

CHINESE LAW

THE CHINESE CRIMINAL DEFENCE SYSTEM: A COMPARATIVE STUDY OF A SYSTEM IN REFORM

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This paper examines some recent steps taken in mainland China towards providing a better system of justice for criminal defendants and considers how effective these reforms are in practical terms. Many of the reforms contained in the Criminal Procedure Law of 1996 were intended to introduce aspects of the adversarial system of justice to the prevailing system. However, the safeguards introduced often lack the necessary guarantees to ensure compliance. To demonstrate the need for mainland China to adopt further reforms, the author compares aspects of the criminal justice system in mainland China with that of the common law jurisdictions of Hong Kong, the United Kingdom, and Australia (Victoria), in four key areas: (1) the collection and admissibility of illegally obtained evidence; (2) the duty of disclosure placed on the prosecution and the defendant's right to all material evidence; (3) the defendant's right to competent and adequate legal advice and representation and (4) the presumption of innocence.

Introduction

Many of the reforms contained in China's Criminal Procedure Law of 1996 were intended to introduce aspects of the adversarial system of justice to the prevailing system, which although not inquisitorial, *per se*, has the European civil law at its roots. Although the introduction of some important cornerstones of the adversarial system is laudable the safeguards introduced often lack the necessary guarantees to ensure compliance. In this article I will demonstrate the need for China to adopt further reforms by comparing aspects of the criminal justice system in China with that of the common law jurisdictions of Hong Kong, the United Kingdom, and Australia, (specifically the State of Victoria), in four key areas: (1) the collection and admissibility of illegally obtained evidence; (2) the duty of disclosure placed on the prosecution and the defendant's right to notice of all material evidence; (3) the defendant's right to competent and adequate legal advice and representation and (4) the presumption of innocence.

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The Collection and Admissibility of Illegally Obtained Evidence

Hong Kong

In accordance with the common law, the courts of Hong Kong may exclude evidence which is otherwise admissible, where its admission would deny the accused a fair trial. Illegally obtained evidence is not *prima facie* inadmissible and may be relied on by the prosecution unless it offends against the approach described by Lord Scarman in the House of Lords decision *R v Sang*.¹ That approach provides that, save with regard to admissions and generally with regard to evidence obtained from the accused after the commission of an offence, a judge has no discretion to exclude relevant admissible evidence on the ground that it was obtained by improper or unfair means. However, a trial judge in a criminal trial always has the discretion to refuse to admit evidence if its prejudicial effect outweighs its probative value.²

The approach was endorsed by Hong Kong's Court of Final Appeal in the case of *The Secretary for Justice v Lam Tat-ming*.³ In that case the Hong Kong Chief Justice stated that a judge could exercise his discretion to exclude evidence which would deny the accused a fair trial because its prejudicial effect outweighed its probative value or it was obtained unfairly or by deception. Unfairness should be judged in the light of all the material facts and circumstances of the case.⁴ The Hong Kong Court of Appeal has held that the mere fact investigators in Hong Kong have used deception will not ensure evidence is excluded. Evidence obtained by deception will however be excluded if the deception has precluded a fair trial.⁵

Further, section 6(1) of the Hong Kong Bill of Rights Ordinance provides that where a court hears proceedings in which a violation of the Hong Kong Bill of Rights is alleged the court may grant such remedy or relief, or make such order, as it considers appropriate and just in the circumstances.⁶ The Bill of Rights guarantees such rights as the right to privacy⁷ and the right to a fair trial.⁸ However, section 6(1) is not used to exclude evidence which would be otherwise admissible under common law principles.

Where the admissibility of a confession is challenged, the Hong Kong courts consider first whether the confession was voluntarily made. The original classic statement on voluntariness was made by Lord Sumner in the

¹ [1980] AC 402.

² *Ibid.*, p 435.

³ *The Secretary for Justice v Lam Tat-ming* [2000] 2 HKLRD 431.

⁴ *Ibid.*, p 444.

⁵ *R v Lam Ka-fai* [1995] 1 HKCLR 155

⁶ *R v Cheung Ka-fai and Yeung Hing-yu* [1995] 3 HKC 214.

⁷ Hong Kong Bill of Rights, Art 14.

⁸ *Ibid.*, Art 10.

Privy Council case *Ibrahim v R*.⁹ It provides that a voluntary confession should not have been obtained either by fear of prejudice or hope of advantage, exercised or held out by a person in authority.¹⁰ To this definition has been added the requirement that a confession has not been obtained by oppression,¹¹ or by deception.¹² What constitutes oppression will vary according to the circumstances of the case and the offender.

Even where a confession is judged to have been voluntarily made, the court may still exclude the confession in its residual discretion, in order to secure a fair trial for the accused. The discretion to exclude a voluntary confession for unfairness is exercised rarely as most unfair conduct by police would render the confession involuntary.¹³

The United Kingdom

Section 78 of the Police and Criminal Evidence Act 1984 states that:

“In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”

Section 82(3) of the Police and Criminal Evidence Act 1984 states that:

“Nothing in this part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.”

