 et seq.

<sup>35</sup> M. Cui (ed.), *Research on Inquisition by Torture: History, Current Situation and Future* (in Chinese), 2011, 223 et seq., 313 et seq.

<sup>36</sup> General Comment No. 2 (note 19), paras. 5, 8.

<sup>37</sup> H. Burgers/H. Danelius (note 10), 129.

Impunity in Chinese judicial practice has also been a concern of the Committee against Torture.<sup>38</sup>

In short, for a State party to CAT, committing the crime of torture with impunity is a violation of a treaty obligation, and the imposition of lighter penalties or the granting of amnesties for the crime of torture is not in conformity with the duty of “punishment by appropriate penalties” stipulated in Art. 4 (2) of CAT.<sup>39</sup>

## IV. Investigation Mechanisms

### 1. The Obligations to Establish Effective and Impartial Investigation Bodies

Article 12 of CAT states:

“Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”

Put otherwise, regardless of whether there has been a complaint, whenever there is reasonable ground to believe that an act of torture has been committed, the State party’s competent authorities should proceed to a prompt and impartial investigation.<sup>40</sup> Where the information behind this belief comes from is not relevant.<sup>41</sup> According to para. 2 of the Annex (Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) to Resolution 55/89 adopted by the UN General Assembly on 4.12.2000,

“States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred.”

<sup>38</sup> CAT/C/CHN/CO/4, 12.12.2008, para. 31.

<sup>39</sup> Communication No. 212/2002, *Kepa Urra Guridi v. Spain*, decision adopted on 17.5.2005, CAT/C/34/D/212/2002, para. 6.7. See also General Comment No. 3 (2012), CAT/C/GC/3, 13.12.2012, para. 41.

<sup>40</sup> Communication No. 269/2005, *Ali Ben Salem v. Tunisia*, decision adopted on 7.11.2007, CAT/C/39/D/269/2005, para. 16.7. Communication No. 341/2008, *Fatiha Sabli v. Algeria*, decision adopted on 3.6.2011, CAT/C/46/D/341/2008, para. 9.6.

<sup>41</sup> *H. Burgers/H. Danelius* (note 10), 144.

Therefore as long as it is reasonable to believe that an act of torture has been committed, a State party has to undertake prompt, effective and impartial investigations.

In the investigation of alleged torture, “prompt” has special importance. In its decision on Communication No. 59/1996 (*Blanco Abad v. Spain*), the Committee against Torture pointed out

“that promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear”.<sup>42</sup>

In order to ensure prompt, effective and impartial investigations, a State party to CAT should establish an outside monitoring body, which is independent of the organizational unit where the act of torture or ill-treatment allegedly took place.<sup>43</sup> In its decision on Communication No. 433/2010 (*Alexander Gerasimov v. Kazakhstan*), the Committee against Torture noted that preliminary examinations of complaints of torture by police officers are undertaken by the Department of Internal Security, which is under the same chain of command as the regular police force, and consequently do not lead to impartial examinations.<sup>44</sup>

According to the Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was issued in 2004 by the Office of the UN High Commissioner for Human Rights, the investigative body must specifically be granted:

- “(a) authority to obtain all information necessary to the inquiry including the authority to compel testimony under legal sanction, to order the production of documents including State and medical records, and to protect witnesses, families of the victim and other sources;
- (b) authority to issue a public report;
- (c) authority to conduct on-site visits, including of the location where the torture is suspected to have occurred; and
- (d) authority to receive evidence from witnesses and organizations located outside the country.”<sup>45</sup>

<sup>42</sup> Communication No. 59/1996, *Blanco Abad v. Spain*, decision adopted on 14.5.1998, CAT/C/20/D/59/1996, paras. 8.2-8.5.

<sup>43</sup> *M. Nowak/E. McArthur* (note 20), 438.

<sup>44</sup> Communication No. 433/2010, *Alexander Gerasimov v. Kazakhstan*, decision adopted on 24.5.2012, CAT/C/48/D/433/2010, paras. 12.4.

<sup>45</sup> United Nations Publication, New York and Geneva, 2004, para. 108.

## 2. Lack of Independent Investigation Bodies in China

In China, the procuratorate is responsible for the investigation of acts of torture, but the function of the procuratorate is the afterwards supervision, and has no actual effect. In addition, as the relationship between police agencies and the procuratorates is primarily cooperative, it is very difficult for the complaint of a victim of torture to be investigated promptly by the procuratorates.

The wrongful conviction in “*Zhang Gaoping and his nephew Zhang Hui case*”, overturned by the Higher People’s Court of Zhejiang Province in 2013, is regarded as one of very few successful cases of complaint. In point of fact, this case has made clear that there are no independent investigation bodies and that the role of the procurators in the investigation of torture is very small. In the night of 18.5.2003, *Zhang Gaoping* and his nephew *Zhang Hui* gave a free ride to 17-year-old *Wang Dong* when they were transporting freight to Shanghai. They dropped the girl off in the city of Hangzhou and continued onto Shanghai. *Wang’s* naked body was discovered later that day. The two men became the principal suspects and were detained on 23 May. The police could not find any physical evidence to charge *Zhang* and his nephew with her murder. *Zhang Gaoping* and his nephew were forced to confess to the crime under torture from police and their fellow inmates and jailhouse bullies at the police’s instigation. Despite their filing a complaint with the procuratorate, the procuratorate insisted on prosecution.<sup>46</sup> In February 2004, the Hangzhou Intermediate People’s Court sentenced *Zhang Hui* and *Zhang Gaoping* to death and life in prison, respectively. Upon appeal, the Higher Court reduced the original sentences to a death sentence with reprieve and 15 years in prison. *Zhang Gaoping* and his nephew were sent to the Xinjiang Uyghur Autonomous Region to serve their sentences in 2005. In the Shi Hezi prison, *Zhang Gaoping’s* repeated complaints attracted the attention of procurators stationed in the prison in the summer of 2007.<sup>47</sup> Due to the “limitation of energy, financial resources, the rank and region-based jurisdiction”, the procurators were unable to undertake investigations, but they could help *Zhang Gaoping* to deliver his complaints. *Zhang’s* complaints were delivered to the procuratorates and

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<sup>46</sup> See <<http://news.sina.com.cn>>.

<sup>47</sup> As of the end of 2011, Chinese procuratorial authorities had established 83 procuratorial outpost agencies in large prisons or areas of prison concentration, with more than 3,600 procuratorial outpost offices in places of detention, resulting in a procuratorial presence in over 95 % of China’s prisons and criminal detention facilities. The fifth periodic report of China, CAT/C/CHN/5, 3.4.2014, para. 26.

courts of Zhejiang Province five times from 2008 to 2011. He got no formal response.<sup>48</sup> The Higher People's Court of Zhejiang Province did not start to examine the case until it uncovered "new evidence" (the real murderer) on 27.2.2012. The Court did not decide to conduct a retrial until 6.2.2013. In this unjust case, despite the victims' repeated complaints and the help of procurators stationed in prison, the procuratorates have yet to undertake investigations into complaints of torture over the past ten years. At the least, the "*Zhang Gaoping and his nephew Zhang Hui case*" indicates that the Chinese procuratorates do not qualify as an independent investigation body, and are unable to fulfill the obligation to undertake prompt, effective and impartial investigations of acts of torture under Art. 12 of CAT.

In most of the unjust cases disclosed by the media in recent years, the correction of the wrongful convictions generally took over a decade, and acts of torture were never investigated by procuratorates during that time, let alone promptly. The fundamental cause for the result is that there are no independent investigation bodies in China. Meanwhile, as there is no oversight mechanism that is independent of police agencies, the Committee against Torture suggested in its concluding observations in 2015 that China should set up an independent system of medical examinations and establish an independent oversight mechanism to ensure prompt, impartial and effective investigation into all allegations of torture and ill-treatment.<sup>49</sup>

According to Art. 5 of the Opinions on Advancing the Reform of the Trial-Centered Criminal Procedure System, jointly issued by the SPC, the SPP and the Ministry of Public Security, the Ministry of State Security as well as the Ministry of Justice in August 2016,

"[a] system shall be researched and established to examine the legality of the interrogation at the end of the investigation of major cases. In respect of any major case investigated by a police agency, a state security organ or a people's procuratorate, the procurators stationed in the detention house shall interview the criminal suspect to examine whether there exists any circumstance of extorting confession by torture or illegal evidence collection and make real-time videos and audio records."

The Opinions will enhance the function of examination by procurators stationed in the detention houses. However, as the "*Zhang Gaoping and his nephew Zhang Hui case*" has shown, the role of the procurators stationed in prison was quite limited, and it is questionable whether the procurators stationed in the detention houses could possibly proceed to a prompt and

<sup>48</sup> The Beijing News, 5.4.2013, A17.

