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Chapter 1. Introduction
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1 Research Background

Since the end of the Second World War, the importance of human rights in criminal proceedings has been increasingly emphasized in all criminal justice systems. Notably, the agreement that we shall all have procedural fairness seems to be one of the few points of consensus in the pluralistic societies around the world (Ma, 2007). Within every criminal justice, we see various mechanisms ostensibly designed to constrain and shape the way in which the police exercise their questioning powers (Van Kessel, 1998). However, miscarriages of justice, such as wrongful detention, prosecution, and incarceration of the innocent, because of coercive and psychologically manipulative interrogation techniques arise both in more adversarial and more inquisitorial types of process (Bedau and Radelet, 1987; Gudjonsson, 1992, 1994). In the People's Republic of China (PRC), the problem of police-coerced confession is also one of the most intensely criticized aspects of the Chinese legal system. Although it is often intentionally hidden from view, during the last 20 years, a growing body of Chinese academic literature on abusive police practices in criminal investigation, media accounts, as well as official statistics, indicates a substantial number of police confessions, based on coercion, have in fact occurred. According to the fourth report from the Chinese government to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), between 1999 and 2004, 566 persons, involved in 541 cases, were sentenced by extorting confessions through torture. However, Ma and Peng (2006: 22) consider that official statistics document only the tip of the iceberg, implying thereby that forced confessions occur with greater frequency than officially reported. Many Chinese scholars, relying on different sources like interviews with present and former law enforcement officers or individual field observations, have made the alarming assertion that the malady of confessions produced by ‘torture’ (xingxunbigong 刑讯逼供)

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1 Chinese version of the fourth periodic report, pages 36-40.
2 Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is the first provision in an international treaty that defines torture, and separates illegal practices into two categories: (i) torture, and cruel, inhuman, or degrading treatment (ii) punishment which does not amount to torture. According to this definition, to classify an act as torture, the pain of suffering inflicted must indeed be severe.
3 The Chinese academics define torture in a broader sense than the CAT does. They define torture as any act by which corporal treatment or quasi-corporal treatment is inflicted on a suspect or a defendant to extract confessions by judicial officers (Zhe, 2005). Corporal treatment refers to physical coercion, inflicting pain directly on the body, such as beating or imparting electric shock. Quasi-corporal treatment refers to physical or psychological coercion, inflicting pain (physical or mental) indirectly on the body, such as through sleep deprivation, exposure to cold or heat, or forcing one to sit or stand in uncomfortable positions. In fact, some studies have shown that in the current era the interrogation practice in China has moved away from brutally scarring violence towards more time-consuming and ‘clean torture’ (Liu and Zuo 2005; He 2006). Notably, the history of American police interrogation also shows an evolution from more brutal forms of interrogation toward a mainly psychological oriented approach of interrogation (Leo, 2008). While the
is widespread in China (Zhou, 2006; Hu, 2007). In fact, the problem of police coercive confession has been so pervasive in the PRC that it captured the attention of not only the domestic academic scholars, but also of the international community. In the face of such ‘devastating’ issues, unsurprisingly, the growing power of the international human rights movement has led to a backlash in China (Peerenboom, 2003, 1). Human rights activists complain bitterly that the judiciary lacks independence, because the party-state politicizes criminal cases and employs torture for oppressing political dissents. In addition, advocates of international human rights have long claimed that some values are so fundamental to human existence that they should be universally applicable. Specifically, they argued that there is a significant level of consensus regarding ‘the presumption of innocence’ and ‘the privilege against self-incrimination’ as set forth in the Universal Declaration of Human Rights (UDHR), and the International Covenant on Civil and Political Rights (ICCPR) (Gelatt, 1982). Hence, in the name of universal human rights, rights activists urge the PRC into compliance with these ‘universal’ norms (Gelatt, 1982).

Many Chinese scholars have also increasingly looked to the right to remain silent and the privilege against self-incrimination as the basis for restricting the questioning power of the police. It is commonly held by Chinese legal academics that the current Criminal Procedure Law (CPL) and relevant supplementary regulations, which are dominated by the ideology of ‘crime control’ rather than ‘due process’, fail to provide the suspect with adequate safeguards against pernicious interrogation practices. Specifically, the majority view among Chinese legal scholars is that coerced confessions are closely related to China’s pre-trial ‘inquisitorial’ investigation with its implicit acceptance of police power to detain and interrogate suspects (Zuo 2005; Chen 2006). In complaining bitterly about the police force’s limitations in gathering physical evidence, scholars argue that the right and the privilege should be given to the suspect as a basis for restricting police officer’s interrogational power and pressing the police to shoulder most of the load by collecting objective evidence (Ning, 2002; Wan, 2006). Notably, efforts to incorporate the right to remain silent into Chinese criminal procedure law began during the drafting of the 1996 CPL, but they were failed (Zhou, 2003). After a period of inactivity, more recently, proposals to advocate the right to remain silent resurfaced. Legal scholars, lawyers and reform-minded officials have voiced their concerns at various occasions and urged for incorporating the right into the third Chinese Criminal Procedure Law now being

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1931 Wickersham Commission Report and Miranda appear to be partly responsible for the dramatic decline in violence in the American interrogation room from the 1930s through 1960s, it is argued that American police have also become skilled at the practice of manipulation and deception during interrogation (Leo 1992).


5 Many authors have suggested that the Universal Declaration of Human Rights (UDHR) has now achieved universal acceptance as an authoritative formulation of human rights standards (Donnelly and Howard-Hassmann, 1987).

6 Article 11 of the UDHR.

7 Article 14 of the ICCPR.
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drafted. In the research project report “Revision of the 1996 CPL”\(^8\), funded by the Ministry of Justice, Jingcun Xu paid particular attention to the right to remain silent. He supported that “anyone being suspected of a crime should have a free choice to admit or to refuse to answer police questions and suffer no adverse consequence from that refusal”.

Nevertheless, despite of the legal attempts to establish the right and the privilege, there is currently a growing scepticism in the academic world if the apparently successful experience of the West with ‘due process’, and a ‘human rights’ legal framework in which the suspect’s autonomy is highly respected, can simply be copied as an independent standard in the Chinese context (Cui, 2001; Ma and Peng, 2006). As Davies and Shen (2010: 256) point out, the attempt to reform the entire Chinese criminal justice system based on Western ideas such as the ‘presumption of innocence’ or a ‘Miranda-style law’ is not a helpful reform proposal for China. According to Zhu (2007: 559), the dominant Chinese legal scholarship with its underlying western theoretical framework cannot be successful for pushing judicial reform. He (2007: 540) further argues that the Western example “blurs and confuses the real problems to be dealt with ... and can, moreover, lead to mistaken solutions”. The dissatisfaction with the current status of criminal procedure studies in China is best summed up by Chen (2009: 158-159): “due to the limitations and constraints of the research methods and perspectives, China’s criminal procedure studies are facing an unprecedented challenge ... we should give up the perfunctory study attitudes of praising the western legal system and criticizing Chinese legal system ... we should also redress the wrong tendency of emphasizing too much on the introduction of western concepts and theories, and try to summarize some evidential rules form China’s judicial philosophy, legal history and legal practice.” According to Peerenboom (2004: 1073), transplantation of laws which are at odds with China’s current conditions or which are based on fundamental values that are not shared by the majority of Chinese citizens diminishes the likelihood of getting the reforms adopted or, even if they are adopted, they will not be implemented. This observation seems to be confirmed by the fact that despite significant revisions to the Criminal Procedure law in 1996, the police’s abuse of questioning power, such as coercing for confession, illegal detention and denying lawyers’ access to their clients, remains pervasive in practice (Lin, 2005).

2 Research Design and Research Questions

This thesis responds to the criticism of the current status of criminal procedure studies in China by discussing police interrogation standards in China and Europe in a theoretical, comparative, and historical way. The research approach does not, as is usually the case, consider Chinese and European regulations alongside each other using the European model as an analytical backdrop. Rather, we focus on why coercing suspects’ statements or confessions during the police questioning is seen as problematic from a Chinese perspective and to what extent this response can be connected to the

human rights discourse taking place in Europe. The research, therefore, extends beyond a formal legal comparison and attempts to answer the research question as how (or how far) the competing claims of cultural relativism and universal fair interrogation standards can be reconciled in China.

To substantiate the research aim, three sub-research questions are formulated.

1) What criticisms have been made of police interrogation in China both internally (official reports, scientific research and media) and externally (NGO’s and scientific research)?
2) To what extent are these criticisms of police interrogation in China related to traditional Chinese legal cultures and to the European human rights concept?
3) What adjustments to the Chinese system of police interrogation could be made?

3 Research Methodology

The primary methodology upon which this research was based is functional comparison. Rather than concentrating on concurrent parallel analysis of legal rules, emphasis was placed on comparing the function of police interrogation between European and Chinese legal systems. As many scholars indicate, a fair legal comparative study requires the researcher to examine the historical and social context of the problem and the proposed solutions (Friedman, 1975; Zweigert and Kötz, 1998; Nelken, 2004). What this implies is that a comparative research will not get far if researchers do not do all that is possible to make sure they have a fair grasp of what is thought and happens in compared societies (Karstedt, 2008; Nelken, 2010, 7-8). Based on this general approach, the research is divided into five stages:

Since ‘torture’ (xingxunbigong 刑讯逼供) is the most pervasive problem concerning police interrogative practices in China, scholars have devoted considerable attention to the subject and provided rich information on the phenomena. Thus, as the first step, we reviewed 1082 research articles on ‘torture’, ‘criminal interrogation’ and related topics published in Chinese language academic journals over the past 15 years (1994–2008) as well as recent literature on Chinese policing and criminal procedure in English, mainly written by Chinese authors, with a view to summarize the current knowledge of what actually happens with regard to Chinese police coercion in criminal questioning and what is known about its causes. This review includes a wide range of studies in terms of levels of analysis and basic questions. More specifically, Law discipline-based journals such as Law Science, Global Law Review, Legal Forum and Hebei Law Science; police-oriented journals such as Policing Studies, Journal of Chinese People’s Public Security University (Social Sciences Edition) and Journal of Fujian Public Security College; procuratorate-oriented journals such as Journal of National Procurators College and

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9 The Chinese academics define torture in a broader sense than the CAT does. Please refer to footnote 3.
10 Electronic versions of these articles can be accessed through China National Knowledge Infrastructure (CNKI) on-line documentation page on the web at URL http://www.global.cnki.net.
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People’s Procuratorial Semimonthly; and Interdisciplinary Journal journals such as Legal System and Society and Journal of Political Science and Law are included. Accordingly, authors of these articles are from a wide variety of fields, including academic scholars, police officers, procuratorates and government officials. Concerning the selected articles reported in Chapter 2 of this thesis, it draws on empirical studies, studies based on empirical data and the most notable literature in the field.

Second, we examined the human rights aspects of police interrogation standards in Europe by way of an analysis of the jurisprudence of the European Court of Human Rights (ECtHR). Although the European Convention on Human Rights contains no explicit reference to the right and the privilege, the Court, drawing its rationale from Article 6 of the Convention, emphasizes that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure. Hence we provided a comprehensive review and analysis of the jurisprudence of the Court on ‘the right to remain silent’ and ‘the privilege against self-incrimination’. First, we identified the features and limitations of the traditional adversarial–inquisitorial dichotomy. Second, we traced the Court’s jurisprudence on ‘the right to remain silent’ and ‘the privilege against self-incrimination’ with the object of showing how the Court has interpreted these immunities to develop its own distinctive version, thus throwing some light upon the practical value of the guarantee provided therein.

Third, we made a historical analysis of Chinese legal theories and the evolution of criminal interrogation rules from the pre-Han to the reform era. The historical and social literature available, mainly written by Chinese authors, is consulted. We first described the rise of Confucianism and legalism during the Spring and Autumn period (770-476 B.C.) and illustrated their legal implications. This was followed by an analysis of the ‘legalization of Confucianism’ process in Chinese society following the Qing’s fall (221-206 B.C.). Then we focused on the Tang dynasty (618-907) and discussed the interrogation model laid down by the Tang Code which thrived until the early twentieth century. Next, after tracing the ideological evolution in China in the turbulent period before the birth of the PRC, the interrogation rules under the Mao era were examined. Finally, the questioning rules and their operation in the reform era were discussed, as also the social and political context underlying them.

Fourth, we addressed Chinese interrogation rules from historical and comparative perspectives by relating them to the very different development of interrogation procedure in Europe. The purpose of this thorough comparison is to get better answers to why practices of criminal interrogation take the form they do in Europe and China. We tackled interpretative problems such as how these two societies conceive ‘confession’ and ‘self-incrimination’, and how differences in social, political and legal culture inform perceptions of crime and the role of criminal interrogations in responding to it. More precisely, we first illustrated the rise of ancient Greek and Chinese civilizations from roughly the eighth to the third century B.C. and their implications for European and Chinese legal cultures. This is followed by an analysis of the evolution of criminal
interrogation rules in Europe. Then we focused on the history of criminal interrogation rules in China, for which a comparative analysis is provided. Methodologically, the above-mentioned analyses were carried out by thorough literature reviews of both Chinese and European academic literature. In addition, for the contextual analysis envisaged in this study, a mere ‘virtually there’ approach (Nelken, 2002) by studying text and documents from abroad, is not sufficient. Having lived, studied and researched in China and having had the opportunity to study, live and research in Europe the last six years gives me the unique opportunity to go further and take a ‘research there’ or even ‘living there’ methodological stance in this study.

Finally, we closed the research with recommendations for China in regulating interrogative practices. These recommendations are based upon the foregoing analysis in the thesis.

4 Structure of the Thesis


Chapter 2 reviews a selection of research articles on police ‘torture’\(^{11}\) (xingxunbigong 刑讯逼供) in China, published in Chinese language academic journals between 1994 and 2008 as well as recent literature on Chinese policing and criminal procedure in English. The study shows that Chinese legal scholars have devoted considerable attention to the subject of police interrogational coercion and have presented evidence that interrogational ‘torture’ is a pervasive problem in criminal investigations in China. Literature on the causes of police-coerced confessions covers a wide range of topics in terms of the levels of analysis. Notably, besides loopholes or shortcomings in the law and the ineffective institutional mechanisms for controlling state powers, the influence of traditional cultural values is also considered a reason by some socio-legal studies: while coerced confession is absolutely cruel, its exercise depends at almost every level on many forms of cooperation and consensus. While the tolerant attitudes for police ‘torture’ among the Chinese citizens may be in part due to its long historical preference for shaming and collective values, the support or tolerance for ‘torture’ is in fact against the core teaching of Confucianism. This chapter concludes that answers about how to protect suspects’ rights and reduce interrogational coercion in criminal proceedings in China, can be found in adaptations of structural elements of the legal landscape, but also in practices and traditions with strong cultural connections. This chapter was published as:


\(^{11}\) The Chinese academics define torture in a broader sense than the CAT does. Please refer to footnote 3.
4.2 Chapter 3 – Interrogational Fairness under the European Convention on Human Rights

In Chapter 3, we examine the human rights aspects of police interrogation standards in Europe. More specifically, this chapter examines the contribution of the European Court of Human Rights to the development of interrogational fairness at the pretrial phase in modern European criminal proceedings. Although the Convention contains no explicit reference to ‘the right to remain silent’ and ‘the privilege against self-incrimination’, the Court, drawing its rationale from Article 6 of the Convention, has been steadily developing its distinctive vision of these immunities in an attempt to create a doctrine that sets a limit below which contracting parties could not allow their legal systems to fall, while also acting in accordance with the established procedures within the civil and common law traditions of its Contracting States. It is shown that the Court’s jurisprudence has produced a carefully balanced doctrinal framework that respects the individual’s choice to remain silent without creating absolute immunities. The Court’s perspective that emphasizes the importance of legal assistance from the first interrogation of a suspect by law enforcement officials has enabled suspects to reach an autonomous decision when they are being called upon to answer criminal allegations. This chapter was published as:


4.3 Chapter 4 – The Evolution of Criminal Interrogation Rules in China

Chapter 4 presents a historical analysis of Chinese legal theories and the evolution of criminal interrogation rules from the pre-Han to the reform era. A fuller understanding of the evolution of rules is relevant to the present day’s controversy in China’s legal reforms surrounding the right to remain silent during interrogation and the privilege against self-incrimination. The historical analysis reveals that the imperial social context which once morally legitimized judicial torture in Chinese criminal justice is very much alive even today. For future legal reforms in China, there are barriers in the current social context, which seem to be unconducive for the right to remain silent and the privilege against self-incrimination. Nevertheless, in setting the right direction for future interrogation standards, Chinese lawmakers could find a lot of wisdom in the early Confucian philosophies. This chapter was published as:

4.4 Chapter 5 – Relativism and Universalism in Interrogation Fairness: a Comparative Analysis between Europe and China

Chapter 5 addresses Chinese interrogation rules from historical and comparative perspectives by relating them to the very different development of interrogation procedure in Europe. The comparative analysis reveals that, in fact, the influence of ancient Greek and Chinese civilizations resulted in a great difference between Europe and China regarding legal cultures and institutional arrangements for criminal interrogation procedure. Considering future legal reforms in China, and given the very different historical and institutional context, the likelihood seems low that an ‘autonomous version’ of the right to remain silent and the privilege against self-incrimination will develop on China’s very different soil. However, traditional native resources are also available to legal reformers to ensure a cooperative interviewing style in criminal questioning, and eliminate police-coerced confessions. This chapter was submitted for publication as:


4.5 Chapter 6 – Conclusion

The final chapter begins with the summarization of the research findings of this thesis. Then the second section provides recommendations for China in regulating interrogative practices.

References


A Review of Literature
A review of literature

[Abstract]

This study reviews a selection of research articles on police torture in China, published in Chinese language academic journals between 1994 and 2008 as well as recent literature on Chinese policing and criminal procedure in English. The study shows that Chinese legal scholars have devoted considerable attention to the subject of police interrogation torture and have presented evidence that interrogation torture is a pervasive problem in criminal investigations in China. While the mainstream legal scholarship treats the gaps or ambiguities in the law as the major cause of police torture others relate it to the organization and structure of the Chinese criminal justice system. Some studies conclude that traditional and cultural Chinese values account for the tolerance and acceptance of police torture. The article concludes that answers about how to protect suspects’ rights and reduce interrogation torture in criminal proceedings in China, can be found in adaptations of structural elements of the legal landscape, but also in practices and traditions with strong cultural connections.

1 Introduction

Obtaining confessions from suspects has long been a favourite technique for solving and proving crimes, as a criminal defendant’s confession can provide convincing evidence of his guilt (Brooks 2000). Hence, when the tyrannical government has an interest in establishing a suspect’s guilt, it has a strong incentive to interrogate the suspect in a way that it produces a confession. Thus, both in the West and in the East, in all ancient autocratic regimes, torture has been part of the ordinary criminal procedure and was regularly permitted to be employed to investigate and prosecute routine crime before the ordinary courts (Langbein 1977; Zuo and Zhou 2002). Importantly, apart from its function of beating confessions out of suspects, torture was most commonly used as a weapon by the tyrannical ruler against his people and to suppress oppositions. During the 18th and 19th centuries, however, torture decreased in Europe, as it came to be legally abolished throughout the continent (Einolf 2007). After World War II, the principle of respect for personal integrity12 was written into some of the most basic documents of international law, and torture and similar abuses were unequivocally and absolutely forbidden by the laws of nations that deem themselves civilized (Levinson 2004).

12 The human right to personal integrity is usually defined as the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Art. 5 The Universal Declaration of Human Rights (UDHR); Art. 7 International Covenant on Civil and Political Rights (CCPR).
Importantly, many international instruments were also created in the effort to make the struggle against torture and other ill-treatment, more effective, and among these, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which came into force on 26 June 1987 is regularly celebrated as the most important (Nowak, McArthur and Buchinger 2008). Nevertheless, torture, the most unequivocally banned practice in the world today, continues to be systematically practiced in many parts of the world (Nowak et al. 2008). Given the increasing reports on torture and massive ill-treatment worldwide, considerable attention is being paid to the situation in China. Scathing reports from Non-governmental Organizations (NGOs), such as Amnesty International, describe torture in China as widespread and systemic. Human rights activists complain bitterly about the lack of judiciary independence because of the party-state, how the authorities politicize criminal cases, and how torture is employed for oppressing political dissents. Additionally, within the academic literature on this topic in the West (e.g. Tanner 2000; Thelle 2006), China is described as a police state (Tanner 2000: 27) in which, apart from using torture to coerce incriminating statements, the police is repressive and abuse various forms of administrative detention, including the Education Through Labor (ETL) (laodong jiaoyang), and the 1989 Tiananmen incident greatly reinforced this image (Cao and Hou 2001).

Chinese scholars have acknowledged the widespread use of “torture” – physical force or psychological duress – by law enforcement in general, and by the police in criminal investigations in particular. Since the mid-1990s, Chinese academics have created a vast literature on police torture in the process of criminal interrogation. In this study, we review research articles on “torture”, “criminal interrogation” and related topics published in Chinese language academic journals in the period 1994–2008 as well as recent literature on Chinese policing and criminal procedure in English, mainly written by Chinese authors, with a view to summarize the current knowledge of what actually happens with regard to police torture in criminal investigations and what is known about its causes. Research that has been conducted on coerced confessions in the West is, as a rule, not integrated in this review.

13 China ratified the CAT in October 1988, and demonstrated its strong commitment to oppose torture consistently and to fulfill its obligations under the CAT conscientiously (Zhe, 2005).

14 Note that “China” as it is used throughout this paper refers to mainland China and excludes Hong Kong, Macau and Taiwan.


16 Electronic versions of these articles can be accessed through China National Knowledge Infrastructure (CNKI) on-line documentation page on the web at URL http://www.global.cnki.net/.


This article reviews a selection of the 1082 articles analyzed and therefore cannot be all inclusive and comprehensive. Nevertheless, in our selection, we have tried to grasp the diversity in all the academic literature studied and have discussed the major trends based on the analyses made.

2 Police Torture in Criminal Investigation

2.1 Definition

"Torture" is an abstract word, made concrete by the knowledge and imagination of the reader. The focus of this study is on the most obvious place to look for it—police interrogation practices, where the police adopt "torture" as a method to coerce confessions or information from a criminal suspect.

Then, the question turns to which acts belong to the category of torture in criminal interrogation. John H. Langbein (1977) supplies illustrations of medieval forms of torture—images of interrogations in chambers furnished with implements of pain—that probably conform to one’s basic image of the practice. Modern experience, however, has led us to wonder whether this limited view is adequate to capture how states organize torture today. Article 1 of the CAT is the first provision in an international treaty that defines torture, and it provides a fairly precise definition of torture, separating illegal practices into two categories—torture and cruel, inhuman, or degrading treatment or punishment which does not amount to torture. According to this definition, to classify an act as torture, the pain of suffering inflicted must indeed be severe. If torture is the inflicting of severe pain, a slap in the face or sleep deprivation, for instance, does not unequivocally rise to the level of torture.

Chinese law, however, defines torture in a broader sense than the CAT. Unlike Article 1 of the CAT, Article 43 of the Criminal Procedure Law of the People's Republic of

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This review includes a wide range of studies in terms of levels of analysis and basic questions. More specifically, Law discipline-based journals such as Law Science, Global Law Review, Legal Forum and Hebei Law Science; police-oriented journals such as Policing Studies, Journal of Chinese People's Public Security University (Social Sciences Edition) and Journal of Fujian Public Security College; procuratorate-oriented journals such as Journal of National Procurators College and People's Procuratorial Semimonthly; and Interdisciplinary Journal journals such as Legal System and Society and Journal of Political Science and Law are included. Accordingly, authors of these articles are from a wide variety of fields, including academic scholars, police officers, procuratorates and government officials. Perhaps most importantly, concerning the selected articles reported in this paper, it draws on empirical studies or studies based on empirical data and the most notable literature in the field.

Translation: Article 43 Judges, procurators and investigators must, in accordance with the legally prescribed process, collect various kinds of evidence that can prove the criminal suspect's or defendant's

China (CPL), Article 22 (4)\textsuperscript{20} of the Police Law of the People’s Republic of China (PL) and Article 247\textsuperscript{21} of the Criminal Law of the People’s Republic of China (CCL) do not draw a line between “torture” and “other acts of cruel, inhuman or degrading treatment”. It is also worth noting that, in accordance with this broad scope of torture, Article 247 of the CCL further specifies when torture does not cause “injury, disability or death”, the appropriate sentence should be less than three years of prison incarceration or criminal detention\textsuperscript{22}, and when torture leads to “injury, disability or death”, the judicial officer can, in serious cases, be punished by life imprisonment or the death penalty. Chinese law, thus, uses a rather broad definition of torture, not requiring the action of the police to be “severe” or to reach a certain level of intensity.

Chinese academics define torture as any act by which corporal treatment or quasi-corporal treatment is inflicted on a suspect or a defendant to coerce confessions by judicial officers (Zhe 2005). Corporal treatment refers to physical coercion inflicting pain directly on the body, such as beating or electric shock. Quasi-corporal treatment refers to physical or psychological coercion inflicting pain (physical or mental) indirectly on the body, such as through sleep deprivation, exposure to cold or heat, or being made to sit or stand in uncomfortable positions. As this definition does not distinguish between more and less abusive forms of it, Lin, Zhao and Huang (2006: 123) have stated that attention should not be centered on classic brutal abuses alone; “untypical” methods, such as standing in the sun for a long time, can be cruel enough. As Mou (2005: 34) puts it, the interrogation practice should adhere to the rule that any valid confession must be “voluntary” and thus cannot be the result of coercion of any kind.

Hence, considering that this article is based on a review of Chinese academic literature, the term “torture” will refer to the following broad concept: any act by which corporal treatment or quasi-corporal treatment is inflicted by police officers on a suspect or a defendant to coerce confessions.

2.2 The Phenomenon

For obvious reasons, obtaining the information necessary to determine the true extent of the torture based on which a confession has been obtained in a criminal investigation, is nearly impossible. Most interrogation occurs in the bowels of police territory, off tape, unscrutinized by the public, the media, or the criminal justice system. Although it is

\textsuperscript{20} Translation: Article 22 People’s policemen may not commit any of the following acts: … (4) to extort confession by torture or subject criminals to corporal punishment or maltreat them; …

\textsuperscript{21} Translation: Article 247 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 fix-term imprisonment or not more than three years 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 Article 234 or 232 of this law.

\textsuperscript{22} “A term of criminal detention shall be not less than one month but no more than 6 months” (CCL, Art. 42).
often intentionally hidden from view, during the last 15 years, a growing body of academic literature on abusive police practices in criminal investigation, media accounts, as well as official statistics, indicates a substantial number of police confessions, based on torture, have in fact occurred.

According to the fourth report from the Chinese government to the CAT, between 1999 and 2004 there were 541 cases involving 566 persons who were sentenced by extorting confessions through torture.

However, as Ma and Peng (2006: 22) have observed, the existing official statistics only document the tip of the iceberg, suggesting that torture confessions occur with greater frequency than officially reported. Many Chinese scholars, relying on different sources like interviews with present and former law enforcement officers or individual field observations, have made the alarming assertion that the problem of confessions produced by torture is widespread in China. Zhou (2006: 117) claimed “it is certain that confession by torture still occur regularly in criminal investigation…it is an unwritten rule in law enforcement”. According to Hu, S. Y., (2007: 109), Senior Procurator of the People’s Procuratorate of Guangdong Province, “Extracting confessions by torture is a nation wide problem…and this problem is even more alarming in certain places”.

These claims hold up under scrutiny as there is sound empirical proof that torture practices are not used only in exceptional cases. Liu, L. and Liu, C. (2004: 62-3) were particularly struck by the result of an earlier study based on questionnaires sent to 200 college students who were criminal investigation majors and had attended internship programs in the Public Security Department. To the question: “Is torture a common phenomenon in the criminal interrogations you have attended?”, 95 per cent of the students chose the answer “very common”. In recent research, the result of a survey, involving 487 police officers in Hunan and Hebei province, demonstrated that 51.6 per cent of police officers considered interrogational torture an exceptional practice which happened from time to time. However, it should be noted that 38.9 per cent of the police officers considered interrogational torture to be a common phenomenon, which happens regularly (Lin, Yu and Zhang 2006: 127).

2.3 Evolution of Torture Techniques

Torture techniques change over time. In outlining the evolution of torture techniques, Ma and Peng (2006: 25-26) have identified three main stages since 1980s: in the first stage, which started in the early 1980s and continued until the end of 1990s, corporal treatment, such as beating and electric shock, were the major torture techniques that were used. At times, the police even tortured the suspect in public, using the bodies to advertise state power. In addition, because public shaming is a serious discursive punishment in Chinese culture (Hu 1944), torturing criminal suspects in public also helps to achieve another cultural function, that is, to forestall crime in Chinese society. In the second period which lasted until the end of the 20th century, the police favoured causing

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23 Chinese version of the fourth periodic report, pages 36-40.
pain that intimidated the suspect alone. In contrast to ordinary forms of direct physical abuse, more covert interrogation practices—exposure to heat or cold, for example, or deprivation of sleep, food and drink—were used to leave few or no signs of injuries on the suspects. Finally, there is the current era, from the beginning of the 21st century to the present, in which interrogation practices involving physical brutality and scarring techniques became even less common. Some other studies have shown that the trend has involved moving away from brutally scarring violence towards more time-consuming and ‘clean torture’ (Liu and Zuo 2005; He 2006). Notably, the history of American police interrogation also shows an evolution from more brutal forms of interrogation toward a mainly psychological oriented approach of interrogation (Leo 2008). While the 1931 Wickersham Commission Report and Miranda appear to be partly responsible for the dramatic decline in violence in the American interrogation room from the 1930s through 1960s, it is argued that American police have also become skilled at the practice of manipulation and deception during interrogation (Leo 1996; Leo and Koenig 2010).

While the police increasingly tend to use ‘clean’ techniques, He (2006: 94) also noted that the classic brutal techniques were used “when necessary”. By examining a collection of torture cases that resulted in death in the Zhejiang Province over the last ten years, Dong (2004: 5) has cited numerous examples from these cases24, including some that involved the use of clubs, leather belts, electronic wire, or using the “water cure,” which involves pouring water slowly into the nostril of a suspect.

2.4 The Role of Police Stations

Interrogational torture depends on certain conditions of time and space, and empirical evidence shows that it is most likely to occur at the police station at the basic level (paichusuo). In a study of a collection of torture cases resulting in death, Dong (2004: 5) found 73 per cent of these cases occurred at these police stations at the basic level. Based on data of 60 criminal cases in 2004 from a Chinese district court, Ma and Peng (2006: 26) found that 85 per cent of the suspects either confessed or made incriminating statements to the police before being moved to the detention house, and 91 per cent of those first confessions happened in police premises. A subsequent study examined the use of torture to obtain information leading to other evidence, such as physical evidence or suspects’ other possible offences, in facilitating criminal investigations using data from 80 criminal cases from three Chinese district courts for the year 2003—2004 (Liu 2008). By analyzing the frequency and the time taken for interrogations, both before and after custody, the study showed the suspects’ confessions at the pre-custody stage have an important function in leading to other evidence in the criminal investigation: in the great majority of cases, the police can rely on the suspects’ confessions to get most evidence before the suspects are taken into custody or are arrested.

24 The exact number of the cases is not reported in the article. Nevertheless, it is mentioned that there are 41 police officers involved in these cases.
2.5 Weak victims

Scholars have observed that possible victims of interrogational torture generally fall into one social category: the lowest level. Lu (2006) found that torture was disproportionately applied against the poorer and weaker members of society, including those least likely to be represented by counsel. This observation was confirmed in another study. Through an in-depth analysis of 20 cases of tortured confession in recent years, Chen (2007) discovered that the majority of torture victims are farmers, and, in general, most of them had a lower social status. Notably, unlike the West, transience rather than race is the major factor differentiating social groups in China. As Lu and Drass (2002: 72) observed, “Urbanites versus peasants and permanent versus temporary residents are major status characteristics that separate the transient population from urban residents.” It is also suggested that transients are most likely to be treated as secondary citizens by police officials as well as by urban residents (Lu and Drass 2002: 77). Research by Yao (2004: 103) also found that transients in the city, unemployed and less educated are more vulnerable to torture than do their counterparts. In a study of 100 cases of interrogational torture, Wu (2006b: 151) pointed out that torture victims had been “labelled” by society and no longer seemed to have rights that police felt bound to respect.

2.6 Wrongful Convictions

Confession can not only prove that the suspect intended the offence or was reckless, but can also take on added significance by leading to other evidence. Moreover, even when other ways of securing evidence are available, interrogation often serves as a ‘short cut’ which can save the legal system a great deal of time and money. Unfortunately, the obvious benefits of confessions have made Chinese law enforcement officers too eager to obtain them. The use of torture to produce compliance is still frequently practiced in nowadays police investigative works with one of the aims to form a strong evidential basis as compelling proof of the offenders’ guilt. However, torture tests endurance rather than veracity, so innocent persons might yield to the torment and confess to actions that they never did, which, in turn, can lead to wrongful prosecution, conviction and incarceration of the innocent (Liu and Zou 2005). Therefore, based on the assertion that the torture problem is widespread in criminal interrogation, one would expect to see hundreds, if not thousands, of wrongful convictions happening each year. The articles reviewed, however, provide a more nuanced picture.

Based on interviews with police officers, Ma and Peng (2006: 23-4) assert that police-induced false confessions are rare. In practice, the use of torture is governed by various rules, thought to minimize the possibility that false statements would be elicited. First, torture is not supposed to be used to wring out an unsubstantiated confession of guilt. Rather, torture is supposed to be employed in such a way that the suspect would also

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25 Morally, there is a lot to be said for confessing. A cultural expectation in China is that individuals should be submissive to legal authorities and exhibit sincerity in their repentance for unlawful actions, which will be discussed in 3.3.2 Traditional Chinese Values.
confess to details of the crime—information which “no innocent person can know.” Further, the information admitted under torture has to be verified to the extent feasible. For example, if a suspect confesses to a murder, he is supposed to be asked where he put the weapon. If he says he threw it into the river, the police officer is supposed to send someone to find it, so that when fetched, it could corroborate the confession. Finally, the requirement that the police verify the inter-relationships of all the evidence is universal and actual corroboration is required. Ma and Ni (2002: 78) argue that, when properly utilized, “torture” interrogation techniques do not necessarily lead to miscarriage cases.

For a variety of reasons, these arguments are inadequate. The reliability of confessions extracted under torture depends considerably upon the prohibition of suggestive questioning (Ma and Peng 2006). The interrogator is supposed to elicit evidence, not supply it. Nonetheless, if the suspect has been “identified” by the victim or eyewitnesses but is still innocent, the interrogator’s suspicion might be enough to let him adopt any means to elicit the answer he wants to hear (Chen, 2007). Additionally, in some jurisdictions, the requirement of verification was not enforced or was enforced indifferently. As Cui (2003: 26) points out, “Although confessions elicited by torture are not always false, wrongful convictions, with no exception, are all because of torture.”