Section 82(3) specifically retains the court's power at common law to exclude relevant evidence if it is necessary in order to secure a fair trial for the accused. Thus legislation, along with common law precedent, provided in decisions such as *R v Sang*,¹⁴ have combined to provide an English judge with the discretion to exclude evidence for unfairness to the accused. Whilst the English courts, in exercising this discretion, are ready to exclude a confession

⁹ *Ibrahim v R* [1914] AC 599.

¹⁰ *Ibid.*, at p 609.

¹¹ *DPP v Ping Lin* [1976] AC 574.

¹² *R v Lam Yip-ying* [1984] HKLR 419.

¹³ *Ibid.*

¹⁴ See n 1 above.

on the basis of involuntariness, in the case of real evidence the courts are far less likely to exercise the discretion to exclude the fruits of an improper search unless the police have acted in bad faith.¹⁵ In Scotland the discretion is exercised more readily in favour of the accused with illegally obtained evidence *prima facie* excluded by the court unless there is reason to allow it.¹⁶

The English Court of Criminal Appeal has the power under section 2 of the Criminal Appeal Act 1968 to allow a defendant's appeal against his conviction where it finds the conviction is unsafe. One of the most common grounds for allowing an appeal against conviction is that the trial judge wrongly exercised his discretion to admit evidence at trial which should have been excluded for unfairness. In determining the appeal the Court of Appeal will consider whether the evidence was indeed wrongly admitted by the trial judge and whether this has rendered the conviction unsafe. On allowing an appeal the appellate court quashes the conviction and directs the court of trial to enter a verdict of acquittal except in those cases where it orders the defendant to be retried.

Australia

The position taken by the Australian courts is that the law should not condone the use of evidence obtained illegally or improperly whether confessional or real.¹⁷ A confession will be excluded if it was obtained in unfair circumstances.¹⁸ Exercising its discretion to exclude real evidence gathered illegally or improperly the court relies on broad questions of public policy and takes into consideration such matters as whether the investigator's unlawful act was based on a mistaken belief or deliberate disregard of the law,¹⁹ the seriousness of the offence charged²⁰ and whether there is any other evidence inferring guilt.²¹

Similar to the position in the United Kingdom, the Victorian Court of Appeal, (there is a Court of Appeal in each Australian state), must allow a defendant's appeal against conviction where it finds what is termed a "miscarriage of justice."²² On allowing the appeal the Court has the power to quash the conviction and enter a verdict of acquittal or order a new trial.²³ In determining whether to order a retrial the appellate court will consider the length and complexity of the retrial and inadequacies in the prosecution's

¹⁵ *R v Khan, Sakkaravej and Pamarapa* [1996] Crim LR 508.

¹⁶ *Lawrie v Muir* 1950 JC 19.

¹⁷ *Cleland v R* (1982) 151 CLR 1.

¹⁸ *McDermott v R* (1948) 76 CLR 501.

¹⁹ *R v Edelsten* (1990) 21 NSWLR 542 at 557.

²⁰ *R v Addabbo* (1982) 33 SASR 84 at 98.

²¹ See n 19 above.

²² Section 568(1) Crimes Act 1958 Victoria.

case that would affect the jury's ability to return a reliable verdict.²⁴ The Federal Court of Australia ruled in *R v Tran*²⁵ that it is contrary to the interests of justice to order a new trial where the evidence at the original trial was insufficient to warrant a conviction. Nor is an order for retrial available to afford the Crown an opportunity to make out a different case from that not made at trial.²⁶ The Victorian Court of Appeal has held that it should not be thought that merely because there is evidence upon which the appellant might be convicted on a retrial, that such a retrial should be ordered as a matter of course.²⁷ There may be sound reasons why, as a matter of discretion, the Crown should not be permitted a second opportunity to present a case against an accused who has already once been the victim of a miscarriage of justice.²⁸

The PRC

The Chinese leadership has been reluctant to provide procedural safeguards for criminal defendants as the general view is that such safeguards may allow the defendant to escape conviction through technical loopholes. This attitude, of not allowing technicalities to stand in the way of convictions, is illustrated by the lack of interest taken by the National People's Congress in legislating to safeguard against the use of illegally obtained evidence in criminal trials.

Article 42 of the Criminal Procedure Law 1996 provides that all facts that prove the true circumstances of a case shall be in evidence. However Article 43 forbids the extortion of confessions by torture and collection of evidence by threat, enticement, deceit or other unlawful means. The missing piece is that the law is silent on the question of admissibility when evidence illegally or improperly collected is challenged. If the trial judge is not required by law to consider the exclusion of illegally obtained evidence and no direction is provided on when to exclude it, there is no real incentive placed on the prosecution not to rely on such evidence at trial. A recent decision of the Supreme People's Court suggests that the court is not prepared to accept that the prosecution's reliance on illegally obtained evidence should effect the verdict or sentence. In a case heard in December 2003, the Supreme People's Court exercised its power under Article 205 of the Criminal Procedure Law 1996, to retry and sentence gang leader Liu Yong. The court ordered his immediate

²³ *Ibid.*, s 568(2). The Court also has the power under ss 568 and 569 to quash the conviction in relation to part of the indictment and affirm or modify the sentence for other counts, substitute a verdict and sentence for a different offence or in place of a special verdict or quash the sentence if it finds the appellant was insane at the time of the commission of the offence.