<sup>49</sup> CAT/C/CHN/CO/5, 3.2.2016, paras. 17, 21, 23.

impartial investigation under Art. 12 of CAT. The Committee against Torture also doubts whether the Chinese procuratorates can carry out the function of independent investigation bodies on torture. In its concluding observations on China's fourth periodic report in 2008, the Committee pointed out that

“there are serious conflicts of interest with the role played by the Office of the Procuratorate which is charged with investigating allegations of torture by government officials and private actors acting with the acquiescence or consent of government officials, which may lead to ineffective and partial investigations (Arts. 2, 11 and 12).”<sup>50</sup>

In fact, acts of torture occurred most often in the office of a criminal police unit rather than in the detention houses. In addition, acts of torture are also more likely to occur in the secret places of detention or residential surveillance designated by investigation organs.<sup>51</sup>

## V. Complaints Mechanism

### 1. Individual Complaints as the Right of Victims of Torture

Article 13 of CAT reads as follows:

“Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

Accordingly, the State party should not only establish an effective and impartial complaints mechanism, but it should also ensure that all persons deprived of their liberty or arrested by law-enforcement officials have the right to complain to authorities about torture or ill-treatment. The right to

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<sup>50</sup> CAT/C/CHN/CO/4, 12.12.2008, para. 20.

<sup>51</sup> For example, under Art. 73 of the Criminal Procedure Law (revised in 2012), “[f]or crimes suspected of endangering national security, cases of terrorist activities and particularly serious bribery cases, residential surveillance at the domicile of the criminal suspect or defendant may impede the investigation, it may, upon approval by the people's procuratorate or the public security authority at a higher level, be enforced at a designated place of residence, on the condition that residential surveillance is not enforced in a detention house or a special venue for case investigation”.

complain has two aspects: one is that everyone has the right to complain to competent authorities about torture; the other is that competent authorities have an obligation to investigate the complaint promptly and impartially. Art. 13 of CAT also applies to ill-treatment.<sup>52</sup> In principle, the article does not require the formal lodging of a complaint of torture under the procedure laid down in national law; it is enough for the victim to simply bring the facts to the attention of a State authority, and competent authorities of the State should promptly and impartially investigate the complaint.<sup>53</sup>

In its conclusions and recommendations regarding the second periodic report of Georgia in 2001, the Committee against Torture recommended that

“[m]easures [should] be taken to ensure that all persons deprived of their liberty or arrested by law-enforcement officials: (i) are informed promptly of their rights (including the right to complain to the authorities about ill-treatment, the right to be informed promptly of the charges against them and the right to counsel and a doctor of their choice); (ii) have prompt access to counsel and doctor of their choice, as well as to family members.”<sup>54</sup>

In its General Comment No. 3 in 2012, the Committee against Torture points out that complaints mechanisms shall be made known and accessible to the public, including to persons deprived of their liberty, whether in detention, psychiatric facilities, or elsewhere.<sup>55</sup>

## 2. Lack of Protection for Complaints in China

Under Art. 41 of China’s Constitution, all Chinese citizens

“have the right to lodge complaints, accusations, or charges with the corresponding state institution regarding the misconduct or criminal actions of other state institutions or public employees”.

<sup>52</sup> C. Ingelse, *The UN Committee against Torture: An Assessment*, 2001, 361.

<sup>53</sup> Communication No. 6/1990, *Henri Unai Parot v. Spain*, decision adopted on 14.5.1998, CAT/C/14/D/6/1990, para. 10.4. Communication No. 59/1996, *Blanco Abad v. Spain* (note 42), para. 8.6.

<sup>54</sup> Report of the Committee against Torture, 2001, Supplement No. 44 (A/56/44), para. 82 (c).

<sup>55</sup> General Comment No. 3 (note 39), para. 23.

This constitutional right has, however, no real meaning as there is no judicial review system and the Constitution cannot be applied in courts.<sup>56</sup>

As mentioned, it usually takes many years for the complaints of the victims of torture to attract competent authorities' attention (if ever), and there are few examples of a wrongful conviction being overturned due to a complaint of a victim of torture. In fact, the complaint of victim of torture before the trial is usually ignored by procuratorates and judges, during the period of serving a sentence is often assumed to be "resistant to reformation", and the complaint will affect the commutation directly and adversely. If the victim's family members persist with a complaint or petition, they will also suffer enormous pressure or even be cracked down on. There are many such examples. The "*She Xianglin* case" is one of the earliest unjust cases overturned in the past two decades. *She Xianglin* was a former security guard from central Hubei Province, and his mentally ill wife disappeared on 2.1.1994. *She Xianglin* was arrested and sentenced to death by the Jingzhou Intermediate People's Court on 28.4.1994. He was forced to confess under torture. Upon reorganization of the administration divisions, the "*She Xianglin* case" was transferred to the Jingshan County police agency. The Jingmen Intermediate People's Court convicted him of murdering his wife and sentenced him to 15 years imprisonment on 22.9.1998. Later, his wife was found to be residing in her hometown, and she returned home suddenly on 28.3.2005. *She Xianglin* was acquitted and released on 13.4.2005. During the eleven years in prison, *She Xianglin* continually complained, his mother and older brother were in custody for 9 months and 41 days separately due to their petitions, his mother dying shortly after the release.<sup>57</sup> In the "*She Xianglin* case" and many other unjust cases caused by torture, the complaints of a victim of torture and his/her family members were not only unacknowledged as legal rights, instead, as the behaviors of disturbing social order have suffered official punishment. This is a blatant violation of Art. 13 of CAT, which asks each State party to ensure that all persons have the right to complain about torture.

In the aforementioned "*Zhang Gaoping and his nephew Zhang Hui* case", *Zhang Gaoping's* older brother visited Beijing many times in ten years to file a petition, but there was no record of this in the Higher People's Court of Zhejiang Province. Even with the help of the procurators sta-

<sup>56</sup> As imitations of the Soviet constitutional model, four Constitutions have successively been enacted in China since 1949, namely in 1954, 1975, 1978 and 1982. None of them has real authority and legal effect. R. Gong, Respect for Constitution Authority: Reflection of the Soviet Mode, Law Science (Chinese magazine), No. 5 (2010), 130 et seq.

<sup>57</sup> China Report, No. 12 (2005), 42 et seq.

tioned in the prison, the victims were unable to hand their complaints to the competent authorities for five years.<sup>58</sup>

In the aforementioned “*Huugjilt* case”, nine years after the teenager’s execution, *Zhao Zhibong*, who had been arrested on suspicion of carrying out a series of rapes and killings in 2005, admitted he actually murdered the woman in the “*Huugjilt* case”. Even so, the wrongful conviction was not overturned. After 2005, the parents of *Huugjilt* tried to hand in a petition for nine years, but no investigation was undertaken.<sup>59</sup> It was primarily five reports by a journalist of Xinhua News Agency from 2005 to 2011 that caught the attention of leaders of the Communist Party of China (CPC) and the SPC, which urged the Higher People’s Court of Inner Mongolia Autonomous Region to examine the case.<sup>60</sup>

Over the past decades, the “*Zhao Zuohai* case” in Henan Province is one of the most influential unjust cases, as it led directly to the revision of The Criminal Procedure Law. *Zhao* is a farmer in the Henan provincial village of Zhaolou. On 30.10.1997, *Zhao Zuohai* had a fight with *Zhao Zhenshang*, another villager, and later *Zhao Zhenshang* disappeared. On 8.5.1999, a corpse in an advanced state of decomposition was discovered during the excavation of a well in the village, and the police agency placed *Zhao Zuohai* in criminal detention as a suspect. *Zhao Zuohai* confessed his guilt nine times because he was tortured for 33 days. During this time, he was beaten up with a club and a pistol was put in his mouth, and the officers would not let him sleep and set off firecrackers on his head. *Zhao Zuohai* was sentenced to death with a two-year suspension by the Shangqiu Intermediate People’s Court on 5.12.2002, which was approved by the Higher People’s Court of Henan Province on 13.2.2003. At the same time, the supposedly murdered victim *Zhao Zhenshang* showed up and returned to the village on 30.4.2010. *Zhao Zuohai* was acquitted and released from prison on 8.5.2010. Due to the painful and terrifying experience of torture by the criminal police during the ten years in prison, *Zhao Zuohai* did not even dare to complain for fear of being tortured again.<sup>61</sup> In the “*Zhao Zuohai* case” and other misjudged criminal cases, due to the lack of physical evidence and witnesses, the convictions of the courts mainly based on the defendant’s coerced confession. Under Art. 15 of CAT, these illegally obtained confessions

<sup>58</sup> See <<http://news.sina.com.cn>>.

<sup>59</sup> Beijing Youth Daily, 26.11.2014, A14.

<sup>60</sup> The Beijing News, 30.11.2014, A08.

<sup>61</sup> Z. Hou, After Zhao Zuohai Release, Democracy and Legal System (Chinese magazine), No. 12 (2010), 7.

shall not be invoked as evidence in any proceeding.<sup>62</sup> However, the exclusionary rule of illegal evidence was not accepted in Chinese Criminal Procedure Law until 2012, and the provisions of CAT have never been applied directly in China's domestic courts.