3 Explaining Torture

Literature on the causes of police torture in criminal interrogations covers a wide range of topics in terms of levels of analysis. Indeed, complex social phenomena can rarely be the direct consequence of any singular factor. Rather, they are the product of various overlapping and reinforcing forces. Despite the breadth in terms of phenomena, we have discerned general patterns in the scholarly literature in this domain and have organized these accounts under three, obviously linked, dimensions: the law, the organization and structure and culture.

3.1 The Law

The traditional Chinese criminal justice system, dominated by the ideology of “crime control” emphasizes substantial justice and truth-finding (Wan 2005). In the long history of Chinese crime control, there have been few safeguards to protect the suspect from the state, if it were to abuse its powers. Notably, from the Zhou dynasty (1066—256 B.C.) to the Qing dynasty (1644—1912), torture was permitted to be employed against suspects to investigate and prosecute crime before the courts (Yan 2004). Even after the founding of the People’s Republic in 1949, China went through a historical vacuum with regard to Criminal Procedure Law for almost 30 years. Only in 1979, China had her first Criminal Law and Criminal Procedure Law (CPL 1979) in place, and this marked the beginning of China’s legal redevelopment (Ma 2003). However, the rights of the suspect were still marginalized by CPL 1979 (Fu 1998). In an effort to progress towards judicial democratization and fairness, China revised CPL 1979 in 1996. The existing CPL, however, in many aspects, is criticized for not finding a balance between law
enforcement and individual rights. More specifically, it is commonly held by Chinese legal academics that the lack of adequate safeguards of the suspect’s procedural rights at the stage of investigation has resulted in the problem of widespread police interrogational torture (Zuo 2005; Bi 2007).

3.1.1 Interrogation in Secrecy

Though police torture in criminal investigations is part of the dim and dark history of Chinese criminal law, today’s China, by virtue of provisions of criminal procedure and criminal law, forbids the practice wherein suspects or the accused should be forced, by actual or metaphorical “arm-twisting”, to respond to police questioning. The CPL declares that “the use of torture to extort confession and the collection of evidence by threats, enticement, deceit or other unlawful methods is strictly prohibited” (CPL, Art. 43). Further, torture is a crime, and the torturer can in serious cases be punished by life imprisonment or death (CCP, Art. 247, 234, 232). The stiff penalties, however, have not had a deterrent effect on police officers. Many scholars have acknowledged that the present legislative restrictions sometimes provide inadequate restraints on pernicious interrogation practices because of the difficulty in determining what transpires during police interrogation (Huang 2002; Bi 2007).

Absence of Neutral Actors

One of the reasons leading to this low visibility, it is alleged, lies largely in the places where the interrogations take place. Under the CPL, the police are given the power to interrogate a suspect under two circumstances:

(1) The police may interrogate a suspect after he/she is detained or arrested and taken into police custody (CPL, Art. 65, 72); and

(2) The police may summon a suspect, who need not be detained or arrested, to a designated place in the city or county where he/she stays for interrogation, or the suspect may be interrogated at his/her residence (CPL, Art. 92).

In the first situation, generally speaking, the suspect must only be questioned in the detention house. If in the second situation, since the CPL contains no guidelines as to the choice of the summon locations, the police in almost all cases choose to summon the suspect to the police station or to some covert place (Wu 2006b; Bi 2007). It has been argued that since the police station and the detention house are both “police territory”, it cannot be wrested from police control, and there is enormous scope for police abuse. Chen (2006: 533) stated that making the rights of suspects dependent on the police or custody officers, but not on a genuine third party, does not subject the behavior of the police to proper control and scrutiny.


Low Visibility of Interrogation Process

The CPL confers powers on the police to interrogate, but also seeks to protect suspects from the abuse of such powers by providing guidelines about the content of the interrogation (CPL, Art. 93, 95). However, because the police have the sole responsibility for implementing procedural safeguards, Bi (2007: 132) claims that the protection provided by the CPL has often been illusory. Under the CPL, a suspect does not have the right to have an attorney present during interrogation. Consequently, the criminal interrogation process, except in exceptional cases, only involves two parties: the police and the suspect. Under such circumstances, written records of interrogation are crucial because, in the absence of mandatory electronic recording, they are the only way to know whether unnecessary pressures were imposed on suspects to confess. Unfortunately, a written record of interrogation, which is often referred to as “police creative work” (Huang 2002: 82), is considered to be notoriously inaccurate. It is hardly realistic to expect a police officer to record the torture part of the interrogational process, and it is almost impossible for a suspect to correct or refuse to sign the record (Ma and Ni 2002).

Due to the low visibility of the interrogation process, most suspects who had claimed that their confessions had been extracted by torture have not been able to present evidence of the prior practices of the police (Wu, 2006a). If the suspect has no discernible or obvious injuries, the judge hearing the suspect’s motion to suppress his confession, is likely to believe denials of abuse by the police rather than the suspect’s claim that he was subjected to torture but the wounds had already healed during the long period of police custody or that the police had used ‘clean’ torture techniques that left no marks (Liu 2007). As Wu (2006a: 146) pointed out, even if the suspect can show injuries consistent with his claims of police torture, police testimony establishing another plausible explanation for the suspect’s injuries will provide judges with a sufficient basis for rejecting the suspect’s allegations.

3.1.2 Right to Silence

Another problem, frequently mentioned in relation to torture, is the principle of presumption of innocence, related to the right to silence. Contrary to the common practice in many Western countries that the interrogating officers are required to inform suspects of the right to remain silent before beginning an interrogation, the CPL requires that at the interrogation a suspect “shall answer questions asked by investigators truthfully” (CPL, Art. 93). The majority view is that the imposition of this obligation has made some officers feel justified in using torture to force suspects to admit their guilt (He 2006; Wu 2006b).

3.1.3 Legal Counsel

Studies also demonstrate that the CPL permits lawyers’ involvement at the stage of police investigation, but neither the CPL nor any supplementary regulations contain
sufficient procedural safeguards to ensure that the lawyers discharge their duties properly (Fu 1998; Ma 2003). In the law, after the first time the suspect is interrogated by the police or from the date coercive measures were used on him, the suspect can retain a lawyer to offer legal advice, or to serve as his representative in the proceedings to file petitions and complaints (CPL, Art. 96). However, this provision is subject to exceptions in special circumstances. If a case involves state secrets, the suspect shall obtain the approval of the investigation organ to retain a lawyer, and he shall ask for further permission to meet or correspond with his legal counsel (CPL, Art. 96). In addition, the police may be present during the lawyer–suspect meetings according to the circumstance of the case and the “necessity” (CPL, Art. 96). Articles 14 and 16 of the Regulation on Lawyers’ Participation in Criminal Procedure Activity issued by the Ministry of Public Security further restrains the lawyer–suspect encounter by granting the police the power to stop a lawyer’s “unlawful” conduct or even suspend a lawyer—suspect meeting on the grounds that the lawyer had violated the rules of the meeting place. Facing the restrictions set by the police, using their statutorily granted supervisory authority, it is very unlikely that a victim of interrogational torture is given the opportunity to have a thorough discussion with his lawyer about filing complaints against the torturer (Chen 2006).

Moreover, the most troubling aspect of the right to counsel provided in the CPL, according to Fu (1998: 45), is that it makes it a criminal offence for a lawyer to “help the suspect to conceal, destroy or falsify evidence or to tally their confessions; or intimidate or induce the witnesses to modify their testimony or give false testimony; or conduct other acts to interfere with the proceedings of the judicial organs” (CPL, Art. 38). This provision and its corresponding article in CCL (Art. 306) are comparable to a Damocles sword hanging above the head of the lawyer, in such a situation (Chen 2006: 531). One of the chilling effects of these two provisions, according to Liu (2007: 26), is that many lawyers are reluctant to take on criminal cases. In practice, more than 70 percent of all criminal cases are processed without lawyers appearing in court on behalf of the defendants (Wu 2006b).

3.1.4 Exclusionary Rule

According to Chinese law, confession evidence secured by torture is inadmissible in court, this seeks to regulate police interrogation. Although the CPL itself contains no exclusionary rule, the relevant regulation issued by the Supreme People’s Court states “the confession of the defendant cannot be used as the basis in deciding a case if it is verified they are elicited by torture, threat, enticement, deceit or other unlawful means”. This provision has been criticized widely for its “incomplete nature”, because, on the face of it, the court can exclude confession evidence, but not any other evidence obtained as a result of the tainted confessions (Liang 2002; Zhe 2005). As Wu (2006b: 157) asserted, “given the fact that torture is ordinarily used to lead to other [objective] evidence rather than a simple statement,

this provision by excluding confessions only is not sufficient to stop pernicious interrogation practices”.

In addition, even considering the rule of exclusion of illegal confessions alone, scholars have found that there are no adequate procedural safeguards supposedly underpinning it (Chen 2005; Wu 2006a). For instance, if individual suspects claim their confessions were extracted by torture, there is no provision as to whether the court should undertake a scrutiny of the circumstances in which the evidence was obtained, or whether it requires the police or the procuratorate to prove that the confession was not obtained by oppression. Without clear and effectively sanctioned rules, it has been recognized that, in most cases, the courts are reluctant to dig deeply to verify the claims of suspects, but have held that all such defenses are “unfounded” solely on the basis of the police’s “no-torture” written statement (Chen 2005).

3.2 Organization and Structure

3.2.1 Daily Operation of the Police Force

Although some aspects of interrogational torture are specific to the criminal justice system, and are either concerned with the technical aspects of the legislation or with institution-building, some studies have indicated that many of them have little to do with the criminal justice system as such. Rather, torture, an extreme means to get evidence, implies the weakness of the daily operations of the police. Specifically, the daily operation of the police is undermined by the shortage of budgets and poorly trained police officers; the police force is undersized and it functions using underdeveloped investigative methods.

First, the lack of a budget for police investigative work is considered a longstanding problem in China. Zhu (2006: 16) observed, that present day China, which is still a poor country in the process of transition and development, cannot provide a solid financial basis for a “physical evidence-centered” investigation model. Contrary to this point, Chen (2007: 59) has argued that the importance of increasing national investment in criminal investigation has never been fully recognized by the Chinese government. Since the advent of an open economy and a reform policy, the Chinese government’s financial input in the case of criminal investigations, either concerning personnel or technology, has not increased along with the significant rise in crime as well as the changes in crime patterns. Due to the limited budget, some forensic techniques of crime procedure, like DNA testing, cannot be employed (Chen 2007).

Second, the lack of competence of the police in criminal investigative work is also considered a salient problem (Wang 2006). Studies have found that the poor educational standards of recruits (Lv and Zhang 2000) and the lack of training lead to incompetence in criminal investigations in which the police officers often fail to discovery or even incidentally destroy forensic material, such as fingerprints, shoe marks and DNA, available on the crime scene (Yao 2004).
Finally, in many cases, there is simply not enough physical evidence for the police to find. It is argued that the lack of wider adoption of proactive methods and intelligence-led models, in many cases, means contemporary reactive techniques may not be capable of producing the required evidence (Zuo and Zhou 2002; Wu 2008). Common crimes such as fraud, conspiracy and extortion often present officers with a crime scene that yield no fingerprints, no eyewitnesses and no forensic evidence.

In those circumstances in which there are a large number of cases to process and limited resources to process them, Xiaoqing Zhu (2006: 16), vice procurator-general of the Supreme People’s Procuratorate, maintains the police are often unable to solve crimes in the absence of a suspect’s incriminating statements. He claims that “interrogation is still playing an important role in current investigative works”. But the problem is, as He (2005: 92) points out, that torture often appears in conditions where the interrogator is incompetent in persuasion, the evidence base is weak and the suspect is reluctant to talk.

3.2.2 Structure of the Criminal Justice System

The pervasive phenomenon of interrogational torture can also be attributed to the “system” of criminal justice that allows it to exist. Most scholars have concluded that the root problem of the widespread employment of interrogational torture without significant problems for such an extended period to the fact that China, whose legal structure relies on an inquisitorial system, fails to separate powers to achieve a “fundamental balance” in criminal justice among these three actors: the Public Security Organs, the People’s Procuratorates and the People’s Court (Chen 2007; Liu 2007). As Chen (2000: 24) observes, Chinese criminal procedure has a “streamlined-production” structure in which the courts are plagued by problems of lack of independence, limited authority and powers, so the courts cannot effectively guard against the state abusing its powerful position to prove a case against an individual citizen in order to fulfil its duty of enforcing the criminal law.

Enforcing the criminal law is crucial to every society, and based on different ways in approaching rational fact-finding, the criminal justice system has been classically divided as being either adversarial or inquisitorial (Jorg, Field and Brants 1995). Owing to China’s traditional hierarchical structures of authority, in 1979, after the Cultural Revolution, China adopted the inquisitorial model to rebuild its criminal justice institutions (Davidson and Wang 1996). Although the 1996 legal reforms were intended to transform a traditional inquisitorial system of justice into a more adversarial legal process, the organizational fundamentals—the hierarchical ordering of criminal justice functions—remained unchanged (Chen 2000).

According to the philosophy of inquisitorial justice, which emphasizes that the state can be largely trusted to conduct a neutral investigation into the truth (Jorg et al. 1995), the Chinese police and the procuratorate, which shoulder dual responsibilities of not
only seeking the truth, but also protecting the rights of the suspect, are expected to carry out a fair investigation by collecting various kinds of evidence, including evidence in the suspect’s favour (CPL, Art. 14, 43). Compared to the adversarial system, due to the faith in the integrity of the state, the need for safeguards, for example defense lawyers, is reduced (Chen, 2006). Additionally, as the court reforms in 1996 started to push a hands-off approach to case adjudication, the courts no longer participated in any pre-trial investigation, therefore, the police and the procuratorate began to play a dominant role in the pre-trial criminal investigation (Zuo 2005; Chen 2006).

Concerning the dominant role of prosecution in the pre-trial stage, the literature delivers much criticism on the absence of any independent element:

First, the current criminal justice structure is considered to have failed to provide effective institutionalized legal restraints on the power of the police (Chen 2000: 25). According to the CPL, the police enjoy broad power to conduct criminal investigations. Except for arrest, which can only be made after approval from the people’s procuratorate, all the pre-trial compulsory measures, such as detaining and summoning, are decided, executed and prolonged by the public security organ themselves. Given the likelihood that the police may do everything possible to facilitate the collection of evidence, especially under tremendous pressure from the Chinese government wanting a decrease in crime to reinforce legitimacy (Hu, M. 2007), many scholars have argued that this self-policing mechanism cannot serve as a real safeguard against police misconduct (Ning 2002; Zheng 2007). Empirical evidence shows that using torture to force suspects to talk is considered by many police officials as a quick solution to accomplish the objective of the local government, of producing a high clear-up rate (Wang 2002). Aside from the top-down pressures, some researchers noted that this result-oriented approach could also be attributed to the over-reliance on monetary incentives to carry out police work (Ma 2003; Dutton 2005). In addition, the internal supervision was found to be failing to fight police abuses. As a recent survey of police officers reveals, 45 per cent of the officers admitted that the use of torture in criminal interrogations was permitted or was carried out with the acquiescence of the police chiefs (Lin, Yu and Zhang, 2006: 132).

Second, the people’s procuratorate, as a supervision organ, has also been reported to fail to respond with vigour due to its simultaneous task of crime control (Man 2008). According to the law, a people’s procuratorate must ascertain whether the investigative activities have been lawful through approval or denial of a proposed arrest and by reviewing the case before making a decision on whether or not the suspect should be prosecuted (CPL, Art. 137). The procuratorate has the power to investigate cases where the police may have committed a crime, for example, by torturing the suspect (CPL, Art. 18). However, all too often, the supposed safeguard against oppressive police practices offered by prosecution control of the investigation and the complaints process is a little more than a façade. Wu (2006b: 159) provides several examples where, when the procuratorate did act upon clues or complaints, the way in which they acted, whether or not to file a case concerning police torture, was decided according to the working rules
listed below: First, if the interrogation does not result in death or detectible serious injury, the case will not be reported; Second, if the evidence to prove the fact that the suspect has committed the crime is verified and sufficient, even if torture is involved, generally, the case will still be processed for prosecution. Finally, in those cases resulting in “serious results”, in most instances, the Politics and Law Committee will first mediate on the conflict between the police and the victim and then decide whether or not to file a police torture case. In fact, police officers have sometimes received disciplinary sanctions, but rarely have they been prosecuted (Wu 2001).

In addition to the criticism of the dysfunctional checks and balances system at the pre-trial stage, some scholars have argued that there is a no party contest in the court as well, and the truth-finding process simply continues at trial (Chen 2000; Liu 2007). After the 1996 judicial reform, the judges were expected to become neutral arbitrators who decided a case solely on the evidence given in court. However, under the current situation, when most defendants have no professional defense attorneys to defend them (Lu 2006), when the great majority of citizens are unwilling to come forward as witnesses (Wan 2007), the trial process aimed at hearing powerful arguments on both sides degenerates into sheer formality. Additionally, as is often asserted, the reason that the courts have shown themselves to be extremely reluctant to discipline the police by excluding the evidence obtained in an improper way is structural in nature: under the current political–legal system, court judges, who are selected by the local people’s congress and receive their salaries and other welfare benefits from the local governments, are likely to share the domestic governments’ concerns for stability and crime reduction (Han 2005; Liu 2007).

3.3 Culture

Other than focusing on loopholes or shortcomings in the law and the ineffective mechanisms for controlling state powers, many scholars have noticed the cultural support in the background and the compliance on which the persistence of police interrogational torture depends.

3.3.1 Communitarian Society

Research based on interviews with police officers reports that Chinese police do not generally think of themselves as evil but rather seem to feel that coercing confessions is justified and they regard themselves as the guardians of the interests of society in combating crime and criminals (Wang 2002; Wu 2006b). Notably, some senior ranks also share a similar view that the ends—convicting criminals—justify the means (Lin, Yu and Zhang 2006). Wu (2006b: 161) discovered that legal authorities showed leniency towards

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28 The local politics and law committee (zhengfa wei) is a department of the Local Chinese Communist Party Committee. The main function of the politics and law committee is to assist the work of the local courts, the procuratorates, and the police by providing guidelines, and it is not supposed to interference with the daily operations of those three organs (Chen, 2007).
the police involved in interrogational torture cases, and the punishment rarely corresponded to the severity of the crime.

Although virtually everyone continues to ritualistically condemn torture in public, the deep conviction, as reflected in the following empirical evidence, is in many cases not to be found behind the strong language. According to Wu’s study (2006b: 161), the media’s accounts of abusive police practices have generated increasing public concern about the police’s use of torture in interrogations in recent years, but it seems the citizens only showed sympathy to those who were innocent but not to the ones with “real guilt”. One typical example is the Liu Yong case. Liu Yong, a Chinese mafia kingpin, was sentenced to death by the Tieling Intermediate People’s Court of Liaoning Province on April 17, 2002, but during the second court procedure on August 15, 2003, the Liaoning Higher People’s Court awarded a two-year reprieve on his sentence. The court attributed the alteration to “the possibility of police’s use of torture during Liu Yong’s interrogations cannot be excluded.” This revised verdict made waves across the country, leading to a strong resentment among the general public. Eventually, the Supreme People’s Court retried the case and sentenced Liu Yong to death (Liu 2007). Additionally, in terms of the public perception of police interrogational torture, a survey conducted in 2006 shows the public’s attitude towards police interrogational torture is tolerant, even supportive (Lin, Zhao and Huang 2006: 133-4).

What accounts for the average citizen’s indifference to the plight of criminal suspects? First, according to Peerenboom (2004: 1047-1048), the basic problem lies in the high tides of crime rates as a result of modernization, the transition to a market economy, and increased social and economic inequality combined with moral crisis, resulting in strong public sentiments for greater punitiveness toward offenders. It is noticed that the government’s periodic strike-hard campaigns, which are often considered as harsh, arbitrary and extralegal, are very popular with the public (Dutton and Tianfu, 1993; Luo 2002; Jing 2007). Not surprisingly, here we see that the government has been all too willing to respond to the public demand for a war on crime. On the one hand, no doubt, China’s leadership learns the importance of maintain stability in a society that is going through the sort of social and economic change that, in the past, has led to chaos and violence. On the other hand, the desire to wage war on crime may also be an attempt to reinforce legitimacy. Peerenboom (2004: 1052) states that, in general, politicians all over the world have learned that being tough on crime is a winning issue, especially when crime is rising, but even when it is not rising. Perhaps more importantly, with socialism as an ideology has survived only on paper, the opinion of Yi (2008: 17-18) is that the Chinese Communist Party (CCP) nowadays has relied primarily on GDP growth and social stability for legitimacy, and the social stability constitutes a prerequisite for the economic miracle.

Second, in general, the Chinese public show more concern for public security rather than individual rights and give high priority to stability (Lin, Yu and Zhang 2006). A massive sample survey conducted in 2005 questioned about 4000 people including judges, procuratorates, lawyers and the general public (Ma and Peng 2006: 23). The final
conclusion of this survey was that there is still a big gap between the legal sense of Chinese citizens and the requirements of the rule of law. When asked which one they thought was more important, effective crime control or protection of the rights of suspects, 90 per cent of the respondents chose the former.

3.3.2 Traditional Chinese Values

Seen in this way, the majority of Chinese scholars tend to see a fundamental conflict between traditional Chinese values that emphasize harmony, order and collective interests, and human rights, which mostly pertain to values such as dignity, equality, individual rights and the rule of law. Are Confucian collective values considered incompatible with the idea of human rights? Several accounts are offered by scholars.

First, the Confucian idea of the individual existing only in the context of society, as well as the importance of the community and duty has prevented giving importance to the idea of a completely autonomous individual (Jiang 2003; Yan 2004; Li 2007). Focusing on historical practices, many have accused Confucianism of having no place for individual liberty, and Confucianism’s hostility to individual liberty has often been attributed to the Confucian concept of ritual propriety (li), which refers to ritualistically proper behavior in all circumstances of life, equated with traditional “rules of conduct”. According to ritual propriety (li), the family code is a parent’s (especially a father’s) authority over children, a husband’s authority over his wife and the veneration of age (Yan 2004). A related moral code is that a family’s interests should always be more important than an individual’s. Consequently, individual rights, interests and privacy got little attention in traditional China (Jiang, Lambert and Wang 2007).

Second, Confucianism with its emphasis on a hierarchical order in society, group orientation and morale, rather than on legal-based behavioral principles leaves society open to authoritarian and despotic rule (Chen 2003; Liu 2007; Zheng 2007). Chinese family relationships were perceived as model relationships for other social settings, and these hierarchical and reciprocal relationships were extended to society and state affairs (Ren 1997; Chen 2003). For example, the emperor, as a father in the family, had absolute authority over his ministers, lower-level officials and citizens. Thus, “the government was nothing but a projection of the patriarchal family, and the virtue which justified the sovereign’s holding of the throne was a projected family ethics, there could never be a government of laws as practiced in the West, but a government of men” (Ren, 1997: 25). In this sense, the citizens may sometimes “serve as ideological sanction for wielders of despotic authority” (Kwok, 1998: 91).

Finally, communitarianism and collective values that encourage confessions may make the right to silence in criminal procedure meaningless (Li 2002; Bu 2003). Traditionally, confession with sincere remorse is strongly encouraged in a communitarian context because of its correctional value for the wrongdoer and restorative value for society (Haley 1994). Denial, in the communitarian context of traditional China, reflects badly on an individual as it signifies one’s refusal to take
responsibility for one’s action (Chu, Bodde and Morris 1973). From a Confucian perspective, even though committing crimes generates anger in people, admitting guilt signals that one still seeks to reform oneself and is open to reconciliation with the larger community, thereby displaying socially “engaging emotions” (Kitayama Markus and Kurokawa 2000). This would result in forgiveness responsive to the degree of contrition. However, if one does not show a sense of shame, people may feel an urge to condemn the person not only for his/her shameful act but more strongly for the person’s unwillingness to amend him/herself, which can generate strong reactions (Li, Wang and Fischer, 2004). Therefore, if the suspect is reluctant to confess, this moral responsibility of the suspect, however, may consequently make the interrogator feel justified in coercing incriminating statements from the suspect (Bu 2003).

4 Conclusion

This literature review shows that Chinese legal scholars have devoted considerable attention to the subject of police interrogational torture and have provided rich information on the phenomena. Empirical evidence has recognized that interrogational torture, a pervasive problem in criminal investigations in China, is most likely to occur at the basic-level, in police stations and is especially likely to be disproportionately applied to the lowest socio-economic groups of the society. Although recent years have witnessed the evolution of torture techniques, from swifter, more painful techniques to more time-consuming and ‘clean’ ones, classic physical brutality is still exploited “when necessary”. Considered by the police as an effective means to get the truth from a suspect, the use of torture is surrounded by various rules to make such a confession reliable. However, the infamous miscarriage of justice cases of the last twenty years demonstrate that information extracted under torture comes with no guarantee of reliability.

Accordingly, Chinese scholars have also offered different views on the factors underlying this phenomenon. Mainstream legal scholarship treats the gaps or ambiguities in the law as the major cause. Dominated by the ideology of “crime control” rather than “due process”, the current CPL and relevant supplementary regulations, in many aspects, it is argued, fail to provide the suspect with adequate safeguards against pernicious interrogation practices: the interrogation process is marked by lack of transparency; legislation regarding the principle of presumption of innocence is absent; the notion of “equality of arms” is not laid down in the law, as lawyers’ involvement at the investigation stage is limited and their functions are subject to police interpretations and are based on abuse; the exclusionary rule is troubled by “incomplete nature” and the inadequacy of procedural safeguards underpinning it. Apart from this point, a part of scholarly literature relates the causes of police torture to the organization and structure of the Chinese criminal justice system, and one of the most prevailing interpretations emphasizes the absence of a functional model of separation of powers, especially the lack of judicial independence which results in this problem. Last but not least, some studies point to the influence of traditional cultural values in this respect: while
interrogational torture is absolutely coercive and cruel, its exercise depends at almost every level on many forms of cooperation and consensus.

These explanations and their implied remedies, while inspiring and useful, however, are not reasonable enough to guide legal reform in the appropriate direction, because:

First, legalistic accounts consider the law as an effective force that intervenes to deter or solve collective action problems arising among the police. But it is important to understand that social norms are unlikely to change as a result of simple legal interventions and many transplants may not have the effects that are intended. Indeed, there are many flaws in China’s criminal procedure legislations and China might find inspiration in Western solutions. Some scholars, however, doubt that the apparently successful Western experience with “due process” and “rule of law” can simply be copied as an independent standard in this context. As Damaška (1997: 839-840) has put it, “the music of the law changes, so to speak, when the musical instruments and the players are no longer the same.” According to Zhu (2007: 540), the Western example “blurs and confuses the real problems to be dealt with…and can, moreover, lead to mistaken solutions”. In addition, another difficulty with this approach is that it fails to take account of law enforcement’s interest in finding evidence and the restorative value of confessions. Blind Western-inspired reforms cannot be successful, as they overlook the fact that legal reform is inherently political. Since China is still witnessing a sharp rise in crime with limited resources, it is unlikely that the CCP will conform to a particular “due process” paradigm, regardless of crime control.

Second, structural accounts demonstrate that the organizational principle and institutional arrangements of China are in conflict with the operation of professional logic in the judicial system. It is worth noting, however, that it is unlikely that the Chinese criminal justice system will take a complete turn towards a system that is based on the separation of powers model. If we agree that today’s China is a historically established fact, the influence of the CCP upon the judiciary is general and diffuse, the CCP will not fall from power in the near future and there is, as yet, no a true and universal standard with regard to the relationship between political parties and the judiciary, so we still need to take into account, the Chinese historical and social context with regard to the position of the judiciary.

Finally, cultural accounts deem the values of Confucianism as one of the causes of the tolerance of police torture. Admittedly, social norms, underpinned by social values, are sometimes desirable yet sometimes odious, and the law is critical to enhancing good social norms and undermining bad ones. The proper regulation of social norms, however, is a delicate and complex task, and what is good or undesirable for Chinese society, of course, cannot be only inspired by Western enlightenment. The current understanding of Chinese culture, which is dominated by critical voices, as this review article shows, is inadequate for guiding lawmakers. Surely, there is good reason to be sceptical about the potential danger of ever expanding state power, which is strengthened by collective Confucianist thinking, as this could lead to the insufficient

protection of individual rights. It can, however, be problematic to strive for standard setting and awareness raising, when it is contrary to or at the expense of the values that a communitarian society is embedded in. Given the fact that the public has reacted to the rise in crime by demanding that the government wage war on crime and the widespread public support for heavy punishments, including the death penalty (Liang, Lu, Miethe and Zhang, 2006), raising more “self-centred” consciousness among citizens in a still collective society giving high value to stability, is most likely to intensify social cleavage rather than alleviate it. As Peerenboom (2002) rightly argues, “it may be too late for Western liberal democracies and the USA in particular to turn back the clock and avoid some of the extremes of radical diversity, autonomy, and individualism. But it may not be too late for China” (p.546). Indeed, the tolerant attitudes for police torture among the Chinese citizens may be, in part, due to its long historical preference for shaming and collective values. Nonetheless, the support or tolerance for torture, in fact, is against the core teaching of Confucianism. Hence, it is believed that the shaping force also lies in Chinese culture, which has a long and rich humanist tradition, itself.

Taken together, all this suggests that scholars can learn from the West and, at the same time, should look beyond Western models. Answers about how to protect suspects’ rights and reduce interrogational torture in criminal proceedings in China, can be found in adaptations of structural elements of the legal landscape (e.g. effective legal representation, visual recordings, public monitoring), but also in practices and traditions with strong cultural connections (e.g. confession-encouraged proceedings; guarantee praise for confessors).

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Chapter 3. Interrogational Fairness under the European Convention on Human Rights
Chapter 3. Interrogational Fairness under the European Convention on Human Rights

[Abstract]

This article examines the contribution of the European Court of Human Rights to the development of interrogational fairness at the pretrial phase in modern European criminal proceedings. Although the Convention contains no explicit reference to the right to remain silent and the privilege against self-incrimination, the Court, drawing its rationale from Article 6 of the Convention, has been steadily developing its distinctive vision of these immunities in an attempt to create a doctrine that sets a limit below which contracting parties could not allow their legal systems to fall, while also acting in accordance with the established procedures within the civil and common law traditions of its Contracting States. It is shown that the Court’s jurisprudence has produced a carefully balanced doctrinal framework that respects the individual’s choice to remain silent without creating absolute immunities. Simultaneously the Court’s approach in defining defence rights not only reflects what is says about the universality of the right to remain silent but also gives plenty of scope for diverse applications in different institutional and cultural settings.

1 Introduction

Police interrogation during the investigation phase is recognized as an accepted and essential aspect of law enforcement in all legal systems. Nevertheless, at the same time, police questioning as an aid to law enforcement has been the focus of intense interest and debate continuously. Specifically, the recognition of the value of confessions has been accompanied by concerns over the factual accuracy of statements and the fairness of the manner in which they are obtained (Ma, 2000).

On the European continent, in both common and civil law traditions, the judge at trial must decide what evidence can and cannot be used for a conviction. The incriminating statements and silence made during the course of police interrogation and used as evidence against the suspect is one of the issues that trial judges or juries consider on a routine basis. It is here that we encounter one of the most often repeated generalizations in comparative discussion of the law of confession. It is said that common law systems are mainly concerned with the issue of admissibility and tend to emphasize the respect given to a suspect’s autonomous right to decide whether and how to participate in defending herself. Civil law systems, on the other hand, emphasize a more ‘social’ approach which obliges states to take positive action to protect the rights of the suspect.
and to take account of all statements that are logically relevant whether of an exculpatory or inculpatory nature (Damaska, 1973; Jackson, 2009b). Certainly, no system in reality is entirely adversarial or entirely inquisitorial, but in most systems the values of one or the other model appear to predominate (Sanders and Young, 2007).

However, in recent years, some commentators have detected a slow, gradual ‘convergence’ in the interrogation procedure of common and civil law systems in Europe (Bradley, 1999; Van Kessel, 2002). As knowledge of, and familiarity with, other systems increases, each legal system is tempted to seek new solutions to deal with similar problems drawing from the experience of others. Therefore, inquisitorial procedures are increasingly influenced by the necessity of fairness in police interrogation at the pretrial stage, whereas there are some indications that adversarial questioning is beginning to avail itself of the instruments of truth-finding. In addition to these internal pressures, there have been external pressures on states to adopt common procedural standards in police questioning. The thrust toward ‘convergence’ would seem to be at its strongest within Europe where supranational institutions, such as the Council of Europe and the European Union, provide a vehicle for strengthening cooperation within a framework of common procedural rights and guarantees laid down by the European Convention on Human Rights and, more recently, the EU Charter of Rights (Cape, Namoradze, Smith, and Spronken, 2010). Notably, although the European Court of Human Rights has neither the jurisdiction to strike down national laws, nor have the authority to order a state to change its legislation, it is estimated that, taken together, both the text of the Convention and the jurisprudence of the Court have inspired numerous national, constitutional, and other court decisions. The European Court of Human Rights has also been the inspiration for legislative changes (Lahti, 1999; Jackson, 2005). Moreover, it has been the hope of European human rights law observers that the Court, through its Jurisprudence in completing and enriching the often vague text of the Convention, may exert a harmonizing influence on the criminal justice practices in the Contracting States (Ma, 2000; Bárd, 2006).

This article explores the jurisprudence on the right to remain silent and the privilege against self-incrimination of the Court, which has been attempting to fashion common standards of interrogation fairness across the common law and civil law systems of criminal procedure in Europe for a number of years. Although the Convention contains no explicit reference to the above right and the privilege, the Court, drawing its rationale from Article 6 of the Convention, has been steadily producing a carefully balanced doctrinal framework that respects the individual’s choice to remain silent without creating absolute immunities. It is shown that the Court’s approach in defining defence

29 Article 82 § 2 of the Lisbon Treaty provides for the establishment of minimum rules in respect of, inter alia, the rights of individuals in criminal procedure. Further, on 1 July, 2009, the Swedish Presidency presented a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings. The Roadmap was incorporated into the Stockholm Programme for the period 2010—2014, which was adopted by the European Council on 10/11 December, 2009. The Roadmap, which provides for a step-by-step approach, identifies six areas that future EU work should focus on. Specifically, Measure C of the Roadmap, which is mainly concerned with the right to a legal counsel at the earliest appropriate stage of criminal proceedings, is due to be legislated in 2011.
rights not only reflects the universal rationale of the right to remain silent but also gives plenty of scope for diverse applications in different institutional and cultural settings.

This article is in three parts. First, we will identify the features and limitations of the traditional adversarial–inquisitorial dichotomy. Second, we will trace the Court’s recent jurisprudence on the right to remain silent and the privilege against self-incrimination with the object of showing how the Court has interpreted these immunities to develop its own distinctive version, thus throwing some light upon the practical value of the guarantee provided therein. The last part concludes.

2 Background

Before we come to the jurisprudence of the European Court of Human Rights, we will first identify the features and limitations of the traditional adversarial–inquisitorial dichotomy.