²⁴ *R v Wilson and Grimwade* [1995] 1 VR 163, at 181.

²⁵ *R v Tran* 118 A Crim R 218.

²⁶ *R v Wilkes* (1948) 77 CLR 511, at 518.

²⁷ *R v Bartlett* [1996] 2 VR 687 at 699.

²⁸ *Sams v The Queen* (1990) 46 A Crim R 468.

execution. This marked the first occasion the Supreme People's Court had ever seen fit to retry a case pursuant to Article 205. Article 205 requires the court to find that a lower court has made a definite error in a judgment or order before a retrial will be held. The lower court in this case had previously sentenced Liu Yong to execution, but had suspended the sentence, after evidence had been presented suggesting his confession had been gained under torture.

Where there have been violations of litigation procedures that may have hampered the impartiality of a trial an appellate court has the power to rescind the decision of a lower court²⁹ but has no power to quash a conviction for miscarriage of justice and direct a verdict of acquittal. Where the court finds such abuses have occurred, the best a defendant can hope for is that the appellate court will remand the case back to the lower court for retrial. Similarly under Article 204, where a judgment is based on evidence which is later found to have been unreliable, there may be ground for a retrial, under the procedure for trial supervision, but a conviction cannot be overturned and execution of the lower court's judgment is not suspended pending the re-trial hearing.³⁰

While fear that stringent procedural fairness will erode crime control and law enforcement continues to prevail in the PRC simply banning the collection of evidence by illegal means will not be enough to ensure safe convictions. The rights of the defendant to a fair trial will continue to be sacrificed until illegally and improperly obtained evidence is routinely challenged and excluded from admission.

The Prosecution's Duty of Disclosure

Hong Kong

The prosecution has a duty of disclosure at common law and in accordance with statute. An additional foundation of the duty is provided by Articles 39 and 87 of the Basic Law and Article 11(2) of the Hong Kong Bill of Rights.³¹ The duty exists whether or not the accused intends to enter a plea of guilty.³²

The duty of the prosecution to give adequate disclosure of its case to the accused is described in "The Statement of Prosecution Policy and Practice 2002" issued by the Department of Justice. At paragraph 18.4 of the Policy it

²⁹ Criminal Procedure Law 1996, Article 191.

³⁰ *Ibid.*, Art 203.

³¹ *HKSAR v Lee Ming-tee* (No 2) [2004] 1 HKLRD 513.

³² *R v Smith (Matthew)* [2004] EWCA Crim 2212.

is stated that the prosecution must disclose to the defence all the material in their possession which may be of relevance to the defence.

If the prosecution does not make adequate disclosure, the defence may apply to the court to stay proceedings to allow for adequate disclosure or may appeal a conviction following inadequate disclosure.³³

The prosecution may object, however, to the production of certain materials on the grounds of public interest immunity. Paragraphs 18.5 and 18.7 of the Policy describe the procedure by which the prosecution may claim this kind of immunity. The prosecution must tell the defence that they are applying to have material excluded from the duty of disclosure on the basis of public interest immunity. The defence may make representations to the court that the material should be disclosed. The court will make the final decision on whether the application for public interest immunity should be upheld.

The prosecution is required to disclose all relevant material evidence which will not be the subject of an application for public interest immunity. Mason PJ in *HKSAR v Lee Ming-tee (No 2)* described the duty as requiring the disclosure of all relevant material which may undermine the prosecution case or advance the defence case. The duty is not limited to disclosing only admissible evidence.

Whether evidence is “material” was clarified in the case of *R v Keane*.³⁴ That decision is specifically referred to in paragraph 18.6 of the Prosecution Policy. The test laid down for establishing whether evidence is material was originally given by Jowitt J in the unreported decision of *R v Melvin*. In that case Jowitt J stated:

“I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution

- (1) to be relevant or possibly relevant to an issue in the case,
- (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposed to use, and
- (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).”

The test was endorsed in *HKSAR v Lau Ngau-chu*.³⁵

The Policy provides, at paragraph 18.8, that any unused material in the possession of the prosecution; for example a statement of a witness which contains information inconsistent with the evidence he is expected to give, must be disclosed. But at paragraph 18.10 the Policy states that the duty to

³³ Section 83(1)(b) of the Criminal Procedure Ordinance.

³⁴ [1994] 1 WLR 746.

³⁵ [2002] 2 HKC 591.

disclose does not extend to require the prosecution to conduct the case for the defence and there is no duty to disclose material relevant only to the credibility of a defence witness, for example, material adverse to the credibility of an alibi.

On the appeal from the magistracy, *HKSAR v Chong Ho Yin*,³⁶ it was held that the prosecution's failure to disclose a material medical report, which they decided not to use at trial, was a material irregularity which rendered the conviction unsafe. The court also stated that the duty of disclosure was the same whether the trial was conducted summarily or on indictment. Where unused material is relevant to a fact in issue the prosecution has a duty to disclose it.