Before 2013, all the unjust cases caused by torture were overturned on accidental reasons, namely “the real murderer was arrested” or “the dead came back to life”. In recent years, some wrongful convictions caused by torture were overturned based on insufficient evidence. This constitutes progress in Chinese criminal judicial practice. In these cases, the victims of an act of torture and their family members suffered for a long time due to complaints or petitions. For example, in the “*Zhao Yanjin* case”, a woman in Hebei Province was convicted of murdering a 6-year-old boy in 2001. *Zhao Yanjin* was beaten during her interrogation and suffered partial hearing loss. She has been sentenced to life imprisonment twice and acquitted twice in the past twelve years, spending more than 3,300 days in a detention house. The conviction of *Zhao* was overturned for a lack of evidence in 2013. During the twelve years, *Zhao*'s husband suffered administrative detentions three times and re-education through labor twice due to the continuous petitions.<sup>63</sup> In the “*Chen Man* case”, *Chen* was arrested in Haikou City, capital of Hainan, in 1992, accused of burning down a house and thereby killing his former landlord. In 1994, the Haikou Intermediate People's Court gave him a suspended death penalty and the verdict was upheld by the Higher People's Court of Hainan Province in 1999. *Chen* insisted that the police tortured him to extract a false confession. Throughout the 23 years in prison, *Chen* and his family members filed complaints. He himself wrote 77 complaint letters but never received a reply.<sup>64</sup> The “*Yang Dewu* case” is a more typical example. *Yang* is a farmer in the Anhui provincial village of Yaoyi. He was arrested on 14.7.2000, accused of murdering his mother-in-law. *Yang* was forced to confess under torture. He was sentenced to death with a two-year suspension by the Wuhu Intermediate People's Court of Anhui Province on 14.11.2000, the Higher People's Court of Anhui Province rejected *Yang*'s appeal and affirmed the original judgment in February 2001. In order to prove his innocent, during the 15 years in prison, *Yang* wrote 5,000 complaint letters which weighed hundreds of pounds.

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<sup>62</sup> Art. 15 of CAT provides “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

<sup>63</sup> China Youth News, 6.5.2013, 7.

<sup>64</sup> Beijing Times, 2.2.2016, A11.

Until November 2016, *Yang* was adjudged not guilty in a retrial by the Higher People's Court of Anhui Province.<sup>65</sup>

These cases have shown that there are no complaints mechanisms and that the complaints of victims of torture and the petitions of their family members generally have little effect. It is quite clear that China has not accepted the complaint of the victim of torture as a legal right. China has not fulfilled its obligations under Art. 13 of CAT at all.

In its concluding observations on the fifth periodic report of China in 2015, the Committee against Torture suggested that China established an independent, effective and confidential mechanism to facilitate the submission of complaints by victims of an act of torture and ill-treatment to the competent and independent authorities and ensured in practice that complainants were protected against reprisals for their complaint or for any evidence given.<sup>66</sup>

## VI. Redress Mechanisms

### 1. Substantive Redress and Procedural Redress

Article 14 of CAT reads:

“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”

As torture constitutes serious damage to the mind and body of a human being and a severe violation of human dignity, the victim of an act of torture has the right to obtain redress. In support of the total eradication of torture and the effective functioning of the Convention against Torture, General Assembly Resolution 52/149 of 12.12.1997 proclaims 26 June as United Nations International Day in Support of Victims of Torture.

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<sup>65</sup> Beijing Times, 24.4.2017, A10.

<sup>66</sup> The Committee also asked China to provide information on the number of torture-related complaints received since 2008, information on the number of investigations into torture allegations initiated *ex officio* by procuratorates or based on doctors' reports, and information concerning the criminal or disciplinary sanctions imposed on those found responsible for torture or ill-treatment. CAT/C/CHN/CO/5, 3.2.2016, paras. 21 (b), 23.

### a) Substantive Redress

In its General Comment No. 3, the Committee against Torture points out that the obligations of States parties to provide redress under Art. 14 of CAT are two-fold: procedural redress and substantive redress.<sup>67</sup> The substantive redress for a victim of an act of torture or ill-treatment includes five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>68</sup> Alone, monetary compensation may not be sufficient redress. The indictment and punishment of the persons who committed an act of torture is closely linked to the redress. Victims have not obtained full redress if perpetrators still enjoy freedom from punishment. In other words, impunity constitutes a denial of the victim's right to justice and redress. As the victim is usually under the torturer's direct control, i.e. in detention or otherwise deprived of personal liberty, he or she is powerless.<sup>69</sup> It is extremely difficult for a victim of torture to initiate a procedure of redress in practice, if a State party's competent authorities do not investigate an act of torture for establishing criminal liability.<sup>70</sup> As the Committee against Torture points out,

“a State's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a de facto denial of redress and thus constitute a violation of the State's obligations under Art. 14.”<sup>71</sup>

Therefore, impunity constitutes in effect a denial of redress for the victim of torture.

### b) Procedural Redress

States parties to CAT are also obligated to provide procedural redress for a victim of an act of torture or ill-treatment. To satisfy their procedural obligations, the Committee against Torture suggests that

“States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capa-

<sup>67</sup> General Comment No. 3 (note 39), para. 5.

<sup>68</sup> General Comment No. 3 (note 39), paras. 6-18; *Kepa Urra Guridi v. Spain* (note 39), para. 6.8. *Ali Ben Salem v. Tunisia* (note 40), para. 16.8.

<sup>69</sup> *M. Nowak* (note 5), 839.

<sup>70</sup> *C. Ingelse* (note 52), 363.

<sup>71</sup> General Comment No. 3 (note 39), para. 17.

ble of determining the right to and awarding redress for a victim of an act of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims.”<sup>72</sup>

In this regard, there is a close link between the obligation under Art. 12 and the obligations under Arts. 13 and 14 of CAT. If States parties do not fulfil their obligations under Arts. 12 and 13, namely failure to undertake prompt, effective and impartial investigations or failure to establish impartial and effective complaints mechanisms, full redress for the victim of an act of torture cannot be obtained.<sup>73</sup>

## 2. The Progress and Gaps of Redress in China

Legislation on State compensation was introduced quite late in China. The State Compensation Law was not formulated until 1994. Under Art. 15 (4) of the Law, the victim shall have the right to compensation if “organs and their personnel which exercise the functions and powers of detection, prosecution, adjudication and administration of prison cause any of the following infringements upon personal rights”, which includes “extortion of a confession”.

There were no provisions on compensation for mental distress under the State Compensation Law formulated in 1994. In the aforementioned “*Zhao Zuohai* case”, *Zhao* received only 650,000 yuan (US\$ 106,700) in State compensation for ten years wrongly spent in prison and no compensation for the mental distress caused by torture.

The State Compensation Law was revised on 29.4.2010. The revised Law adds compensation for psychological injury and increases the compensation standards. Under Art. 35 of the Law,

“[w]here any of the circumstances as provided for in Art. 3 and Art. 17 of this Law, is confirmed according to law and causes infringement upon the rights of reputation and honor of the aggrieved person, the organ compensatory obligations shall eliminate the bad effect, rehabilitate the reputation of and make an apology to the aggrieved person to the extent of the infringing acts affected.”

According to Art. 7 of the Opinions of the SPC on Issues concerning the Application of Mental Distress Compensation in the State Compensation Cases on 29.7.2014, the specific amount of solatium for the infliction of

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<sup>72</sup> General Comment No. 3 (note 39), para. 5.

<sup>73</sup> General Comment No. 3 (note 39), para. 23.

mental distress shall generally not exceed 35 % of the sum of personal freedom compensation and life and health compensation as determined under Arts. 33 and 34 of the State Compensation Law, but shall not be lower than 1,000 yuan. Since 2011, most of the victims of torture, after their wrongful convictions had been overturned, have received State compensation including consolation money for their mental distress. Nevertheless, State compensation for victims of ill-treatment has not yet been put on the agenda.

Art. 26 of the State Compensation Law revised in 2010 provides that

“if a person in custody dies or loses his civil conduct capacity during the period of custody, the organ obligated to make compensation shall provide evidence on whether there is a causation between its action and the death or loss of civil conduct capacity of the person in custody.”

As the burden of proof is on the organ obligated to make compensation, this provision is beneficial to the victim of an act of torture or to the victim's family members.