2.1 The Adversarial and Inquisitorial Dichotomy

Enforcing the criminal law is crucial to every society, but the pursuit of the ultimate social goals of criminal justice must be qualified by the goal of avoiding miscarriages of justice: the guilty should be punished and the innocent left alone (Sanders, Young, and Burton, 2010). Based on different ways in approaching a rational fact-finding process, the criminal justice system has been classically divided as being either adversarial or inquisitorial (Jorg, Field, and Brants, 1995). It is noted that the two systems differ in their fundamental assumptions as to the best way of arriving at “the truth”.

The adversarial system, in theory, promotes truth-finding through the partisan clash of opposing viewpoints in which each side pursues its narrow self-interest (Jorg et al 1995; Leo, 2008). This approach draws on the system’s historic distrust of state power. It reflects the classic liberal idea that state power must be checked to prevent an unjust or corrupt structure coming into being that would regularly risk the wrongful convictions of the innocent (Sanders, Young, and Burton, 2010; Leo, 2008). Thus, to hold state agents accountable at each stage of the criminal process, the suspect is endowed with a number of procedural presumptions and privileges even as the prosecution is saddled with procedural burdens, holding it to a complex web of rules of evidence (Jorg et al. 1995; Jackson, 2009b). Perhaps most importantly, the suspects are represented by attorneys whose obligation, however, is not to pursue truth itself but to zealously advocate the client’s interest. In police questioning, this means that the attorney may prevent the introduction of highly probative evidence, for example, by advising the client not to speak, testify or cooperate, minimizing the importance of unfavourable facts, and trying to construe inferences from ambiguous evidence in the client’s favour (Sanders, Young and Burton, 2010). By emphasizing the pursuit of self-interest and delegating to the parties the control of gathering and presenting evidence, the adversarial system is supposed to motivate the parties to assiduously discover facts. In principle at least, there
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is a strict demarcation between the investigative and trial stage in adversarial systems and the determination of guilt is reserved for the trial. The most traditional assumption in the adversarial theory is that real equality of parties and the oral contest involved in courtroom procedure will lead to truth emerging. The adversarial clash of partisan perspectives is supposed to leave the judge in the most informed position to adjudicate between disputed claims (Leo, 2008).

An inquisitorial system, by contrast, assumes that the state can be largely trusted to conduct a neutral investigation into the truth and the truth can be, and must be, discovered in an investigative procedure (Jorg et al. 1995; Sanders, Young, and Burton, 2010). Because it may be in the interests of parties to conceal the evidence, it is assumed that the legal professionals are best equipped to carry out such investigations. Based on the assumption that professional investigators employed by the state can do the criminal inquiry in a detached and impartial manner, the need for procedural safeguards such as a strict separation of investigative and adjudicative powers, rules of evidence, and defence lawyers is seen as much diminished. Public interest, rather than self-interest, is the key purpose here. This means, in contrast to lawyers in an adversarial system where a counsel may ‘terminate’ police interrogation by advising a client to answer no further questions, the defence lawyer’s role within inquisitorial procedures serves to demonstrate that the investigative officials adhere to the rules rather than ‘end’ the police questioning (Hodgson, 2006). In principle, therefore, it is possible for suspects to be subjected to police interrogation without access to legal advice in this procedure (Sanders and Young, 2010). Importantly, the legitimacy of the inquisitorial procedure requires an inordinate amount of faith in the integrity of the state and its capacity to pursue truth unprompted by partisan pressures of individual self-interest and untrammelled by equality of arms (Jorg et al. 1995, 43). Consequently, in the inquisitorial approach, the line between the investigative and trial stage is less clear. From a functional point of view, although the judges in an inquisitorial court actively engage in discovering ‘the truth’, they are adjudicative rather than legislative (Jorg et al. 1995, 44).

One difference between the adversarial and inquisitorial approaches lies in their degree of success in discovering the truth. In Jeremy Bentham’s view, the passiveness of the suspect in the adversarial questioning, in theory at least, had the inevitable effect of excluding the suspect’s confessions (Helmholz, 1997, 3). As Damaska (1973: 587) observes, “The Anglo-American adversary system’s commitment to values rather than the pursuit of truth has caused it to erect higher evidentiary barriers than its continental non-adversary counterpart.” Notably, this does not mean that its factual findings are ipso facto more reliable. Higher barrier to convictions not only decreases the chances of an innocent person being convicted but also increases the chances of the guilty escaping punishment (Alschuler, 1997). Similarly, inquisitorial procedure committing to the discovery of truth is not better equipped to achieve precision in its fact finding. Truth may be loved unwisely or too much. If permanently hidden and therefore unchallenged, the state’s abilities to interrogate the suspect and to discover the truth are equally dangerous. An example that presents the issue is the demanding standard of proof-sufficiency in medieval law, designed to decrease false convictions, which led to the use
of torture in criminal investigations, a practice that undoubtedly increased false convictions (Langbein, 2004). Apart from this extreme example, although the accused in a democratic context should not be compelled to incriminate himself or herself, all too often, because of strong desires among police officers not to release a suspect until the truth as perceived by the police has been ascertained, the supposed safeguard against aggressive questioning offered by judicial control of the interrogation process becomes a chimera. Surely, information extracted under improper physical or psychological pressures comes with no guarantee of reliability (Jackson, 2009a).

Which of the two rival systems is better adapted to fact-finding precision has been the subject of great dispute at least since the nineteenth century. Even if one of the two systems is found to be better adapted to the discovery of truth, this will not be decisive. In the dialectics of the criminal process, concern for individual rights often sets limits to the pursuit of truth and at odds with the truth-finding considerations. According to Damaska (1973), the relation between fact-finding precision and fairness in criminal process is a zero-sum game, “for it often happens that what is gained on one front is lost on another (p. 589).” Therefore, no opinion on whether one type of procedure is superior to the other both in terms of its fact-finding precision and in terms of its fairness can be voiced.

2.2 Legal System in Practice

Here we must emphasize that the classical models of adversarial and inquisitorial legal systems discussed above are theoretical ones, describing ideal types and not necessarily the functioning of the system in practice. No system in reality can correspond exactly with either model, but in most systems the values of one or the other model appear to predominate (Sanders and Young, 2007). The adversarial system is generally adopted in common law countries, such as in the England, United States, Canada, and Australia. Civil law countries in continental Europe such as France, Germany, and Netherlands are regarded as typical examples of inquisitorial system.

In recent years, national legal systems are attempting to seek ‘foreign’ solutions to similar problems in the criminal justice system. Therefore, in the field of the law of confession, changes are occurring in both systems, in the composition of the mixture between concerns over the factual accuracy of statements and the fairness of the manner in which they are obtained, and these are reflected in piecemeal changes in the organization of criminal procedure. To take two examples, despite the traditional emphasis in the inquisitorial system on the importance of truth-finding, continental European countries, however, has seen a growth in administering warnings to suspects about their right to remain silent prior to interrogation and the use of an exclusionary rule to ensure the police compliance with the warning requirement30 (Ma, 2007). A

30 Notably, forty-five years ago, when the U.S. Supreme Court in \textit{Miranda v. Arizona} (1966) held that the Fifth Amendment privilege against self-incrimination applied to the pretrial interrogation of suspects in custody, few European countries required the police to issue preinterrogation warnings. Except for coerced confessions, it was also rare for European courts to exclude evidence for police failure to follow procedure
counter-tendency in common law jurisdictions, away from an emphasis on respect for autonomy, however, is seen in the shift from giving more procedural safeguards in police questioning. The modification of British law in 1994 that curtails the right to silence and permits the courts to draw adverse inferences from a suspect’s failure to answer police questions is a clear example of crime control concerns (O’Reilly, 1997). It is clear that inquisitorial procedure is increasingly influenced by the necessity of fairness in police questioning at the pretrial stage, even as there are some indications that adversarial interrogation is beginning to avail itself of the instruments of truth-finding.

These developments would appear to suggest gradual convergence (Bradley, 1999; Van Kessel, 2002). The idea mixture, of course, is optimal truth-finding and fundamental fairness. Undoubtedly, truth-finding and fairness are the distinctive aims of criminal justice and the legitimacy of each legal system depends on its ability to do both. However, recent comparative scholarship has pointed to counter-influences at work that are actually moving the systems further away from each other. On the one hand, legal transplants may not have the effects that are intended. Because of institutional and cultural resistance within the receiving system, attempts to import ‘foreign’ solutions often lead to practices being ‘translated’ in a different way and this can lead to fragmentation and divergence rather than convergence within the systems concerned (Langer, 2004: 3-4). This suggests that we must not lose sight of the risk involved in adopting strategies and safeguards from each other’s procedural styles. For interrogation safeguards to be adequate and effective, each system depends on its own historically developed institutions and the faith that different societies place in them. On the other hand, it is at the time when a state exercises its law enforcement authorities that the substantive individual rights are most likely to clash with the state’s interest in seeking the most effective means of crime control (Ma, 2000; Summers, 2007). Hence, as Jorg et al. (1995: 53) pointed out, “If there are distinctive values supporting both truth-finding and fairness of procedure, minimum standards for the pursuit of each must be established as explicit objectives.”

It is in this field of criminal procedural safeguards in police questioning, in the matter of forcing the state to accept full responsibility for ensuring that their own systems produce optimal results, that the jurisprudence of the European Court of Human Rights has the greatest role to play. In the next section, we will trace the Court’s recent jurisprudence on the right to remain silent and the privilege against self-incrimination rules (Ma, 2007, 6). The U.S. Court then seemed to lead the way in expanding the procedural safeguards for suspects subject to police inquiry. Nevertheless, in the post-Miranda cases, to accommodate the conflicting interests between law enforcement and individual interests in police interrogation cases, the U.S. Court has carved various exceptions out of Miranda exclusion policy, for instance, the public security exception, which permits the police to interrogate a suspect without the Miranda warning if there is evidence indicating that immediate interrogation is necessary for some urgent public need (Ma, 2007; Roth, 2008).

31 According to The Police and Criminal Evidence Act 1984 (PACE 1984), silence during the police questioning should not be capable of being the subject of adverse comment by both the judge and the prosecution. In particular, the judge was not permitted to suggest to the jury that silence or a refusal to answer questions is in any way evidence of guilt (Zander, 1990, 144). However, the modification was made by the Criminal Justice and Public Order Act 1994 (CJPOA).
with the objective of showing how the Court has interpreted these immunities to develop its own distinctive version thus throwing some light upon the practical value of the guarantee provided therein.

3 The Approach of the Court toward Interrogation Fairness

In this section, we will expose readers to the Court’s jurisprudence on the right to remain silent and the privilege against self-incrimination and their implications for the development of interrogation standards in the Contracting States. To help readers gain a better perspective of the implications of Court decisions, this section will start by providing a brief introduction on the history and status of the Court.

3.1 The Rights to a Fair Police Interrogation

In the aftermath of the World War II, to prevent the types of atrocities that took place in Europe in the first half of the twentieth century, the international community sought to express universal principles regarding state behaviour toward individuals. The United Nations Universal Declaration of Human Rights 1948 was the platform from which the principles in the language of “human rights” were first propounded (Guild, 2004). As the decades have progressed, human rights have moved on from their initial 1948 source as they have become codified in a series of international human rights treaties, notably the European Convention on Human Rights adopted by the European Council in 1950. The Convention represents a major effort by its Contracting States, now forty-seven in number, to establish a common legal standard for the protection of individual rights and freedom (Berger, 2006).

The European Convention is a unique supranational document of protection of human rights. With it were set up the two supervisory and enforcement organs, the European Commission of Human Rights and the European Court of Human Rights, to ensure the observance of the obligations that states assume under the Convention (Merrills, 1988). Specifically, the European Court interprets and applies the Convention when making decisions in individual cases. European citizens who have exhausted all approaches for remedies before their domestic courts may lodge a complaint with the Court claiming that one of their rights protected by the Convention was violated. However, acting neither as a European constitutional Court nor as a European Court of Appeal, the Court does not have the authority to strike down national laws nor does the Court consider that it can order a Contracting State to change its legislation. Therefore, as a matter of principle, the Court’s competence has been restricted to declaring a breach of the Convention and awarding compensation to the applicant without repealing domestic legislation or quashing judicial decisions in question (Herrmann, 2007).

32 The Commission was abolished in 1998 under Protocol NO. 11. The Court now performs both the initial screening function, which used to be performed by the Commission, and the function of final adjudication. Nevertheless, reports that the Commission prepared during its existence are still an important source of information as to the interpretation of the Convention (Herrmann, 2008).
This ‘modest’ approach adopted by the Court is also for the sake of respecting state sovereignty. The Convention was adopted with the consent of the member states of the Council of Europe and the Court’s operation presupposes the preservation of that consensus (Bárd, 2006, 39). The Court was aware of the Contracting States’ sovereignty concerns and the Court’s own ‘democracy deficit’. Therefore, as a general rule, the Court has avoided directly interfering with national law. Nevertheless, as Ma (2000: 56) noted, “most states do choose to change national laws that are questioned by the Court”. It is true that the Court can hardly be said to have acted as a truly independent European ‘Supreme’ Court because its judgments are declaratory rather than prescriptive. But this distinction has become blurred as the jurisprudence of the Court has come to complete and enrich the often vague text of the Convention and in this manner arrive at a set of norms that seems increasingly to be that of a true supranational legal order (Jackson, 2005; Bárd, 2006).

In practice, the parts of the Convention most commonly invoked in applications made to Strasbourg authorities have been those in Article 6 on ensuring the right of fair proceedings in determining criminal liabilities (Harris, 1970; Brems, 2005). Specifically, the primary objective of Article 6 is to guarantee the right to a fair trial, which is a recognizable feature of every significant international Convention or Treaty proclaiming an allegiance to democracy, the rule of law and protecting human rights (Toney, 2001; Summers, 2007: 97). Identifying only a limited number of particularized standards within the broader fair hearing guarantees, Article 6 broadly protects individual rights in criminal proceedings (Jackson, 2005; Berger, 2006). Taken at face value, in the criminal context, the specific rights incorporated in Article 6 appear to only apply to those who are “charged with criminal offence”33. This would seem to preclude its application to pretrial procedures such as police interrogation34. However, in *Imbrioscia v Switzerland*35 the Court indicated that:

“[t]he primary purpose of Article 6 (art. 6) as far as criminal matters are concerned is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, but it does not follow that the Article (art. 6) has no application to pre-trial proceedings … Article 6 (art. 6) – especially of paragraph 3 (art. 6-3) – may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.”

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33 Article 6 (1) provides “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time…”. In addition, Article 6(3), which enumerate additional protection, states that “Everyone charged with a criminal offence has the following minimum rights...”.

34 In the commission’s view, a person becomes “charged” for Article 6 purposes at the point when he is “substantially affected” by the proceedings taken against him (ECtHR 27 February 1980, Deweer v. Belgium, (no. 6903/75), § 46).

35 ECtHR 24 November 1993, Imbrioscia v. Switzerland, (no. 13972/88), § 36.
Chapter 3. Interrogational Fairness under the European Convention on Human Rights

Even as acknowledging that “the investigation proceedings are of great importance for the preparation of the trial”\(^{36}\), many scholars have found that the Strasbourg authorities were careful to avoid announcing a general principle on whether the full panoply of rights under Article 6 was applicable at the stage of a preliminary investigation, notably the police interrogation (Toney, 2001; Summers, 2007; Jackson, 2009a, 2009b). The reasons are many, but the most plausible explanation lies in the Court’s acknowledgment of criminal proceeding as involving two distinct stages—trial and pretrial stage—and of the consequent differences in the nature of the rights that are required in the respective phase (Summers, 2007).

Instead, the Court has interpreted Article 6 to include the right to remain silent and the privilege against self-incrimination as part of the fair trial standard, and in a series of cases\(^{37}\) has been crafting a set of jurisprudence to define how much the Convention will protect an individual charged with criminal offenses despite state efforts to the production of incriminating evidence.

3.2 The Right to Remain Silent and the Privilege against Self-incrimination

Currently in Europe, in both common law and civil law traditions, there is a near-universal agreement on the importance of the right to remain silent and privilege against self-incrimination as effective safeguards in police questioning for individuals suspected of having committed a crime (Van Kessel, 1998: 804; Jackson, 2005: 835). Although the Convention contains no explicit guarantee of these immunities, in Funke v France\(^{38}\) the Court gave an important symbolic statement of the significance of the right to remain silent and the privilege against self-incrimination, the Court repeatedly stated that\(^{39}\):

“For although not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair trial … By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.”

The absence of specific provisions establishing the right and the privilege under the Convention has enabled the Court to be quite flexible about the confession standards that are to be equated with Article 6, permitting the Court to develop its distinctive set of


\(^{37}\) In the following, the paper traces the series of cases concerning the right to remain silent and the privilege against self-incrimination to examine the rationale put forward by the Court. See, for instance, ECHR 25 January 1996, John Murray v. The United Kingdom, (no. 41/1994/488/570), ECHR 29 November 1996, Saunders v. The United Kingdom, (no. 43/1994/490/572), ECHR 5 February 2003, Allan v. The United Kingdom, (no. 48539/99), and ECHR 27 November 2008, Salduz v. Turkey, (no. 36391/02).

\(^{38}\) ECHR 25 February 1993, Funke v. France, (no. 10828/84), § 44.

parameters to define the reach of these immunities. As we saw in the previous section, the police questioning process involves conflicting values, aims, and interests: law enforcement has an interest in obtaining a confession or incriminating statement from the guilty to lead to the solution of crimes and individuals should be protected from abusive or overreaching interrogation practices. The two sides may clash and yet at the same time depend on each other for legitimacy. Although all legal systems in Europe provide for the respect of the rights of the defence during interrogation proceedings, in balancing the public interest in crime control against individual interest in freedom from police coercive tactics, the civil law and common law systems adopt significantly different ways. Yet no one can say that the procedure in either civil or common law models is superior to the other both with regards to its fact-finding precision and its fairness. Importantly, the Court itself did not set out with any presumption that the common law concept of a “fair” police questioning is superior to the civil law concept, or the latter superior to the former (Summers, 2007, 98). In drawing attention to shortcomings in the procedures of national systems, the Court has tried to ‘translate’ the right to remain silent and the privilege against self-incrimination in such a manner as to make them amenable to diverse institutional frameworks of its Contracting States and accommodation within both common law and civil law traditions.

3.2.1 The Scope of the Right and the Privilege

The need to balance important competing interests requires the Court to develop standards for determining when the setting in which incriminating information is sought is sufficient to warrant application of the right and the privilege. And the degree to which limitations may be put upon the exercise of these immunities would seem to depend on how broad the scope of the immunities is considered to be. Although the right and the privilege were enunciated early on Funke v France, the scope of the immunities has undergone development and refinement over the years.

In the case of Funke, the Court based its acceptance of the right and the privilege on its view of the generally accepted European jurisprudence principles (Berge, 2006). However, nothing was said about the scope of the immunities, or about their nature and rationales. Some three years passed, during which the implications of Funke judgment were unclear, before the topic again attracted the attention of the Court. In John Murray v United Kingdom, the Court made it clear that warning suspects that adverse inferences may be drawn against them at their trial amounted to an indirect form of compulsion that did not necessarily destroy the very essence of the privilege. The Court went on to state that “the right to remain silent” was not absolute, in the sense that the immunities could and should not prevent the accused’s silence from being taken into account in situations that clearly called for an explanation.

Whereas the John Murray decision confirmed the place of the right and the privilege in European human rights law, the scope of these immunities still awaited a detailed

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examination by the Court. This was not long in coming, in the case of Saunders v. United Kingdom, decided in 1997. The case of Saunders concerned the use of statements made at the applicant’s criminal trial, which had been obtained under local compulsion under the Company Act 1985. In the instant case, the Court noted that testimony obtained under compulsion that appears on its face to be of a nonincriminating nature — such as exculpatory remarks or mere information on questions of fact — may later be deployed in criminal proceedings in support of the prosecution, for example, to contradict or cast doubt upon other statements of the accused or evidence given by him or her during the trial or to otherwise undermine the suspect’s credibility. Where the credibility of an accused must be assessed by a jury, the use of such testimony may be especially harmful. It concluded that the privilege cannot reasonably be confined to statements of admission of wrongdoing or to remarks that are directly incriminating. Further, in referring to the case of John Murray and Funke, the Court held that the privilege against self-incrimination “is primarily concerned with respecting the will of an accused person to remain silent.” It did not extend to the use in criminal proceedings of material that may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect, such as breath, blood, and urine samples.

The Court’s approach was developed in Allan v United Kingdom, where an undercover police officer had been placed in the applicant’s cell for some weeks for the specific purpose of eliciting from the applicant information implicating the suspect in a murder. The Court began its consideration with the following statement of principle: “In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will examine the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put.” Applying this approach to the facts of the case, the Court defined the scope of the right and the privilege in the following terms:

“While the right to silence and the privilege against self-incrimination are primarily designed to protect against improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused, the scope of the right is not confined to cases where duress has been brought to bear on the accused or where the will of the accused has been directly overborne in some way. The right, which the court has previously observed is at the heart of the notion of fair procedure, serves in principles to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police.”

We have seen that the Court explained that the scope for the immunities is twofold. First, specifically, it protected the accused against abusive coercion inquires by the

43 Ibid. § 71.
44 Ibid. § 69.
45 Ibid. § 69.
46 ECtHR 5 February 2003, Allan v. The United Kingdom, (no. 48539/99), § 44.
47 Ibid. § 50.
authorities. Secondly, in principle, it supported and defended the will of an accused person to speak or to remain silent during police questioning. Thus the focus of the case law has been on attempting to distinguish cases of improper compulsion from cases where the accused should have been able to reach an autonomous decision when he is called upon to answer criminal allegations. The robustness of this rationale will be discussed below.

3.2.2 Improper Compulsion

As regard to the nature and degree of the improper compulsion in police questioning to obtain the incriminating statements, first, prohibition on torture and other forms of inhuman and degrading treatment are not open to question. All European countries prohibit the use or threat of violence and require exclusion of confessions so obtained (Herrmann, 2008). Apart from this, however, countries differ as to what constitute improper compulsion, as we observed in the previous section, with some countries focusing more on the need to prevent unreliable confessions and some focusing more on deterring improper police practices. Notably, the Court stated explicitly in Murray that it did not consider it prudent to “give an abstract analysis of the scope of these immunities” and, in particular, “of what constitutes ‘improper compulsion’” 48.

Nevertheless, in Heaney and McGuinness v Ireland, the Court held that there had been a violation of the privilege against self-incrimination, where the applicants were convicted and imprisoned for failing to account for their movements. The Court held that the “degree of compulsion” imposed on the applicants by the legal obligations with a view to compelling them to provide information relating to charges against them “destroyed the very essence” of their privilege against self-incrimination and their right to remain silent 49. Furthermore, noting that the United Kingdom government’s claim of the terrorist nature and complexity of the alleged offences, the Court concluded that the public interest could not be relied on to justify a provision that extinguished this essence 50.

Moreover, the Court found no distinction between the imposition of criminal sanctions themselves and the threat to impose them. The threat of criminal prosecution was at issue in Saunders, where the accused was convicted on a number of counts of fraud relating to share dealing. During the investigation of the offence, the trade and industry inspectors relied on section 434(5) of the Companies Act 1985, which made it a possible contempt of court to refuse to produce documents or answer questions posed by fraud investigators, and provided that the answers to such questions may be used in evidence against him at trial. Thus Saunders was faced with either incriminating himself or being in contempt of court, an unenviable dilemma. In this case, the Court concluded that the privilege was violated when statements, which were extracted from the accused by the investigators under threat of contempt of court, were subsequently used against

49 ECtHR 21 March 2001, Heaney and McGuinness V. Ireland, (no. 34720/97), § 55.
50 Ibid. § 57-58.
the accused in court\textsuperscript{51}. The Court rejected the government’s argument that the right and the privilege could be balanced on some pressing ground of public interest such as the need to investigate and punish fraud. The fairness requirement of Article 6 meant that the immunities applied to all types of criminal proceedings without distinction from the most simple to the most complex\textsuperscript{52}.

These cases demonstrate a clear type of compulsion, where the suspect’s silence amount to a criminal offence. In another words, the cases reveal that under Article 6 of the Convention there should be no duty imposed on individual suspects, backed by a sanction, to answer the questions of state officials in relation to criminal charges against them. Moreover, this approach also suggests that when an infringement becomes an issue of the “essence of the privilege”, it can never be justified by the security and public order concerns.

All of this presupposes a particular relationship between the citizen and the state and its officials in the context of criminal justice. According to Redmayne (2007: 221), the emphasis on the importance of not compelling the individual suspects with legal obligations to supply oral evidence for the purpose of prosecution has underlined the necessity of limiting the scope of prosecution powers in a liberal democracy as this is when the State is at its most powerful. The underlying rationale is that if the suspect was under an obligation to cooperate in whatever way in bringing about his or her own conviction in the course of police questioning, then the duty of the prosecution to establish guilt beyond reasonable doubt would be watered down and even contradicted by the duty imposed on the suspect (Ashworth, 2008). On this view, the right and the privilege, that is, by guaranteeing individual suspects of not being compelled by the threat of criminal sanctions to answer incriminating questions, are considered to act as useful brakes on the untrammelled power of investigation by the law enforcement officials (Hogan, 1997, 75). In addition, not only might the immunities be considered to act as useful brakes on the untrammelled state power but statements made under pressure may be unreliable. As will be discussed later in the article, their worth is also in the avoidance of miscarriages of justice.

However, in a recent road traffic case \textit{O’Halloran and Francis v United Kingdom}, the Court did not seem to follow a consistent line or to relate well to the \textit{Saunders} principles by holding that it could not accept that any direct compulsion requiring a suspect to make incriminatory statements automatically results in a violation\textsuperscript{53}. The central issue in each of two applications brought in this case was whether the privilege was violated when the registered owner of a car was required under United Kingdom road traffic law to furnish the name and address of the driver of the car when it was caught speeding on camera and, whether this evidence could be used in a prosecution. Notably, failure to give the information was an offense punishable by a fine and by penalty points on the driving license. The Grand Chamber, by fifteen votes to two, held that there was no

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{51} ECtHR 29 November 1996, Saunders v. The United Kingdom, (no. 43/1994/490/572), § 75-76.
\item \textsuperscript{52} Ibid. § 74.
\item \textsuperscript{53} ECtHR 29 June 2007, O’Halloran and Francis v. The United Kingdom, (nos. 15809/02 and 25624/02), §53.
\end{itemize}
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violation of Article 6. Although all cases of direct compulsion, as noted above, had been held to violate the privilege in the past, the Court held that this is not a necessary conclusion, and that other factors would be taken into account in determining whether the essence of the privilege against self-incrimination has been violated such as the nature and degree of the compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put. Having regard to these factors, particularly the special nature of the regulatory regime at issue and the limited nature of the information required, the Court held that the essence of the applicants’ right to remain silent and privilege against self-incrimination had not been destroyed, and thus there was no violation of Article 6.

Apparently, in this case, the Grand Chamber allowed direct compulsion to be outweighed by other factors. Should this be a cause of concern? Does this judgment suggest any loosening of the right and the privilege? According to Ashworth (2008: 765), it would be preferable to recognize it as a discrete exception. This might be supported by Judge Borrego’s concurring opinion in the instant case, arguing that a citizen who chooses to own and drive a car “accepts the existence of the motor vehicle regulations and undertakes to comply with them in order to live as a member of society. These regulations clearly entail certain responsibilities.” Perhaps more importantly, there is a European consensus that the immunities should not apply in this situation (Ashworth, 2008, 763).

3.2.3 Freedom to Choose

Europeans today generally recognize the rule against the use of criminal sanctions to compel a person to answer questions in the criminal process; however, vast differences remain within the states concerning the nature and scope of the right to remain silent and the privilege against self-incrimination (Van Kessel, 1998). More specifically, there is less agreement within the Contracting States with respect to how far, short of coercion or oppressive methods, authorities may go to persuade or encourage individual suspects to speak during pretrial interrogations. Two issues generate the most controversy: (1) to what extent may a suspect be disadvantaged from silence, and (2) what procedural safeguards must be afforded to a suspect in pretrial interrogation, such as warning of the right to silence and the right to counsel. As the rights of the defence are procedural rights, their applications in practice depend to a larger extent on the legal system under which the case is to be adjudicated. Therefore, the interplay of policies at work in balancing state and individual interest is likely to vary as the setting changes.

Nevertheless, in both common law and civil law traditions, it has long been recognized that only voluntary confessions can be admitted as evidence (Ma, 2007, 5). The classic protection for common law criminal suspects in police questioning has been the voluntariness test according to which confessions have to be voluntary before they can be admitted as evidence. In King v. Warickshall (1783: 235), the court eloquently

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54 Ibid. § 55.
55 Ibid.
explained “a free and voluntary confession is deserving of the highest credit because it is presumed to flow from the strongest sense of guilt and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape when it is to be considered as the evidence of guilt that no credit ought to be given to it; and therefore it is rejected.” On the European continent, despite torture having been part of the ordinary criminal procedure and regularly permitted to be employed to investigate and prosecute routine crime before the ordinary courts in the inquisitorial system, the use of coercion was legally abolished throughout the continent during the eighteenth and nineteenth centuries (Langbein 1977; Einolf 2007).

Clearly, the British Court’s explanation expresses the view that the exercise of free will through a voluntary confession is the best indication of the truth —autonomy if you like guarantees truth. Arguably, one of the difficulties of this substantive rationale here, however, is that voluntariness and consent are ‘meaningless’ in police questioning where all the choices available to suspects are unpleasant (Sanders and Young, 2007, 247). At any rate, many interrogations are stressful and unpleasant, where the police, who acknowledge the reason they arrested and kept the suspect in police custody for questioning, may give the suspect the feeling that the interrogation will be lengthy until the suspect provides the interrogators with answers that satisfy them (Kitai-Sangero, 2008). Indeed, a suspect’s confession to the police is not voluntary in the same way as a spontaneous confession to a clergyman; in this sense, no admission of guilt is voluntary (Seidman, 1992).

Seen in this way, the substantive dimension of voluntariness is extraordinarily difficult to assert in the coercive atmosphere of a custodial interrogation. In fact, Contracting States have upheld the possibility to conduct custodial interrogations by establishing safeguards that supposedly ‘dispel’ the inherent coercion that it entails. Most notably, the Court, in the earlier case of John Murray v United Kingdom, has stated that “a certain level of indirect compulsion” is permissible56. However, after the case of John Murray, the Court did not reaffirm an approach that would justify certain “proper compulsion” as only where they do not become an issue of the “essence of the privilege”. The underlying reasoning may be that if it is acknowledged that a certain degree of compulsion during an interrogation is legitimate, then it is difficult to determine when the applied pressure crosses the boundary of the permissible.

Actually, the Court went far beyond the traditional voluntariness test by differentiating between acceptable and unacceptable police behaviour when it decisively ruled that a custodial interrogation is inherently coercive. In the case of Magge v United Kingdom the applicant was detained and access to legal advice was delayed for 48 hours. The Court noted that the “intimidating atmosphere [of a custodial interrogation] specifically devised to sap his will and make him confess to his interrogators” 57. Notwithstanding this conclusion, the Court attempted to preserve the autonomy of the

57 ECtHR 6 June 2000, Magee v. The United Kingdom, (no. 28135/95), § 43.
suspect in a manner that would allow the police to continue conducting custodial interrogations. In *John Murray*, the Court stated that the right to remain silent was not an absolute guarantee against any and all government efforts to secure information from a suspect during interrogations\(^58\). The Court assumed that by means of legal assistance it would ensure that a suspect’s confession was a reflection of his or her true will to cooperate.

According to this rationale, the right and the privilege are designed to protect the suspect’s right to reach an autonomous decision by means of legal assistance. In drawing attention to shortcomings in the procedures of national systems, the Court has had to develop its vision of defence rights in a piecemeal fashion, case by case, proceeding on the basis, as the Court has done throughout its jurisprudence, that the Convention is a living instrument that requires adaptation as circumstances change\(^59\). Nevertheless, it is possible to identify three broad standards in the development of its distinctive version of the immunities. In the following, these three standards will be analyzed with the object of throwing some light upon the practical value of the guarantee provided therein and of identifying some of the questions left open by the Court judgments to date.

*Access to a lawyer from the first police interrogation*

First, as a rule, access to a lawyer should be provided from the first interrogation of a suspect by the police. In the Court’s opinion, early access to a lawyer is part of procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege\(^60\). The reasons why the Court considers the right of early access to legal counsel to be so important are to be found in a passage in *Salduz v Turkey*, which has been restated in a number of subsequent judgments\(^61\):

“The Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial ... At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.

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\(^59\) ECtHR 25 April 1978, Tyrer v. The United Kingdom (no. 5856/72), § 31.
\(^60\) ECtHR 27 November 2008, Salduz v. Turkey, (no. 36391/02), § 54.
\(^61\) Ibid. § 54-55.
Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective” Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.”

In fact, there are two kinds of rationales mentioned that are somewhat mixed together: what has been described as a protective rationale that the right of early access to a lawyer is needed to ensure that suspects are not coerced into making confessions and a participative defence rationale that claims that lawyer is needed in advising on the complexities of gathering and using evidence to achieve an effective defence.

The protective rationale would seem to highlight the Court’s acknowledgment of the inherent coercive nature of the custodial interrogation. In a recent case, Pishchalnikov v Russia, the Court held that the police, prosecution authorities, and experts in the field of criminal proceedings are well-equipped with various, often psychologically coercive, interrogation techniques that facilitate, or even prompt, receipt of information from an accused. In the instant case, the Court observed that, having been denied legal assistance, the applicant in the first few days after arrest had been subjected to intense interrogations by the police who are in an effort to generate evidence aiding the prosecution’s case. With these facts in mind, the Court considered there is no evidence that the confessions made by the applicant during those interrogations were initiated by the suspect. In the Court’s view, “if an accused has no lawyer [during police interrogation], he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected.” It is certainly arguable that in custodial interrogation the potential for systemic abuse of law enforcement powers is at its greatest (Toney, 2001). Empirical study of police detectives reveals that they are anything but neutral or impartial in their collection and construction of case evidence against criminal suspects during the interrogation process (McConville, Sanders, and Leng, 1991; Williams, 2000; Cape, Hodgson, Prakken, and Spronken, 2007).

The participative defence rationale, which would seem to be the primary concern, highlights the Court’s acknowledgment of the important impact the interrogation stage may have for the subsequent criminal proceedings, the vulnerable position that the suspects are in, and of the need of lawyer help therefore to achieve an effective defence. Noticeably, in Salduz, the Court expressly linked the right of access not only to the need to protect the accused against abusive conduct on the part of the authorities and the prevention of miscarriages of justice but also to the fulfilment of the aims of Article 6, notably “equality of arms between the investigating or prosecuting authorities and the accused.” Equality of arms, an old principle with roots in both common law and civil law traditions, is a principle that has been expressed as affording every party to the

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62 ECtHR 24 December 2009, Pishchalnikov v. Russia, (no. 7025/04), § 86.
63 Ibid. § 80.
64 Ibid. § 78.
65 ECtHR 27 November 2008, Salduz v. Turkey, (no. 36391/02), § 53.
proceedings “a reasonable opportunity to present his case in conditions that do not place him at substantial disadvantage vis-a-vis his opponent”\(^{66}\).