The prosecution's duty to disclose is ongoing and arises whether the defence seeks specific disclosure or not.³⁷ There is no duty on the defence to go about making their own enquiries to establish or undermine the prosecution's case. However, where the defence claims the prosecution is withholding relevant material a justified claim must be distinguished from a manufactured opportunity to generally trawl through the prosecution papers, in the hope of establishing an undefined defence.³⁸

The United Kingdom

The prosecutor's common law duty to disclose all material evidence to the defence has been codified in the United Kingdom by the Criminal Procedure and Investigation Act 1996. Under the Code of Practice 1996 (revised April 2005) issued by the Secretary for Security, in accordance with the Act, the police have a duty to record and retain all relevant material during investigation and provide it to the prosecution.³⁹ The Act also requires that the prosecutor must make primary disclosure to the defence of all relevant material either inspected by him or in his possession including what is termed as "unused material" (material upon which the prosecution does not seek to rely and which might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the defence).⁴⁰ The prosecutor's duty to make disclosure arises after the defendant has pleaded not guilty to a summary charge or has been committed for trial on an indictable charge.⁴¹

After disclosure a defendant committed for trial on an indictable charge must provide the prosecutor with a written statement outlining the general

³⁶ [1999] HKLRD (Yrbk) 179.

³⁷ *Ibid.*

³⁸ *HKSAR v Tang Ka-kit* [1999] 1 HKC 678.

³⁹ Section 23 of the Criminal Procedure and Investigations Act 1996.

⁴⁰ *Ibid.*, s 3(1)(a), as amended by s 32 of the Criminal Justice Act 2003.

⁴¹ Section 1 of the Criminal Procedure and Investigations Act 1996.

nature of his defence and indicating those matters in the prosecution case he takes issue with and give his reason for taking issue.⁴² A defendant pleading guilty to a summary charge is not under any obligation to provide a statement of defence. The prosecutor must keep under review the question whether, at any given time, (and, in particular, following the giving of a defence statement) there is prosecution material which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused, which has not been disclosed to the accused. If at any time there is any such material, the prosecutor must disclose it to the accused as soon as is reasonably practicable.⁴³ The prosecution has an ongoing duty of disclosure to the defence throughout proceedings.

The defence may make an application to the court for further disclosure if it is of the view that any relevant materials are being withheld by the prosecution.⁴⁴ A delay in disclosure may be an abuse of process where it results in the denial of the defendant's right to a fair trial.⁴⁵

The prosecution, whilst having a duty to disclose the previous convictions and disciplinary offences of prosecution witnesses, has no duty to disclose to the defence evidence damaging to the credibility of defence witnesses.⁴⁶ There is also no duty to disclose evidence claimed to be privileged on the basis of public interest immunity, although the defence may apply to the court for a ruling on whether a document is indeed privileged. The House of Lords recently warned, in *R v H and C*, that two distinct risks of unfairness may arise in *ex parte* public interest immunity hearings. The first is that material of potential assistance to the accused may be wrongly withheld. This risk occurs because the Act requires the prosecution only to disclose material which might undermine its case or assist that of the defence, so it is only where material is of assistance to an accused, but none the less considered to be sensitive, that the question of public interest immunity should arise. The second risk is that the tribunal determining the public interest immunity application may be privy to material damaging to the accused which he has no opportunity to answer. The House of Lords ruled that having regard to the necessity that the trial process should be fair, the trial judge, on a public interest immunity application, was required to give detailed consideration to the material sought to be withheld and ensure that any reduction from full disclosure was kept to

⁴² See ss 5(5), 6 and 6B Criminal Procedure and Investigations Act 1996 as amended by s 33 Criminal Justice Act 2003.

⁴³ Section 7A Criminal Procedure and Investigations Act 1996, as amended by s 37 Criminal Justice Act 2003.

⁴⁴ Section 8 Criminal Procedure and Investigations Act 1996 as amended by s 38 Criminal Justice Act 2003.

⁴⁵ *Re Attorney General's Reference (No 1 of 1990)* [1992] QB 630.

⁴⁶ *R v Brown* [1998] AC 367.

the minimum necessary to secure the public interest.⁴⁷ If the duty of disclosure is not strictly complied with the defendant may appeal against any conviction recorded on the ground it is unsafe.⁴⁸

Australia; The Victorian Practice

Each of the Australian states must pass its own laws to govern the procedure for criminal trials. The laws are similar between states but for the sake of consistency this article will focus on the laws of one state, Victoria, for comparative purposes.

Under the Magistrates' Court Act 1989, Victoria, the defendant is entitled to a copy of the charge sheet filed with the court on commencement of proceedings against him along with reasonable particulars of the charge alleged.⁴⁹

A minimum of seven days before the matter is first mentioned in court the defendant must be provided, by the police officer in charge of the case, with copies of all prosecution witness statements and other material relevant to the case.⁵⁰ Any claim by an officer that material should not be provided for reasons of public interest immunity may be challenged by the defence before a magistrate.⁵¹

Unless there has been a magistrates' post committal conference recording such matters, the prosecutor must not less than 28 days before the date for commencement of trial serve on the defence and file in court a summary of the prosecution opening and a notice of pre-trial admissions. The summary of the prosecution opening must outline the manner in which the prosecution will put the case against the accused and the acts, facts, matters and circumstances being relied upon to support a finding of guilt. The notice of pre-trial admissions must contain a copy of the statements of the witnesses whose evidence, in the opinion of the prosecutor ought to be admitted as evidence without further proof.⁵²

After being served with the summary of the prosecution opening and the proposed pre-trial admission the defence is under an obligation to serve a notice setting out its response to the opening and proposed admissions at least 14 days before the trial is due to commence. The defence response to the summary of the prosecution opening must identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken. This response will be presented to the jury after the prosecution has opened

⁴⁷ *R v H and C* [2004] 2 AC 134.