Although progress regarding redress to victims of torture has apparently been made, there are gaps between Chinese practice and Art. 14 of CAT. In its General Comment No. 3, the Committee against Torture refers not only to the five forms of reparation mentioned, but notes the possibility of further reparations. These may include reimbursement of medical expenses paid and provision of funds to cover future medical or rehabilitative services needed by the victim to ensure as full a rehabilitation as possible; pecuniary and non-pecuniary damage resulting from the physical and mental harm caused; loss of earnings and earning potential due to disabilities from the torture or ill-treatment; and lost opportunities such as employment and education. In addition, adequate compensation awarded by States parties to a victim of an act of torture or ill-treatment should provide for legal or specialist assistance and other costs associated with bringing a claim for redress.<sup>74</sup>

The main method so far of State compensation in China has been the payment of damages, which includes compensatory payment for freedom of the person of a citizen, compensatory payment for a citizen's life and health, return or compensatory payment for distrained property, compensatory payment for economic losses and consolation money for mental distress. These reparations are mainly confined to monetary compensation and do not include compensatory payment for personal injury, medical expenses, living expenses of victims' children, expenses for petitions, costs of legal or

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<sup>74</sup> General Comment No. 3 (note 39), paras. 6-8, 9-10.

specialist assistance. For example, in a typical case of “*in dubio pro reo*” overturned in recent years, the appeal of a victim of torture, *Nian Bin*, on State compensation (for personal injury, medical expenses, living expenses of the victims’ children and expenses for petitions) was rejected by the SPC at the end of 2016.<sup>75</sup>

Even with the monetary compensation, there are problems of unreasonable calculation of compensatory amount, the narrow scope of compensation and the low standard of compensatory payment. The State compensation is also limited to the victim who suffered torture. According to the Committee against Torture, however, the term “victim” includes affected immediate family members or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization.<sup>76</sup> As one of the five forms of redress, “guarantees of non-repetition” includes prompt and fair prosecution and punishment of perpetrators of torture. In its decision on Communication No. 212/2002 (*Kepa Urra Guridi v. Spain*), the Committee against Torture deemed the imposition of lighter penalties on, and the granting of pardons to, the perpetrators of torture to be incompatible with the duty to impose appropriate punishment under Art. 4 of CAT.<sup>77</sup> As mentioned, there is widespread impunity and lighter penalties for the perpetrators of torture in China. Therefore considerable gaps remain between the redress provided by China’s law for victims of torture and Art. 14 of CAT.

## VII. The Institutional Reasons for Unjust Cases

### 1. The “Trinitarian” System of Police Agency, Procuratorate and Court

It is worth recalling that whenever and wherever the wrongful convictions in the many unjust cases overturned in recent years occurred, the unlawful practices exist not only in police agencies but also in the procuratorates and courts. Legally, Art. 126 of the Constitution, Art. 5 of the Criminal Procedure Law, and Art. 4 of the Law on the Organization of the People’s Courts all stipulate explicitly that the people’s courts exercise judicial power independently. Similarly, under Art. 129 of the Constitution, Art. 5

<sup>75</sup> China Youth News, 7.2.2017, 4.

<sup>76</sup> General Comment No. 3 (note 39), para. 3.

<sup>77</sup> *Kepa Urra Guridi v. Spain* (note 39), paras. 6.7 and 6.8.

of the Criminal Procedure Law, and Arts. 5 and 9 of the Law on the Organization of the People's Procuratorates, the procuratorates shall exercise public prosecution power independently and shall exercise supervision over the investigatory activities of police agencies. There is, however, a great disparity between the legal provisions and judicial practice. At least in the unjust cases mentioned, the courts rarely exercised judicial power independently, and the procuratorates not only rarely exercised public prosecution power independently, but also gave up their function of supervision.

Most criminal defendants withdraw their confessions under torture in court, but the judge usually ignores the defendant's profession of innocence. The courts and the procuratorates prefer to cooperate actively with police agencies in cracking a criminal case and to deal together with criminal suspects or defendants, rather than to pay attention to the defendant's complaint about acts of torture. As the courts rely heavily on the defendant's coerced confession, the inevitable result is gross injustice.

The "*Du Peiwu* case" is typical in this respect. On 20.4.1998, a policewoman and a deputy director of police in Yunnan Province were found killed in a car. The policewoman's husband, *Du Peiwu*, who was a police officer at the drug rehabilitation center, became the principal suspect and was detained on 22 April. *Du* was forced to confess to the crime under torture during 16 days in the office of the criminal police unit. On 19.7.1998, when *Du* was taken to the detention house, he immediately withdrew his confession, wrote a complaint to the authorities and asked the procurator stationed in the detention house to take pictures of his injury under torture as evidence. When *Du Peiwu* appeared before the Intermediate Court Kunming on 1.1.1999, he asked the prosecutor to show his complaint and the pictures, but the prosecutor refused to show *Du's* complaint and said the pictures could not be found. In this situation, *Du* displayed the bloodstained garment that he wore inside when he was being tortured in the office of the criminal police unit as the evidence of acts of torture, but the judges ignored it. Curiously, shortly after *Du Peiwu* left the bloodstained garment in the court, the evidence disappeared.<sup>78</sup> *Du Peiwu* was incarcerated until 2000, when the real murderer was caught in the context of another case.

In the "*Du Peiwu* case", the officials including the police, prosecutors and judges responsible for the wrongful conviction not only violated China's domestic laws, but also the provisions of CAT. Despite the police committed the acts of torture, the consequences of their unlawful acts – false confession – still received the subsequently confirmation by the prosecutors and the judges. The prosecutors neither undertook prompt and impartial

<sup>78</sup> D. Wang/Y. Zeng (note 6), 17 et seq., 66.

investigations under Art. 12 of CAT, nor ensured the complaints of the victim of torture under Art. 13 of CAT. The judges not only cooperated with the prosecutors and blatantly ignored the complaints of the victim of torture, but also violated the exclusionary rule of illegally obtained evidence stipulated by Art. 15 of CAT for the wrongful conviction based on the defendant's coerced confession. Thus, it can be seen that the relationship between the public security organs, procuratorates and courts is mutual coordinate and close cooperation in handling a criminal cases. The "trinitarian" relationship of the three organs is an important characteristic of the Chinese criminal judicial system.

The "trinitarian" system of police agency, procuratorate and court make the correction of unjust cases extremely difficult. Correction of an unjust case may involve many personnel of the three organs, and police officers, prosecutors and judges are reluctant to reverse a torture-related unjust case for fear of punishment and demotion. Why must a wrongful conviction take so many years to be overturned? It is not due to the difficulty of finding the evidence of torture; it is due to institutional reasons, such as the integrative system of police agencies, the procuratorates and courts.

The aforementioned "*Huugjilt* case" is again typical. From the commission of the crimes on 9.4.1996, through the filing for investigation, approval of the arrest, examination and prosecution, public prosecution, trial proceedings, appeal, procedure for review of death sentences, to the execution of the death sentence on 10.6.1996, the whole judicial process took only 61 days. In contrast, correction of the wrongful conviction took 18 years! During this period, another alleged serial rapist and killer, *Zhao Zhibong*, was arrested in 2005 and admitted that he was the real murderer. As mentioned, the reports of a journalist from the Xinhua News Agency had caused leaders of the CPC and the SPC to be concerned, and the politics and law committee of the Inner Mongolia Autonomous Region set up a group to reexamine the "*Huugjilt* case" in March 2006. The "*Zhao Zhibong* case" was heard, but not as a public trial, on 28.11.2006. Nevertheless, of the ten cases of homicide that *Zhao Zhibong* was accused of, nine were indicted, the exception being the "*Huugjilt* case".<sup>79</sup> The "*Huugjilt* case" was not overturned until 2014. By this time, 18 years had passed after the execution of *Huugjilt*, and nine years had passed since the arrest of "the real murderer".

In response to a reporter's question about "what the problem was", the female judge *Sa Ren*, who was the deputy of the reexamination group of the

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<sup>79</sup> The Beijing News, 30.11.2014, A08.

Higher People's Court of Inner Mongolia Autonomous Region on "Huugjilt case", admitted that

"we have problems in the structure of judicial mechanism, that is, the police agencies, the procuratorate and courts didn't maintain a strict standard in every link, the courts were not able to check independently as well, the judicial idea was outdated, and the courts did not exercise the power to trial independently."<sup>80</sup>

On 3.8.2016, the Opinions of Advancing the Reform of the Trial-Centered Criminal Procedure System were issued jointly by the SPC, the SPP, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice. The Opinions seem to be a progress in the judicial reform, but cannot get rid of the institutional framework characterized by the "trinitarian" system of organs.<sup>81</sup>

## 2. The Role of Party Organs in Criminal Cases

There was a system of examination and approval of criminal cases by Party committees in China's courts at all levels from the 1950s to the 1970s. This system was abolished once by "Instructions on Guaranteeing the Implementation of the Criminal Law, the Criminal Procedure Law", which was issued by the CPC Central Committee (Document No. 64) on 9.9.1979. The system reappeared later, changed to the examination and approval of cases at all levels by the commissions for political and legal affairs of the CPC.<sup>82</sup> There is no legal basis for the status and role of the commissions for political and legal affairs of the CPC in criminal procedure under China's law; it is exclusively the documents of the CPC Central Committee that determine the functions of the commissions. As the Party's leading organ, one of its basic functions is to coordinate the working relationship of police agencies, procuratorates and courts. In practice, this coordinating role reinforces the structure of the joint handling of case investigations by police agencies, procuratorates and courts. Since the mid-1990s, the functions of

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<sup>80</sup> The Beijing News, 23.10.2015, A15.

<sup>81</sup> Under Art. 1 of the Opinions, "the people's courts, the people's procuratorates and the police agencies shall, in handling criminal cases, divide their functions, each taking responsibility for its own work, coordinate their efforts, and restrict each other to ensure accurate finding of facts of a crime in a timely manner, correct application of the laws, and punishment of criminal offenders, and ensure that no innocent person is investigated for criminal liabilities".