Although traditionally the principle of equality of arms has been reserved for the trial, there seems to have been widespread realization that the examination of evidence did not always occur at the court (Summers, 2007, 28). In both common law and civil law systems, the police are permitted to detain persons suspected of committing crimes to interrogate them before deciding whether and when to initiate criminal proceedings and to produce them before the court (Kitai-Sangero, 2008). Unless the prosecution is prevented from using the information obtained in custodial interrogation as evidence, the police are likely to regard interrogation as an important opportunity to obtain evidence to be used to encourage suspects to plead guilty or to be used against them at their trials. Such evidence may be in the form of a confession, but may alternatively be in the form of an inconsistent account given by the suspect, demonstrating lies told by the suspect, or even failure to answer questions put by the police (Cape, 2002, 113).

The situation in the interrogation room is compounded by the fact that suspects normally want to provide an account of themselves (Jackson, 2009a, 850). Nearly every European Continental country today has adopted rules that technically prohibit courts from drawing unfavourable inferences from a suspect’s silence, with England, Scotland, and Norway being exceptions (Van Kessel, 1998). However, in practice, in most jurisdictions, irrespective of whether there is a rule against adverse inferences from silence or not, most suspects do speak to the police or testify during interrogations (Van Kessel, 1998; Kitai-Sangero, 2008; Jackson, 2009a). Scholars realized that suspects feel pressure to speak because silence can be considered as an act of noncooperation with the authorities, which can do the suspect little good in terms of decisions that affect his or her liberty or that affect the level of the charge brought (Damaska, 1973; Dixon, 1991; Jackson, 2009a).

In the Court’s view, the defence right to speak for oneself is a double-edged sword with the potential to count against the suspect. In *Pishchalnikov*, the Court reiterated that the criminal law — substantive as well as procedural — and criminal proceedings are a rather complex and technical matter that is often incomprehensible to laypersons, such as the suspect\(^{67}\). In the absence of assistance by counsel, who could have provided legal advice and technical skills, the applicant was unable to make the correct assessment of the consequences the decision to confess would have on the outcome of the criminal case\(^{68}\). Moreover, practically at every stage of criminal proceedings decisions have to be taken, the wrong decision being able to cause irreparable damage. Hence the Court concluded reliable knowledge of law and practice is usually required to assess the consequences of such decisions\(^{69}\).

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\(^{66}\) ECtHR 17 February 1997 Foucher v. France, (no. 10/1996/629/812), § 34.

\(^{67}\) ECtHR 24 December 2009, Pishchalnikov v. Russia, (no. 7025/04), § 84.

\(^{68}\) Ibid. § 85.

\(^{69}\) Ibid. § 84.
Further, in emphasizing the importance of the appearance of justice, the Court drew attention to the increased sensitivity of the public to the fair administration of criminal justice: “it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused.” It is noticed that “an ultimately successful appeal against conviction, secured on the basis of the absence of legal advice meant that a confession made to a police officer was unreliable, which is determined following months, if not years, in pre-trial detention, is likely to leave the accused resentful and distrustful not just of the police, but of the whole criminal justice apparatus (Cape et al. 2010, 4).” In Pishchalnikov v Russia, the applicant was arrested on suspicion of aggravated robbery. He was interrogated — both on the day of his arrest and immediately on the following day — in the absence of a lawyer, although he had clearly indicated a defence counsel he wanted to represent him. During these interrogations the applicant confessed to having taken part in the activities of a criminal group that included a murder, kidnapping, hijacking, and unlawful possession of weapons. The Court considered it unlikely the applicant could reasonably have appreciated the consequence of his proceeding to be questioned without the assistance of counsel.

Certainly, Russia is not an exception. Although the right to contact a lawyer after arrest exists in most Contracting States, there is a great divergence as to the moment at which the right to a lawyer can be effected (Spronken, Vermeulen, De Vocht and Van Puyenbroeck, 2009, 38). In a considerable number of countries, such as Belgium, Austria, and Germany, the right to counsel is not possible immediately after arrest but only at a given stage of the investigative proceedings. The Court indicated that even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction—whatever its justification—must not unduly prejudice the rights of the accused under Article 6. The Court further considered that the lack of legal assistance during a suspect’s interrogation would constitute a restriction of his or her defence rights, and that these rights will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. This new interpretation of Article 6 § 3 of the Convention, referred as the “Salduz doctrine”, has been confirmed in several subsequent judgments.

Waiver standard for the right to counsel

Second, the right to counsel from the first police interrogation, being a fundamental right among those that constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights that require the special protection of the knowing and intelligent waiver standard. The Court does not rule out that a suspect may himself waive the right to

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70 ECtHR 11 March 2009, Panovits v. Cyprus, (no. 4268/04), § 97.
71 ECtHR 24 December 2009, Pishchalnikov v. Russia, (no. 7025/04), § 80.
72 ECtHR 27 November 2008, Salduz v. Turkey, (no. 36391/02), § 55.
73 ECtHR 27 November 2008, Salduz v. Turkey, (no. 36391/02); ECtHR 11 March 2009, Panovits v. Cyprus, (no. 4268/04); ECtHR 27 30 June 2009, Płonka v. Poland, (no. 20310/02); ECtHR 24 December 2009, Pishchalnikov v. Russia, (no. 7025/04).
legal assistance and respond to interrogations. But the Court emphasized in *Pishchalnikov* that such a waiver “must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.” In the Court’s view, a valid waiver cannot be established by showing only that a suspect responded to further police-initiated interrogation even if he or she has been reminded of the right to remain silent and signed the form stating these rights. Somewhat akin to the *Miranda* rules, when a suspect has invoked the right to be assisted by counsel during interrogation, the Court is of the opinion that the suspect should not be subject to further interrogation by the authorities until counsel has been made available to the suspect, unless the suspect himself initiates further communication, exchanges, or conversations with the police or prosecution.

A lawyer can not only ensure the legality of any measures taken in the course of the investigation proceedings, he can also provide advice and assistance on how to mount the most effective defence. It hence has been argued that such a rule allowing prior consultation with an attorney would make it virtually impossible for police to obtain confession evidence (Kitai-Sangero, 2008, 151). In the absence of empirical data either way, these arguments tend to consist of inflated claims about the effect of the lawyer as an obstacle for convicting the guilty without enough attention being given to the procedural context in which the right operates. In fact, when a reasonable explanation is given that could clear the suspect of all suspicion, a lawyer in most jurisdictions might advise the suspect to provide his or her version of the event because silence at the police station could increase the police interrogators’ suspicion against the suspect (Damaska, 1973; Seidmann and Stain, 2000). Moreover, the fact that the suspect has not provided his or her version at the first opportunity available could weaken the credibility of a later version provided in court. Actually, various options are available at this stage as they are at the trial. One may suggest certain lines of exculpatory inquiry. One may be made aware that they have an opportunity to respond to certain allegations and all this information will enter into the totality of data on the basis of which guilt-determination will eventually be made. In recognition of the growth in nonjudicial disposals across a

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74 30 November 2000, Kwiatkowska v. Italy (dec.), (no. 52868/99).
75 ECtHR 24 December 2009, Pishchalnikov v. Russia, (no. 7025/04), § 77.
76 The *Miranda* Court established a general rule that once a suspect indicates that he or she does not wish to be interrogated, the police must cease all questioning (Van Kessel, 1998). With respect to whether the police may make attempts to obtain a waiver of the right to remain silent from a suspect, the U.S. Court in subsequent decisions made a distinction between the situation when a suspect asserts his or her right to remain silent and the situation when the right to counsel is invoked (Ma, 2007). If a suspect asserts only the right to remain silent, the police may resume questioning after a substantial time lapse so long as they properly advise the suspect of the *Miranda* rights prior to interrogation (*Michigan v. Mosley*, 1975). But once a suspect has invoked the right to counsel under *Miranda*, there can be no further interrogation until counsel has been made available unless defendant initiates further communications with police officers (*Edwards v. Arizona*, 1981; *Arizona v. Roberson*, 1988; *Minnick v. Mississippi*, 1990).
77 Ibid. § 79.
78 In fact, there is some evidence from England and Wales that lawyers do not routinely advise their clients not to confess, and do not routinely advise their clients to remain silent (Sanders, Young, and Burton, 2010).
number of jurisdictions, the suspect would also be made aware of any informal disposals or decisions that may be made if they are prepared to make an admission to the allegations. As Jackson (2009a: 861) pointed out, “once the rights of the defence are put in place … the right of silence reverts to an exercise of will or choice on the part of the individual accused, but a choice that is made on an informed basis as part of a defence strategy which is taken in full recognition of the costs and benefits of its exercise.”

The quality of the defence lawyer’s work

Third, as a general rule, a state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. The Convention does not contain any explicit provision regarding the role, or standards, of criminal defence lawyers. As regards the quality of the work of a defence lawyer, the Court has been reluctant to hold the State liable for the failures of a lawyer’s defence. In Imbrioscia, the Court stated explicitly that “owing to the legal profession’s independence, the conduct of the defence is essentially a matter between the defendant and his representative; under Article 6 para. 3 (c) the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention”\(^\text{79}\).

In the court’s opinion, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police; however, it is not for the Court to speculate on the impact that a suspect’s access to a lawyer during police custody would have had on the ensuing proceedings\(^\text{80}\). It is unlikely that the Convention protects the legally aided suspect who, ex post facto, challenges a legal adviser’s reasonable exercise of discretion or tactical decision.

During the all important pretrial investigation, there are important legal and ethical constraints upon the lawyer’s ability to prepare the defence case. The equality of the defence is, of course, linked inextricably to the legal procedural role that the lawyer might properly be expected to play within the space allotted to him or her in the criminal process. In an adversarial procedure, we would expect the defence lawyer to have comprehensive freedom to investigate the case for the accused — to have early access to the suspect, interview witnesses, gather expert evidence, and so on. In inquisitorial procedure, where evidence gathering is the responsibility of a central judicial enquirer, the defence lawyer, who is subsidiary to that of the central enquirer, may mainly serve to ensure the legality of the proceedings. Closely linked to the ways in which the defence lawyer’s function is defined and understood within criminal procedure, defence lawyers in Contracting States are most likely to adopt different defence strategies to achieve their clients’ best interests. As Van Kessel (1998: 816) observed, defence lawyer in Netherlands, in which the judges possess both the power and motivation to reward those early confessors with noncriminal alternatives, generally advises suspects to cooperate and give their side of the case at an early stage in the proceedings.

\(^\text{79}\) ECtHR 24 November 1993, Imbrioscia v. Switzerland, (no. 13972/88), § 41.
\(^\text{80}\) ECtHR 27 November 2008, Salduz v. Turkey, (no. 36391/02), § 58; ECtHR 27 30 June 2009, PŁonka v. Poland, (no. 20310/02), § 40.
Chapter 3. Interrogational Fairness under the European Convention on Human Rights

Importantly, any defence strategy cannot be implemented in a meaningful way without disclosure of relevant evidence. The ‘cat and mouse’ game played at custodial interrogation, in which police use of evidence plays a significant part, may deprive the suspect of adequate facilities for the preparation of a defence (Toney, 2001). Legal advisers need adequate details of the case against the suspect to advise the suspect effectively on such important matters as whether to remain silent or whether to respond to certain allegations that have arisen against the suspect. As explained earlier, there are various options available at the pretrial stage as at the trial. Hence, if there are no clear procedures for the use and disclosure of evidence by the police at custodial interrogation, it is argued the lawyer’s engagement in the defence or guilty plea procedure is likely to be little more than symbolic, lending credibility to the legal process rather than providing the suspect with an effective defence guarantee (Toney, 2001; Hodgson, 2006).

Yet the precise parameters of the requirement of disclosure of relevant information to the defence and the right to comment on the evidence during police interrogation remain uncertain in the Court’s jurisprudence. In Rowe and Davis v United Kingdom, the Court held that the full disclosure right is not absolute prior to trial, and there are competing interests such as national security or the need to protect witnesses at risk of reprisals or to keep secret methods of police investigation of crime, which must be weighed against the rights of the suspect. Nonetheless, the Court emphasized any limitation on disclosure must be “strictly necessary” and subject to procedural safeguards that compensate for the handicap imposed on the defence81.

We must bear in mind that consistent with the wide margin of appreciation afforded to the Contracting states, the Court’s concern is not with procedural guarantee per se, but rather with their effect on the overall fairness of the proceedings82. The Court has permitted inroads to be made by domestic jurisdictions into the specific rights provided that the trial as a whole may be considered fair in an attempt to accommodate established procedures within the two prevailing traditions. Recent research shows that there appears to be no consensus so far between EU jurisdictions as to the precise formulation of pretrial disclosure (Cape et al. 2010). Nevertheless, most member states do give a right to the accused or their lawyers at the pretrial stage to information about the evidence, although the scope of the right varies enormously and, in particular, depend upon whether the jurisdiction has an adversarial or inquisitorial tradition (Spronken et al. 2009).

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81 ECtHR 16 February 2000, Rowe and Davis v. The United Kingdom (no. 28901/95), § 61.
82 ECtHR 25 January 1996, John Murray v. The United Kingdom, (no. 41/1994/488/570), § 44. Moreover, it should be noted that in Al-Khawaja and Tahery v United Kingdom (ECtHR 20 January 2009, Al-Khawaja and Tahery v. The United Kingdom, (no. 26766/05 and 22228/06)), the Court stated explicitly that each element of Article 6 § 3 is one of the minimum rights which must be accorded to anyone who is charged with a criminal offence and each right in Article 6 § 3 is an express guarantee (§ 34).
4 Conclusion

Since it came into force in 1953, the European Convention on Human Rights has served as a reflection of Europe’s effort toward the establishment of common standards of individual human rights and freedoms. The forty-seven countries that are currently signatories to the Convention are subject to the jurisdiction of the European Court of Human Rights, which was established in 1959 in Strasbourg as a mechanism to interpret and enforce the obligations created by the Convention. Although the Convention contains no explicit reference to the right to remain silent and the privilege against self-incrimination, the Court, drawing its rationale from Article 6 of the Convention, has been steadily developing its distinctive vision of the right and the privilege in an attempt to create a doctrine that sets a limit below which contracting parties could not allow their legal systems to fall, and at the same time accords with the established procedures within the civil law and common law traditions of its Contracting States.

The scope of the Court’s distinctive vision of the right to remain silent and the privilege against self-incrimination is thus two-fold:

On the one hand, the Court has demonstrated its strong position for the core principle that state power should not be used to compel self-incrimination. In recent years, criminal procedure systems throughout Europe are being severely tested by the increasing ease of movement between European countries as well as by the problems of organized crime, drug trafficking and, most urgently, international terrorism. The tension between due process and crime control is inevitable, and it is at the time when a state exercises its law enforcement authorities that the substantive individual rights are most likely to clash with the state’s interest in seeking the most effective means of crime control. Despite these challenges, the Court took the view that there should be no duty imposed on individual suspects, backed by a sanction, to answer the questions of state officials in relation to criminal offenses. Moreover, in evaluating self-incrimination challenges, the Court has also shown no inclination to balance the security and public order concerns when an infringement becomes an issue of the “essence of the privilege”. The Court’s position reflects a European commitment to respect individual human rights in the law enforcement process by requiring the domestic law of the Contracting States to keep within certain bounds.

On the other hand, the Court’s perspective suggests that the suspect should have been able to reach an autonomous decision when called upon to answer criminal allegations. This stems from the Court’s belief that the right to a fair hearing does not mean that the right to remain silent is absolute and the recognition of the privilege against self-incrimination is not incompatible with learning what happened from the suspect. It held that the right to have access to a lawyer should be provided as from the first interrogation of a suspect by the police while still permitting procedures that encourage defendants to meaningfully participate in the fact-finding process. Yet the precise parameters of the requirement of disclosure of relevant information to the defence and the right to comment on the evidence during police interrogation remain
uncertain in the Court’s jurisprudence. We must bear in mind that consistent with the wide margin of appreciation afforded to the Contracting States, the Court’s concern is not with the essentiality for the special rights to be respected in every case, but rather with their effect on the overall fairness of the proceedings. As explained, despite the binding nature of the Court, the Court does not have jurisdiction to strike down national laws. It is up to the Contracting States to take steps to make necessary amendments in their domestic laws to bring them into compliance with the Convention provisions. As the rights of the defence are procedural rights, for safeguards in police questioning to be adequate and effective will in practice depend to a larger extent on each legal system’s own historically developed institutions and the faith that different societies place in them. Therefore, the Court, in an attempt to accommodate within both common law and civil law traditions the understanding of the defence lawyer’s function and to adapt to diverse institutional frameworks of its Contracting States, has permitted inroads to be made into the right to disclosure by domestic jurisdictions provided the limitation on disclosure is viewed in proper perspective, such as for a favourable result for the accused.

Nevertheless, we would like to stress that although the scope of the right to disclosure is thereby left to the national authorities, their decisions remain subject to review by the Court for conformity with the fair trial requirement of the Convention. As indicated, it is no longer possible for proof processes to be dominated by judicial inquiry but neither is it possible for them to be dominated entirely by a trial contest between partisan parties refereed by a passive judge. The Court’s approach that emphasizes the importance of legal assistance from the first interrogation of a suspect by law enforcement officials has enabled suspects to play an active role when they are being called upon to answer criminal allegations. This approach actually takes criminal procedure beyond the traditional boundaries of adversarial/inquisitorial discourse. Accordingly, both systems face new challenges and we may witness further divergence of existing pretrial proceedings as countries adapt their procedures to meet the demands of interrogation fairness laid down by the Court. However, controversy often remains as to whether the changes effected by the Contracting States are in full compliance with the decisions of the Court. So long as Contracting States’ decisions remain subject to review by the Court, elements that are incompatible with the effective defence rights are likely to be subject to the Court’s jurisprudence in the future. In this sense, the margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Contracting States even as realizing a “uniform standard” of human rights.

There is a growing interest among academics to analyze the changing political, economic and social factors to the development of the future professionalism within lawyers. See, for instance, Glasser, C. (1990), The Legal Profession in the 1990s—Images of Change. Legal Studies, 10(1), 1-11.
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Chapter 4. The Evolution of Criminal Interrogation Rules in China
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[Abstract]

This paper presents a historical analysis of Chinese legal theories and the evolution of criminal interrogation rules from the pre-Han to the reform era. A fuller understanding of the evolution of rules is doubtless relevant to the present day’s controversy in China’s legal reforms surrounding the right to remain silent during interrogation and the privilege against self-incrimination. The historical analysis reveals that the imperial social context which once morally legitimized judicial torture in Chinese criminal justice is very much alive even today. For future legal reforms in China, there are barriers in the current social context, which seem to be unconducive for the right to remain silent and the privilege against self-incrimination. But, traditional native resources are also available to legal reformers to ensure better protection of the rights of the suspect subject to police interrogation, and to eliminate police-coerced confessions.

1 Introduction

The agreement that we shall all have interrogation justice seems to be one of the few points of consensus in the pluralistic societies around the world (Ma, 2007). Within every criminal justice, we see various mechanisms ostensibly designed to constrain and shape the way in which the police exercise their questioning powers (Van Kessel, 1998). However, miscarriages of justice, such as wrongful detention, prosecution, and incarceration of the innocent, because of coercive and psychologically manipulative interrogation techniques arise both in more adversarial and more inquisitorial types of process (Bedau and Radelet, 1987; Gudjonsson, 1992, 1994). The European Court of Human Rights (ECHR) has condemned violations of “the right to remain silent under police questioning and the privilege against self-incrimination” everywhere, in Great Britain as well as on the continent (Wu, 2011). In the People’s Republic of China (PRC),

84 In many Western countries, there is a tendency to use the concept of “investigative interviewing” as an alternative to interrogation. For instance, in the United Kindom (UK), the expression “investigation interviewing” is used to describe questioning of suspects and victims, as well as witnesses at any point in the investigative process (Williamson, 1993; Gudjonsson, 1994). This change is a result of the combined effects of new legislation, psychological development, and organizational policies designed to make the questioning of suspect less inherently coercive. It is hoped that this ethical approach to investigation could elicit reliable information from a person about an alleged offence (Brewer and Williams, 2005). Indeed, as a result of these efforts, police questioning has come a long way. However, there is still a long way to go before the principles of investigative interviewing are reflected in standard police practice (Williamson, 1993, 98; Gudjonsson, 1994).
the problem of police-coerced confession is also one of the most intensely criticized aspects of the Chinese legal system (Wu & Vander Beken, 2010).

For obvious reasons, obtaining information on the extent of coercion exerted in extracting a confession for a criminal investigation is nearly impossible. According to the fourth report from the Chinese government to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), between 1999 and 2004, 566 persons, involved in 541 cases, were sentenced by extorting confessions through torture. However, Ma and Peng (2006: 22) consider that official statistics document only the tip of the iceberg, implying thereby that forced confessions occur with greater frequency than officially reported. Many Chinese scholars, relying on different sources like interviews with present and former law enforcement officers or individual field observations, have made the alarming assertion that the malady of confessions produced by torture (xingxunbigong) has been widespread in China (Wu and Vander Beken, 2010). Notably, the problem of interrogation practices has been so pernicious and pervasive that it captured the attention of not only the domestic academic community, but also of the international community. Scathing reports from Non-government Organizations (NGOs) and other overseas human rights institutions observe that torture has been widespread and systemic. Human rights activists complain bitterly that the judiciary lacked independence, because the party-state politicized criminal cases and employed torture for oppressing political dissent. Noting that the Chinese criminal procedure, particularly the one for interrogation, is inconsistent with the privilege against self-incrimination and the right to remain silent, the rights activists urge the PRC for compliance with the “universal” norms.

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85 Chinese version of the fourth periodic report, pages 36-40.
86 Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is the first provision in an international treaty that defines torture, and separates illegal practices into two categories: (i) torture, and cruel, inhuman, or degrading treatment (ii) punishment which does not amount to torture. According to this definition, to classify an act as torture, the pain of suffering inflicted must indeed be severe.
87 The Chinese academics define torture in a broader sense than the CAT does. They define torture as any act by which corporal treatment or quasi-corporal treatment is inflicted on a suspect or a defendant to extract confessions by judicial officers (Zhe, 2005). Corporal treatment refers to physical coercion, inflicting pain directly on the body, such as beating or imparting electric shock. Quasi-corporal treatment refers to physical or psychological coercion, inflicting pain (physical or mental) indirectly on the body, such as through sleep deprivation, exposure to cold or heat, or forcing one to sit or stand in uncomfortable positions. In fact, some studies have shown that in the current era the interrogation practice in China has moved away from brutally scarring violence towards more time-consuming and ‘clean torture’ (Wu & Vander Beken, 2010, 561). Notably, the history of American police interrogation also shows an evolution from more brutal forms of interrogation toward a mainly psychological oriented approach of interrogation (Leo, 2008). While the 1931 Wickersham Commission Report and Miranda appear to be partly responsible for the dramatic decline in violence in the American interrogation room from the 1930s through 1960s, it is argued that American police have also become skilled at the practice of manipulation and deception during interrogation (Leo 1992).
89 The rights activists argued that there is a significant level of consensus regarding “the presumption of innocence” and “the privilege against self-incrimination” as set forth in the Universal Declaration of Human
While not denying that much remains to be done, the Chinese government is not happy with the foreign critics for discounting the progress it made in the promotion and protection of human rights, including its efforts to combat torture, and for exaggerating the severity of the problems by focusing on the relatively few cases involving political dissidents. On the other hand, acknowledging that involuntary confession in criminal investigations remains a serious problem, it has taken various steps to address it, including reforming its procedural law and educating police officials about the importance of due process. Indeed, although China was governed largely as a “lawless” state in the first three decades after the founding of the PRC, the past 20 years witnessed significant changes in the Chinese criminal justice landscape which sets restrictive standards for police behaviour and provides procedural safeguards to suspects subject to police interrogation. Nevertheless, the government still feels uneasy about some “undeniable” principles in western criminal procedures, such as the presumption of innocence and the privilege against self-incrimination (Gelatt, 1982; Ren, 2007). The officials in the legal committee of the Standing Committee of the National People’s Congress explained that the Chinese approach to criminal investigation is not to engage either in the “presumption of guilt” or in the “presumption of innocence” (Man and Li, 1999: 63). The Chinese criminal procedure does not presume anything—it lets evidence and facts speak for themselves (Gelatt, 1982). Stressing on reliable evidence and strict prohibition on extracting confessions by torture, the revised criminal procedure law (CPL) in 1996 continues to adopt the principle of “taking facts as the basis and law as the criterion” (CPL, Art. 6) and to encourage suspects to “answer questions asked by investigators truthfully” (CPL, Art. 93) to achieve truthful and fair justice.

In fact, the Chinese government’s position is by no means universally shared. The majority view among Chinese legal scholars is that pernicious interrogation is closely related to China’s pre-trial inquisitorial investigation with its implicit acceptance of police power to detain and interrogate suspects (Zuo 2005; Chen 2006). Hence, many Chinese academics have increasingly looked to the right of remaining silent and the privilege against self-incrimination as the basis for restricting the questioning power of the police and for pressing law enforcement to shoulder most of the load by collecting objective evidence of the crime charged (Ning, 2002; Wan, 2006). Although there have been many legal attempts to establish the right and the privilege, there is currently a growing scepticism in the academic world if the apparently successful experience of the West with “due process”, and an accusatorial system in which defendants are privileged to remain passive, can simply be copied as an independent standard in the Chinese

Rights (UDHR) (Art. 11), and the International Covenant on Civil and Political Rights (ICCPR) (Art. 14) (Gelatt, 1982).

Comments by the Government of the People’s Republic of China to the concluding observations and recommendations of the Committee against Torture (CAT/C/CHN/CO/4).

Eliciting reliable information from a suspect is a complex process in which both the interviewer and interviewee play integral roles. Ultimately, the quality of any police interview is determined by a wide range of interrelated factors (Brewer and Williams, 2005, 11). Nonetheless, Chinese lawmakers believed that cooperative interviewing styles rather than a confrontational style of interviewing could best lead to accurate information and confessions.
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context (Cui, 2001; Ma and Peng, 2006). According to Peerenboom (2004: 1073), transplantation of laws which are at odds with China’s current conditions or which are based on fundamental values that are not shared by the majority of Chinese citizens, diminishes the likelihood of getting the reforms adopted or, even if they are adopted, they will not be implemented. This observation seems to be confirmed by the fact that despite significant revisions to the Criminal Procedure law in 1996, the police’s abuse of questioning power, such as coercing for confession, illegal detention and denying lawyers’ access to their clients, remains pervasive in practice (Lin, 2005).

This paper presents a historical analysis of Chinese legal theories and the evolution of criminal interrogation rules from the pre-Han to the reform era. A fuller understanding of the evolution, besides being desirable for its own sake, is definitely relevant to the present day’s controversy surrounding the right to remain silent and the privilege against self-incrimination. The purpose of the historical analysis is twofold. On the one hand, by exploring the historical, political, and philosophical backdrop of current reforms, it is easier for (Western) legalists to understand how the right and the privilege in China develop along a different path. On the other hand, only after understanding China’s legal traditions, can one begin to ascertain what traditional native resources are available to reformers, and what obstacles are they likely to encounter in trying to establish the right and the privilege, given China’s past.

This paper is structured as follows. The first section documents the rise of Confucianism and legalism during the Spring and Autumn period (770-476 B.C.) and illustrates their legal implications. This is followed by an analysis of the “legalization of Confucianism” process in Chinese society following the Qing’s fall (221-206 B.C.). The paper will then focus on the Tang dynasty (618-907) and discuss the interrogation model laid down by the Tang Code which thrived until the early twentieth century. Next, after tracing the ideological evolution in China in the turbulent period before the birth of the PRC, the interrogation rules under the Mao era will be examined. In the following section, the questioning rules and their operation in the reform era are discussed, as also the social and political context underlying them. The last section presents the conclusions.

2 Classical Legal Theories

The era of the Spring and Autumn period (770-476 B.C.), though characterized by interstate warfare with many Chinese in despair, was intellectually one of the most productive eras in Chinese history. Many philosophers propounded various theories. From these theories, two major schools of thought—Confucianism and legalism—eventually emerged, and they remained central to Chinese legal thought down to the twenty first century.
2.1 Confucianism

2.1.1 Shame, Self-examination and Self-cultivation

Confucianism was first conceived and developed by Confucius (551-479 B.C.), when he was an itinerant teacher. In his theories, Confucius adhered to the premise that humans are essentially good by nature and that their good qualities can be brought out through education (Terrill, 2003; Chen 2004). The ultimate goal of Confucian’s personal cultivation was to achieve self-perfection, as represented by the concept of ren (benevolence, 仁), which means becoming the most genuine, most sincere, and the most humane person one can be (Tu, 1979). This process of self-perfection requires self-discipline and the observation of li (ritual propriety, 礼) (Analects, 12:1). Through internalization of li, individuals will develop a sense of shame when they have done something wrong. Moreover, shame will direct the person inward for self-examination, and motivates the person toward socially and morally desirable changes (Analects, 2:3). Thus, admitting one’s misconduct and desiring to change oneself, which is believed to be an act of expiation requiring personal courage, is a virtuous sensibility that a Confucian values and fosters (Fung, 2006).

2.1.2 Community, Deviance and Contrition

Confucius made it clear that li is and should be based on human nature and universal reasons (Ma, 1987). Though human relationships are manifold, Confucius emphasized the society’s “natural” relationships. He said: “Let the monarch be a monarch, and the minister a minister. Let the father be a father, and the son a son” (Analects, 12:11). Put differently, each individual should act in accordance with his role in life. Mencius (372-289 B.C.), an important philosopher of early Confucianism, elaborated the content of each relationship that must be jointly realized by both the parties concerned: “Affection between father and son, righteousness between ruler and minister, separate functions between husband and wife, precedence of the old over the young, and fidelity between friends (Mencius 5)”. Considering the relationships separately, the elaboration consists in the father being merciful and the son filial, the ruler being a leader by superior virtue and the minister a loyal follower, the husband being upright and the wife complaisant, the elder brother being caring and the younger brother complying respectfully, and friends being faithful to each other. Seen in this perspective, Confucianism is decidedly paternalistic with each relationship carrying obligations of respect and submission by its members. Nonetheless, Confucian’s relationships also stress a sense of reciprocity (bao, 报), that is, those who have increased authority shall also have increased responsibilities (Johnson, 1995).

Confucius taught that one of the superior’s responsibilities is to be the role model for the subordinates (Analects, 2:19, 8:2). The personal moral aspiration of achieving ren is an

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92 li is essentially a set of ethical norms that provide guidance for appropriate behaviors in all circumstances of life, spanning from ordinary daily activities to special ceremonies, prescribed on the basis of a person's social status (Kaempfer, 2006).
Chapter 4. The Evolution of Criminal Interrogation Rules in China

early and ongoing process which can be achieved only through communal participation and efficacious communications. Importantly, to Confucius, those who are engaged in such moral education can best do so by setting themselves as personal examples (Ma, 1987; Windrow, 2006). By so doing, the superior inspires the subordinates with virtues and prevents them from crossing the social deviance line into criminal activity. Ultimately, the benefits of proper behaviour would diffuse throughout the society and strengthen social harmony (Peerenboom, 2002).

Under these communitarian social conditions, individuals, almost always, find themselves belonging to a closely integrated group that reflects their honour or shame. More specifically, when people achieve well, the entire community shares the honor. Likewise, when people fail, they do not lose just their own face (mianzi,面子), but of all those around them (Wilson, 1980, 1981). Apparently, shame, in Confucian communities, is a group concern, rather than an individual concern (Hu, 1944). This group concern and mutual “interest” also ensure interdependency and reinforces mutual obligation and supervision among neighbours.

Apart from this, in the light of the Confucian belief in humanity’s capacity for moral improvement through education, shaming is also used as a mechanism in reforming wrongdoers – what might today be labelled as rehabilitation or reintegration. As mentioned earlier, shame is primarily related to morality; so, people would show anger or even extreme rage toward those who commit shameful acts (Lu, Zhang and Miethe, 2002). Nevertheless, from a Confucian perspective, even though shameful acts generate anger in people, the wrongdoer’s showing a sense of shame and admitting his guilt signal that he realizes his moral faults. They also demonstrate that one promises to reform oneself and seeks reconciliation with the larger community, thereby displaying socially “engaging emotions” (Kitayama, Markus & Kurokawa, 2000). This would result in forgiveness commensurate with the degree of contrition.

Because Confucians stressed using shame to mitigate deviancy and re-socialize individuals, they regarded the codification and public dissemination of laws sends the wrong kind of message (Peerenboom, 2002; Windrow, 2006). According to Confucius, laws, backed up by punishments, may induce compliance in the external behaviour of society members, but they are powerless to change their inner character (Analects 2:3). Theoretically, this view leaves little room for the operation of codified law and punishment. On the contrary, it constitutes a sphere of informal social control operating on a familial or communitarian basis through moral persuasion and social education.

2.2 Legalism

Confucian was rivalled from the very beginning. Legalism that had arisen during the early Warring State period (475-221 B.C.) advocated a social control program which was in direct conflict with Confucian ideals. In the legalistic view, human beings are naturally greedy and selfish. Thus, virtue cultivation and moral examples are inadequate to maintain the social order because people’s base instincts will constantly drive them to
wrongful behaviour (Ren, 1997). The only way to make them behave correctly and to achieve a well-ordered society is by an impartial system of rewards and punishments. Specifically, legalists advocate centralization of authority in the ruler through creation of a vast bureaucracy and extensively written laws, and the use of harsh, universally enforced penal code to ensure compliance with state policy. They believe that if even minor infractions are ruthlessly punished, then no one will dare to commit serious crimes (*Shang Jun Shu*, 17:3).

In theory, the ruler remains the ultimate authority. Han Feizi (281-233 B.C.), a prominent philosopher of legalism, advocated that the ruler should use *fa* (law, 法), *shu* (tactic, 术) and *shi* (power, 势) to govern his subjects (Peerenboom, 2002). It is seen clearly that legalistic law is one of the means to serve the interest of the ruler, not necessarily the common people.

### 3 Two Legal Theories Combined: Legalistic Bureaucracy to Enforce Confucian Norms

The Zhou dynasty (1046-256 B.C.) maintained fairly effective control of China for a few generations, but then gradually lost its grip. After 770 B.C., real power was divided among a number of states. During the war period, Qin State’s minister, Lord Shang (390-338 B.C.), overhauled the state according to legalistic ideas. His legalism-inspired reforms deployed a detailed penal code through an elaborate, tightly controlled bureaucracy to ensure efficient control in the hands of the ruler (Bary, 1995). These reforms, together with other favoured agricultural policies, successfully bolstered the state’s power. Finally, Qin state unified China and established the Qin Empire (221-206 B.C.).