⁴⁸ *R v Mullen (No2)* [2000] QB 520.

⁴⁹ Section 32 Magistrates' Court Act 1989 (Victoria).

⁵⁰ Magistrates' Court Act 1989, Sched 2, cl. 1A(2).

⁵¹ *Ibid.*, Sched 2, cl. 1A(6).

⁵² Section 6(1) Crimes (Criminal Trials) Act 1999 (Victoria).

its case in a jury trial.⁵³ The defence must indicate what evidence, as set out in the notice of pre-trial admissions, is agreed to be admitted as evidence without further proof, and what evidence is in issue. Where issue is taken, the defence must indicate the basis on which issue is taken. However the accused is not required to state the identity of any defence witness other than an expert witness it will be calling at trial or indicate whether the accused will give evidence.⁵⁴

The court may conduct directions hearings before the trial commences in order to have the lawyers identify any matters of law or procedure that will be the subject of *voir dire* (questions of admissibility to be resolved before the judge sitting alone prior to empanelling a jury), and the court may rule on such matters before the trial commences.⁵⁵

Failure to supply copies of any exculpatory material to the defence is in breach of prosecutorial ethics and may result in a successful appeal against conviction for miscarriage of justice.⁵⁶ Previous inconsistent statements of any prosecution witness must also be provided to the defence.

The PRC

At the investigation stage of criminal proceedings a defence lawyer only has the right to be told the name of the offence under investigation.⁵⁷ However Article 37 of the Criminal Procedure Law 1996 provides that once the matter is handed over to the Procuratorate to assess the strength of the case for prosecution, a defence lawyer may apply to read and copy case files. The law is silent as to what, in the interests of fair disclosure, those files should contain. Where a statement has been made by a defendant that is exculpatory this will not be provided to the defence and will usually not have even been recorded by the Public Security Bureau as in practice most investigators only treat a defendant's confession as a statement of his evidence.⁵⁸ Without a mandatory duty of disclosure of all relevant materials including exculpatory evidence placed on the Procuratorate the defendant cannot be said to have had access to a fair trial.

A further difficulty for defence lawyers arises from their new status beyond "state legal workers" under the Lawyers' Law 1996. As they are no longer working for the government, defence lawyers find it difficult to get real co-operation from those government agencies and departments with access

⁵³ *Ibid.*, s 13. It should be noted that jury trials are held at both levels of court of first instance above the magistrates' court in Victoria.

⁵⁴ Section 7 Crimes (Criminal Trials) Act 1999 (Victoria).

⁵⁵ *Ibid.*, s 5.

⁵⁶ *R v Garofalo* [1999] 2 VR 625.

⁵⁷ Article 96 Criminal Procedure Law of the PRC 1996.

⁵⁸ Min Cui, *Xin Bian Xing Shi Su Song Fa Jiao Cheng* ("New Textbook on Criminal Procedure Law") (Beijing: The Press of the People's Public Security University, 1996), p 221.

to internal documents relevant to the defence case. By contrast the Procuratorate and public security organs have the right to demand materials from individuals and units under Article 45 of the Criminal Procedure Law. The defence must also seek Procuratorate approval to interview witnesses and may only interview those who consent.⁵⁹

Article 191 of the Criminal Procedure Law 1996 provides that an appellate court can rescind the judgment of a trial court where it finds a defendant has his rights under the law restricted to hamper the impartiality of his trial. It is hoped that where restrictions on access to materials are imposed by the Procuratorate this article will be exercised to overturn an unfair conviction. This seems unlikely however while disclosure remains discretionary. Further, should the defendant successfully demonstrate his trial was not fairly conducted the best he can hope for is a retrial as Article 191 does not allow for acquittal on appeal.

The Right to Competent and Adequate Legal Advice and Representation

Hong Kong

In accordance with Direction 8 of the "Rules and Directions for Questioning Suspects and Taking Statements," issued by the Secretary for Security, a person in custody is entitled to consult privately with a qualified barrister or solicitor, provided that no unreasonable delay or hindrance is reasonably likely to be caused to the processes of the investigation, or the administration of justice.

A detainee should be allowed to communicate privately with his solicitor or barrister and should be provided with a list of current solicitors registered with the Hong Kong Law Society if he so requests. He should be allowed to have a barrister or solicitor present whilst he is interviewed.⁶⁰ Direction 8 provides that police may justify delaying access to a legal adviser where other people were involved in the commission of the offence and it is reasonably likely that giving the suspect immediate access to legal counsel might interfere with the arrest of other offenders or the recovery of stolen property.