<sup>82</sup> B. Li, Rectification of Name for Judicial Independence, Global Law Review (Chinese magazine), No. 2 (2013), 24.

the commissions for political and legal affairs of the CPC have been extended continuously. It has become routine at all levels for the local chief of police to hold the post of the heads of the commissions for political and legal affairs of the CPC. Judicial interference by local commissions for political and legal affairs of the CPC has become serious.<sup>83</sup>

In some of the unjust cases caused by torture, the local commissions for political and legal affairs of the CPC have played the key role. In the “*She Xianglin* case”, the evidence that *She* murdered his wife was insufficient, and the opinions of the local court and the procuratorate of Jingzhou of Hubei Province differed. The commission for political and legal affairs of the CPC Jingmen City Committee convened a coordinating meeting of police agencies, procuratorates and courts on 9.10.1997 and decided to initiate public prosecution by the Jinshan county procuratorate. Following the instruction of the Party’s politics and law committee, the Jianshan county court convicted *She Xianglin* of murdering his wife and sentenced him to 15 years in prison on 15.6.1998.<sup>84</sup> In the “*Zhao Zuohai* case”, the Shangqiu City Procuratorate of Henan Province had returned the case file to the police agency twice because the evidence was insufficient in 1999. The commission for political and legal affairs of the CPC Shangqiu City Committee convened a coordinating meeting of police agencies, procuratorates and courts in August and September 2002 and decided to indict *Zhao* for murder. In consequence, the Shangqiu Intermediate People’s Court wrongfully sentenced *Zhao Zuohai* to death with a two-year reprieve on 5.12.2002.<sup>85</sup>

The local commission for political and legal affairs of CPC Committees was also a hindrance in the process of correcting some unjust cases. The “*Nie Shubin* case” in Hebei Province, the latest case overturned by China’s top court, is a typical example. *Nie Shubin*, a 21 year-old man from North China’s Hebei Province, was convicted of rape, murder, and sentenced to death by the Shijiazhuang Intermediate People’s Court on 15.3.1995. The Higher People’s Court of Hebei Province rejected *Nie*’s appeal and affirmed the original judgment on 25.4.1995. Two days later, *Nie* was executed. According to *Nie*’s lawyer, there was evidence that *Nie Shubin* was forced to confess under torture.<sup>86</sup> Ten years after *Nie*’s execution, another man who was already facing death sentence for an unrelated rape and murder, *Wang Shujin*, admitted his guilt and said that *Nie* was innocent. Even though the

<sup>83</sup> Y. Zhou, Study on the Reform of the Party Committees and the Commissions for Political and Legal Affairs of the CPC, Law Science (in Chinese), No. 5 (2012), 7.

<sup>84</sup> G. Wang, Law Enforcement Officials Deciding the Fate of She Xianglin, China News Weekly, 25.4.2005, 24 et seq.

<sup>85</sup> G. Liu, Review Zhao Zuohai Case, China News Weekly, 7.6.2010, 39 et seq.

<sup>86</sup> See <<http://china.caixin.com>>.

“real murderer” confessed, the local courts did not release the reexamination results. On 27.9.2013, the Higher People’s Court of Hebei Province ruled that *Wang Shujin* was not the real murderer in the “*Nie Shubin* case” and affirmed the original verdict. On 12.12.2014, the SPC assigned the Higher People’s Court of Shandong Province to review the “*Nie Shubin* case”. The latter found that there were too many questions about the previous trials to uphold the conviction and granted an extension for review of the case four times. Finally, at the suggestion of the Higher People’s Court of Shandong Province, the SPC decided in June 2016 to retry the case. On 2.12.2016, *Nie Shubin* was found innocent by the Second Circuit Court of the SPC based on unclear facts and insufficient evidence, though he had been executed 21 years ago. The court noted that *Nie*’s confession was also questionable.

The reasons that the correction of the “*Nie Shubin* case” took so long and was so difficult are complicated, but a main reason was constant interference by the head of the commission for political and legal affairs of the CPC Hebei Province Committee. In July 2016, *Zhang Yue*, who was the head of the commissions for political and legal affairs of the CPC Hebei Province Committee from 2008 to 2016, was expelled from the Party and removed from public office for corruption and for violation of the Party’s frugality code. He also interfered in judicial activities according to the statement of the Central Commission for Discipline Inspection of the CPC from 28.7.2016.<sup>87</sup> Obviously, *Zhang*’s “judicial interference” involved hindering the correction of the “*Nie Shubin* case”.<sup>88</sup> The “*Nie Shubin* case” has striking similarities to the aforementioned “*Huugjilt* case”.<sup>89</sup> On 20.4.2017, *Zhang Yue* stood trial at a court in east China’s Jiangsu Province for accepting bribes money and assets worth more than 157 million yuan (nearly 23 million US\$) between 2008 and 2016. *Zhang* made a statement to the court in which he pled guilty and expressed remorse.<sup>90</sup>

In brief, the extensiveness of acts of torture and the difficulty in correcting a wrongful conviction are fundamentally related to the Chinese criminal

<sup>87</sup> Honesty Outlook (Chinese magazine), No. 8 (2016), 17.

<sup>88</sup> Special report by *H. Zhao* (the reporter of business magazine Caixin), The Background of Turnaround of *Nie Shubin* case, see <<http://china.caixin.com>>.

<sup>89</sup> Namely: (1) Both cases resulted from an incident of rape and murder. (2) *Nie* and *Huugjilt* were sentenced to death and executed very soon afterwards. (3) In both cases, “real murderers” appeared many years after their execution. (4) Even though the “real murderers” admitted guilt in both cases, local courts insisted on confirming the original judgment. (5) The correction of the two unjust cases took a very long and difficult time: the “*Nie Shubin* case” took 22 years and the “*Huugjilt* case” 18 years.

<sup>90</sup> See <<http://www.ecns.cn>>.

judicial system. The Party organs also played an improper role in some criminal cases. Since 2012, there have been subtle changes in the functions of the commissions for political and legal affairs of the CPC.<sup>91</sup> Except Hunan Province, the heads of the commissions for political and legal affairs of the CPC in 31 provinces no longer held the post of the chiefs of the public security department by 2015.<sup>92</sup> There are 32 province-level administrative regions in mainland China, which include 23 provinces, 5 autonomous regions and 4 municipalities. However, the phenomenon of retrogression appears in 2017, the chiefs of the public security were appointed as the heads of the commissions for political and legal affairs of the CPC in 7 provinces.<sup>93</sup> At the highest level, the position of the head of the Political and Legal Affairs Commission of the CPC Central Committee, has been held by the Ministers of public security for three consecutive terms since 2002. This shows that the police organs are the most important in the Chinese criminal judicial system.

### 3. The Influence of the Soviet Mode

The cause and the formation of the “trinitarian” system and the special role of Party organs in criminal cases have a particular historical background. After 1949, the Chinese judicial system was influenced deeply by the Soviet mode. The new regime in China not only followed the Soviet legal system, but also adopted entirely the mode of legal theories of USSR. For instance, the legal theory of *Andrey Vyshinsky*, the most famous Soviet legal theorist during *Joseph Stalin’s* reign, dominated Chinese legal circles for decades. *Vyshinsky* was procurator general between 1935 and 1939, the period which included *Stalin’s* Great Purge, and he played a key role in the Moscow trials. According to *Vyshinsky*, the public hearing of cases by courts is the most critical and the most crucial moment in which to struggle against the enemy of socialism; all the activities of courts must obey the political goal of class struggle; and the evidentiary system is always full of the spirit of class struggle.<sup>94</sup> The courts and procuratorates are “the powerful organs of the dictatorship of the proletariat”; the task of the proletariat re-

<sup>91</sup> For instance, the local chiefs of police no longer hold the post of the heads of the commissions for political and legal affairs of the CPC in most provinces, but serve concurrently as the vice-governor instead. The Beijing News, 23.11.2014, A08-09.

<sup>92</sup> See <<http://china.caixin.com>> <<http://www.bjnews.com>>.

<sup>93</sup> See <<http://china.caixin.com>>.

<sup>94</sup> *A. Вышинский*, Теория судебных доказательств в советском праве, translated into Chinese by Z. Wang, Beijing: Law Press China, 1957, 24, 67.

volution was to be solved by means of administrative and judicial organs.<sup>95</sup> Logically, secret police agencies, the courts and procuratorates were also deemed to be the Party's tools for suppressing the class enemy.