Unsurprisingly, the Qin dynasty lasted less than twenty years. Although the ruthless rule of Qin brought its speedy downfall, the succeeding Han dynasty’s emperors, facing tremendous pressure to consolidate their rule in such a large territory, retained the Qin’s essential legalist apparatus for central administration (Windrow, 2006).

Noticeably, the Confucian intelligentsia at that time started to explore the relationship between Confucian *li* and legalist *fa* (law). In a similar thought shift, Dong Zongshu (179-104 B.C.), a Han Confucian, integrated legalist and Yin-Yang school of thought to create his own Confucian doctrines. He overhauled the standard interpretation of the Confucian classics and advocated combining the functions of *li* and law (*fa*) by emphasizing the supremacy of *li* and the subservience of law. On the presumption of the operations of *Yin* (阴) and *Yang* (阳), he further emphasized the emperor’s sacrosanct power in governing the state and in enacting laws. Simply put, this shift in Confucian thought legitimized the use of bureaucracy, recognized the role of law and punishment, and helped to uphold the superiority of the emperor (Ma, 1987). Eventually, Emperor Wu (157-87 B.C.) adopted Confucianism as the official orthodox doctrine.
Since then, Confucian’s moral standards started to become a part of the content of law, and criminal code became the instrument for executing such content. In addition, on the ground, as the people trained in Confucianism began to take on adjudicatory positions in the government, Confucian thought shaped Han’s administration (Windrow, 2006). Even after the Han dynasty’s fall in 220, successive dynasties continued to accelerate the Confucianization of the legal code. Perhaps most importantly, the Tang Code, first issued in 637 and last revised in 737 during the Tang dynasty (618-907), represents the final synthesis of legalist and Confucian ideals begun centuries before (Ma, 1987, 673).

4 The Criminal Interrogation Rules under the Tang Code

The Tang Code is characterized by Confucian’s moral standards (li) and its penal attribute. The Code’s preamble states that the primary aim of the law is to maintain human order as coordinated with the cosmic order of Heaven and Earth. In other words, the ruler’s remedial use of law is to redress human disorders and restore the proper balance between man and nature. Hence, if a crime happens, the truth has to be discerned so that the state could administer appropriate punishments\(^a\) and restore social harmony (Ren, 1997, 31). Because of this assumption, finding factual guilt, which insists on the offender’s voluntary or coerced admission of guilt and repentance of the crime, is an almost indispensable element for concluding criminal cases before the courts (Tang Code, Art. 476).

Therefore, undergirding the interrogation procedure of the Tang trial was a set of rules whose purpose was to persuade or oblige the accused to respond or confess to the charges against him.

4.1 The Structure of an “Accused Speaks” Trial

The criminal case was first investigated, prosecuted and tried by a district magistrate\(^b\) who was both the judge and chief administrator of the region. In fact, the Confucian family concept was extended to judicial and governmental affairs, where the district magistrate was called ‘parent’ officer (fu-mu guan, 父母官) with presumably good moral characteristics, such as benevolence and impartiality, and superior wisdom (Alford, 1984). As Ren (1997: 25) put it, “the government was not a public servant body, but a sacrosanct paternity”.

The structure of the trial inquiry can be described as paternalistic when historical sources allow one to see how a Chinese imperial criminal trial was conducted. Generally, at trial, both the accused and the accuser were required to kneel on the ground in front

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\(^a\) Penalties in imperial China were designed to fit the criminal, not the crime (Ansley, 1986, 171).

\(^b\) Like all dynasties since the Qin, the Tang government operated through its bureaucracy, brimming with officials who had passed the imperial examinations based on the Confucian Classics (Windrow, 2006).
of the magistrate who was assigned the responsibility of ferreting out the facts (Gelatt, 1982). The accused, with no aid of a counsel, replied insistently to the questioning and to the testimony of the accusers. Moreover, the magistrate, as an authority in a leading position, could control the content and direction of the interactions for his purpose (Chang, 2004).

4.2 Confession by Persuasion

As observed above, the questioning session in courtrooms permitted the magistrate to control and extend the questioning sequences as he deems necessary to extract the desired response. Suspects, by contrast, were required to interactively respond to the questions asked. Responding to these pressures, the guilty would often resort to lies to escape conviction. Though this frequently instinctive desire of the guilty to play the innocent was recognized, the Tang’s trial was not concerned about exposing the magistrate to the suspect’s dubious statements. On the contrary, the Code provided that the magistrate should sit back at the beginning of the case and expect that evidence damaging to the suspect would come out of his altercation with the accuser and witnesses (Art. 476). It was believed that precious information can be obtained even from false denials of guilt, inconsistencies, and other verbal and non-verbal expressions emanating from the suspect (Zu, 2008). In addition to the special attention given to the time sequence of the questioning, the Code went on to specify that both the accused and the accuser’s statements should be verified to the extent feasible (Art. 476). Thus, for example, if a suspect confessed to a murder, he was supposed to be asked where he put the weapon. If he said he threw it into the river, the magistrate was supposed to send someone to find it, so that when fetched, it could corroborate the confession.

Eventually, if the suspect managed to prove to the magistrate’s satisfaction during the course of the interrogation that he was innocent and had been falsely accused, one way to maintain proper balance of social harmony was to punish the accuser for the crime of false accusation (Gelatt, 1982). On the other hand, if the suspicions were established, the suspect would be greatly shamed or criticized to make the ‘offender’ feel ashamed of his crime and persuade him to change his mind, repent and admit to the crime facts (Ren, 1997; Chang, 2004). The Chinese literature, arts and folklore often tell that the magistrate talked loudly, powerfully, and fiercely to urge on the reluctant suspect to confess.

4.3 Confession by Judicial Torture

Judicial torture, at least in theory, was reserved as a last resort for those who were under strong suspicion, but chose to defy confession of their moral faults (Tang Code, Art. 476). It had been long recognized by Chinese lawmakers that the agony of torture may induce the innocent to confess things that they never did (Zu, 2008). Hence, a highly detailed set of rules governing the application of torture was put forward by the Code to enhance the reliability of tortured confessions and to acquit the innocent. First, the torture practices were permitted only in cases where the evidence strongly tended to establish the suspect’s guilt. As observed earlier, Article 476 of the Code lays down
specific procedures regarding interrogation, such as the confrontation between the accused and the accuser, and the co-examination of objective evidence. By and large, the magistrates were not vested with discretionary powers; they were required to strictly enforce the statutory rules (Alford, 1984; MacCormack, 1987). Hence, violations of these rules by magistrates carried a punishment of sixty strokes with a wooden stick (Tang Code, Art. 476). Second, magistrates needed prior approval of higher officials for torture decision. (Tang Code, Art. 476). Third, the types of torture were limited to whipping or beating with a bamboo strip or wooden stick, and adjusted depending on the suspect’s responses during the examination. The Code provided that the torture should not exceed 3 applications, with an interval of 20 days; the number of whippings or beatings should not exceed 200 in total. If the suspect refused to confess even after these beatings, he should be released subject to obtaining a guarantor pending the trial (Tang Code, Art. 477). Presumably, 20 days for repentance or confession was considered reasonable for individuals to ‘reflect on’ their acts. This also can be seen as another example of the law makers’ intent to deter undesirable social behaviour and to change the wrongdoer’s mind.

4.4 Factual Guilt

All this clearly implies that the essential purpose of the criminal interrogation at the Tang trial was not finding the legal guilt of crime by using legally admissible statements against the accused, but, rather, discovering the factual guilt through the offender’s confession and making the wrongdoer morally shameful and remorseful. The judicial torture, which, together with the confession reward policy*, was lenient to those who complied with the government, fortified the wrongdoer’s deference to legal authority.

4.5 A Stable Model for Centuries

Through the interplay between Confucian moral standards and legalist’s bureaucracy, this ‘persuasive’ interrogation model of the Tang Code proved astoundingly stable by thriving until the early twentieth century.

On the one hand, rather than simply enforcing an arbitrary set of government-defined criminal procedures, the interrogation rules noticeably reflected social norms which were already pervasive, providing legal enforcement with powerful social legitimacy. In fact, after Confucianism became the official orthodox doctrine in China, families who were affluent enough to practice it engaged private tutors to teach their children Confucianism. Schoolboys were also required to learn the entire Analects by heart (Grant, 1989). Among the poor families, Confucianism was passed on by parents or other adults from generation to generation (Jiang, Lambert and Wang, 2007). Therefore, there is good reason to believe that Confucianism’s moral standards, particularly those dealing with contrition, patriarchal relationships and familial obligations, were to some

* The Tang Code provided detailed statutory clarifications of penalty reduction or remission for offenders who confessed or surrendered voluntarily according to the seriousness of their offences (Rickett, 1971; Ren, 1997).
extent internalized within Chinese citizens. Meanwhile, as observed earlier, since the Han dynasty, Confucian doctrines also served as the guiding light to define what might or might not become a matter of law and govern the administration of criminal penalties. The consensus between law and morality often indicates that what the state seeks to enforce by compulsion corresponds largely to the sense of right and wrong of the society in general (Ren, 1997). The judicial torture could be regarded as an extreme case in which law and morality become one—what Confucianism ‘forbids’, the law ‘punishes’. To Westerners, it is fundamental to human liberty that individuals cannot lawfully be required to answer incriminating questions that will aid in convicting them for a crime (Helmholz, 1997). The imperial Chinese may regard submission to legal authority and repentance for unlawful behaviour as valuable virtues (Lu and Miethe, 2003).

On the other hand, perhaps more importantly, this ‘persuasive’ interrogation model could survive over a millennium in imperial China, not only because there was a social consensus between law and morality, but also because of its inherent connection with the increased imperial hierarchical powers. As already suggested, Confucian codes of morality (li) such as filial piety and loyalty were enforced by legalist’s (fa) reward and punishment machineries. In this way, the throne, through unrelenting fortification of familial and social hierarchies, transformed the family into a de facto extension of the bureaucratic state (Windrow, 2006). Indeed, members of society that held relative power in informal positions, such as father and brother, had an interest in maintaining the social order through the mediation of conflicts, because the restoration of order granted them power and prestige over their subordinates. Moreover, imperial law unequivocally gave the parents extended rights, ranging from physical punishments to commanding their child’s suicide for moral causes (Ren, 1997, 27). The result in theory, and to a remarkable degree in practice, was a system designed to educate wrongdoers in a subtly graded way, which began with the minor ‘punishment’ usable by fathers to force their children to confess and recognize their moral faults. It was then passed on to the minor but sometimes different devices available to intervening authorities, and finally ended with the potential application of more severe torture by the formal legal authority. This complex gradation ensured that informal, socially-based enforcement of social norms occurred continually and finally fortified people’s deference to authorities, leading ultimately to consolidation of power in the hands of the throne. Under this social structure, district magistrates, members of the real ruling class of the society, could maintain their enormous power and authorities in courtrooms. In contrast, criminal suspects were put in a disadvantageous position both interactively and socio-culturally. Hence, magistrates could fully exercise, as interrogators, their interactive power to humiliate and attack criminal suspects’ moral senses, or even torture them, to elicit confession and remorse.
4.6 Actual Operation and Legitimacy “Crisis”

Although the imperial criminal justice encompassed a broad range of procedural and administrative measures designed to convict the guilty and acquit the innocent, and to limit the extent and degree of torture that could be applied, it does not, of course, mean that such results were regularly reached or that the magistrate’s discretion was always properly controlled. True, the moral rhetoric tells that criminal questioning in the courtroom was designed to teach, humble, and extract contrition from wrongdoers. However, in reality, in the absence of the kinds of procedural protections afforded by a formal legal system, good magistrates, learning well in the Confucian Classics but not abusing their powers, were episodic and unpredictable. In fact, numerous studies have shown that torture was widely abused by magistrates in practice as a “short cut” to end cases (Zu, 2008). Langbein (2004: 101) captures the matter with great insight, observing that “once legitimated, torture could develop a constituency with a vested interest in perpetuating it”. In addition, as Langbein (2004: 101) further pointed out, “history’s most import lesson is that it has not been possible to make coercion compatible with truth”. If the magistrate engaged in suggestive questioning and the accused knew something about the crime but was still innocent, the accused might yield to the pain and torment and confess to things that he never did (Langbein, 1977, 2004). Cases arose repeatedly in which the real guilty person was detected after an innocent had confessed under duress and been convicted and executed (Zhu, 2005).

4.7 Late Imperial China

On a more macro level, the lack of effective institutional constraints on the ruling elites, especially the throne, left the interest of the whole Chinese society or the state’s destiny largely at the mercy of those in power. Besides, good emperors having both great moral achievements and extraordinary political insight were also episodic and unpredictable. Under the Tang (618-907) and Song (960-1279) dynasties, China was among the leading cultures of the world, far superior to Europe in wealth, technology and science (Moise, 1994). However, by the time of Ming dynasty (1368-1644), China had gradually fallen into decline. In the early 17th century, when the British were moving ahead with capitalism, China was just then in the final years of the Ming dynasty characterized by internal chaos and a ban on maritime trade and interaction with foreign countries. By the middle of the 19th century, the continuous isolationist policy adopted by the Qing dynasty (1644-1911) was beginning to break down in the face of European military threats.

After several failures against foreign military attacks, especially the failure of the Boxer Uprising in 1900, Empress Dowager Cixi (1835-1908)—who was under the impression that Chinese civilization was superior to all other civilizations of the world—

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*The accused or the family of the accused virtually had unlimited scope to register their protest against a decision to higher authorities through an appellate procedure. Parties could even take their case all the way up to the emperor (Alford, 1984). If magistrates were found to have rendered wrong judgments, they and even their higher officials would be punished according to a complex liability system (MacCormack, 1987).*
was shocked to realize and finally accept the necessity of changing the mode of governance in accordance with the changing circumstances to stay in power. Hence, New Policies (xinzheng, 新政) were initiated and the revision of the legal system was a part of it. Spurred further by foreign pressures and high-ranking officials, who were anxious to abolish the feudal extraterritoriality, legal reform progressed remarkably fast. Thus in 1904, the Bureau of Legal Codification was established to draft a new series of code, including the criminal and criminal procedure law. Shen Jiaben (1840-1913), the co-director of the Bureau, was particularly instrumental in the drafting of the new laws. Shen, combining Confucian ethical norms with German and Japanese models of punishment and due process, hoped to revive the ideal of a benevolent government (renzheng, 仁政) that punishes lightly (xingqing, 刑轻) and forbids extracting confessions under torture (Dikötter, 2002). It was Shen and his colleagues’ efforts, in January 1911, that made the government put into effect the “New Penal Code of the Great Qing”. Although some legalists considered this code ‘conservative’ with Confucian legal tradition preserved in numerous articles, the dominant view still seems to be that it is an important landmark in China’s legal modernization (Wang, 1997). In this legal document, corporal punishments and extracting confessions by torture were outlawed.

However, the first wave of legal modernization could not take root during the turbulent period, following the Qing dynasty’s collapse. Three years later after Cixi’s death, the Qing dynasty was overthrown by the Wuhan Uprising on October 10, 1911. The establishment of the Republic of China in 1912 by the Nationalist Party (known as the Guomindang or GMD) aroused high expectations, but within about five years, the central government collapsed completely, and China slipped into an unstable period of warlord factionalism, imperial Japan’s invasion, and a civil war between GMD and the Chinese Communist Party (CCP) from 1946 to 1949.

Noticeably, an iconoclastic tendency, aimed at destroying the Confucian legal traditions, was also advanced during this turbulent period (Ma, 1987). The “legalization of Confucianism” by imperial thrones unfortunately brought disrespect and even ‘damage’ to both law and Confucianism. As explained, Confucius’s belief was that wrongdoers could reform themselves by contrition, enlightenment, and education. Therefore, Confucius would be the last person to approve of “compulsory” morality by torture and corporal punishments. However, owing to the harsh criminal procedure and punishment designed to uphold Confucianism’s moral standards, not only was imperial Chinese law made largely inhuman, but also Confucianism’s inherent humanity was challenged. Consequently, with the downfall of China’s two-millennia-old imperial system in 1911, Confucianism not only lost its official status as the state orthodoxy but was also undermined as a “feudal ideology” by both the GMD and the CCP.

\[^{97}\text{Although most of China came under the control of the GMD during the Nanjing period (1927–1949), political control of the entire region remained in the hands of warlords. As Zhu (2007: 536) observed, “the GMD’s unification of China was more symbolic than real”.}\]
The Criminal Interrogation Rules in the Mao Era

The establishment of the PRC in 1949 was often claimed by Chinese Communists as a total break with China’s “feudal” past (Gelatt, 1982). Replacing Confucianism, Marxism-Leninism became the official orthodoxy in guiding social transformation and other facets of national affairs. Notably, Marxism has a poor opinion of law. It was argued that the capitalist law was nothing more than a suppressive tool, which traditionally served the interests of the wealthy minority. When the proletarian revolution succeeds, the state will gradually wither away and law will not be needed (Engels, 1979, 164). In the interim, law was to advance the socialist revolution toward communism and maintain the socialist order (Ren, 1997). More precisely, “law is to be used by the proletariat as a weapon in class struggles against the enemy in order to realize the people’s democratic dictatorship” (Peerenboom, 2002, 44).

Owing to the dominance of heavily instrumental understanding of law in the Mao era, the legal restraints imposed on police power in criminal interrogation varied in accordance with the changes in the official attitude toward law and depended, to a large extent, on the political mode toward class struggles.

5.1 Rules on Police Interrogation: Ups and Downs

After the CCP seized power in 1949, the majority of laws in force during the Republic were abolished. The Chinese Communists were then beginning to develop a socialist legal system of their own (Ren, 1997). After several years of experimentation, the period 1954 to 1956 saw a brief enlightenment in China’s legal development. In 1954, the first Constitution of PRC was promulgated. Simultaneously, considerable progress was made in the creation of criminal justice characterized by separate judiciary, procuratorate, and police functions (Gelatt, 1982). Remarkably, efforts were also made to draft a series of criminal procedure rules. According to Article (2:1) of the “Provisional Regulation on the Investigation Procedures for the Procuratorate”, promulgated on August 5, 1956, the investigator should inform the accused of his defense rights prior to interrogation. And, during the questioning, the investigator must give the accused sufficient opportunities to explain away the case and make his statements. Although silent on the lawyer’s role at the pre-trial investigative stage, the Provisional Code has taken a big step forward by showing serious concern for objective evidence and not just the extraction of confession.

China’s progress toward a due interrogation process, however, was interrupted by the Anti-Rightist movement from 1957 to 1958. The Anti-Rightist Movement was a reaction against the “Hundred Flowers” Campaign (1956-1957), which was initially promoted by Mao to invite criticism of the government and to encourage different views and solutions to national policy issues. But, upon further encouragement, the criticisms became scathing and drifted from Mao’s intention of consolidating the socialist leadership and fighting corruption. In July 1957, Mao ordered a halt to the campaign, and shortly thereafter, a series of movements were launched to purge alleged “rightists” within the state (Moise, 1994). Consistent with political priority, the 1956 Provisional
Code, which was perceived as “dogmatic”, was annulled by the Supreme People’s Procuratorate on August 15, 1958. The lawmakers stressed that the crime proofing procedure should not “tie the hands and feet of the investigators”. Eventually, in the later promulgated “Provisional Regulation on the Procedure of Handling Criminal Cases for the Procuratorate (draft)”⁹⁸, many procedural safeguards for the suspect were removed. In particular, the interrogation process became much simplified, with only one legal requirement: the accused should be informed at the beginning of the questioning on the nature and cause of the accusations against him (Art. 14).

After the failure of the Great Leap Forward (1958-1960), during the recovering period in the early 1960s, there were resumed efforts to put the interrogation procedure back on the due process track. Article 4 of the “Provisional Regulations of the Supreme People’s Procuratorate on the Examination of Arresting and Prosecution and on Initiating Public Prosecution of Cases”, promulgated on August 26, 1963, provided that all investigatory bodies must “base cases on facts and take law as the criterion”. This principle was to rely not just on oral statements but on full evidence to ensure just and accurate investigation from which “the guilty would not escape and by which the innocent would not be wronged” (Art. 3). The statute went on to emphasize that any person charged with a crime should not be forced to confess (bigongxin, 逼供信) during the questioning process (Art. 24).

However, the storm of Cultural Revolution (1966-1976) quickly swept away the intentions to bring back the interrogation process due, as also justice. In May 1966, alleging that bourgeois elements were permeating the Party and the society at large, Mao ordered that these elements be removed through violent class struggle. The Cultural Revolution that ensued witnessed the dark age of Chinese legal development, when “smashing Gong-Jian-Fa (公检法, police-procuratorate-judiciary)” became the slogan of the day (Leng, 1982). “Mass violence” against the so-called “class enemies” through widespread incarceration and torture, all without due process, was what they observed (Ren, 1997: 57). For ordinary criminal procedure, there was no more division of functions by investigation, prosecution and trial, and the criminal cases were handled by the court, the procuratorate or the police (Wu, 2006).

5.2 On the Ground

The heavily instrumental nature of the laws, which were periodically altered to control undesirable social groups according to political priorities, no doubt diminished the official’s respect for law. Consequently, throughout the first three decades of the People’s Republic, Party policy and principles served as the sole guidelines for law enforcement in handling “antagonistic” or “non-antagonistic” contradictions (Ren, 1997). In fact, in the PRC’s early administrations, there was not a ‘decent’ bureaucracy with professionals, such as judges and police officers. Zhu (2007: 554) said that the CCP, long after it seized power in 1949, “remained a revolutionary party in character”. In Zhu’s opinion, the CCP’s strong party organization and ideology during the revolution period

⁹⁸ Promulgated on March 12, 1959.
(1921-1949) compensated for the lack of a modern bureaucracy, though they impeded the development of such a bureaucracy. For quite a long time after the foundation of the PRC, political loyalty and ideological purity were the most important criteria in selecting government personnel and in promoting cadres, including those in the judiciary and the Public Security (Ren, 1997; Zhu, 2007).

According to the often claimed Party principle, for the purpose of revealing the truth and giving correct treatment\(^9\), the investigators should be impartial and objective in crime interrogations, and the “people” as also those defined as “the antagonistic classes” should not be coerced into confessing (Wu, 2006, 162). However, lacking a stable legal system, those Party claims are only symbolic manifestations of formalism that merely provide general guidelines for law enforcement, rather than substantive laws that could impose meaningful restraints on the investigator’s questioning powers. Thus, although investigators had no reason to wrongfully persecute suspects, neither had investigators any particular incentive to be vigilant on behalf of suspects. Not to mention being vigilant on behalf of suspects is often potentially inconsistent with or even contradictory to the political agenda of class struggles (Chen, 2000). Free of substantial restraints, the aspiration of the investigator to capture the suspect as a testimonial resource is perfectly understandable. The investigators acknowledged the reason behind their arresting the suspect was, after all, the most efficient possible witness in the investigator’s eyes (Cui, 2003). Under this situation, unsurprisingly, there have been frequent reports of brutality in interrogations that clearly amount to cruel, inhuman, and degrading treatment and sometimes even ‘torture’, under contemporary international law (Chen, 2000).

At this point, one question arises. No doubt, this type of law enforcement must exercise a great deal of discretion so that the players in it could manipulate the interrogation procedure according to the practical needs. To understand this issue, one should not overlook the influence of the traditional Chinese legal culture, which enhanced the rulers’ real and symbolic status as the locus of political authority. Although Marxism literally has little in common with Chinese tradition, the influence of Confucianism and legalist values remained a strong driving force in Communist China even without their official recognition (Ren 1997; Peerenboom, 2002).

The Communists, nonetheless, in the process of building a new elite power structure, departed from imperial thrones in stressing family loyalty by displaying higher loyalty to the state. During the early decades of the socialist construction, the informal social control preferred by Confucianism was largely institutionalized through urban household registration system, which linked individuals’ residency with their entitlement to social programs. The strict control of population mobility effectuated different social control mechanisms in community, which were primarily responsible for

\(^9\)Mao had a lifelong faith in the ability of human beings to change. He was convinced that individuals with incorrect views could be reformed (Moise, 1994). Therefore, in investigating criminal liabilities, the “factual guilt”, especially the offender’s criminal motives, should be ascertained in order to accordingly render criminal penalties (Ren, 1997).
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handling local disputes and wrongdoers of minor offences (Whyte and Parish, 1984). When individuals violated rules under the Security Administration Punishment Act\(^{100}\), the police had the authority to impose a series of administrative sanctions without formal litigation. Notably, the formal court process was only reserved for offenders who committed serious crimes, especially the so-called class enemies who did not accept and support the Communist leadership (Rojek, 1985). In this manner, the Communist leaders enforced stratifications within the civil society between those who supported the socialist state and those who did not, and thus created a web of status and privilege in the criminal justice sphere to bolster their own legitimacy. Under this arrangement, traditional shaming, moral control, and mutual checks were to some extent as effective as in old times (Rojek, 1985; Lu and Drass, 2002). As a result, in the interrogational rooms, the questioners (i.e. the police, the procuratorate, and the judge), who were both the representatives of the state power and ‘moral executors’, enjoyed enormous authority. On the contrary, as in imperial times, suspects were still in a socio-culturally disadvantageous position. As such, the contrast in striking power between the two status groups gave the law enforcement huge space for manipulation.

6 The Criminal Interrogation Rules in the Reform Era

Upon Mao’s death and the subsequent political downfall of the “Gang of four” in 1976, the CCP’s devotion to the political struggle against class enemies quickly faded away. Some of the Right-wing leaders who had been purged during the Cultural Revolution were back in position. When the Central Committee of the Communist Party met in the famous Third Plenum in December 1978, the Right-wing group led by Deng Xiaoping could succeed in establishing effective control (Moise, 1994).

The new CCP leadership quickly launched the modernization programme which was summarized as the “Four Modernization”—modernization of agriculture, industry, national defence, and science and technology. In the meantime, many Party leaders, having suffered personally and severely during the lawless period of the Cultural Revolution, were eager to advocate greater reliance on law as a means to preventing the recurrence of such policy-driven excesses. In addition, perhaps more importantly, strengthening the legal system was also considered essential to win back legitimacy both at home and abroad and to provide an orderly environment for economic development (Peerenboom, 2002).

Since then, the new leadership in China made some rapid progress on the legislative front. Notably, the first step it took after the ten year turbulence was the promulgation of the criminal law and the criminal procedure law in 1979. The promulgation of the two laws, no doubt, marked the beginning of the redevelopment of China’s criminal justice system (Leng, 1982). Despite remarkable progress, in the ensuing years, legal scholars and criminal justice practitioners noted various deficiencies in the 1979 CPL (Ma, 2003). Specifically, there was a broad consensus that the rights of the suspect were still

\(^{100}\) Promulgated in October, 1957.
marginalized by the law (Fu, 1998). In an effort to progress towards judicial democratization and fairness, China revised the 1979 CPL in 1996.

6.1 The Criminal Interrogation Rules under the 1996 CPL

No doubt, structures and concepts influenced by the west had already found their way into Chinese legislation. However, the drafting of legal texts was always greatly influenced by historical experience from which the texts were derived, and in the light of the rationale behind such application. The 1996 CPL is no exception. In general, its content is in no way similar to that of the old imperial codes. Nevertheless, if one compares the central features of contemporary interrogation procedure with those of the imperial ‘persuasive’ type, it can be seen that many ideas are common to both. The current questioning procedure seems to still focus on fact-finding or factual guilt and to similarly ‘oblige’ the suspect to respond to the incriminating evidence against him, thereby fostering a high level of self-incriminating statements.

6.1.1 Circumstances Surrounding Interrogations

Under the CPL, the police are given powers to interrogate a suspect under two types of situations:

(1) The police may interrogate a suspect after he/she is detained or arrested and taken into police custody (CPL, Art. 65, 72); and

(2) The police may summon a suspect, who need not be detained or arrested, to a designated place in the city or county where he/she stays for interrogation, or the suspect may be interrogated at his/her residence (CPL, Art. 92).

These clauses definitely do not imply that whenever a crime happens the police are empowered to interrogate whomever they please. In the first situation, after a suspect is detained in the detention house, interrogation of the suspect, a typical investigatory act during criminal investigation, would be taken up by the police. In the second situation, because official interrogation invades the suspect’s privacy and usually results in a rather prolonged limitation of freedom, it should not be permitted without antecedent justifications. Hence, according to the relevant regulation\textsuperscript{101}, the police officer in charge, at or above the county level, shall determine the necessity of questioning. Although necessity operates as a loosely defined threshold, solidly grounded suspicion, rather than slender suspicion, is needed in practice. The law states explicitly that, before the interrogation, the investigator should acquaint himself with the case and its supporting evidence, and then plan and outline the questioning\textsuperscript{102}.

\textsuperscript{101} Ministry of Public Security: Regulation on the Procedures of Handling Criminal Cases by Public Security Agencies (Article 173).
\textsuperscript{102} Ibid. Article 178.
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It is also worth noting that, under the 1979 CPL, there is no limit on the duration of interrogation through summons. In contrast, according to the 1996 CPL, the duration of interrogation through summons shall not exceed 12 hours, and the police are forbidden from turning a summons interrogation into a *de facto* detention under the disguise of successive summonses (Art. 92). In essence, the revised CPL wants to limit the initial police investigation to sources of objective information other than of the potentially guilty. Nevertheless, this does not imply that it relaxes its intention of considering the suspect as an important source of testimonial evidence on the whole. Arguably, the revised law devotes considerable attention to the interrogation preconditions to make the questioning effective and productive.

### 6.1.2 The “Suspect Speaks” Interrogation

The Chinese questioning procedure, as mentioned earlier, focuses on *fact-finding* (Wei, 2003, 1-3). Accordingly, in practice terms, the lawmakers asked thus: What procedure would both be fair and best reveal the truth? From this perspective, there was good reason to keep lawyers from speaking on behalf of the accused: truth probably would not so well be discovered from the artificial defense of others speaking for the suspect. Hence, under the 1979 CPL, questioning by the police was conducted without legal advice and without the presence of a lawyer. The 1996 CPL improved the rights of the suspect in various perspectives, but did not include the right to have a lawyer by his side during police questioning. Only after the first interrogation or from the day on which compulsory measures are adopted, can the suspect have the right to see his attorney (CPL, Art. 96).

Consequently, the suspect himself has to speak in his own defense and respond to the evidence as given by the questioner. In contrast to the jurisprudence of the European Court of Human Rights (ECtHR), which requires suspects to make unfeathered waivers to the right of remaining silent whenever they respond to official inquiry, in China, they are not free to decide whether to submit to the interrogation process in general. A suspect is expected to answer questions asked by investigators truthfully and can refuse to respond to only those questions that are irrelevant to the case (CPL, Art. 93). Although there is no provision in the law as to the consequences that follow from a suspect’s silence, such as the fact finder drawing unfavourable inferences from a passive reaction, the real concern of continued silence is that such adverse inferences will, in fact be drawn, consciously or unconsciously, by the interrogators (Chen and Lan, 2008). Clearly, if the suspect refuses to respond, the defensive function will merge with the testimonial function in the current questioning process, and his suspicion could appropriately increase.

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103 ECtHR 29 November 1996, Saunders v. The United Kingdom, (no. 43/1994/490/572), § 55.
104 Because the police officers believe that if the case against a suspect is false, the suspect is likely to speak up and object, and if he remains silent rather than talking, this could only be because he has something to conceal or, because he is unable to deny the truth of the evidence, which the police have against him (Cui, 2001).
As truthfulness of the statements elicited cannot be guaranteed, prohibitions of torture and other forms of inhuman practices are not open to question (CPL, Art. 43). Moreover, the CPL pays special attention to the types of questions that need to be asked sequentially during the questioning. According to Article 93 of the CPL, “when interrogating a suspect, the investigators shall first ask the suspect whether or not he has committed any criminal act, and let him state the circumstances of his guilt or explain his innocence; then they may ask him questions”. The Chinese legal principle maintains that the suspect’s defence comes first because it is primarily designed to prevent the police from proceeding on the premise that the suspect is guilty (Ma, 2007). Whatever the proclaimed rationale, there is little doubt that this arrangement is advantageous to the investigation. The police, as the imperial magistrates, may sit back at the beginning and hope that damaging evidence would come out if the concocted story of a guilty suspect crumbles on subsequent disclosure of evidence. Such damaging evidence may be in the form of inconsistency in the account given by the suspect, thereby demonstrating the lies told by the suspect, or in the form of failure to answer the questions posed by the police. All this evidence could be used either to encourage suspects to confess or against them at their trials (Wei, 2003).

6.2 Law in Practice and Social Context

In short, the Chinese law no longer considers confession or voluntary admission of guilt as an essential legal component of ending a crime investigation, while it still encourages suspects to participate in police questioning as a testimonial source. Factual guilt, not legal guilt, is the key word here. The criminal procedure, in general, focuses more on the need to prevent unreliable statements, than on the restraining of police interrogation powers. This perspective is reflected in a strong emphasis on proper preparation prior to the questioning, in the limited right to counsel at the pre-trial stage and in the “suspect speaks” interrogation model that seeks to gather extensive, detailed information and factual accounts from the suspect. Apparently, this model presupposes that the interrogator, being impartial and professional, can be largely trusted to guarantee both the quantity and the quality of information that the interviewee can potentially provide, which are essential to truth-finding.

However, such expectations do not bear out in practice. Many Chinese scholars, relying on different sources, such as interviews with present and former law enforcement officers, or individual field observation, have made the alarming assertion that the problem of confessions produced by xingxun (刑讯) – physical force or psychological duress – is widespread in police questionings in China (Wu & Vander Beken, 2010). In addition, Cui (2003: 26) comments thus on the fatal effect of police coercion on the reliability of evidence: “Although confessions elicited by xingxun are not always false, wrongful convictions, with no exception, are all because of xingxun”.

Literature on the causes of police-coerced confessions in criminal interrogations covers a wide range of topics in terms of the levels of analysis. Notably, besides loopholes or shortcomings in the law and the ineffective institutional mechanisms for
controlling state powers, the influence of traditional cultural values is also considered a reason by some socio-legal studies: while coerced confession is absolutely cruel, its exercise depends at almost every level on many forms of cooperation and consensus (Lin, Yu and Zhang, 2006; Lin, Zhao and Huang, 2006). To further understand the social and cultural background because of which the pernicious interrogation practices persist, it is evident from the foregoing discussion that one must consider the relationship between the interrogator and the suspect in the crime investigation. An analysis of this relationship, at both macro and micro levels, is presented below.

The Paternalistic Criminal Justice System

First, on a macro level, China is still a paternalistic state in which the law enforcement is likely to have the real and symbolic status as the protector of anonymous collective interests, such as public security or social stability, engendering a tendency to ignore concrete interests of individual suspects and to lose sight of the power abuse by the investigators within the sphere of crime and justice.