A breach of the Rules and Directions denying access to legal representation may result in the exercise of the judge's discretion to exclude evidence obtained in breach. Whether the discretion is so exercised depends on a number of factors such as the merit and the facts of each individual case and the degree of seriousness of the breach.⁶¹

⁵⁹ Article 37 Criminal Procedure Law of the PRC 1996.

⁶⁰ Direction 8, The Rules and Directions for Questioning Suspects and Taking Statements.

⁶¹ *R v Lau Ching-wing* [1996] HKEC 152.

The Hong Kong Bar's Code of Conduct provides, at paragraph 110, that a barrister has a duty to uphold the interests of his client without regard to his own interests or to any consequences to himself or to any other person. A client may sue those who represent him for negligence where such representation is flagrantly incompetent.

The United Kingdom

The Police and Criminal Evidence Act 1984 together with the Codes of Practice issued under section 66 of the Act govern the right of a suspect at the police station to legal advice. Paragraph 3.1 of Code C, the "Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers," provides that a person arrested and held in custody in a police station or other premises has the right to consult a solicitor privately at any time. Delay in allowing the arrested person to exercise this right is only allowed where a senior police officer has assessed that the exercise of the right would be likely to lead to interference or harm to evidence connected with a serious arrestable offence, interference with or physical harm to other persons, the alerting of other suspects not yet arrested or may hinder the recovery of property obtained as a result of the offence.⁶² These rights may be delayed for no longer than a maximum of 36 hours.⁶³ Where a person has been detained on suspicion of an offence under the Terrorism Act 2000 he may also have his rights delayed if a senior police officer believes that an exercise of those rights will interfere with the gathering of information about the commission, preparation or instigation of acts of terrorism. In this case the suspect may have his rights delayed by up to 48 hours.⁶⁴

The Court of Appeal has stated that the circumstances in which an officer can deny legal advice are rare as the officer would usually need to show reasonable evidence that the lawyer instructed is likely to commit an offence by interfering with evidence or witnesses or tipping off suspects.⁶⁵ The European Court of Human Rights has stated that access to legal advice at the police station forms part of the right to a fair trial guaranteed under Article 6 of the Convention.⁶⁶

Under paragraph 6.4 of Code C a police officer may not at any time do anything to dissuade an arrested person from exercising his right to legal advice. Further the right to advice under section 58 of the Act is re-enforced by the

⁶² See s 118(2) of the Police and Criminal Evidence Act 1984 and Annex B to the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers.

⁶³ Section 41 Police and Criminal Evidence Act.

⁶⁴ Annex B to the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers.

⁶⁵ *R v Samuel* [1988] QB 615.

⁶⁶ *Murray v The United Kingdom* (1996) 22 EHRR 29.

Legal Aid Scheme ensuring free legal advice is offered to those who cannot afford to retain a solicitor themselves through the provision of duty lawyers who are available to attend police stations day and night.

The right to legal advice is a continuing one; after an initial waiver during detention the advice can later be actively sought. The suspect has the right to have his solicitor present during a police interview and once a suspect has requested legal advice he may not be interviewed until he has received advice, unless a senior officer has reasonable grounds to believe delaying the interview will involve an immediate risk of harm to persons or serious loss or damage to property or where a solicitor has been contacted but waiting for his arrival would cause unreasonable delay to the investigation.⁶⁷

Criminal Legal Aid is regulated under Part V of the Legal Aid Act 1988. The Act provides that a court may grant a defendant legal aid where it is satisfied the defendant does not have the means to fund his own defence. The Law Society also operate Duty Lawyer Schemes which send solicitors to magistrates' courts to assist unrepresented defendants and arrange for solicitors to advise detainees at police stations.

A problem exists with firms sometimes sending unqualified persons to undertake the task of advising detainees at police stations, particularly at unsociable hours. In order to control the competency of advice provided by such unqualified persons the Law Society provides programmes for law clerks offering training with accreditation. Legal Aid does not provide payment for police station advice to those firms who send non-accredited advisors.

The crucial role the defence lawyer plays in determining the outcome of his client's case continues with his presentation of the defence at trial. Counsel representing a criminal client has a duty under the Bar Code to promote and protect fearlessly and by all proper and lawful means his client's best interests without regard to his own interests or to any consequences to himself.⁶⁸ If representation at trial is inadequate the client may allege the incompetence of Counsel as a ground of appeal against conviction. An appellate court must have a "lurking doubt" that the appellant may have suffered an injustice due to Counsel's flagrantly incompetent advocacy before it can allow the appeal and quash the conviction.⁶⁹

Australia; The Victorian Practice

A person arrested and taken to a police station in Victoria has the right to legal advice. Before any questioning of a person in custody may take place, the police must inform the suspect of his right to communicate with a lawyer.

⁶⁷ Para 6.6 Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers.

⁶⁸ English Bar Code para 303(a).

⁶⁹ *R v Ensor* 89 Cr App R 139.