Under the influence of the Soviet mode, the “trinitarian” system of police agencies, procuratorates and courts was formed in China under the leadership of the Party committees from the 1950s. During the “campaign of political purge of ‘hidden counterrevolutionaries’” in 1955, some local Party committees organized the personnel of police agencies, procuratorate and courts into the same group handling the case and conducted the method of work-package solution in criminal investigation, prosecution and trial.<sup>96</sup> After the “Anti-Rightist Campaign” in 1957 (a campaign of suppressing the criticism of intellectuals), local judicial and law enforcement agencies were under the direct leadership of local Party committees, and the lawyer system was abolished later. The Politics and Law Leading Group of the CPC Central Committee was set up in 1958, and most Party committees in the provinces established politics and law leading groups, which were in charge of coordinating the relationship of police, procuratorates and courts, and formed the system of examination and approval cases by Party's committees.<sup>97</sup> During the “Great Leap Forward” (1958-1960), many prefectures and counties combined police agencies, procuratorates and courts as “the department of public security of politics and law” and jointly handled case investigations.<sup>98</sup> For the sake of strengthening the centralized leadership of CPC and streamlining government organs, all the political-legal organs including the court, procuratorate, police agencies and the department of justice were incorporated under the direct leadership of Party. An absolutely centralized system under the leadership of Party within the political-legal organs was thereby established.<sup>99</sup>

In the ninth session of the national public security on 31.7.1958, the then Minister of Public Security, China's top police chief *Luo Ruiqing*, an-

<sup>95</sup> *A. Вышинский*, Всесоюзный институт юридических наук Министерства юстиции СССР, translated into Chinese by Q. Li *et al.*, Beijing: Law Press China, 1955, 15 et seq.

<sup>96</sup> *L. He/M. Lu* (eds.), Contemporary China: the People's Judicial Work (in Chinese), 1993, 238.

<sup>97</sup> *Y. Zhou*, The History and Evolution of the Politics and Law Committee, Yan Huan Historical Review (Chinese magazine), No. 9 (2012), 7. *J. Zhong*, Rethinking on the History and Evolution of the Politics and Law Committee, Yan Huan Historical Review (Chinese magazine), No. 12 (2012), 52.

<sup>98</sup> *Y. Yang/H. Chen* (eds.), The Legal History of the People's Republic of China (in Chinese), 1997, 780.

<sup>99</sup> *N. Tanaka*, China's Separation of the Party and the Government and the Task of the Rule of Law, in: K. Kondou/H. Wada (eds.), Reforms in Post-Maoist China and Perestroika: A Comparison (in Japanese), 1993, 262 et seq.

nounced that “for nine years, in the struggle against enemies, under the unified leadership of Party committees, the relationship of cooperating and checking each other of the police agencies, procuratorates and courts has been established and has played a very good role”.<sup>100</sup> The “enemies” that *Luo* referred to were tens of millions of “class enemies” or “the five black categories” (黑五类), which included landlord class, rich peasants, counterrevolutionaries, “bad elements” (mainly the adult children of those in the first three categories) and the “rightists” (during 1957 and 1958 over 550,000 intellectuals and others were labelled “rightist” due to critical statements, and more than half lost their jobs and were sent to re-education labor camps). In this way, the Chinese criminal judicial system was formed under the influence of the Soviet mode and for the “struggle against enemies”. The system has three features: the direct leadership of the Party, the “trinitarian” system of police agencies, procuratorates and courts, and the leading role of police agencies in criminal cases.

During the “Cultural Revolution” (1966-1976), the procuratorate was eliminated and its functions and powers were transferred to the police.<sup>101</sup> The Politics and Law Leading Group of the CPC Central Committee ceased to exist other than in name. The courts were unable to exercise judicial functions normally, and many unjust, false and erroneous cases resulted.<sup>102</sup>

After the “Cultural Revolution”, the procuratorial system and lawyer system were re-established in 1978 and 1979. The Politics and Law Leading Group of the CPC was also re-established and was renamed the Commission for Political and Legal Affairs of the CPC Central Committee in 1980, and all the Party committees of provinces, municipalities, counties and autonomous regions set up politics and law commissions as well.

Although the special cooperative relationship of police agencies, procuratorates and courts was not written into the current Constitution until 1982, it was formed and at work from the 1950s.<sup>103</sup> The SPC, the SPP and the Ministry of Public Security have not only jointly handled certain im-

<sup>100</sup> *R. Luo*, *The Work of People’s Public Security 1949-1959* (in Chinese), 1994, 423, 455.

<sup>101</sup> Under Art. 25 of the Constitution of 1975, the functions of procuratorates shall be exercised by public security organs.

<sup>102</sup> During the ten years of the “Cultural Revolution” (1966-1976), 970,000 ordinary criminal cases and 280,000 counterrevolutionary cases were sentenced. Upon reexamination after the “Cultural Revolution”, most of the counterrevolutionary cases were unjust, false and erroneous and one-tenth of ordinary criminal cases resulted in wrongful convictions. Most of these unjust, false and erroneous cases were sentenced by the military control offices of police agencies from 1968 to 1972. *Y. Yang/H. Chen* (note 98), 787.

<sup>103</sup> Art. 135 of the Constitution of 1982.

portant criminal cases, they have also jointly issued judicial interpretations and regulations frequently since the 1950s. As explained, the “trinitarian” system of police agencies, procuratorates and courts is an outcome of the negative influence of the Soviet mode and of the political and ideological “class struggle” of the mid-twentieth century. In effect, unjust, false and erroneous cases disclosed by the media in recent years have fully reflected the defects of the Chinese criminal judicial system. This system has impeded the courts in exercising judicial power independently and the procuratorates in exercising the public prosecution power or the function of supervision independently, and the pursuit of cooperative relations between the three organs has replaced the pursuit of judicial fairness.

In his report in March 2006, the UN Special Rapporteur *Manfred Nowak* also noted that

“one of the largest overall obstacles to eliminating torture in China is the institutional weakness and lack of independence of the judiciary, particularly in a context where police exercise wide discretion in matters of arrest and detention and are under great pressure to solve cases. Nor do there seem to currently be any truly independent monitoring mechanisms of places of detention or complaints mechanisms in China. The procuratorate is not perceived as an independent monitoring organ given its role in convicting suspects. Nor does the procuratorate have the requisite independence to meet the international criteria of a judicial officer authorized by law to exercise judicial power to take decisions on arrest.”<sup>104</sup>

## VIII. Prohibition of Torture: There Is Still a Long Way to Go

Progress has been admittedly made in the field of criminal justice in China in recent years, e.g. in the form of the revamped and improved litigation system; strictly enforced principles of legality, “*in dubio pro reo*”, and exclusion of unlawful evidence; treatment of crime suspects, defendants and criminals in a more civilized manner.<sup>105</sup> The Standing Committee of the NPC abolished the notorious system of re-education through labor in 2013. The Criminal Procedure Law, revised in 2012 has specific provisions on respecting and protecting human rights, includes clear strictures on forced

<sup>104</sup> E/CN.4/2006/6/Add.610, 10.3.2006, para. 75.

<sup>105</sup> New Progress in the Judicial Protection of Human Rights in China (white paper) issued by The State Council Information Office of the People’s Republic of China on 12.9.2016. See <<http://www.ecns.cn>>.

self-incrimination, improves the mechanism for excluding illegal evidence, enhances the advocacy system for defendants, sets norms for compulsory and investigative procedures, and strengthens the legal supervision of the people's procuratorates. Since 2013, the correction of wrongful convictions is no longer based solely on accidental reasons, namely "the real murderer was arrested" or "the dead came back to life"; it is increasingly based on a lack of evidence or "*in dubio pro reo*". Out of twelve seriously wrongful convictions corrected, only two were because the actual murderer appeared in 2014. This situation has reflected the change of the judicial idea of Chinese courts from "giving the accused partial benefit of the doubt" or "doubtful cases to be adjourned" to "*in dubio pro reo*".<sup>106</sup>

Nevertheless, none of the problems with the implementation of CAT discussed in this paper (such as the definition of torture, impunity, establishing impartial and effective mechanisms for investigations, complaints and redress) has been solved. Under Art. 2 (1) of CAT, China is obligated to act through legislative, administrative, judicial or other means to reinforce the prohibition against torture.<sup>107</sup> The Chinese Criminal Procedure Law has also not fully recognized the principles of the presumption of innocence and the prohibition of self-incrimination.<sup>108</sup> Recently, many people (public figures, lawyers, journalists, booksellers, etc.) charged with a criminal offence in China have admitted their guilt on TV. As these people lost thereby their personal freedom, the possibility of the methods of interrogation that caused severe mental pain or suffering on detainees can't be ruled out, and the admission of guilt on TV might as well be coerced confession. This sort of pretrial not only violates the principles of presumption of innocence and the prohibition of self-incrimination but also infringes these people's rights to defense and a fair trial.

Besides the aforementioned legislative inaction, there are problems with the timelag of legislation in China. For example, though Art. 15 of CAT clearly provides "that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings",

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<sup>106</sup> D. Shen, On "in Dubio Pro Reo", The China Legal Science No. 4 (2013), 6 et seq.

<sup>107</sup> General Comment No. 2, (note 19), para. 2.

<sup>108</sup> For instance, the document entitled "Decision of comprehensively advancing the Rule of Law" adopted by the fourth plenary session of the 18<sup>th</sup> CPC Central Committee on 23.10.2014, referred only to implementation of "*in dubio pro reo*" and did not mention the presumption of innocence. See <<http://news.xinhuanet.com>>. There are also differences between Art. 12 of the Criminal Procedure Law and the principle of presumption of innocence. Although Art. 50 of the Criminal Procedure Law (Revised in 2012) provides that "no one shall be forced to prove his guilt", however, under Art. 118, "the criminal suspect shall answer the investigators' questions truthfully".