Although the CCP has made a series of mistakes since it came into power in 1949, in Peerenboom’s (2002:42) view, “the image [of the Chinese government] remains the same: the father, knowing what is best, takes care of his children”. Today, the CCP leadership, to a large extent, decides what is best for the Chinese society and takes ameliorative actions to solve contemporary problems. In the last three decades, the state’s economic policy proved to be spectacularly successful, improving the Chinese citizens’ living conditions in a relatively short run while at the same time creating a high rate of long-term economic growth (Peerenboom, 2006). The Chinese government clearly understands the importance of maintaining stability which constitutes a prerequisite for economic growth and for the CCP’s continuous legitimacy and popularity. Hence, to satisfy the practical need for more effective social control, the current Chinese criminal justice system altered the principles of law and punishment under the Mao era in some aspects and adopted Confucianism and legalist legacies in others. As in the pre-reform era, the police, without court approval, have the authority to impose administrative sanctions on individuals guilty of minor crimes and public order violations. Wrongdoers are dealt with by the criminal justice system only when serious offences were involved. Although the police’s administrative power that was once used to control the urban transients has been eliminated under the 1996 CPL, their power for detaining criminal suspects was extended. No doubt, Chinese police, compared with those of Western law enforcement, have greater authority and power over ordinary citizens (Biddulph, 1993; Ma, 1997).

Apart from political agenda, another crucial factor in further reinforcing the authority of the police lies in social changes within the Chinese civil society in the reform era. As China has been moving toward a market economy since 1978, the traditional informal social control that relied on rigid household registration and employment structure has declined (Dutton, 2000). Concurrently, increased mobility has resulted in a class of “floating population” (liudongrendou, 流动人口), who are often blamed for urban
problems, including the soaring crime rates. Given that transients have no attachment, commitment, or involvement in communities, subjecting them to stronger formal control by the criminal justice system is deemed necessary by urban citizens to curtail crimes (Lu and Drass, 2002). Moreover, as police officers, following the “mass-line” in policing, actually live and work in a neighbourhood for a long time, most Chinese citizens do not view the police as a force limiting their freedom, but as a service resource they can rely on (Jiao, 2001). As a result, the formal law enforcement is shouldering more responsibility for solving crimes, thus reinforcing itself in both real and symbolic senses (Wong, 2001).

Importantly, within the paternalistic state, as a legal professional group, Chinese defence counsels have not been a prominent force in balancing state powers. In imperial China, the status of scriveners, who were labelled as “litigation tricksters”, was regarded low, because the pursuit of self-interest by adverse litigation, as it signifies one’s refusal to take responsibilities for one’s action, is at odds with the paramount virtue of social harmony (Yu, 2002; Clark, 2008). Under socialist China, the state belongs to the people; so, lawyers are not expected to oppose the state in a criminal investigation but shoulder dual responsibilities of not only protecting the rights of the suspect, but also, more importantly, helping the state to seek the truth (Lu and Miethe, 2002; Clark, 2008). In the absence of an officially recognized legal profession for millenniums, the use of legal counsel is rather new to the Chinese criminal justice system. Until recently, more than 70 percent of the criminal cases were processed without lawyers appearing in court on behalf of the defendants (Wu, 2006). In this context, Lu and Miethe (2002: 277) observed thus: “contrary to the image of an advocate of the defendant, Chinese attorneys under the reform policies still play a major role in legitimizing the current legal system.” Chinese counsels, even those seasoned attorneys, know how to obtain the best results for their clients by not being “combative” or “arrogant”, but being “deferential” and “submissive” during the criminal proceedings (Liu and Scymour, 1998).

Undoubtedly, the current paternalistic procedure structure in which the police have the sole responsibility for implementing procedural safeguards, if frequently unchallenged, is dangerous. Though coercive questioning, an extreme means to get objective evidence, implies weakness of the daily operations of the police, it can also be attributed to the “system” of criminal justice that allows it to exist. For law enforcement as a whole, by relying heavily on confession to solve crimes, it is able to divert the available funds to other arguably more productive uses.

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105 Specifically, the daily operations of the police are undermined by a shortage of budget (Zhu, 2006; Chen, 2007) and poorly trained police officers (Wang 2006); the police force is undersized and functions by using underdeveloped investigative methods (Zuo and Zhou 2002; Wu 2008).

106 Chen (2007: 59) argues that the importance of increasing national investment in criminal investigation has never been fully recognized by the Chinese government. Since the advent of an open economy and a reform policy, the government’s financial input in criminal investigations, concerning personnel or technology, has not increased concurrently with the significant rise in crime as well as the changes in crime patterns. Owing to limited budget, some forensic techniques of crime procedure, like DNA testing, cannot be employed (Chen, 2007).
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Interrogational Paternalism

Second, on a micro level within the interrogation space, the relationship between the interrogator and the suspect has been and continues to be paternalistic. The attitude of criticizing wrongdoers for their unwillingness to repent and admit to the crime facts, which has driven from the familist or paternalism tradition, continues to offer plenty of psychological comfort to the police. Although the “open-door” policy has increased individualism in China, to a large extent, Confucian doctrines of filial piety and family loyalty still strongly influence the modern Chinese family relationships (Whyte and Parish, 1984). It was suggested that the Chinese family often dominates the individuals by forcing them to come to terms with family values and tradition (Lu, Zhang and Miethe, 2002). With such moral cultivation, according to Fairbank (1987:31-32), “Chinese well habituated to the family system have been prepared to accept similar patterns of status in other institutions, including the official hierarchy of the government”. Hence, in the interrogation room, the suspect’s submissive and honest attitude seems to be considered legitimate and morally valid by the interrogators. In addition, the societal view on crime and wrongdoers gives law enforcement “additional moral legitimacy to take measures to coerce confessions and press for repentance” (Ren, 1997, 132). As a survey conducted in 2006 shows, the public’s attitude towards police pernicious interrogation practices is tolerant, and even supportive (Lin, Zhao and Huang 2006: 133-4).

7 Conclusion

Even a cursory review of the interrogation rules of the imperial, Mao and reform eras will suffice to demonstrate just how remarkable has been China’s criminal justice transformation. Notwithstanding the many shortcomings in the current interrogation procedure, dramatic progress has been made in creating a fair questioning process that not only addresses the concern over factual accuracy of statements but also emphasizes the fairness of the manner in which they are obtained. Most strikingly, though police torture in criminal interrogation is part of the dim and dark history of Chinese criminal law, today’s China, by virtue of the provisions of criminal procedure and criminal law, forbids the practice wherein the suspect or the accused should be forced, by actual or metaphorical “arm-twisting”, to respond to police inquiries. Nonetheless, the result might not always be what the law intends to achieve: numerous Chinese scholars observed that confession obtained by extensive use of psychological and physical coercion is still a pervasive problem in crime investigations in China today. Several views were offered on the factors that contributed to this phenomenon.

This paper offers an alternative perspective on the evolution and operation of Chinese interrogation rules, besides positing more nuanced explanations for the prevalence of police coerced confession in China. The present historical analysis reveals that the imperial, social context which once morally legitimized judicial torture is still very much alive today. More precisely, historically, the Chinese leadership, through the interplay
between Confucianism’s moral standards and legalist bureaucracy, relied heavily on informal means to maintain social order and settle disputes, and established a powerful, minimalist law enforcement authority which was responsible for only conflicts that could not be solved by informal mechanisms, and for serious crimes. On the whole, this social control model failed to adequately address the need to protect individuals against law enforcement interrogation practices that were abusive or overreaching, and therefore indirectly contributed to the prevalence of police-coerced confession both in the past and in the present.

Considering the future reforms within the current Chinese social context, two factors seem to be unconducive for the right to remain silent and the privilege against self-incrimination. First, Chinese lawmakers under the reform era continued to emphasize the importance of being honest in police interrogation. Article 93 of the 1996 CPL provides that “the criminal suspect shall answer the investigators’ questions truthfully”. This legal requirement has drawn heavy criticism from contemporary legal scholars (He, 2006; Wu, 2006), who claim that it denies the suspect’s basic rights to reach an autonomous decision when called upon to answer criminal allegations. This is viewed as the essence of the right to remain silent in Western culture (Jackson, 2009; Wu, 2011). However, at this point, it should be noted that Chinese law was embedded in an altogether different ideological context than the one that gave rise to the right to remain silent in the West. As already seen, the imperial Chinese law is largely moralistic in nature. Since the Han dynasty, Confucian’s moral standards, particularly those dealing with contrition, patriarchal relationships and familial obligations, started to become a part of the content of law, and legalist’s reward and punishment machineries became the instruments for executing such content. In the reform era, the attitudes of being honest about one’s misconduct and being submissive to authority continued to be reinforced by Chinese familism. Hence, the better way to comprehend the above mentioned provision is not to consider it a manifestation of caprice on the part of the present Chinese leadership, but rather to recognize it as an expression of the inherent Chinese legal attitude which the Chinese lawmakers want to respect and enhance. This is not to say that other external pressures of the kind mentioned at the beginning of this article, such as the pressure on the PRC to comply with the “universal norms”, for instance the privilege against self-incrimination, will not make the content of the new laws profoundly different from that of the past, difficult as this may be to accomplish. So long as the familist and societal view of crime and wrongdoers held sway, the real question is whether the new content can overcome hoary practices, values and interpretations.

Second, complicating the task of legal reformers who wish to establish the right to remain silent, China is, to a large extent, still a paternalistic state in which the law enforcement is likely to have the real and symbolic status as the protector of anonymous collective interests, such as social stability, engendering a tendency to ignore concrete interests of individual suspects within the sphere of crime and justice. It is still debatable whether China will develop a robust civil society in which the citizens will strike a similar balance between the concerns for individual rights, and for the interests of families, communities and the nation, considering the continuity of the political and
social control traditions in the Chinese society. The CCP, certainly, will not fall from power in the near future. Moreover, the familism values of bonding individuals to the family, community, and state has enabled the Communist leadership to continue its traditional role in manipulating those conventional social control variables either by reinforcing their traditional functions or by redirecting their impacts on individual citizens.

At this point, the Chinese government, whose image has been badly tarnished by police torture, both at home and abroad, does not lack the motivation to eliminate coerced confessions. In addition, the desire for modernization of China’s political and legal system will inevitably reshape the law and social control mechanisms. To be sure, the vicissitudes along the road to social development are never predetermined; so, it may be difficult at this point to foresee the impact of state policies on social relationships. Nevertheless, given that the average citizen’s indifference to the plight of criminal suspects is largely due to the high crime rates as a result of the weakened informal social control, particularly on urban transients after the legal reforms, the best chances for a better protection of a suspect’s rights and the elimination of coerced confession lie in narrowing down the yawning social cleavage rather than widening it. There is no doubt that Chinese lawmakers can find a lot of wisdom in the early Confucian philosophy.

As Posner (1990) rightly argues, laws are not abstract, sacred entities, but socially determined goads for shaping behaviour so as to conform to society’s values. Indeed, there can be no wisdom in the choice of a path unless we know where it will lead. As we have seen in the first section, the values of community relationship and shaming serve as the basis of social inclusion in the Chinese communitarian society. Those values are also supportive of an ethical approach to investigation and a cooperative interviewing style in police questioning. Therefore, in any event, many of the most pressing obstacles for the implementation of fair interrogation standards have nothing to do with the early Confucian philosophy. Rather, they are institutional in nature. Ultimately, the key to the future realization of interrogation fairness is power. How is power to be controlled and allocated in the questioning room? According to Peerenboom (2004: 137), “[i]t is possible that the ruling regime [of China] will be forced to accept limitations on its power as a condition for staying in power.” Hence, there are reasons to believe that the issue of power can be resolved in favour of rule of law and law will come to impose ever more meaningful restraints on law enforcement in the near future.

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Chapter 5. Cultural Relativism and Universal Fair Interrogation Standards in Europe and China
[Abstract]

This paper addresses Chinese interrogation rules from historical and comparative perspectives by relating them to the very different development of interrogation procedure in Europe. A fuller understanding of the evolution of the rules in both contexts is relevant to the present day controversy concerning the universal versus relative nature of interrogation fairness. The comparative analysis reveals that, in fact, the influence of ancient Greek and Chinese civilizations resulted in a great difference between Europe and China regarding legal cultures and institutional arrangements for criminal interrogation procedure. Considering future legal reforms in China, and given the very different historical and institutional context, the likelihood seems low that an ‘autonomous version’ of the right to remain silent and the privilege against self-incrimination will develop on China’s very different soil. However, traditional native resources are also available to legal reformers to ensure a cooperative interviewing style in criminal questioning, and eliminate police-coerced confessions.

1 Introduction

In recent years, a number of high profile wrongful convictions have plagued the Chinese criminal justice system.\(^\text{107}\) While each of these cases has raised serious questions concerning the justice system as a whole, particular attention has been directed towards the police and their ability to satisfy their dual mandate to investigate a crime while protecting the rights and freedoms of the accused. One notable aspect of police operations that has come under increasing scrutiny in this regard is the police interrogation, a practice which is both upheld by police officers as a crucial means of gathering information and disposing cases, and denounced by legal scholars and civil rights advocates as a serious threat to the standards of fairness and due process (Wu, 2006; Chen, 2007). Many Chinese scholars, relying on different sources, including interviews with present and former law enforcement officers or individual field observations, have made the alarming assertion that the malady of confessions produced by torture\(^\text{108}\) (xingxunbigong, 刑讯逼供) has been widespread in China (Wu and Vander

\(^{107}\) For instance, in 2005, the wrongful convictions of Li Jiuming, Nie Shubin, and She Xianglin precipitated a growing crisis of legitimacy within the Chinese criminal justice system (Chen, 2007:54).

\(^{108}\) The Chinese academics define torture in a broader sense than the CAT does. They define torture as any act by which corporal treatment or quasi-corporal treatment is inflicted by judicial officers on a suspect or defendant to extract confessions (Zhe, 2005). Corporal treatment refers to physical coercion through inflicting pain directly on the body, such as a beating or imparting an electric shock. Quasi-corporal
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Beken, 2010). The majority view among researchers was that dominated by ideology of ‘crime control’ rather than ‘due process’, the current Criminal Procedure Law (CPL) of the People’s Republic of China (PRC) and relevant supplementary regulations fail to provide the suspect with adequate safeguards against pernicious interrogation practices (Zuo 2005; Bi 2007).

In fact, the problem of coercive police confession has been so pervasive in China that it has captured the attention not only of domestic academic scholars but also of the international community. In the face of such ‘devastating’ issues, unsurprisingly, the growing power of the international human rights movement has led to a backlash in China (Peerenboom, 2003:1). Notably, activists have argued that there is a significant level of consensus regarding ‘the presumption of innocence’ and ‘the privilege against self-incrimination’ as set forth in the Universal Declaration of Human Rights (UDHR),110 and the International Covenant on Civil and Political Rights (ICCPR)111 (Gelatt, 1982). Hence, in the name of universal human rights, rights activists urge the PRC to comply with these ‘universal’ norms (Gelatt, 1982).

The Chinese government, however, has raised serious challenges to this claim of universality, arguing that all moral values, including human rights, are relative to the social and cultural context in which they arise (Peerenboom, 2003), and the law’s very existence depends on its interpretation and application within an interpretative community, which is historically and culturally conditioned (Zhu, 2007). In particular, the government feels uneasy about some ‘undeniable’ principles in western criminal procedures, such as the presumption of innocence and the privilege against self-incrimination (Gelatt, 1982; Ren, 2007). The officials in the legislative body of the Standing Committee of the National People’s Congress explained that the Chinese approach to criminal investigation is to engage neither in the ‘presumption of guilt’ nor in the ‘presumption of innocence’ (Ma and Li, 1999: 63). The Chinese criminal procedure does not presume anything—it lets evidence and facts speak (Gelatt, 1982).

Competing claims about the universal versus relative nature of interrogation fairness reflect one of the main challenges confronting international legal instruments and comparatists: how can the competing claims of cultural relativism and fair universal interrogation standards be reconciled? This paper addresses the Chinese interrogation rules from a historical and comparative perspective by relating them to the very different development of police interrogation procedure in Europe. The purpose of this comparative analysis is twofold. On the one hand, only after a deeper understanding of different social and legal systems can one begin to ascertain the proposition that, in the

treatment refers to physical or psychological coercion through inflicting pain (physical or mental) indirectly on the body, such as through sleep deprivation, exposure to cold or heat, or being forced to sit or stand in uncomfortable positions.

110 Article 11 of the UDHR.
111 Article 14 of the ICCPR.
area of interrogation procedure, there exists a ‘common core’ of problems among various legal systems, notwithstanding momentous differences in political, cultural, and legal outlooks. On the other hand, by exploring the historical, political, and philosophical backdrop of current Chinese reforms, it is easier for (Western) legalists to understand how the right and the privilege in China will develop along a different path.

This paper is structured as follows. The first section documents the rise of ancient Greek and Chinese civilizations from roughly the eighth to the third century B.C. and illustrates their implications for European and Chinese legal cultures. This is followed by an analysis of the evolution of criminal interrogation rules in Europe. The paper will then focus on the history of criminal interrogation rules in China, for which a comparative analysis is provided. The last section presents the conclusion.

2 Ancient Greek and Chinese Civilizations: Different Perspectives on Law

From roughly the eighth to the third century B.C., many civilizations made great strides in philosophical and moral thought, notably those of Greece and China. The influence that each of these two civilizations has had on the world is particularly great. Greek civilization nurtured the Western legal culture, and Chinese civilization gave rise to the legal culture of East Asia.

2.1 Greek Civilization and Law as an Autonomous Institution

One of the most remarkable characteristics of the ancient Greeks was the vesting of power in the individual. It is observed that ordinary Greek people developed a sense of personal agency that had no counterpart among the other ancient civilizations (Nisbett, Peng, Choi, and Norenzayan, 2001:292). Indeed, one definition of happiness for the Greeks was ‘the exercise of vital powers along lines of excellence in a life affording them scope’ (Hamilton, 1973:25). Though the Greeks believed that the secular order was influenced by the gods, ‘divine intervention and independent human action’ were seen to work together (Knox, 1990:39). The daily lives of the Greeks were imbued with a sense of choice and an absence of social constraint that were unparalleled in the ancient world. According to Hamilton, ‘The idea of the Athenian state was a union of individuals free to develop their own powers and live in their own way, obedient only to the laws they passed themselves and could criticize and change at will’ (1973:144). As Wieacker (1981:263) showed, in the developed Greek polis, ‘law’ was not conceived of as a divine gift or an immemorial custom, but rather as a man-made, autonomous institution.

Related to the Greek sense of personal freedom was the tradition of debate, which was already well established by at least the time of Homer in the 8th century (Galtung, 1981; Lloyd, 1990). Homer emphasizes repeatedly that, next to being a capable warrior, the most important skill for a man to have was that of a debater. Even ordinary people
participated in the debates of the political assembly and could challenge even a king (Cromer, 1993:65).

An aspect of Greek civilization that had a great effect on posterity was their sense of curiosity about the world and the presumption that it could be understood by the discovery of rules (Lloyd, 1991; Toulmin and Goodfield, 1961:62). The Greeks focused on salient objects and used rules and categorization for purposes of describing and explaining the environment (Nisbett, Peng, Choi, and Norenzayan, 2001:292). In particular, recognition that the law was man-made led the Greeks to question the moral basis of human laws. This at the same time raised the problem of why laws are binding. How can law bind the conscience of an individual? Wherein lies the ethical foundation of the coercive power of the state’s legal and moral order? For, if an eternal, immutable law obliges men to obey a particular secular law, there must exist behind the popular images of tribal deities ‘an eternal, all-wise lawgiver who has the power to bind and to loose’ (Rommen and Hanley, 1947:4-5). In fact, the Greeks speculated a great deal about the philosophical conception of natural law and about the law’s place in society.

Although the Greeks never developed an autonomous legal science, their refinement of the concept of law and its philosophy and rhetoric were instrumental in the formation of Roman jurisprudence. The Romans did not give much attention to the theory of law; their philosophy was largely borrowed from the Greeks. Nevertheless, the detailed rules of Roman law were developed by professional jurists and became highly sophisticated. Specifically, the very technical superiority of the reasoning behind Roman laws developed through the categorizing of legal practices and generating of rules about them for the purpose of systematic explanation (Wieacker, 1981:268). Eventually, Roman jurisprudence reached its height in Justinian’s Code, which absorbed all the extracts from the writings of the greatest jurists. The large amount of material summarized in the term ‘Roman law’, according to Wieacker (1981: 257), provided the basis for the rational character of the Western legal systems and the legalism of the Western world.

2.2 Chinese Civilization and Law as an Instrument for Maintaining Social Order

This picture of the Greeks provides a basis with which to contrast the ancient Chinese. The Chinese counterpart to the Greek sense of personal agency was a sense of reciprocal social obligation or collective agency. According to Hansen (1983: 30), a fundamental intellectual difference between the Chinese and the Greeks was that the Chinese held the view that ‘the world is a collection of overlapping and interpenetrating stuffs or substances...[This contrasts] with the traditional Platonic philosophical picture of objects which are understood as individuals or particulars which instantiate or “have” properties’. The profound difference in metaphysics had many ramifications, for

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112 The positive laws of the various Greek states were not highly developed in the sense that Greeks did not have a class of legal professionals or state officials who monopolized the production of law or the delivery of legal services (Tamanaha, 2004:7; Lesaffer and Arriens, 2009:77).
instance, the Chinese, unlike the Greeks, were inclined to feel that individuals are part of a closely-knit collectivity and that the behaviour of the individual should be guided by the expectations of the relationships in the community (Hamilton, 1984:408; Nisbett, Peng, Choi, and Norenzayan, 2001).

These different metaphysical beliefs also resulted in great differences between Greece and China in their approach to philosophical questions. It has been argued that the Chinese tended to engage in context-dependent and holistic perceptual processes by attending to the relationship between the object and the context in which the object is located (Nisbett and Miyamoto, 2005). Confucianism, which is the dominant Chinese philosophy, is a prime example of this holistic approach. Notably, one fundamental goal of Confucianism is to achieve a harmonious social order in which each person is able to realize his or her full potential as a human being through mutually beneficial relations with others (Peerenboom, 2002:28). Emphasizing the individual’s self-consciousness to maintain the social order, Confucians believed that the codification and public dissemination of laws sends the wrong kind of message (Peerenboom, 2002; Windrow, 2006). In Confucius’ words, ‘lead the people with government regulations and organize them with penal law (xing, 刑), and they will avoid punishments but will be without shame. Lead them with virtue and organize them through the li (礼), and the people will have a sense of shame and moreover will become humane people of good character’ (Analects, 2: 3). Theoretically, the early Confucian view leaves little room for the operation of codified law and punishment.

Since li have often been construed as universal ethical principles, they have been depicted as kinds of natural law. However, as Peerenboom (2002: 31) explained, ‘the li are better understood as customary norms that gain favour within a particular historical tradition at a particular time’. Indeed, since there is an emphasis on change in Confucian philosophy, li were merely historically contingent norms founded on experience-based knowledge. It has been maintained that the Chinese never developed a concept corresponding to ‘natural law’ for the sufficient reason that they did not have a concept of ‘nature’ as distinct from human or spiritual entities (Munro, 1969; Fung, 1983; Zhou, 1990; Lloyd, 1991).

Notably, although early Confucian ethics evidence poor opinions of law, they were rivalled from the very beginning. Legalism (fajia, 法家) that had arisen during the early Warring State period (475-221 B.C.) advocated a social control program, which was in direct conflict with Confucian ideals. In the legalistic view, human beings are naturally greedy and selfish. Thus, virtue cultivation and moral examples are inadequate to maintain the social order because people’s base instincts will constantly drive them to wrongful behaviour (Ren, 1997). The only way to make people behave correctly and to achieve a well-ordered society is by an impartial system of rewards and punishments. Specifically, legalists advocate centralization of a ruler’s authority through creation of a vast bureaucracy and extensively written laws, and the use of harsh, universally enforced penal code to ensure compliance with state policy. They believe that if even minor infractions are ruthlessly punished, then no one will dare to commit serious
crimes (*Shang Jun Shu*, 17:3). It is seen clearly that legalistic law is one of the means to serve the interest of the ruler, not necessarily the common people. Additionally, legalistic ideas can hardly be regarded as a result of scientific theory and the use of formal logic. Instead, they are reflective of the Chinese genius for practicality.

### 3 Ancient Greek and Chinese Civilizations: Different Perspectives on Law

#### 3.1 The Development of the Ideas of Natural law, the Rule of Law, and Legal Rational Domination in Medieval Europe

During the fifth century, the Western Roman Empire gradually disintegrated in the face of continuous pressure from Germanic tribes. As Roman authority disintegrated, from the sixth until the eleventh century, Europe entered an age of decline and disruption: the Dark Middle Ages. Culturally speaking, the Germanic conquerors of the Roman Empire lagged behind the Romans. In Lesaffer and Arriens’s (2009: 123) words, ‘[the Germans] proved incapable of maintaining Roman civilization or of replacing it with anything worthy of the name’. The law that prevailed in the early kingdoms was essentially the Germanic custom of the rulers.\(^{113}\) Although the Germans had retained the enactment of the Byzantine emperors together with some epitomes of elementary legal literature, these collections reflected a low level of legal science compared to the scope and complexities of the Justinian’s complication (Wieacker, 1981:273-274). Moreover, the Roman texts often proved to be beyond the comprehension of those who consulted them.

The disappearance of Roman law accompanied the withering away of legal education and professional jurists who handed down judicial opinions by scientific reasoning. In place of the imperial system of courts were tribal assemblies in which the freemen of a given tribe sought to forestall interfamily vendettas and, more importantly, to facilitate negotiation and mediation between hostile families (Berman, 1983). During trials, customary rules were not applied rigidly. Rather, the tribal leaders would generally seek to persuade the parties to resolve a dispute amicably and reach a compromise (Stein, 1999:38). When the parties could not be reconciled, the community courts decided on a method of proof, often leaving vital points to be established by the ‘judgment of God’. Such judgment was ascertained by ordeals, duels, or the procurement of oath-helpers (Baldwin, 1961; Brown, 1975). All these forms of inquisition for guilt imply a low level of intellectual development. As Berman (1983: 77-78) rightly demonstrated, in settling criminal disputes, guilt was not determined by applying legal rules; rather, people’s superstitious beliefs and unconscious ideas influenced judgments.

\(^{113}\) During that time, Europe consisted of a multiplicity of tribal, local and lordship units, which came to share a common religious faith and common military loyalty to the emperor and kings. Nevertheless, prior to the eleventh century, royal and ecclesiastical authorities did not attempt to alter in any fundamental way the essential tribal and feudal character of the legal orders of Europe (Berman, 1983:51-52). Thus legal orders prevailing among the peoples of the Continent during that period were primarily tribal in nature.
Nevertheless, the turning point came during the decades before and after the eleventh century. In fact, with the Christian Church emerging as an independent political entity under the papacy, a higher view of the law was established in Western Christendom. According to Christianity, there exists a universal ecumenical law above local traditions and enactments (Wieacker, 1990:12). Notably, while Greek thought was largely lost under the rule of the Germanic West during the Middle Ages, the concept of natural law found its way into early medieval theology. The fathers of the early Church made use of Stoic natural law to support the Christian doctrine of the personal Creator-God as the author of the eternal law as well as of the natural moral law promulgated in the voice of conscience and reason (Rommen and Hanley, 1947:35). The Church Fathers Origen (181-254), Augustine (354-430), and Isidore of Seville (560-636) further claimed that all secular law, including the canon law of the Church, should be in accordance with natural or divine law to be valid (Lesaffer and Arriens, 2009:183). Nonetheless, a new philosophy and a new world order did not follow at once upon the entrance of the Christian faith into the Germanic world; prior to the late eleventh century, Christianity was for the most part an otherworldly faith (Rommen and Hanley, 1947:30). The Papal Revolution, however, made Christianity into a political and legal program. Christianity became the prevailing religious ideology. Accordingly, law came to be seen as the very essence of faith and as a way of fulfilling Western Christendom’s mission to achieve the kingdom of God on earth (Berman, 1983:521).

The religious cloak over understandings of law and society in medieval times in fact laid the groundwork for the concept of the rule of law in the West. According to this concept, rulers should be subject to divine law and the positive law, which they themselves lawfully enacted. To be sure, with the Gregorian Reform, religious faith became individualized and privatized. The emphasis of Christianity shifted from collective salvation to the salvation of each individual soul, and from the Last Judgment of mankind as a whole at the end of times to individual judgment upon each person’s death (Lesaffer and Arriens, 2009; Finer, 1999:24). Hence, under the new theology, the individual could participate in the worship with his own inalienable tie to God. Under this understanding, the ruler had no superior status. He was one with his fellow-believers in having to obey divine law (Finer, 1999:25-26). Consequently, believers had the right and duty to disobey the divinely appointed ruler when he violated fundamental law. This, as discussed above, was based on the belief that fundamental law was itself divinely instituted. Popes and kings made laws, but they did so as deputies of God, acknowledging that not they but ‘God is the source of all law’ (Berman, 1983; Tamanaha, 2004:23). In this sense, for the first time in Western history, ‘law’ provided the ideology and social cohesion for rebellion and reform movements at the same time as it served to legitimate and reinforce the social order.

The concept of the rule of law or impersonalized obedience to law was supported by a high level of legal consciousness and legal sophistication that came to prevail throughout Europe in the late Middle Ages. As Hamilton (1984: 410) noted, the tension regarding personal power between position holders and non-position holders, or between kings and people, favoured the development of a systematic means of defining
jurisdictions within which the right of command is deemed legitimate. This increasingly became the function of law. Therefore, as a principle of domination applied in practice, the theme of personalized authority became the object of codification in institutionalizing the legal and economic idea of property, as well as political and philosophic ideas of freedom and reason (Hamilton, 1990:96). Of course, the law of the Middle Ages did not embrace norms and rights identical to those of the twenty-first century. Nevertheless, this does not undercut the conclusion that the medieval canonists and jurists understood and endorsed the notion that natural rights existed and could be asserted by individuals (Tierney, 1997; Helmholz, 2002:303-304). Law factually provided the formal means that allowed both kings and people to preserve personal spheres of power. According to Weber (1968), it is this legalism or legal rational domination that most distinguishes European civilization from that of other high cultures, such as China’s, in which law emanates from an accepted social ethic rather than the logic of authority.

Notably, in the general context of a movement towards more rational legal procedure, the Fourth Lateran Council of 1215 abolished the old system of trials by ordeal. The attempt to make God the fact finder for human disputes was thus abandoned (Baldwin, 1961:613). Since mortal judges were going to replace God in finding and deciding guilt or innocence, it was well understood that the preservation of legality required not merely abstract perceptions of justice and equality but also specific principles and rules. Hence, the theme of legalism led to the systematization of jurisprudence and to a legal framework regulating the ‘free’ will of legal officials in truth-finding processes (Posner, 1990:6-7). As Wieacker (1990: 9-19) argued, from successive re-shapings of the sources of jurisprudence, there arose what moderns recognize as European legal civilization. More specifically, the history of the European legal civilization and interrogation jurisprudence can be divided roughly into two main stages, each of them captured by its own distinctive formulation of the legal science.

3.2 Late Middle Ages and Early Modern Age: Divine Law and the Obligation to Answer

In the late Middle Ages, secular law and jurisprudence were largely based upon the tenets of natural and divine law, laws that God himself had created and implanted in authoritative texts. For medieval jurists, all Greek, Roman and early Christian writings, especially the newly discovered Roman law of Justinian and canon law,\footnote{Originally, canon law lacked an authoritative body of texts comparable to Justinian’s corpus. Nevertheless, by the 1160s, the civil lawyers recognized canon law as a discipline parallel to civil law, with parity of esteem (Stein, 1999:49)} shared to some extent the authority of the Bible (Berman, 1983:122; Lesaffer and Arriens, 2009: 253-254). These authoritative materials were treated by the jurists as data to be observed, classified, and systematically explained in terms of concepts of truth and general principles (maxims) (Stein, 1999). Several maxims of the \textit{ius commune}\footnote{The term \textit{ius commune} refers to the combination of Roman and canon law that dominated European legal education before the modern era. In large measure, it also determined the rules of practice in the courts of} (Stein, 1999:49) expressed the
most important limitation on the judge’s power to convict. These maxims preserved the medieval view that human testimony was a form of proof whose probative value could not be weighed (Jackson, 1988:552). Under this rationale, only two forms of evidence could provide proof ‘as clear as the noonday sun’: non-contradictory testimony from two eyewitnesses, or confession by the accused (Langbein, 1977). This meant convictions of crimes could be pronounced only based on the testimony of two eyewitnesses or the confession of the accused. All other forms of circumstantial evidence, known as indicia, were hierarchically arranged and assigned numerical values. With only one eyewitness and several indicia there could be no conviction (Peters, 1985:69). Moreover, the ius commune insisted that a judge adhere strictly to the rules of law and acquit a suspect if the proof were imperfect: ‘the judge must decide according to the allegations and the laws, not according to his conscience’ (Fraher, 1989:24).

Nevertheless, the rules of evidence in the ius commune were largely aspirational—a set of norms that look good on paper but were not enforced, because the required witnesses were seldom available, and, in the view of the draconian punishments, voluntary confessions were also in short supply. Since covert crimes do not generate eyewitness testimony, and since no amount of circumstantial evidence could substitute for the testimony, Langbein (1977: 5-8) argued that medieval civil and canon legal systems turned to torture in order to satisfy the alternative requirement of confession. Consequently, from the inception of the inquisitorial procedure, the examination of the suspect was considered the principal mechanism for discovering truth (Damaska, 1978:875). According to the Roman-canon procedure, a judge was allowed to put a direct question to a suspect regarding his guilt whenever (1) the suspect was under infamy for the crime, that is, when he was publicly known to have committed the crime; or (2) when there was clear circumstantial evidence; or (3) when the testimony of one immediate witness could be brought forth against the suspect. If any of these three conditions were fulfilled, the judge could question the suspect concerning his crime, and he was legally bound to answer truthfully and unambiguously (Connery, 1955:181; Langbein, 2004:95). The violation of these legal duties (silence) constituted one of the indicia required for the interlocutory order to apply torture (Damaska, 1978:875). Moreover, when the evidence strongly tended to establish the suspect’s guilt but the suspect still refused to confess, torture would be applied to induce a confession (Langbein, 1977:2004).

Although the system of judicial torture was never known in England, there had been a broad consensus among European jurists that it was legitimate to require a...
Chapter 5. Cultural Relativism and Universal Fair Interrogation Standards in Europe and China

particular person to answer incriminating questions, when there was good reason for suspecting that person had violated the law. As Macnair (1990: 67) stated, up until at least the revolution of 1688, the common lawyers shared the same ‘mental universe’ of the canonists on the question of self-incrimination. Indeed, whereas English common lawyers used the *Nemo tenetur prodere seipsum* (no person is to be compelled to accuse himself) maxim\(^{118}\) to rein in the activities of the Court of High Commission or the Star Chamber, they were not seeking to establish an invariable rule of practice or ‘procedures indispensable to fair trial or due process of law’ (Levy, 1968:321). Had this been their aim, they would have applied the rule to *unsworn* statements made in their own courts, or at least they would have argued that it should be applied there. The fact is, they did not even make the connection. In practice, the accused was legally obliged to formulate a factual defence and, at the same time, to counter the prosecution’s factual evidence as it unfolded. Even when the accused was provided with defence counsel around the middle of the eighteenth century, the counsel’s role was strictly limited to advice on legal issues, never on factual matters (Beattie, 1991). The underlying assumption was that innocent defendants could easily persuade the jury of their innocence. In contrast, guilty defendants would betray themselves to the jury through speech, gesture, demeanour, and manner (Langbein, 1994:1053). Accordingly, seventeenth and eighteenth century English courts frequently drew adverse inferences from the accused’s tactical use of silence, seeing it either as directly or indirectly inferring guilt in order to build a *prima facie* case (Theophilopoulos, 2003:162).