If the suspect wishes to talk to a lawyer questioning must be delayed until communication has occurred unless the officer believes, on reasonable grounds, that the communication would result in the escape of an accomplice, the fabrication or destruction of evidence or any delay in questioning would put at risk the safety of other persons.⁷⁰ Any communication between a lawyer and his client should occur in private.⁷¹ If an officer does not inform the suspect of this right or unreasonably refuses access to a lawyer any confession or admission made by a suspect may be inadmissible in evidence at trial.⁷²

Victoria Legal Aid established under the Legal Aid Act 1978 provides free legal advice to persons charged with a criminal offence, means tested substantial legal assistance and a Duty Lawyer Service.

The Victorian Bar Rules of Conduct provide that Counsel acting for a criminal client has the duty to advance and protect his client's interests to the best of his skill and diligence notwithstanding any threatened unpopularity or criticism of the barrister.⁷³

The Victorian Court of Appeal may overturn a conviction on a miscarriage of justice where Counsel is found to have been flagrantly incompetent in presenting his client's case.⁷⁴

The PRC

Under the Criminal Procedure Law 1996 after a suspect has been interrogated by an investigating body (usually the Public Security Bureau) for the first time or has been placed under restrictions, he may appoint a lawyer to assist him to secure bail, to make procedural complaints on his behalf and to seek details from police of the nature of the crime alleged.⁷⁵ In a preliminary version of the bill it was proposed that a suspect would have the right to a lawyer at any time when being questioned or detained by police however this right was not adopted. The basis on which the right was not adopted was that in theory during the period of investigation no prosecutor-defendant relationship has yet been formed so no access to a lawyer is necessary.⁷⁶ If a case involves state secrets a lawyer may only be appointed to assist the suspect with the investigating body's permission.⁷⁷ Regulations jointly introduced by the Supreme People's Court, the Legislative Affairs Committee of the Standing Committee of the National People's Congress, the Supreme People's

⁷⁰ Section 464C(1)(c) and (d) Crimes Act 1958 (Victoria).

⁷¹ *Ibid.*, s 464C(2).

⁷² *Pollard* (1992) 176 CLR 177.

⁷³ Victorian Bar Rules of Conduct, para 11.

⁷⁴ *TKWJ v The Queen* 133 A Crim R 574.

⁷⁵ Article 96 Criminal Procedure Law 1996.

⁷⁶ Zhang Yong, "Recent Developments in Chinese Criminal Justice" (2000) *Asia Pacific Law Review* 77, 85.

⁷⁷ Article 96 Criminal Procedure Law 1996.

Procuratorate, the Ministries of Public and State Security and the Ministry of Justice, in 1998, are intended to stop the public security bureaus overzealously claiming that cases involve state secrets. These regulations warn the public security bureaus against arbitrarily defining cases as “state secret” investigations and require that a lawyer should normally have access to his client within 48 hours, or, if the case is serious, within five days, of arrest or interrogation.⁷⁸

Whilst the investigation is ongoing the lawyer may meet with the suspect for an interview at the discretion of the investigating body and provided an investigator may be present at the interview.⁷⁹ The investigator will determine the date, time and place of the meeting. Article 124 provides that the time limit for holding a criminal suspect in custody during investigation after arrest may not exceed two months. However if the case is complex and cannot be concluded within the time limit, an extension of one month may be allowed with the approval of the Procuratorate. In certain serious cases the post-arrest detention period may be extended to four months. Serious cases are defined as those involving grave offences committed by criminal gangs, or offences committed over large geographical areas, or in outlying areas where the obtaining of evidence is difficult.⁸⁰

The detention period is also not deemed to have commenced until the Public Security Bureau has established the suspect’s name, address and identity and is deemed to re-commence when new offences of which the detainee is suspected are discovered by the investigators.⁸¹

Only once the case has been transferred from the public security organ to the Procuratorate for examination before prosecution does the suspect have the right to appoint a lawyer to assist with the preparation of his defence.⁸² However a person who is a minor, physically or mentally disabled, a foreigner, or liable to life imprisonment may secure legal assistance at any stage of proceedings. On appointment a lawyer may meet the client held in custody for interview, communicate with him by letter and consult, extract and duplicate the judicial documents and the technical verification material.⁸³ A defence lawyer may interview a witness who has consented to be interviewed and can request the People’s Court to inform the witness to appear in court and give testimony. The victim, his near relatives or the witnesses provided by the victim, may only be interviewed, however, where they have consented

⁷⁸ Joint Regulations Concerning Several Problems in the Implementation of the Criminal Procedure Law, 1998, Article 11.

⁷⁹ See n 77 above.

⁸⁰ Article 126 Criminal Procedure Law 1996.

⁸¹ *Ibid.*, Art 128.

⁸² *Ibid.*, Art 33.

⁸³ *Ibid.*, Art 36.

and permission has been granted by the People's Procuratorate or the People's Court.⁸⁴

At trial, defence lawyers are entitled to question witnesses, present evidence and argue submissions based on the defence theory of the case. However in spite of judges being advised to give defence lawyers a fair hearing, negative attitudes towards criminal lawyers still prevail and a lawyer who represents his client too vigorously risks court detention. Article 306 of the Criminal Law makes it an offence to destroy or forge evidence or coerce or entice witnesses to change their testimony in defiance of the facts or give false testimony. This provision has been used to prosecute defence lawyers who zealously challenge the facts of the case as alleged by the prosecution.⁸⁵ Whilst lawyers remain circumspect in presenting their client's cases to the best of their ability the criminal defendant will continue to be inadequately represented. With no sanctions for inadequate representation and an added incentive not to upset the court with a vigorous defence there can be no guarantee a defendant will receive a fair trial.