China did not enact any domestic legislation implementing the exclusionary rule until the revision of Criminal Procedure Law in 2012.<sup>109</sup> By this time, 24 years had passed after its ratification of CAT, and most unjust cases were based on illegal evidence obtained by torture during the period. As a matter of fact, it was the “*Zhao Zuohai* case” that led to the acceptance of the exclusionary rule in China.<sup>110</sup> Legislative inaction or a long timelag after ratification of a human rights treaty is relatively common in countries where treaties may not be invoked directly by individuals as a basis of legal rights before the domestic courts.<sup>111</sup> Nevertheless, failure to give required domestic effect to the obligations of a treaty would result in a breach of the treaty, for which the State party would be responsible in international law.<sup>112</sup>

More importantly, as regards the main institutional reasons for unjust cases caused by torture in China, such as the “trinitarian” system of police agencies, procuratorates and courts as well as the lack of independence of the judiciary, there is no sign of institutional reform. Despite the fact that under China’s law, courts exercise judicial power independently,<sup>113</sup> as the touchstone of the rule of law, the principle of judicial independence has never been established in China. For example, though the first PRC Constitution in 1954 provided that “the people’s courts exercise judicial power independently, only obey law” (Art. 78), this provision in reality existed in name only: during the “Anti-Rightist Campaign” in 1957, many judges and legal experts were labelled “rightist” due to their proposition of judicial independence or independence of trial, the concept of judicial independence

<sup>109</sup> Under Art. 54 of the revised Criminal Procedure Law, “the representations from the criminal suspect and the defendant obtained by illegal means such as extortion of confession by torture, and witness statement and the representations of the victim obtained by illegal means such as force and coercion shall be excluded”.

<sup>110</sup> Before 2010, the exclusionary rule had been written into the judicial interpretations of the SPC (1998) and the SPP (1999). These interpretations had, however, little actual impact because they were not binding upon the police. On 13.6.2010, approximately one month after the disclosure of *Zhao Zuohai*’s wrongful conviction, the SPC, the SPP, Ministry of Public Security, Ministry of State Security and Ministry of Justice jointly promulgated the “Regulations on the Exclusion of Illegally Obtained Evidence in Criminal Cases”. *I. Belkin*, China’s Tortuous Path toward Ending Torture in Criminal Investigations, *Columbia Journal of Asian Law* 24 (2011), 287 et seq.

<sup>111</sup> For example, the United Kingdom ratified European Convention on Human Rights in 1953, but it did not enact legislation to transform the Convention into domestic law until 1998.

<sup>112</sup> *R. Jennings/A. Watts* (eds.), *Oppenheim’s International Law*, 9<sup>th</sup> ed. 1992, Vol. 1, 60 et seq.

<sup>113</sup> Art. 126 of the Constitution, Art. 5 of the Criminal Procedure Law, Art. 4 of the Law on the Organization of the People’s Courts. According to the Decision on Comprehensively Advancing the Rule of Law adopted by the CPC Central Committee on 23.10.2014, China will also establish a mechanism by which officials will be given demerits or be held accountable if they are found illegally interfering in judicial cases. See <<http://news.xinhuanet.com>>.

was publicly criticized. On 9.10.1957, an editorial in the *People's Daily*, the official newspaper of the CPC central committee, stated that

“in order to resist the leadership of our Party on political-legal work, the rightists also put forward a slogan of ‘judicial independence’ or ‘independence of trial’ and attempted to place judicial system in contradiction to people’s democratic dictatorship.”<sup>114</sup>

Since then, the term “judicial independence” disappeared completely from mainland China. During “the Cultural Revolution”, the Constitution of 1975 deleted the clause “the people’s courts exercise judicial power independently”. After “the Cultural Revolution”, by the early 1980s, the judicial independence became a positive word. The current Constitution of 1982 restores the provision that “the people’s courts exercise judicial power independently” (Art. 126). The term judicial independence was officially accepted and frequently appeared in the Party newspaper *People's Daily* for two decades. However, the concept of judicial independence has become a taboo again since 2008.<sup>115</sup>

The first sign was in a lecture to a seminar hosted by the Central Commission for Political and Legal Affairs of the CPC on 17.7.2008 by the then Dean of PKU Law School. *Zhu Suli* warned that

“by emphasizing separation of powers and judicial independence to weaken and even reject the leadership of CPC, actually is one of core contents of the overseas hostile forces to undermine Chinese Socialist Construction and legal construction, we must be sufficiently vigilant”.<sup>116</sup>

*Zhu* fired the first shot in publicly rejecting the judicial independence since the reform and opening up. It was not an ordinary seminar, because 450 participants of the seminar were the top leaders of the SPC, the SPP, grand justices, principal procurators,<sup>117</sup> and the high officials of the Central Commission for Political and Legal Affairs of the CPC.

Since the 18<sup>th</sup> CPC National Congress in 2012, the term judicial independence has become a target. The CPC has officially denied the concept of judicial independence since 2013.<sup>118</sup> On 14.1.2017, the SPC’s president

<sup>114</sup> There Is a Serious Struggle in the Front of Politics and Law, *People's Daily*, 9.10.1957, 1.

<sup>115</sup> *G. Qian*, Who Wants to Sentence “Judicial Independence” to Death, FTChinese, 19.1.2015, <<http://next.ftchinese.com>>.

<sup>116</sup> See <<http://news.china.com>>. About the comprehensive critique on this lecture, see *R. Gong*, The Origins of the Rule of Law, *Law Science* (Chinese magazine), No. 1 (2009), 8 et seq.

<sup>117</sup> Both judges and procurators are divided into twelve grades in China. The judges of first and second grade are grand justices (大法官); the procurators of first and second grade are principal procurators (大檢察官).

<sup>118</sup> *G. Qian* (note 115).

Zhou Qiang said at a meeting attended by the heads of higher people's courts nationwide that courts must resist the wrong ideology from the West (such as constitutional democracy, separation of powers and judicial independence) and stand firm on the rule of law with Chinese characteristics.<sup>119</sup> It might seem absurd for the top justice to warn against the “Western trap” of judicial independence, but his speech reflected the reality of the Chinese judicial system and fitted in with the ideology of the CPC.

The primary reason that these concepts of “constitutional democracy”, “separation of powers” and “judicial independence” have been resisted by the Chinese authorities is the influence of the ideology and system of the former Soviet Union. During the 1950s, mainland China realized “overall Sovietization”. Since it follows the Soviet constitutional model (especially *Stalin's* Constitution of 1936), China's National People's Congress system takes the form of a “combination of legislation and execution” and refuses the principle of separation of powers. Similarly, according to the Soviet political model of the one-party system, the rule or the leadership of the Communist Party is a paramount principle; even the NPC as the “the highest organ of state power”, stipulated by Art. 57 of the Constitution, must be under the leadership of the CPC. Thus there is no constitutional or political basis for judicial independence under the Soviet mode. China has reformed the Soviet economic model since 1978, but it has been maintaining the Soviet constitutional and political model. The Chinese authorities have until now considered the Soviet mode as the basic standard of socialism. According to the Chinese official view, after the disintegration of the Soviet Union and radical change in Eastern Europe, the “socialist countries” have dropped from 15 to five, namely China, Vietnam, Cuba, North Korea and Laos.<sup>120</sup> The five countries are still maintaining the Soviet model of the one-party system, though they have developed their own characteristics. In fact, “*Marxism*” in China means essentially “*Leninism*” or “*Stalinism*” and the thoughts of CPC's leaders. However, the contradictions between the rule of law and the Soviet model are difficult to reconcile. As a matter of fact, it is impossible to reconcile because the Soviet model emphasizes the absolute leadership of the unique ruling party, insists the dictatorship of the proletariat unrestricted by any laws,<sup>121</sup> and rejects judicial independence

<sup>119</sup> See <<http://www.ecns.cn>>.

<sup>120</sup> H. Jiang, *World Socialism in 21st Century: New Pattern, New Feature and New Trend*, *World Socialism Studies* (Chinese magazine), No. 1 (2016), 54. S. Xun et al., *Research Summary on World Socialism in 2014*, *Contemporary World and Socialism* (Chinese magazine), No. 2 (2015), 199 et seq.

<sup>121</sup> In his article titled “The Proletarian Revolution and the Renegade Kautsky” in 1918, V. I. Lenin wrote that “[t]he revolutionary dictatorship of the proletariat is rule won and main-

and separation of powers. That is why there is no precedent that one “socialist country” of the Soviet model has established the rule of law in the last hundred years since the October Revolution of Russia.

While the concept of judicial independence has Western origins,<sup>122</sup> it should not be regarded simply as a “Western value”. Judicial independence has become a fundamental element of the rule of law in modern states. The independence of judges is also the capstone of the rule of law and constitutional democracy.<sup>123</sup> The independence of every judge is the core content of judicial independence. After the Second World War, the principle of judicial independence has in fact become an important component of human rights, particularly the right to a fair trial. For instance, many universal human rights instruments contain the clause of judicial independence, such as Art. 10 of the Universal Declaration of Human Right, Art. 14 of the International Covenant on Civil and Political Rights and Basic Principles on the Independence of the Judiciary of 1985.