3.3 Morden Age: Individual Autonomy and the Right to Remain Silent

The turning point of European legal civilization came in the sixteenth and seventeenth centuries with the emergence of the theories of Copernicus (1473-1543), Kepler (1571-1630), Galileo (1564-1642), and Newton (1642-1727) about the nature of the physical world. These new theories reduced the earth to a mere part in the universe, a planet occupying an immense space, and suggested that individuals could make their own inquiries into the nature of the world. This view came to be reflected in the writings of philosophers as diverse as Descartes (1596-1650), Spinoza (1632-1677), Leibniz (1646-1716), Rousseau (1712-1778), Bacon (1561-1626), and Locke (1632-1704). Whatever their differences, these philosophers all came to agree that knowledge may be gained by anyone working on his own, rather than by appeal to authoritative propositions (Jackson, 1988), a doctrine that has been called the ‘principle of universal cognitive competence’ (Cohen, 1983:1). It actually took some time for European procedure, which had been less prevalent in England than it was on the Continent.\(^{118}\) The recent Helmholz-Macnair canon law theory suggests that the maxim *Nemo tenetur prodere seipsum* originated within the *ius commune* as a defensive sub-principle of inquisitorial procedure centuries before its appearance within the common law. The idea was taken up by seventeenth century common lawyers and expanded into the modern format (Helmholz, 1990:967; Macnair, 1990:70).
developed as a replacement for the system of legal proofs a system of moral proofs by which the weight of evidence was to be assessed not by the sheer number of proofs but by the number of independent items of evidence that could be obtained (Esmein, Mittermaier, and Garraud, 2010:364). However, the procedural reforms did not begin until 1808, when the great Napoleonic Code d’instruction criminelle caused the biggest shake-up of European criminal justice machinery since the decision of the Fourth Lateran Council of 1215 to abandon the old system of trials by ordeal\(^{119}\) (Summers, 2007).

The key features of the reformed European procedure as it first emerged in France and later in other European countries was the abolition of the system of legal proofs and the establishment of the doctrine that the accused cannot lawfully be required to answer incriminating questions or confess during interrogation. More precisely, on the Continent, the examining magistrate, and trial judge were no longer fettered by the doctrine of ‘two eyewitnesses or confession’. Instead, they were free to conduct an active investigation of the truth and evaluate the evidence according to their convictions (Jackson, 1988, 553-555). Similarly, across the channel in England, the rather vague and shifting standard of proof was replaced by a new ‘beyond reasonable doubt’ standard by the late eighteenth century (McCormick, 1954). The idea that the accused was to be regarded as innocent until sufficient evidence proved otherwise gained momentum. Given that evidence introduced at a trial was subject to the free evaluation of the judge or jury, it became clear that confessions obtained by the threat or use of physical and psychological force were not voluntary and tended to be unreliable (Pieck, 1962). Meanwhile, in the wake of the Enlightenment and the French Revolution, there was increasing consensus, both in England and on the Continent, that the government should not be permitted to employ certain kinds of coercive pressure against any individual, regardless of the individual’s guilt or innocence (White, 2001:2-3). Consequently, animated by both scepticism as to a coerced statement’s reliability and concern for protecting individual dignity, European courts eventually prohibited the use of coercion and inhumane practices, including compulsion by legal mandate\(^{120}\) to force an accused person to answer questions in the criminal process (Esmein, Mittermaier, and Garraud, 2010).

Despite Europeans’ general recognition of the right of the accused to remain silent and its rule against the use of coercion to compel a person to answer incriminating questions during criminal proceedings, there was less agreement among the states regarding how far, short of the forgoing coercive devices, authorities could go to persuade or encourage the accused to speak, either during pre-trial questioning or during the trial. In fact, as the respublica christiana in Europe collapsed in the sixteenth century, law as the product of a sovereign legislator gradually replaced the medieval and early-modern notion of the ruler as the administrator of law, based on the

\(^{119}\) The 1808 Code provided for the separation of the roles of the prosecutor and the investigating judge. As a result, out went the pure inquisitorial system whereby the same authority, an examining judge, was responsible for prosecuting, examining, and judging and in came a separation of the roles of judging and prosecuting (Summers, 2007:34-35).

\(^{120}\) As a general rule, suspects are not prosecuted for refusing to answer questions before trial and are never prosecuted for contempt for failing to testify at trial (Jackson, 2009).
conception of law as principally a matter of universal reason (Nelken and Feest, 2001:104). Therefore, one can discern a great emphasis in the English common-law system on respecting an accused’s autonomous right to decide whether and how to participate in defending himself, while the Continental civilian systems put greater emphasis on a more ‘social’ approach which obliges states to take positive action to protect the rights of the accused (Trechsel and Summers, 2005:263-264). This difference in approach would seem to be reflected in the different political ideologies underpinning the two systems—classical laissez faire versus amore paternalist approach (Damaska, 2005). Thus, the English system has tended to put a high premium on the accused’s autonomous decision to admit, deny, or refuse to answer in the face of potentially incriminating questioning. Under British law, police are required to warn a person of his or her right to silence and to counsel prior to interrogation when there are reasonable grounds to suspect the person of an offense, again upon arrest, and, finally, when a detained person is charged or informed that he or she may be prosecuted for an offense. Once a suspect requests legal advice, the police cannot continue to question him until he has consulted with a solicitor, and the suspect must be allowed to have the solicitor present whenever he is interviewed if the solicitor is available. Damaska (1973: 587) observed, ‘The Anglo-American adversary system’s commitment to values rather than the pursuit of truth has caused it to erect higher evidentiary barriers than its Continental non-adversary counterpart’. In contrast, Continental civilian systems have given less opportunity to accused persons to exercise choice over the course of procedural actions, because there is a general understanding in civilian systems that rules implementing the right to silence should not present substantial barriers to testimonial evidence from the accused (Van Kessel, 1998:842). This perspective is reflected in the limited right to counsel during initial periods of police interrogation and in the ‘permissive approach’ to waiver rules that allow continued questioning in the face of assertions of silence or expressions of a desire for counsel (Van Kessel, 1998; Ma, 2007). Not surprisingly, the reality in most Continental jurisdictions is that most suspects do speak or testify during pre-trial questioning by the police or the investigating magistrate (Jackson, 2009:848).

Some see in this difference of approach a fundamental dichotomy between English common-law and Continental civil-law systems. It may be better, however, to view it in terms of competing tendencies within common-law and civil law systems, one emphasizing individual autonomy, and the other, accurate outcomes. To take two examples, despite the traditional emphasis in inquisitorial systems on the importance of truth-finding, Continental countries have seen a growth in administering warnings to suspects about their right to remain silent prior to interrogation and the use of an exclusionary rule to ensure police compliance with the warning requirement (Ma, 2007). However, a counter-tendency in English common-law jurisdiction is seen in the shift

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121 The Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code C), § 10.1.
122 Ibid. § 10.3.
123 Ibid. §16.2.
124 Ibid. § 6.6.
125 Ibid. § 6.8.
from giving more procedural safeguards in police questioning and thus away from an emphasis on respect for autonomy. The modification to British law in 1994 that curtails the right to silence and permits the courts to draw adverse inferences from a suspect’s failure to answer police questions\textsuperscript{126} clearly exemplifies crime control concerns (O’Reilly, 1997).

In its interpretation of fair interrogation standards, the European Court of Human Rights (ECtHR) has given weight to both autonomy rights and the notion of effective defence to achieve accurate outcomes in fact-finding. Although the European Convention on Human Rights (ECHR) contains no explicit reference to the right to remain silent and the privilege against self-incrimination, the Court, drawing its rationale from Article 6 of the Convention, has been steadily developing its distinctive vision of the right and privilege (Wu, 2011). The Court’s perspective suggests that, as a rule, access to a lawyer should be provided at the first interrogation of a suspect by the police. In \textit{Salduz}, the Court expressly linked the right of access not only to the need to protect the accused against abusive conduct on the part of the authorities and the prevention of miscarriages of justice but also to the fulfilment of the aims of Article 6, notably ‘equality of arms between the investigating or prosecuting authorities and the accused’\textsuperscript{127}. Although, traditionally, the principle of equality of arms has been reserved for the trial, the realization that the examination of evidence does not always occur in court has become widespread (Summers, 2007:28). Moreover, the situation in the interrogation room is compounded by the fact that suspects normally want to provide an account of themselves (Jackson, 2009:850). In the Court’s view, the defence right to speak for oneself is a double-edged sword with the potential to count against the suspect. In \textit{Pishchalnikov}, the Court reiterated that criminal law—substantive as well as procedural—and criminal proceedings are a rather complex and technical matter that is often incomprehensible to laypersons, including the suspect.\textsuperscript{128} In the absence of assistance by counsel, who could provide legal advice and technical skills, the applicant is unable to make the correct assessment of the consequences the decision to provide an account or confess would have on the outcome of the criminal case.\textsuperscript{129} Importantly, practically at every stage of criminal proceedings, decisions have to be made, and the wrong decision may cause irreparable damage. The Court then concluded that reliable knowledge of law and practice is usually required to assess the consequences of such decisions.\textsuperscript{130} A lawyer can not only ensure the legality of any measures taken in the course of the investigation proceedings; he can also provide advice and assistance on how to mount the most effective defence. For sure, various options are available at this stage as they are at the trial (Wu, 2011:54). As Jackson (2009: 861) pointed out, ‘once the rights of the defence are

\textsuperscript{126} According to the Police and Criminal Evidence Act 1984 (PACE 1984), silence during police questioning should not lead to adverse comment by either the judge or the prosecution. In particular, the judge was not permitted to suggest to the jury that silence or a refusal to answer questions was in any way evidence of guilt (Zander, 1990:144). However, a modification was made by the Criminal Justice and Public Order Act 1994 (CJPOA).

\textsuperscript{127} ECtHR 27 November 2008, Salduz v. Turkey (no. 36391/02), § 53.

\textsuperscript{128} ECtHR 24 December 2009, Pishchalnikov v. Russia (no. 7025/04), § 84.

\textsuperscript{129} Ibid. § 85.

\textsuperscript{130} Ibid. § 84.
put in place … the right of silence reverts to an exercise of will or choice on the part of the individual accused, but a choice that is made on an informed basis as part of a defence strategy which is taken in full recognition of the costs and benefits of its exercise’.

4 The Evolution of Criminal Interrogation Rules in China

The European case provides a particularly valuable contrast to the Chinese one.

4.1 Legalistic Bureaucracy to Enforce Confucian Norms and Moral Domination in Imperial China

The Zhou dynasty (1046-256 B.C.) maintained fairly effective control of China for a few generations, but then gradually lost its grip. After 770 B.C., real power was divided among a number of states. During the war period, the Qin State’s minister, Lord Shang (390-338 B.C.), overhauled the state according to legalistic ideas. His legalism-inspired reforms deployed a detailed penal code through an elaborate, tightly controlled bureaucracy to ensure efficient control in the hands of the ruler (Bary, 1995). These reforms, together with other favoured agricultural policies, successfully bolstered the state’s power. Finally, the Qin state unified China and established the Qin Empire (221-206 B.C.). Although the ruthless rule of the Qin led to the empire’s speedy downfall, the succeeding Han dynasty’s emperors, facing tremendous pressure to consolidate their rule in such a large territory, retained the Qin’s essentially legalist apparatus for central administration (Windrow, 2006).

At that time, the Confucian intelligentsia also started to explore the relationship between Confucian li and legalist fa. In a similar thought shift, Dong Zongshu (179-104 B.C.), a Han Confucian, integrated the legalist and Yin-Yang school of thought to create his own Confucian doctrines. He overhauled the standard interpretation of the Confucian classics and advocated combining the functions of li and fa by emphasizing the supremacy of li and the subservience of fa. On the presumption of the operations of Yin (阴) and Yang (阳), he further emphasized the emperor’s sacrosanct power in governing the state and in enacting laws. Simply put, this shift in Confucian thought legitimized the use of bureaucracy, recognized the role of law and punishment, and helped to uphold the superiority of the emperor (Ma, 1987). Eventually, Emperor Wu (157-87 B.C.) adopted Confucianism as the official orthodox doctrine. Confucian moral standards then began to become part of the content of law, and criminal code became the instrument for executing such content. Even after the Han dynasty’s fall in 220, successive dynasties continued to accelerate the Confucianization of the legal code. Perhaps most importantly, the Tang Code, first issued in 637 and last revised in 737 during the Tang dynasty (618-907), represents the final synthesis of the legalist and Confucian ideals, which had begun to merge centuries before (Ma, 1987: 673).

131 The Tang Code is the most influential legal work in imperial China. The Code served as the basis for all subsequent Chinese criminal and criminal procedure law until the foundation of the Republic of China in 1911, and some of its attributes can be seen even today(Ansley, 1986).
The ‘legalization of Confucianism’ process was further fostered by the internal bureaucratic shifts in imperial administrations. After the Han dynasty, the Chinese government began to operate through its bureaucracy, brimming with educated officials who had passed state examinations based on Confucian Classics. The Confucian concept of family was in fact extended to judicial and governmental affairs, where the district magistrate was called the ‘parent officer’ (fu-mu guan, 父母官) and evidenced presumably virtuous moral characteristics, such as benevolence, impartiality, and superior wisdom (Alford, 1984). As Ren (1997: 25) put it, ‘the government was not a public servant body, but a sacrosanct paternity’. Using persuasion rather than force, the Confucian ruler was supposed to inspire others to become humane and rule by virtue of his moral vision (Peerenboom, 2002:32-33). Scholar-bureaucrats formed the main ruling class of China up until the nineteenth century (Moise, 1994; Windrow, 2006).

4.2 The Tang Code: Moral Persuasion, Confession, and Coercion

As indicated, the Tang Code is characterized by Confucian moral standards (li) and its penal attribute (fa). The Code’s preamble states that the primary aim of the law is to maintain human order in coordination with the cosmic order of Heaven and Earth. In other words, the ruler’s remedial use of law serves to redress human disorders and restore the proper balance between man and nature. Hence, if a crime occurs, the truth has to be discerned so that the state can administer appropriate punishment and restore social harmony (Ren, 1997, 31). Because of this assumption, determining factual guilt, which requires the offender’s admission of guilt and repentance of the crime, is almost indispensable for concluding criminal cases before the courts (Tang Code, Art. 476). Therefore, undergirding the interrogation procedure of the Tang trial was a set of rules whose purpose was to persuade or oblige the accused to respond or confess to the charges against him.

4.2.1 Confession by Persuasion

The questioning of accused criminals in imperial Chinese courtrooms was designed to teach, humble, and extract contrition from wrongdoers. The structure of Chinese trial inquiries can be described as ‘paternalistic’ when historical sources allow one to see how an imperial trial was conducted. In general, a criminal case was first investigated, then prosecuted, and tried by a district magistrate who was both the judge and chief administrator of the region. At trial, both the accused and the accuser were required to kneel on the ground in front of the magistrate who was assigned the responsibility of

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132 Penalties in imperial China were designed to fit the criminal, not the crime (Ansley, 1986:171).
133 Chinese patriarchy fundamentally differs from that found in the West. Jamieson (1921: 4) noted that there is no Chinese concept equivalent to patria potestas; in Chinese the relevant concept identifying patriarchy is xiao (孝). More specifically, Patria potestas defines jurisdictions within which a person can exercise personal discretion, and accordingly defines relations of authority between people. Xiao defines roles, actions and values that accompany the roles, and, accordingly, a person’s duty to a role. These two concepts imply different ideas about the nature of patriarchal domination both within and especially beyond the family (Hamilton, 1984:411).
ferreting out the truth (Gelatt, 1982:264-265). As an authority in a leading position, the magistrate could control and extend the questioning sequences, as he deems necessary to extract the desired response (Chang, 2004). In contrast, suspects were required to respond interactively to the questions asked. Though the frequent, instinctive desire of the guilty to play innocent was recognized, the Tang trial was not concerned with exposing the magistrate to the suspect’s dubious statements. On the contrary, the Code provided that the magistrate should sit back at the beginning of the case and expect that evidence damaging to the suspect would come out of his altercation with the accuser and witnesses (Art. 476). It was believed that precious information could be obtained even from false denials of guilt, inconsistencies, and other verbal and non-verbal expressions emanating from the suspect (Zu, 2008). The Code went on to specify that both the accused and the accuser’s statements should be verified to the extent feasible (Art. 476). Eventually, if the suspect managed to prove to the magistrate’s satisfaction during the course of the interrogation that he was innocent and had been falsely accused, one way to maintain proper social harmony was to punish the accuser for the crime of false accusation (Bodde and Morris, 1967:402-408). If the suspicions were confirmed, the suspect would be greatly shamed and criticized to persuade the ‘offender’ to change his mind, repent, and admit to the facts of the crime (Ren, 1997; Chang, 2004). Chinese literature, arts, and folklore often portray the magistrate as talking loudly, powerfully, and fiercely to urge the reluctant suspect to confess (Wu and Vander Beken, 2012).

4.2.2 Confession by Judicial Torture

Judicial torture, at least in theory, was reserved as a last resort for those who were under strong suspicion, but continued to defy confession of their moral faults (Tang Code, Art. 476). It had been long recognized by Chinese lawmakers that the agony of torture might induce the innocent to confess things that they never did (Zu, 2008). Hence, a highly detailed set of rules governing the application of torture was put forward by the Code to enhance the reliability of tortured confessions and acquit the innocent. First, torture practices were permitted only in cases where evidence strongly supported the suspect’s guilt. As observed earlier, Article 476 of the Code laid down specific procedures regarding interrogation, such as the confrontation between the accused and the accuser and the co-examination of objective evidence. By and large, magistrates were not vested with discretionary powers; rather, they were required to strictly enforce the statutory rules (Alford, 1984; MacCormack, 1987). Hence, violations of these rules by magistrates carried a punishment of sixty strokes with a wooden stick (Tang Code, Art. 476). Second, magistrates needed prior approval from higher officials if they decided to employ torture (Tang Code, Art. 476). Third, the types of torture were limited to whipping or beating with a bamboo strip or wooden stick, and adjusted depending on the suspect’s responses during the examination. The Code provided that torture should not exceed three applications with intervals of 20 days between them; the

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334 Thus, for example, if a suspect confessed to a murder, he should have been asked where he put the weapon. If he said he threw it into the river, the magistrate was supposed to send someone to find it, so that once fetched, it could corroborate the confession.
number of whippings or beatings should not exceed 200 in total. If the suspect refused to confess even after these beatings, he should be released subject to obtaining a guarantor pending the trial (Tang Code, Art. 477). Presumably, 20 days was considered a reasonable period for individuals to ‘reflect on’ their acts and choose to repent or confess. This can be seen as another example of lawmakers’ intent to deter undesirable social behaviour and change the wrongdoer’s mind.

4.2.3 Factual Guilt, Shaming and Obligations of Roles

All this clearly implies that the essential purpose of the criminal interrogation at the Tang trial was not determining legal guilt of a crime by using legally admissible statements against the accused, but, rather, discovering factual guilt through the offender’s confession and through making the wrongdoer morally shameful and remorseful. Judicial torture, which, together with the confession reward policy, was lenient to those who complied with the government, fortified the wrongdoer’s deference to legal authority.

Moreover, power restriction in the imperial Chinese courtroom apparently was not found in the allocation of rights and duties through a system of general norms, as in the West, but in the maintaining of the proper relationships among those who held different ‘roles’. In medieval Europe, as discussed earlier, each individual seeks his own salvation, in a secular as well as a religious sense. As a result, Western law preserved the personal sphere by institutionalizing rights and obligations of individuals. In contrast, the Chinese, with no transcendental sources of legitimation and under the strong influence of Confucian thought, built their legal system on assumptions of harmony among hierarchically arranged players. Individuality was defined in terms of one’s responsibility to explicitly defined roles. More specifically, the suspect, as a subordinate member of the family, had the obligation to be obedient and admit his moral guilt. The judge or magistrate, as the head of a family, had the authority and obligation to persuade the suspect to change his mind and confess based on evidence and patience. Hence, in theory, power is impersonal, non-intentional, and directed towards maintaining the harmony of the whole. It is actually the duty of all individuals to conform to their roles in order to maintain social harmony. Accordingly, ‘giving each his due’ is not emphasized in the Chinese legal culture.

4.3 A Stable Interrogation Model for Centuries

Through the interplay between Confucian moral standards and legalistic bureaucracy, the ‘persuasive’ interrogation model of the Tang Code proved astoundingly stable by thriving until the early twentieth century.
On the one hand, rather than simply enforcing an arbitrary set of government-defined criminal procedures, the interrogation rules noticeably reflected social norms which were already pervasive, providing legal enforcement with powerful social legitimacy. In fact, after Confucianism became the official orthodox doctrine in China, families who were affluent enough to practice it engaged private tutors to teach their children Confucianism. Schoolboys were required to learn the entire Analects by heart (Grant, 1989). Among poor families, Confucianism was passed on by parents or other adults from generation to generation (Jiang, Lambert, and Wang, 2007). Therefore, there is good reason to believe that Confucian moral standards, particularly those dealing with contrition, patriarchal relationships and familial obligations, were to some extent internalized within Chinese citizens. Meanwhile, as observed earlier, Confucian doctrines have, since the Han dynasty, served as the guiding light to define what might or might not become a matter of law and govern the administration of criminal penalties. The consensus between law and morality often indicates that what the state seeks to enforce by compulsion corresponds largely to the sense of right and wrong of the society in general (Ren, 1997). In the West, as Connery (1955: 181) revealed, moralists maintain that no criminal is obligated to spontaneously reveal his crime to the public authorities. This would be expecting too much of human nature. In contrast, the Confucian Chinese regarded admitting one’s misconduct in public and desiring to change oneself as valuable virtues (Lu and Miethe, 2003; Fung, 2006). Judicial torture in imperial China thus is not so much a legal tool, as it was in medieval Europe, to extract information and statements necessary for a legitimate conviction, but rather an extreme case in which law and morality become one—what Confucianism morality ‘forbids’, the law ‘punishes’.

On the other hand, perhaps more importantly, this ‘persuasive’ interrogation model could survive over a millennium in imperial China, not only because social consensus unified law and morality, but also because of the model’s inherent connection with increased imperial hierarchical powers. As already suggested, Confucian codes of morality (li) such as xiao (filial piety, 孝) and family loyalty were enforced by legalistic (fa) reward and punishment machineries. In this way, the throne, through unrelenting fortification of familial and social hierarchies, transformed the family into a de facto extension of the bureaucratic state (Windrow, 2006). Indeed, members of society that held relative power in informal positions, such as father and brother, had an interest in maintaining the social order through the mediation of conflicts, because the restoration of order granted them power and prestige over their subordinates. Moreover, imperial law unequivocally gave parents extended rights, ranging from the right to punish children physically to the right to command their child’s suicide for moral reasons (Ren, 1997:27). The result in theory, and to a remarkable degree in practice, was a system designed to educate wrongdoers in a subtly graded way, which began with the minor ‘punishment’ fathers used to force their children to confess and recognize moral faults. It then increased to still minor but sometimes different devices available to intervening authorities, and finally climaxed with the potential application of more severe torture inflicted by formal legal authorities. This complex gradation ensured that informal, socially-based enforcement of social norms occurred continually and finally fortified people’s deference to authorities, leading ultimately to consolidation of power in the
hands of the throne. Under this social structure, district magistrates, members of the real ruling class of society, could maintain their enormous power and authority in courtrooms. In contrast, criminal suspects were put in a disadvantageous position both interactively and socio-culturally. Hence, magistrates, as interrogators, could fully exercise their interactive power to humiliate and attack suspected criminals’ moral sense, or even torture them, to elicit confession and remorse.

### 4.4 Legal Changes in Late Imperial China

Under the Tang (618-907) and Song (960-1279) dynasties, China was among the leading cultures of the world, far superior to Europe in wealth, technology and science (Moise, 1994). However, by the time of the Ming dynasty (1368-1644), China had gradually fallen into decline. By the middle of the nineteenth century, the continuous isolationist policy adopted by the Qing dynasty (1644-1911) was beginning to break down in the face of European military threats. After several failures to resist foreign military attacks, especially the failure of the Boxer Uprising in 1900, Empress Dowager Cixi (1835-1908) finally accepted the necessity of changing the mode of governance in accordance with the changing circumstances to stay in power. Hence, new policies (xinzheng, 新政) were initiated, including the revision of the legal system. In 1904, further spurred by foreign pressures and high-ranking officials, the Bureau of Legal Codification was established to draft a new series of codes, including criminal and criminal procedure law. Shen Jiaben (1840-1913), the co-director of the Bureau, combining Confucian ethical norms with German and Japanese models of punishment and due process, hoped to revive the ideal of a benevolent government (renzheng, 仁政) that punished lightly (xingqing, 刑轻) and forbade extracting confessions through torture (Dikötter, 2002). It was due to efforts of Shen and his colleagues that the government put into effect the ‘New Penal Code of the Great Qing’ in January 1911. In this legal document, corporal punishment and extracting confessions by torture were outlawed. Although some legalists considered this code ‘conservative’ and numerous articles argued for the preservation of the Confucian legal tradition, the dominant view still seems to be that it is an important landmark in China’s legal modernization (Wang, 1997). However, the first wave of legal modernization could not take root during the turbulent period following the Qing dynasty’s collapse.

### 4.5 The Mao Era: the ‘Lawless’ State and Traditional Legal Culture

Chinese Communists often claimed establishment of the PRC in 1949 was a total break with China’s ‘feudal’ past (Gelatt, 1982). Replacing Confucianism, Marxism-Leninism became the official orthodoxy guiding social transformations and governing other facets of national affairs. Notably, Marxism has a poor opinion of law. Marxists argue that the capitalist law is nothing more than a suppressive tool, which traditionally served the interests of a wealthy minority. When a proletarian revolution succeeds, the state gradually withers away and law will not be needed (Engels, 1979:164). In the interim, law serves to advance the socialist revolution towards communism and
maintain the socialist order. More precisely, ‘law is to be used by the proletariat as a weapon in class struggles against the enemy in order to realize the people’s democratic dictatorship’ (Peerenboom, 2002:44). Owing to the dominance of a heavily instrumental understanding of law in the Mao era, the legal restraints on the power of police in criminal interrogations varied in accordance with the changes in the official attitude towards law and depended largely on the political mode towards class struggles (Wu and Vander Beken, 2012). Free of substantial restraints, the aspiration of the investigator to capture the suspect as a testimonial resource is perfectly ‘understandable’. The suspect is, after all, the most efficient possible witness in the investigator’s eyes (Cui, 2003). Consequently, there have been frequent reports of brutality in interrogations that clearly amount to cruel, inhuman, and degrading treatment, and sometimes even ‘torture’ under contemporary international law (Chen, 2000).

At this point, one question arises. No doubt, this type of law enforcement must exercise a great deal of discretion so that its key players can manipulate the interrogation procedure to meet practical needs. To understand this issue, one should not overlook the influence of the traditional Chinese legal culture, which enhanced rulers’ real and symbolic status as the locus of political authority. Although, literally, Marxism has little in common with the Chinese tradition, the influence of Confucianism and legalist values remained a strong driving force in Communist China even though this was not officially recognized (Ren 1997; Peerenboom, 2002).

In the process of building a new elite power structure, the Communists departed from the imperial thrones that had stressed family loyalty by displaying higher loyalty to the state. During the early decades of the socialist construction, the informal social control preferred by Confucianism was largely institutionalized through an urban household registration system, which linked individuals’ residency with their entitlement to social programs. The strict control of population mobility effectuated different social control mechanisms in community, which were primarily responsible for handling local disputes and wrongdoers who had committed minor offences (Whyte and Parish, 1984). When individuals violated rules under the Security Administration Punishment Act,\textsuperscript{136} the police had the authority to impose a series of administrative sanctions without formal litigation. Notably, the formal court process was reserved only for offenders who committed serious crimes, especially the so-called class enemies who did not accept and support the Communist leadership (Rojek, 1985). In this manner, the Communist leaders enforced stratifications within the civil society between those who supported the socialist state and those who did not, and thus created a web of status and privilege in the criminal justice sphere to bolster their own legitimacy. Under this arrangement, traditional shaming, moral control, and mutual checks were, to some extent, as effective as in previous eras (Rojek, 1985; Lu and Drass, 2002). As a result, in the interrogation rooms, the questioners (i.e. the police, the procuratorate, and the judge), who were both the representatives of the state power and ‘moral executors’, enjoyed enormous authority. The justice officials generally had a strong sense of responsibility and moral consciousness to persuade suspects to confess (Ren, 1997:130).

\textsuperscript{136} Promulgated in October 1957.
On the contrary, suspects, as in imperial times, were still in a socio-culturally disadvantageous position. They were supposed to be obedient and cooperate totally in the questioning (Ren, 1997:119-122). Nevertheless, just as laws do not create a lawful society, morals do not create a moral order. The striking contrast in power between the two status groups also gave the law enforcement great space for manipulation. Therefore, it is not difficult to understand why ‘voluntary’ cooperation and confession in judicial questioning during that ‘lawless’ period may not have been voluntary at all.

4.6 The Reform Era: ‘Modern’ Legal Rules and Answering Questions Truthfully

Upon Mao’s death and the subsequent political downfall of the ‘Gang of Four’ in 1976, the CCP’s devotion to the political struggle against class enemies faded away. The new CCP leadership quickly launched the modernization programme which was summarized as the ‘Four Modernizations’—modernization of agriculture, industry, national defence, and science and technology (Moise, 1994:194). In the meantime, many Party leaders, having suffered personally and severely during the lawless period of the Cultural Revolution, were eager to advocate greater reliance on the law as a means of preventing the recurrence of such policy-driven excesses. In addition, strengthening the legal system was also considered essential to win back legitimacy both at home and abroad and to provide an orderly environment for economic development (Peerenboom, 2002:55).

Since then, the new leadership in China has made rapid progress on the legislative front. Notably, the first step it took after the ten-year turbulence was the promulgation of criminal law and criminal procedure law (CPL) in 1979. The promulgation of these two laws no doubt marked the beginning of the redevelopment of China’s criminal justice system (Leng, 1982). Despite remarkable progress, legal scholars and criminal justice practitioners noted various deficiencies in the 1979 CPL in the ensuing years (Ma, 2003). Specifically, there was broad consensus that the law still marginalized the rights of the suspect (Fu, 1998). In an effort to progress towards judicial democratization and fairness, China revised the 1979 CPL in 1996.

4.6.1 The Criminal Interrogation Rules under the 1996 CPL

Structures and concepts influenced by the West had already undoubtedly found their way into Chinese legislation. Nevertheless, the drafting of legal texts was always influenced by historical experiences from which the texts were derived and viewed in light of the rationale behind their application. The 1996 CPL is no exception. In general, the content of the 1996 CPL is in no way similar to that of the old imperial codes. However, if one compares the central features of contemporary interrogation procedure with those of the ‘persuasive’ imperial type, it is apparent that many ideas are common to both. The current questioning procedure still seems to focus on objective fact-finding

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The suspect’s deference to legal authority was further fostered by the official slogan of ‘leniency to those who confess their crimes and severity to those who refuse to’ (Bao and Chelminski, 1973: 33).
and to similarly persuade the suspect to respond to the incriminating evidence against him, thereby fostering a high level of self-incriminating statements or confessions.

4.6.1.1 Proper Preparation Prior to the Initial Interrogation

Under the 1996 CPL, the police are given power to interrogate a suspect under two types of situations:

(1) The police may interrogate a suspect after he/she is detained or arrested and taken into police custody (1996 CPL, Art. 65, 72); and

(2) The police may summon a suspect, who need not be detained or arrested, to a designated place in the city or county where he/she stays for interrogation, or the suspect may be interrogated at his/her residence (1996 CPL, Art. 92).

These clauses definitely do not imply that, whenever a crime happens, the police have the power to interrogate whomever they please. In the first situation, after a suspect is detained in the detention house, as a typical investigatory act during criminal investigation, the police may interrogate the suspect. In the second situation, the police officer in charge, who must be at or above the county level, shall determine the necessity of questioning. In essence, the revised CPL endeavours to limit the initial police investigation to sources of objective information other than potentially guilty parties. Nonetheless, this does not imply that it minimized the consideration of the suspect as an important source of testimonial evidence overall (Zhu, 2006:15-16). The revised law arguably devotes considerable attention to the interrogation preconditions in order to make the questioning effective and productive. There is clearly a strong emphasis on proper preparation prior to interviews. The law states explicitly that, before the interrogation, the investigator should acquaint himself with the case and its supporting evidence, and then plan and outline the questioning process.

4.6.1.2 Persuasion based on Listening and Evidence

During the interrogation, without the aid of a counsel, a suspect is expected to answer questions asked by investigators truthfully and can refuse to respond to only those questions that are irrelevant to the case (1996 CPL, Art. 93). In addition, the law pays special attention to the types of questions that need to be asked sequentially during the questioning. According to Article 93 of the 1996 CPL, ‘when interrogating a suspect, the investigators shall first ask the suspect whether or not he has committed any criminal act, and let him state the circumstances of his guilt or explain his innocence; then they

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139 Ibid. Article 178.
140 Compared to the 1979 CPL, the 1996 CPL improved the rights of the suspect in various ways, but did not include the right to have a lawyer during police questioning. Only after the first interrogation or from the day on which compulsory measures are adopted does the suspect have the right to see his attorney (1996 CPL, Art. 96).
may ask him questions’. Under this arrangement, the police, as the imperial magistrates, may sit back at the beginning and hope that damaging evidence will arise if a guilty suspect’s concocted story crumbles upon subsequent disclosure of evidence. Such damaging evidence may arise in the form of inconsistency in the account given by the suspect, thereby demonstrating the lies told by the suspect, or in the form of failure to answer the questions posed by the police. All this evidence could be used either to encourage suspects to confess or against them at their trials (Wei, 2003).

4.6.2 Law in Practice and the Limits of the Black Letter Law

In summary, consistent with the traditional Chinese philosophy of legitimizing power in terms of one’s responsibility to explicitly defined roles, the current Chinese interrogation procedure grounds the discretion of the police in criminal interrogation in terms of their role in being impartial and professional in truth-finding. Accordingly, unlike in Europe, where the suspect’s actions in criminal questioning are institutionally structured by the jurisdictional parameters of his ability to exercise his autonomy, in China, the suspect’s behaviour is restricted by the pertinent relationships that demand obedience, or honesty, during the questioning process. This interrogation model is justified by the belief that it is the duty of both the police and the suspect to conform to their roles in order to eliminate ambiguity and arrive at the ‘truth’.