The negative attitude towards lawyers carrying out defence work is further strengthened by members of the profession no longer being defined as "state legal workers". Whilst the autonomy of lawyers is essential to ensure a client's interests are pursued against the State, lawyers also require the protection of the Ministry of Justice when unfair pressure is exerted upon them by the Procuratorate and judges.

In 2001 only 30 per cent of persons accused of crimes had legal representation.⁸⁶ Criminal defendants are represented by a wide variety of people including lawyers, relatives, work colleagues or defenders appointed by the court. China is not without a legal aid scheme. The Lawyers Law 1996, provides at Article 41, that legal aid may be available in criminal cases and lawyers may be required to take legal aid work. However an offender only has the right to demand legal aid where he is accused of a capital crime, or is a minor, deaf, dumb or blind.⁸⁷ China's first Legal Aid centre was launched in Guangzhou in 1995. A Beijing Legal Aid Centre followed in 1997 which is primarily staffed by private lawyers working on rotation with their outside practice. In 2003 the State Council published Regulations on Legal Aid, which should assist to standardise access to aid and go further towards ensuring that criminal suspects who cannot afford legal representation have access to legal assistance.

⁸⁴ *Ibid.*, Art 37.

⁸⁵ See, for example, the criminal judgment of the Beijing No 1 Intermediate People's Court in the case of Zhang Jianzhong, 9 Dec 2003. After a 1-day trial, noted PRC criminal defence lawyer, Zhang Jianzhong, was convicted and sentenced to two years imprisonment for assisting in the fabrication of evidence, contrary to s 307 Criminal Procedure Law.

⁸⁶ According to Ministry of Justice statistics published in Jan 2003.

The Presumption of Innocence

Hong Kong, the United Kingdom and Australia

The presumption of innocence is one of the most fundamental rules of criminal procedure in the common law jurisdictions. It provides that the burden of proving the offence alleged, beyond all reasonable doubt, rests with the prosecution. In other words the defendant has the right not to cooperate with the prosecution in his own conviction. It has been said that throughout the web of criminal law “one golden thread is always to be seen, that is that it is the duty of the prosecution to prove the prisoner’s guilt.”⁸⁸ The burden is subject only to the defence of insanity or where statute provides the occasional exception.⁸⁹

Recognition for this fundamental right appears in Article 6(2) of the European Convention on Human Rights which declares that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”⁹⁰ In the decision of *Funke, Cremieux and Mialhe v France*⁹¹ the European Court of Human Rights recognised the link between the presumption of innocence and the defendant’s right to silence. The Court of Human Rights has described the right to silence as a “generally recognised international standard” which lies “at the heart of the notion of fair procedure under Article 6.”⁹² Article 6 guarantees the right to a fair trial and includes the presumption of innocence.

The PRC

The Criminal Procedure Law 1996 does not provide for any formal acceptance of the presumption of innocence. Article 12 provides that no person is guilty of a crime without the judgment of a People’s Court. However, Article 162 provides three possible judgments: guilty, proven innocent and insufficient grounds to secure a conviction, therefore deemed innocent.

This “third verdict” stems from the traditional Chinese refusal to acquit a defendant in the event a conviction cannot be secured for technical reasons. The old attitude that the investigating body finds the “truth” of the case and that the court should accept and verify that finding, wherever it can, still exists under the 1996 Law. Article 35 specifically provides that the role of the

⁸⁷ Article 34 Criminal Procedure Law 1996.

⁸⁸ *Woolmington v DPP* [1935] AC 462.

⁸⁹ For example the defendant must prove diminished responsibility on the balance of probabilities.

⁹⁰ The Human Rights Act 1998 (UK) has given effect in the domestic law of the United Kingdom to the rights guaranteed under the Convention.

⁹¹ *Funke v France* (1993) 16 EHRR 297, Series A, No 256-A; *Cremieux v France* (1993) 16 EHRR 357, Series A, No 256-B; *Mialhe v France* (1993) 16 EHRR 332, Series A No 256-C.

⁹² *Saunders v The U.K* (1997) 23 EHRR 313.

defence lawyer is to present materials and opinions proving the innocence of his client.

As for the right to silence, under the 1996 Law there is no such protection. Article 155 provides that both the public prosecutor and the judge may interrogate the defendant at trial.

Conclusion

Whilst reforms to the laws of criminal procedure in China have begun to redress the inadequacies of the past, the procedural changes promulgated cannot currently be relied on to guarantee a fair trial for the defendant. If the system for securing a conviction in China is ever to be truly reliable, a fundamental shift in attitude towards the defendant must be effected. This cannot be achieved without routine challenges to unfair practices and consequences when those procedures are flouted. The introduction of some key rights is a step in the right direction but further safeguards are necessary to ensure an effective rebalance of China's criminal justice system.