*Karl Marx* stated in his criticism of Prussia’s censorship in 1842 that

“[t]he censor has no law but his superiors. The judge has no superiors but the law.” (“Der Censor hat kein Gesetz, als seinen Vorgesetzten. Der Richter hat keinen Vorgesetzten, als das Gesetz.”)<sup>124</sup>

Ironically, all countries of the Soviet mode have maintained tougher censorship and denied judicial independence completely. In politically sensitive cases, all the judges of these countries usually have no law but his superiors.

It is still difficult to ensure the independent and impartial exercise of the judicial and procuratorial power in China due to a lack of the rule of law. Although the Amendment of Constitution in 1999 added the term “rule of law”,<sup>125</sup> the concept of the “rule of law” used in China is very different from Western countries’ and the international community’s as well. For instance, according to the “Decision of comprehensively advancing the rule of law”, adopted by the fourth plenary session of the 18<sup>th</sup> CPC Central Committee on 23.10.2014, the main aim of the Party is to “form a system serving the socialist rule of law with Chinese characteristics”. The next day, a *Peo-*

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tained by the use of violence by the proletariat against the bourgeoisie, rule that is unrestricted by any laws.”, in: *The Collected Works of Lenin*, Vol. 35, 1985, 237.

<sup>122</sup> The English Act of Settlement (1701) is the first known law that guarantees the independence of judges; French lawyer and philosopher *C. L. Montesquieu*’s “*De l’esprit des lois*” (1748) is the first book that systematically discussed separation of powers and judicial independence.

<sup>123</sup> *K. Loewenstein*, *Political Power and the Governmental Process*, 1957, 228.

<sup>124</sup> *K. Marx/F. Engels*, *Gesamtausgabe (MEGA)*, 1975, Bd. I, 154.

<sup>125</sup> Para. 1 of Art. 5 of the Constitution reads: “the People’s Republic of China practices ruling the country in accordance with the law and building a socialist country of law”.

*ple's Daily* editorial was published that stated that the CPC's leadership is "the most fundamental feature of socialism with Chinese characteristics" and "the most fundamental guarantee" for advancing rule of law comprehensively.<sup>126</sup>

The Chinese traditional word "*fa zhi*" (法治) (to rule according to law) is a very old, originating from the legalist school during the Spring and Autumn Warring States period (770-221 BC). Legalists tried to persuade some kings of vassal states to use law as means of governing states contending for hegemony.<sup>127</sup> The word "*fa zhi*" used by the legalist school means in essence "rule by law", which was a meaning opposed to the *Confucian* theory of "rule by virtue". The "law" advocated by the legalist school mainly referred to the criminal law. The ideas of revering the monarch, weakening people and exacting severe punishment were the main tenets of the legalist school.<sup>128</sup> Since the early twentieth century, with the translation and introduction of Western legal theories, the Chinese word "*fa zhi*" has become a polysemous word that has different meanings including the rule by law and the rule of law. In contemporary China, the word "*fa zhi*" or "rule of law", as used officially, means primarily the rule by law, not the rule of law. Under the rule by law, the law is mainly the means of governing a country, and any state, including authoritarian states or even totalitarian states, can be realized. The principle of the rule of law, characterized by the supremacy of law, limiting state power, the separation of powers and judicial independence, which have not been recognized by the Chinese authorities, is the opposite of despotism.

Since the British constitutional scholar *A. V. Dicey*,<sup>129</sup> there have been many definitions of the rule of law, of which the following definition by the International Commission of Jurists' Act of Athens of 1955 is widely accepted, namely:

1. the State is subject to the law.
2. Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement.

<sup>126</sup> People's Daily, 24.10.2014, 3.

<sup>127</sup> *Y. Yang*, *Yanzi's Spring and Autumn Annals*, (晏子春秋), Vol. 1. Ch. 1 (9); Han Feizi, (韩非子), Vol. 17, Ch. 43.

<sup>128</sup> Han Feizi, (韩非子), Vol. 4, Ch. 4 and Vol. 19, Ch. 49; *The Book of Lord Shang* (商君书), Vol. 4, Ch. 17 and Vol. 20, Ch. 20.

<sup>129</sup> *A. V. Dicey*, *Introduction to the Study of the Law of the Constitution* [first published in 1885], 1982, 107 et seq. *Dicey's* was the first prominent modern formulation and analysis of the rule of law in a liberal democratic system. See *B. Z. Tamanaha*, *On the Rule of Law: History, Politics, Theory*, 2004, 63.

3. Judges should be guided by the Rule of Law, protect and enforce it without fear or favor and resist any encroachments by governments or political parties on their independence.

4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial.”<sup>130</sup>

Chinese authorities have not, however, accepted this definition. Take only the topic of this paper as an example. Firstly, as mentioned, the local commissions for political and legal affairs of the CPC has played the key role in some unjust cases caused by torture, but it is impossible to investigate the legal responsibility of the Party’s organs. This means that the Party is still above the law.

Secondly, Chinese authorities have not accepted the complaint of the victim of torture as a legal right, and they have not provided impartial and effective means or mechanisms for investigations, complaints and redress for the victims of torture.

Thirdly, Chinese authorities have, as mentioned, denied the principle of judicial independence until today. While everyone has the right to a fair trial, it is impossible to have one without judicial independence. This is not only the common sense of a modern civilized society, but also the bitter lesson of contemporary China.<sup>131</sup>

Finally, there is no self-governance or autonomy system for the legal profession in China, all lawyers being subject to the control and monitoring of judicial administrative organs. Recently, there has been a trend to control lawyers intensively. For example, the Administrative Measures for Law Firms, revised in 2016 by the Ministry of Justice, added many new provisions. Under Art. 3.1,

“a law firm shall regard supporting the leadership of the CPC and the socialist rule of law as the fundamental requirement in its practice”.

Under Art. 50.6, law firms shall not indulge their lawyers who

“express [...] or spread [...] the opinions that deny the fundamental political system and basic principles determined in the Constitution”.

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<sup>130</sup> Bulletin of the International Commission of Jurists 4 (1955).

<sup>131</sup> R. Gong (note 116), 8 et seq.

The difficult situation of Chinese human rights lawyers attracted the attention of the Committee against Torture.<sup>132</sup> Some lawyers have been tortured, too.<sup>133</sup>

Even a Western country such as the United States, which has long established the rule of law and the principle of prohibition of torture, is still facing a serious challenge from presidential power. The new president *Trump* publicly mocked Judge *James L. Robart*, the federal district court judge who stayed the President's ban on travel for individuals from seven predominantly Muslim countries, and expressed contempt for the deliberations of the three-member appellate court convened to review *Robart's* order, showing his disregard for judicial independence and the rule of law.<sup>134</sup> During the presidential campaign, Mr. *Trump* was hoping to resume waterboarding, too.<sup>135</sup> It seems that sustaining the rule of law is a permanent concern in such countries as well.

In contrast, the first task for China is to establish the rule of law. China will find it difficult to prevent and punish acts of torture as long as it is not established. To this end, China should get rid of the negative influence of the Soviet mode, namely de-Sovietization, deepen the reform of the criminal justice system and start the transition from rule by law to rule of law. As the preamble of the Universal Declaration of Human Rights points out, "human rights should be protected by the rule of law".

As explained, the main cause of the criminal unjust cases in China has been torture. Nevertheless, preventing unjust cases should not be the only purpose of the prohibition of torture. What is more important is protecting the dignity and the physical and mental integrity of the individual.<sup>136</sup> If the purpose of the prohibition is limited to preventing wrongful convictions, it will tolerate acts of torture so long as the torture did not cause the conviction of an innocent person. Both the acts of torture and the wrongful convictions will persist. Indeed, it is possible that anyone, including the police, judges and high officials, might become a victim of torture.

<sup>132</sup> In its concluding observations on the fifth periodic report of China in 2015, the Committee against Torture requested that China stops sanctioning lawyers for actions taken in accordance with recognized professional duties. CAT/C/CHN/CO/5, 3.2.2016, paras. 19 and 61.

<sup>133</sup> *C. Buckley*, Punches, Kicks and the "Dangling Chair": Detainee Tells of Torture in China, *The New York Times*, 20.1.2017, A3.

<sup>134</sup> See *M. Minow/R. Post*, Standing up for "so-called" law, *The Boston Globe*, 10.2.2017. See <<https://www.bostonglobe.com>>.

<sup>135</sup> "Trump's Flirtation with Torture", *Los Angeles Times*, 27.1.2017, Editorial Desk; Part A; Pg. 14.

<sup>136</sup> General Comment No. 20 by the Human Rights Committee in 1992, HRI/GEN/1/Rev.9, Vol. 1, 27.5.2008, 200, para. 2.

In order to respect human dignity and protect the rights of everyone, everybody including an actual criminal as a human being, should enjoy the freedom from torture, whatever its intent may be. This is the object and purpose of the Convention against Torture and should also be the bottom line of criminal justice.