However, such expectations do not bear out in practice. Many Chinese scholars, relying on different sources, such as interviews with present and former law enforcement officers or individual field observation, have made the alarming assertion that the problem of confessions produced by xingxun—physical force or psychological duress—is widespread in police questionings in China (Wu and Van der Beken, 2010). In addition, Cui (2003: 26) comments thus on the fatal effect of police coercion on the reliability of evidence: ‘Although confessions elicited by xingxun are not always false, wrongful convictions, with no exception, are all because of xingxun’.

Literature on the causes of police-coerced confessions in criminal interrogations covers a wide range of topics in terms of the levels of analysis. Notably, besides loopholes or shortcomings in the law and the ineffective institutional mechanisms for controlling state powers, some socio-legal studies also consider the influence of traditional cultural values a reason for coerced confessions. While coerced confession is absolutely cruel, its exercise depends at almost every level on many forms of cooperation and consensus (Lin, Yu, and Zhang, 2006; Lin, Zhao and Huang, 2006). To understand further the social and cultural background that has led to the persistence of such pernicious interrogation practices, it is evident from the foregoing discussion that one must consider the relationship between the interrogator and suspect in criminal confusion.

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141 Though judicial torture in criminal investigations is part of the dim and dark history of Chinese criminal law, today’s China, by virtue of provisions of criminal procedure and criminal law, forbids the practice wherein suspects or the accused should be forced, by actual or metaphorical ‘arm-twisting’, to respond to police questioning (1996 CPL, Art. 43; the Criminal Law of the People’s Republic of China, Art. 247, 234, 232).

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investigations. An analysis of this relationship, at both macro and micro levels, is presented as follows.

**The ‘Paternalistic’ Criminal Justice System**

First, on a macro level, China is still a ‘paternalistic’ state in which law enforcement is likely to have the real and symbolic status as the protector of anonymous collective interests, such as public security or social stability. This engenders a tendency to ignore concrete interests of individual suspects and lose sight of the abuse of power by investigators within the sphere of crime and justice.

Although the CCP has made a series of mistakes since it came into power in 1949, in Peerenboom’s (2002:42) view, ‘the image [of the Chinese government] remains the same: the father, knowing what is best, takes care of his children’. Today, the CCP leadership largely decides what is best for Chinese society and takes ameliorative action to solve contemporary problems. In the last three decades, the state’s economic policy proved to be spectacularly successful, improving the Chinese citizens’ living conditions over a relatively short period while at the same time creating a high rate of long-term economic growth (Peerenboom, 2006). The Chinese government clearly understands the importance of maintaining stability, which is a prerequisite for economic growth and for the CCP’s continuous legitimacy and popularity. Hence, to satisfy the practical need for more effective social control, the current Chinese criminal justice system altered the principles of law and punishment established during the Mao era in some ways and adopted Confucianism and legalist legacies in others. As in the pre-reform era, the police, without court approval, have the authority to impose administrative sanctions on individuals guilty of minor crimes and public order violations. Wrongdoers are dealt with by the criminal justice system only when serious offences are involved. Although the police’s administrative power, which was once used to control urban transients, has been eliminated under the 1996 CPL, their power for detaining criminal suspects has been extended. Thus, unquestionably, compared with those of European law enforcement, Chinese police have greater authority and power over ordinary citizens (Ma, 1997).

Apart from the political agenda, another crucial factor that further reinforces the authority of the police lies in the social changes that have occurred in Chinese civil society in the reform era. Since 1978, as China moved towards a market economy, the traditional informal social control that relied on rigid household registration and employment structures has declined (Dutton, 2000). Concurrently, increased mobility has resulted in a class of “floating population” (*liudongrendou*, 流动人口), who are often blamed for urban problems, including the soaring crime rates. Given that transients have no attachment, commitment, or involvement in communities, using the criminal justice system to subject them to stronger formal control is deemed necessary by urban citizens to curtail crime (Lu and Drass, 2002). Moreover, as police officers, following the ‘mass-line’ in policing, actually live and work in certain neighbourhoods for a long time, most

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142 Chinese patriarchy fundamentally differs from that found in the West. Please refer to footnote 27.
Chinese citizens do not view the police as a force limiting their freedom, but as a service resource they can rely on (Jiao, 2001). As a result, the formal law enforcement is shouldering more responsibility for solving crimes, thus reinforcing itself in both real and symbolic senses (Wong, 2001).

Importantly, as a group of legal professionals, Chinese defence counsels have not been a prominent force in furthering the balance of state power. In imperial China, the status of scriveners, who were labelled ‘litigation tricksters’, was considered low, because the pursuit of self-interest by adverse litigation is at odds with the paramount virtue of social harmony, as it signifies one’s refusal to take responsibilities for one’s action (Yu, 2002; Clark, 2008). Under socialist China, the state belongs to the people; thus, lawyers are not expected to oppose the state in a criminal investigation but shoulder the dual responsibilities of not only protecting the rights of the suspect but also, more importantly, helping the state seek the truth (Lu and Miethe, 2002; Clark, 2008). For millennia, China had no officially recognized legal profession, which means the use of legal counsel is rather new to the Chinese criminal justice system. Until recently, more than 70 per cent of the criminal cases were processed without lawyers appearing in court on behalf of defendants (Wu, 2006). In this context, Lu and Miethe (2002: 277) observed, ‘contrary to the image of an advocate of the defendant, Chinese attorneys under the reform policies still play a major role in legitimizing the current legal system’. Chinese counsels, especially seasoned attorneys, know how to obtain the best results for their clients by not being ‘combative’ or ‘arrogant’, but instead ‘deferential’ and ‘submissive’ during criminal proceedings (Liu and Seymour, 1998).

Undoubtedly, the current ‘paternalistic’ procedure structure in which the police have the sole responsibility for implementing procedural safeguards is dangerous if frequently unchallenged. Though coercive questioning, an extreme means to obtain objective evidence, implies weakness of the daily operations of the police, it can also be attributed to the ‘system’ of criminal justice that allows it to exist. As a whole, by relying heavily on confession to solve crimes, law enforcement is able to divert the available funds to other arguably more productive uses.

Interrogational Paternalism

Second, on a micro level within the interrogation space, the relationship between the interrogator and the suspect has been and continues to be ‘paternalistic’. The attitude of criticizing wrongdoers for their unwillingness to repent for and admit to the crime facts,

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143 Specifically, the daily operations of the police are undermined by budget shortages (Zhu, 2006; Chen, 2007) and poorly trained police officers (Wang, 2006); the police force is undersized and functions by using underdeveloped investigative methods (Zuo and Zhou, 2002; Wu, 2008).

144 Chen (2007: 59) has argued that the importance of increasing national investment in criminal investigation has never been fully recognized by the Chinese government. Since the advent of an open economy and a reform policy, the government’s financial input in criminal investigations concerning personnel or technology has not increased concurrently with the significant rise in crime as well as the changes in crime patterns. Owing to a limited budget, some forensic techniques, like DNA testing, cannot be employed in crime investigation procedure (Chen, 2007).
derived from the *familist* or *paternalism* tradition, continues to offer plenty of psychological comfort to the police. Although the ‘open-door’ policy has increased individualism in China, to a large extent, Confucian doctrines of *xiao* (孝) and *family loyalty* still strongly influence the modern Chinese family relationships (Whyte and Parish, 1984). It was suggested that the Chinese family often dominates individuals by forcing them to come to terms with family values and tradition (Lu, Zhang and Miethe, 2002). Given such moral cultivation, according to Fairbank (1987:31-32), ‘Chinese well habituated to the family system have been prepared to accept similar patterns of status in other institutions, including the official hierarchy of the government’. Hence, in the interrogation room, the suspect’s submissive and honest attitude seems to be considered legitimate and morally valid by interrogators. In addition, the societal view on crime and wrongdoers gives law enforcement ‘additional moral legitimacy to take measures to coerce confessions and press for repentance’ (Ren, 1997:132). As a survey conducted in 2006 shows, the public’s attitude towards pernicious police interrogation practices is tolerant, and even supportive (Lin, Zhao, and Huang, 2006: 133-4).

5 Conclusion

Ancient Greece and China differed markedly in their systems of thought. Greeks tended to engage in *context-independent* and *analytic* perceptual processes by focusing on a salient object (or person) independently of its context, whereas Chinese tended to engage in *context-dependent* and *holistic* perceptual processes by attending to the relationship between the object and the context in which the object was located. These two ancient civilizations in fact resulted in great difference between Europe and China in terms of their legal cultures and the institutional arrangements of their criminal justice systems.

Europe believed fundamental law was itself divinely instituted and favoured a *rational* legal system in which law served as a systematic means to define jurisdictions. Since the boundaries of jurisdictions were clarified, law factually provided the formal means by which both legal officials and individual suspects could preserve personal spheres of power in criminal interrogations. Specifically, under medieval law, the rights of the accused were mainly based upon a purportedly objective assessment of the teachings of authoritative materials. Nonetheless, in modern Europe, individual rights and internal independence are highly respected. Hence, the principles of the right to silence and the privilege against self-incrimination were raised and seen as an expression of *individual autonomy*—the right of the accused to be respected as an individual throughout the criminal process and to reach an autonomous decision when called upon to answer to criminal allegations.

In contrast, the Chinese, without transcendental sources of legitimation and under the strong influence of Confucian thought, built their legal system on assumptions of harmony among hierarchically arranged players. Precisely, in the imperial criminal procedure individuality was defined in terms of one’s responsibility to explicitly defined
roles. The suspect, as a subordinate member in the family, had the obligation to be obedient and admit his moral guilt. The judge or magistrate, as the head of a family, had the authority and obligation to persuade the suspect to change his mind and confess based on evidence and patience. Hence, in theory, power is impersonal, non-intentional, and directed towards maintaining the harmony of the whole. In developmental terms, this line of reasoning emphasized the collective and intuitive sides of life and led to the specification of roles and of role-defined actions and emotions, a trend that in turn reduced the legitimate discretionary spheres of individual action. Consistent with the traditional Chinese legal culture, the suspect’s behaviour under the current Chinese interrogation procedure continues to be ‘restricted’ by the pertinent relationships that demand obedience, that is, honesty, during the questioning process.

Considering future legal reforms in China, given the very different historical and institutional context, the likelihood of an ‘autonomous version’ of the right to silence and the privilege against self-incrimination in China’s very different soil seems low. In the reform era, as indicated, the attitude of being honest about one’s misconduct, and submissive to authority have continued to be reinforced by Chinese familism, especially the concept of xiao (孝). This is not to say that other external pressures of the kind mentioned at the beginning of this paper—such as the pressure on the PRC to comply with the ‘universal norms’ of the right to silence and privilege against self-incrimination—will not make the content of new interrogation rules profoundly different from those of the past, difficult as this may be to accomplish. As long as the familist and societal view of crime and wrongdoers holds sway, the real question is whether new content can overcome hoary practices, values, and interpretations. Pound (1948: 751) once emphasized that many plausible legal reform projects have been slow in achieving their purposes, and more than a few have failed, because they break with the past too violently or fail to take into account long-settled habits of thought of action. Therefore, if the right and the privilege would be interpreted and applied in the Chinese context, it is crucial to remember that legal precepts have to be fitted to the lives of the people they are to govern, not the lives of people arbitrarily fitted to the legal precepts.

As Posner (1990) rightly argues, laws are not abstract, sacred entities, but socially determined goads for shaping behaviour so as to conform to society’s values. Indeed, there can be no wisdom in the choice of a path unless one knows where it will lead. Based on this paper’s preceding analysis, it may well be established that traditional Chinese moral values are supportive of an ethical approach to criminal investigation and a cooperative interviewing style in questioning the suspect. Therefore, in any event,

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145 There is no provision in the law as to the consequences that follow from a suspect’s silence, such as the fact finder drawing unfavourable inferences from a passive reaction. Hence, the better way to comprehend the above mentioned provision is to recognize it as an expression of the inherent Chinese legal attitude which Chinese lawmakers want to respect and enhance.

146 In many Western countries, there is a tendency to use the concept of ‘investigative interviewing’ as an alternative to interrogation. For instance, in the United Kingdom, the expression ‘investigation interviewing’ is used to describe questioning of suspects and victims, as well as witnesses, at any point in the investigative process (Williamson, 1993; Gudjonsson, 1994). This change is a result of the combined effects of new legislation, psychological development, and organizational policies designed to make the questioning of a
many of the most pressing obstacles for the implementation of fair interrogation standards in China have nothing to do with Confucian philosophies. Rather, they are institutional in nature. Historically, Chinese leadership, through the interplay between Confucianism’s moral standards and legalist bureaucracy, relied heavily on informal means to maintain social order and settle disputes, and established a powerful, minimalist law enforcement authority, which was responsible only for conflicts that could not be solved by informal mechanisms and for serious crimes. On the whole, this social control model, which required tremendous ‘faith’ in the credibility of the judicial authorities, failed to adequately address the need to protect individuals against law enforcement interrogation practices that were abusive or overreaching, and therefore indirectly contributed to the prevalence of police-coerced confession both in the past and present. In light of this, how traditional moral obligations, for both the interviewer and interviewee, could best be combined with institutional restrictions, should be a central concern underlying future research on interrogative practices within the Chinese criminal justice system. Since it has been long recognized in the West that standing legal orders and forced instructions have a limited effect on police questioning (Leo, 1992; Gudjonsson, 1994), it may well prove to be an advantage that China already has a traditional moral philosophical body of ethical customs. This body of customs may become a body of ideals around which the adjustment of relations and ordering of conduct in criminal interrogation may be shaped.

References


Chapter 5. Cultural Relativism and Universal Fair Interrogation Standards in Europe and China


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Chapter 6. Conclusion
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1 Research Background and Research Questions

In recent years, a number of high profile wrongful convictions have plagued the Chinese criminal justice system. While each of these cases has raised serious questions concerning the justice system as a whole, particular attention has been directed towards the police and their ability to satisfy their dual mandate to investigate a crime while protecting the rights and freedoms of the accused. One notable aspect of police operations that has come under increasing scrutiny in this regard is the police interrogation, a practice which is both upheld by police officers as a crucial means of gathering information and disposing cases, and denounced by legal scholars and civil rights advocates as a serious threat to the standards of fairness and due process (Wu, 2006a; Chen, 2007). Many Chinese scholars, relying on different sources, including interviews with present and former law enforcement officers or individual field observations, have made the alarming assertion that the malady of confessions produced by ‘torture’ (xingxunbigong, 刑讯逼供) is widespread in China (Zhou, 2006; Hu, 2007). The majority view among researchers was that dominated by ideology of ‘crime control’ rather than ‘due process’, the current Criminal Procedure Law (CPL) of the People’s Republic of China (PRC) and relevant supplementary regulations fail to provide the suspect with adequate safeguards against pernicious interrogation practices (Zuo 2005; Bi 2007). Hence, many Chinese academics have increasingly looked to ‘the right to remain silent’ and ‘the privilege against self-incrimination’ as the basis for restricting the questioning power of the police and for pressing law enforcement to shoulder most of the load by collecting objective evidence of the crime charged (Ning, 2002; Wan, 2006). Notably, although there have been many legal attempts to establish the right and the privilege, there is currently a growing scepticism in the academic world if the apparently successful experience of the West with ‘due process’, and a ‘human rights’ legal framework in which the suspect’s autonomy is highly respected, can simply be copied as an independent standard in the Chinese context (Cui, 2001; Ma and Peng, 2006). As Davies and Shen (2010: 256) point out, the attempt to reform the entire Chinese criminal justice system based on Western ideas such as the ‘presumption of innocence’ or a ‘Miranda-style law’ is not a helpful reform proposal for China. According to

147 For instance, in 2005, the wrongful convictions of Li Jiuming, Nie Shubin, and She Xianglin precipitated a growing crisis of legitimacy within the Chinese criminal justice system (Chen, 2007:54).

148 The Chinese academics define torture in a broader sense than the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) does. They define torture as any act by which corporal treatment or quasi-corporal treatment is inflicted by judicial officers on a suspect or defendant to extract confessions (Zhe, 2005). Corporal treatment refers to physical coercion through inflicting pain directly on the body, such as a beating or imparting an electric shock. Quasi-corporal treatment refers to physical or psychological coercion through inflicting pain (physical or mental) indirectly on the body, such as through sleep deprivation, exposure to cold or heat, or being forced to sit or stand in uncomfortable positions.
Peerenboom (2004: 1073), transplantation of laws which are at odds with China’s current conditions or which are based on fundamental values that are not shared by the majority of Chinese citizens, diminishes the likelihood of getting the reforms adopted or, even if they are adopted, they will not be implemented. This observation seems to be confirmed by the fact that despite significant revisions to the Criminal Procedure law in 1996, the police’s abuse of questioning power, such as coercing for confession, illegal detention and denying lawyers’ access to their clients, remains pervasive in practice (Lin, 2005).

This thesis responds to the criticism of the current status of criminal procedure studies in China by discussing police interrogation standards in China and Europe in a theoretical, comparative, and historical way. The research approach does not, as is usually the case, consider Chinese and European regulations alongside each other using the European model as an analytical backdrop. Rather, we focus on why coercing suspects’ statements or confessions during the police questioning is seen as problematic from a Chinese perspective and to what extent this response can be connected to the human rights discourse taking place in Europe. The research, therefore, extends beyond a formal legal comparison and attempts to answer the research question as how (or how far) the competing claims of cultural relativism and universal fair interrogation standards can be reconciled in China.

To substantiate the research aim, three sub-research questions are formulated.

4) What criticisms have been made of police interrogation in China both internally (official reports, scientific research and media) and externally (NGO’s and scientific research)?

5) To what extent are these criticisms of police interrogation in China related to traditional Chinese legal cultures and to the European human rights concept?

6) What adjustments to the Chinese system of police interrogation could be made?

2 Criticisms Concerning Police Interrogation in China

The literature review in Chapter 2 shows that legal scholars have devoted considerable attention to the subject of police interrogational coercion and have provided rich information on the phenomena. Empirical evidence has recognized that interrogational ‘torture’, a pervasive problem in criminal investigations in China, is most likely to occur at the basic-level, in police stations and is especially likely to be disproportionately applied to the lowest socio-economic groups of the society. Although recent years have witnessed the evolution of ‘torture’ techniques, from swifter, more painful techniques to more time-consuming and ‘clean’ ones, classic physical brutality is still exploited ‘when necessary’. Considered by the police as an effective means to get the ‘truth’ from a suspect, the use of ‘torture’ is surrounded by various rules to make such a confession reliable. However, the infamous miscarriage of justice cases of the last twenty years demonstrate that information extracted under physical or psychological coercion comes with no guarantee of reliability.
Accordingly, scholars have also offered different views on the factors underlying this phenomenon. Mainstream legal scholarship treats the gaps or ambiguities in the law as the major cause. Dominated by the ideology of ‘crime control’, the current CPL and relevant supplementary regulations, in many aspects, it is argued, fail to provide the suspect with adequate safeguards against pernicious interrogation practices: the interrogation process is marked by lack of transparency; legislation regarding the principle of ‘presumption of innocence’ is absent; the notion of ‘equality of arms’ is not laid down in the law, as lawyers’ involvement at the investigation stage is limited and their functions are subject to police interpretations and are based on abuse; the exclusionary rule is troubled by ‘incomplete nature’ and the inadequacy of procedural safeguards underpinning it. Apart from this point, a part of scholarly literature relates the causes of police ‘torture’ to the organization and structure of the Chinese criminal justice system, and one of the most prevailing interpretations emphasizes the absence of a functional model of separation of powers, especially the lack of judicial independence which results in this problem. Last but not least, some studies point to the influence of traditional cultural values in this respect: while interrogational ‘torture’ is absolutely coercive and cruel, its exercise depends at almost every level on many forms of cooperation and consensus.

These explanations and their implied remedies, while inspiring and useful, however, are not reasonable enough to guide Chinese legal reforms in the appropriate direction, because:

First, legalistic accounts consider the law as an effective force that intervenes to deter or solve collective action problems arising among the police. But it is important to understand that social norms are unlikely to change as a result of simple legal interventions and many transplants may not have the effects that are intended. Indeed, there are many flaws in China’s criminal procedures and China might find inspiration in Western solutions. Nevertheless, as Damaška (1997: 839-840) has put it, “the music of the law changes, so to speak, when the musical instruments and the players are no longer the same.” According to Zhu (2007: 540), the Western example “blurs and confuses the real problems to be dealt with…and can, moreover, lead to mistaken solutions”. In addition, another difficulty with this approach is that it fails to take account of law enforcement’s interest in finding evidence and the restorative value of confessions. Blind Western-inspired reforms cannot be successful, as they overlook the fact that legal reform is inherently political. Since China is still witnessing a sharp rise in crime with limited resources, it is unlikely that the Chinese Communist Party (CCP) will conform to a particular ‘due process’ paradigm, regardless of crime control.

Second, structural accounts demonstrate that the organizational principle and institutional arrangements of China are in conflict with the operation of professional logic in the judicial system. However, it is worth noting that it is unlikely that the Chinese criminal justice system will take a complete turn towards a system that is based on the separation of powers model. If we agree that today’s China is a historically
established fact, the influence of the CCP upon the judiciary is general and diffuse, the CCP will not fall from power in the near future and there is, as yet, no a true and universal standard with regard to the relationship between political parties and the judiciary, we still need to take into account the Chinese historical and social context with regard to the position of the judiciary.

Finally, cultural accounts deem the values of Confucianism as one of the causes of the tolerance of police ‘torture’. Importantly, the proper regulation of social norms is a delicate and complex task, and what is good or undesirable for Chinese society, of course, cannot be only inspired by Western enlightenment. The current understanding of Chinese culture, which is dominated by critical voices, as the review shows, is inadequate for guiding lawmakers. Surely, there is good reason to be sceptical about the potential danger of ever expanding state power, which is strengthened by collective Confucianist thinking, as this could lead to the insufficient protection of individual rights. It can, however, be problematic to strive for standard setting and awareness raising, when it is contrary to or at the expense of the values that a communitarian society is embedded in. Given the fact that the public has reacted to the rise in crime by demanding that the government wage war on crime and the widespread public support for heavy punishments, including the death penalty (Liang, Lu, Miethe and Zhang, 2006), raising more ‘self-centred’ consciousness among citizens in a still collective society giving high value to stability, is most likely to intensify social cleavage rather than alleviate it. As Peerenboom (2002) rightly argues, “it may be too late for Western liberal democracies and the USA in particular to turn back the clock and avoid some of the extremes of radical diversity, autonomy, and individualism. But it may not be too late for China” (p.546).

Indeed, the tolerant attitudes for police ‘torture’ among the Chinese citizens may be, in part, due to its long historical preference for shaming and collective values. Nonetheless, the support or tolerance for ‘torture’, in fact, is against the core teaching of Confucianism. Hence, it is believed that the shaping force also lies in Chinese culture, which has a long and rich humanist tradition, itself.

3 Relativism versus Universalism in Interrogation Fairness

Chapter 4 offers an alternative perspective on the evolution and operation of Chinese interrogation rules, besides positing more nuanced explanations for the prevalence of police coerced confession in China. The historical analysis reveals that the imperial, social context which once morally legitimized judicial torture is still very much alive today. More precisely, historically, the Chinese leadership, through the interplay between Confucianism’s moral standards and legalist bureaucracy, relied heavily on informal means to maintain social order and settle disputes, and established a powerful, minimalist law enforcement authority which was responsible for only conflicts that could not be solved by informal mechanisms, and for serious crimes. On the whole, this social control model failed to adequately address the need to protect individuals against law enforcement interrogation practices that were abusive or overreaching, and therefore
indirectly contributed to the prevalence of police-coerced confession both in the past and in the present.

Moreover, based on the analysis in Chapter 3 and 5, we find that the European ‘human rights’ legal framework in which the suspect’s autonomy is highly respected in criminal interrogations cannot simply be copied as an independent standard in the Chinese context. In fact, Ancient Greece and China differed markedly in their systems of thought. Greeks tended to engage in context-independent and analytic perceptual processes by focusing on a salient object (or person) independently of its context, whereas Chinese tended to engage in context-dependent and holistic perceptual processes by attending to the relationship between the object and the context in which the object was located. These two ancient civilizations in fact resulted in great difference between Europe and China in terms of their legal cultures and the institutional arrangements of their criminal justice systems. Europe believed fundamental law was itself divinely instituted and favoured a rational legal system in which law served as a systematic means to define jurisdictions. Since the boundaries of jurisdictions were clarified, law factually provided the formal means by which both legal officials and individual suspects could preserve personal spheres of power in criminal interrogations. Specifically, under medieval law, the rights of the accused were mainly based upon a purportedly objective assessment of the teachings of authoritative materials. Nonetheless, in modern Europe, individual rights and internal independence are highly respected. Hence, the principles of the right to silence and the privilege against self-incrimination were raised and seen as an expression of individual autonomy—the right of the accused to be respected as an individual throughout the criminal process and to reach an autonomous decision when called upon to answer to criminal allegations. In contrast, the Chinese, without transcendental sources of legitimation and under the strong influence of Confucian thought, built their legal system on assumptions of harmony among hierarchically arranged players. Precisely, in the imperial criminal procedure individuality was defined in terms of one’s responsibility to explicitly defined roles. The suspect, as a subordinate member in the family, had the obligation to be obedient and admit his moral guilt. The judge or magistrate, as the head of a family, had the authority and obligation to persuade the suspect to change his mind and confess based on evidence and patience. Hence, in theory, power is impersonal, non-intentional, and directed towards maintaining the harmony of the whole. In developmental terms, this line of reasoning emphasized the collective and intuitive sides of life and led to the specification of roles and of role-defined actions and emotions, a trend that in turn reduced the legitimate discretionary spheres of individual action. Consistent with the traditional Chinese legal culture, the suspect’s behaviour under the current Chinese interrogation procedure continues to be ‘restricted’ by the pertinent relationships that demand obedience, that is, honesty, during the questioning process.

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149 There is no provision in the law as to the consequences that follow from a suspect’s silence, such as the fact finder drawing unfavourable inferences from a passive reaction. Hence, the better way to comprehend the above mentioned provision is to recognize it as an expression of the inherent Chinese legal attitude which Chinese lawmakers want to respect and enhance.
Chapter 6. Conclusion

Taken together, given the very different historical and institutional context, the likelihood of an ‘autonomous version’ of the right to silence and the privilege against self-incrimination in China’s very different soil seems low. In the reform era, as indicated in Chapter 4 and 5, the attitude of being honest about one’s misconduct, and submissive to authority have continued to be reinforced by Chinese familism, especially the concept of xiao (孝). This is not to say that other external pressures, such as the pressure on the PRC to comply with the ‘universal norms’ of the right to silence and privilege against self-incrimination, will not make the content of new interrogation rules profoundly different from those of the past, difficult as this may be to accomplish. As long as the familist and societal view of crime and wrongdoers holds sway, the real question is whether new content can overcome hoary practices, values, and interpretations. Pound (1948: 751) once emphasizes that many plausible legal reform projects have been slow in achieving their purposes, and more than a few have failed, because they break with the past too violently or fail to take into account long-settled habits of thought of action. Therefore, if the right and the privilege would be interpreted and applied in the Chinese context, it is crucial to remember that legal precepts have to be fitted to the lives of the people they are to govern, not the lives of people arbitrarily fitted to the legal precepts.

Globalization intensifies contacts between cultures more than ever in the history of humankind. The flow of migrants around the world, global business and global consumption provide us with new experiences of difference and diversity as well as of common ground. As Nuyen (2003: 75) observed, one distinct feature of globalisation is the move towards universalism: the world is increasingly moving towards universal technical formats, languages, procedures and regulations. For many thinkers, both the need for and the justification of universal ‘human rights’ are self evident, although some have chosen to argue further that, morally, the claim for universal ‘human rights’ rests on a deeper claim that there is a common human nature or humanity that obligates us to regard all others as having a moral status equal to our own. This common humanity dictates that disputes be settled not by appealing to what is judged good, right or valuable by the standard of one’s own culture, but by applying standards that transcend cultural values (Donnelly, 1984).

While many Western liberals would like to consider that autonomous values are universal, the question is whether the global justice or fairness is inherently autonomy oriented, as many liberals would have us believe. As pointed out above, internal independence is a Western doctrine borne out of a specific philosophical tradition stretching from Plato to Descartes and beyond. In the autonomous metaphysics, the individual person is a rational and self-sufficient being, who chooses to associate with others, acknowledged to be his equals, to further his interests. This is reflected in, among other things, the liberal idea of citizenship, according to which citizenship consists of a set of rights protecting the individual from the state and from other individuals. Confucianism, in contrast, understands the individual person as a socially embedded being, not an individual standing apart from, or over the community. Based on a Western metaphysics of personhood, ‘human rights’ is thoroughly Western. Therefore, non-Westerners have good reasons to question its claim to be universal.
Arguably, the point above concerning the liberal conception of universalism is what lies behind recent criticisms of the idea of the universalism of ‘human rights’, particularly those coming from Asia (Peerenboom, 2003). As one critic has put it, ‘universalism’ normally ends up as a vehicle forwarding particular political interests (Leino-Sandberg, 2005). However, to throw universalism out with the liberal Western conception is surely to throw the baby out with the bath water. From whatever perspective, Western or Eastern, protecting the basic core of human dignity requires fairness, and impartial norms of fairness must be universally applicable (Donnelly, 1984, 2007).

Based on the above analysis, what Western liberals should not do is to assume that their conception of ‘human rights’ is the only possible conception, that a notion of universal justice or fairness cannot be worked out from the inside of any other cultural tradition, such as Confucianism. Equally, what the critics of the liberal conception of universalism should not do is to reject the idea of universal ‘human rights’ altogether. Instead, efforts should be made to arrive at an idea of global justice from the inside of something other than individual autonomy or the ‘rights’ discourse, such as Confucianism. While it is beyond the scope of this thesis actually to build the structure of an idea of universal fairness from within the Confucian perspective, all that can be done here is to show that Confucianism has the necessary recourses for such a task, keeping in mind that the end result must be universal.

First, Confucianism is committed to a movement towards universalism. The Confucian vision is a vision of a peaceful and harmonious world that extends beyond the individual and beyond a particular community. As stated in The Great Learning (LiJi-DaiXue, 礼记-大学), the idea of learning is initially to ‘rectify the mind’ in order to ‘cultivate the person’, but in learning, the individual person must aim, beyond the person, at ‘regulating the family’, then beyond the family, at promoting harmony in the community, and then beyond one’s community, at contributing to peace and prosperity of one’s country, and then finally beyond one’s country, at making the whole world virtuous. Insofar as a virtuous world is first and foremost a just world, it may be said that the Confucian vision envisages the very idea of universal justice.

Second, in all the Confucian classics the stress is always on respect in the interrelationships of people. As indicated in Chapter 5, in Confucianism, heaven, earth and man are distinct parts of the whole; each has its own function in maintaining the whole, and each interacts in such a way as to harmonize the whole. This imagery, when extended to the family, locates authority in terms of family roles. Family hierarchy rests upon the identification of necessary family roles and upon each member’s submission to his own role. Power is therefore legitimate only when it can be justified in terms of one’s duty to a role. Accordingly, in China the basic virtue interrelating family and community members is respect (zunzhong, 尊重). Notably, Kant (1964: 115) declares that the “love and respect” that we experience personally and individually are the “feelings that accompany the practice of ... duties [to others]”. Duties, in turn, are also universal.
Clearly then, there are resources within the personal ethics of Confucianism for a move toward the adoption of universal fairness. We can perhaps even say that the virtues of *ren* (仁) and *li* (礼) find their ultimate manifestation in a universal ethics. Hence, although there is a lack of the notion of individualistic human spirit or the conception of rights-based individuals in the Chinese legal culture, we try, in what follows, to show that combining traditional *moral obligations* with *institutional restrictions* could also enable us to achieve fairness in the field of investigative interviewing in China.

At this point, one question remains. Typically, a culture has an *identifying core* but also *open borders*, allowing for exchanges with other cultures and for transformation as result of such exchanges. As Midgley (1991: 84) puts it, cultures are “more like climactic regions or ecosystems than … like the frontiers drawn between nation states”. Under this view, the inevitable coming together of the Confucian ‘climactic region’ with others in the globalization process need not result in the dissipation of the Confucian ‘climate’ or any particular cultural ‘climate’, nor in a massive storm that engulfs us all. More specifically, economic development and the encroachment of a global culture need not lead to the endorsement of a liberal conception of ‘human rights’ that seeks to maximize individual autonomy and freedom in China. In studying policing and punishment in the reform period of China, Dutton (1992: 350) notes that there is “no growing process of individualization but only the redevelopment and, in many ways, extension of modes of collectivity”. This observation cannot automatically be assumed that there was no ‘individuation’ within the Chinese culture. The concept of ‘individual’ was not absent—it was just different. Peerenboom (2002: 587) also recognizes that notwithstanding the advance of global market, the Chinese “continue to draw a different balance than liberals when it comes to conflicts between individual autonomy and freedom versus social stability and the interests of the majority”. A certain amount of diversity within the general framework of universal fairness is indeed valuable, and the challenge for Chinese is to draw on the diversity within Asia and elsewhere to fashion their own version of a just society that respects common humanity and allows individuals to flourish, and for Westerners to learn from Confucianism countries and incorporate what is useful in improving the lives of people in their countries.

4 Reforming and Regulating Police Interrogation in China

Considering future legal reforms of police interrogation in China, the research on the one hand shows that there are traditional native resources available to legal reformers to ensure a *cooperative interviewing* style in criminal questioning and eliminate police-coerced confessions. Nevertheless, on the other hand, the research also reveals that there are cultural factors which are *unconducive* to fair interrogative practices. Admittedly, social norms, underpinned by social values, are sometimes desirable yet sometimes odious, and the law is critical to enhancing good social norms and undermining bad ones. Hence, recommendations for the proper regulation of social norms in police questioning, at both enhancing and limiting levels, are presented below.
4.1 Enhancing ‘Investigative Interviewing’

As we have observed earlier in Chapter 4, traditional Confucianism moral values are supportive of an ethical approach to criminal investigation and a cooperative interviewing style in questioning the suspect. Similarly, in many Western countries, there is a tendency to use the concept of ‘investigative interviewing’ as an alternative to interrogation. For instance, in the United Kingdom (UK), the expression ‘investigative interviewing’ is used to describe questioning of suspects and victims, as well as witnesses, at any point in the investigative process (Williamson, 1993; Gudjonsson, 1994). Underpinning the new approach of criminal interviewing is a firm commitment to move from questioning purely to obtain a confession, towards questioning that is more of an inquiry—examining and adding to the existing evidence (Williamson, 1993). This change is a result of the combined effects of new legislation, psychological development, and organizational policies designed to make the questioning of a suspect less inherently coercive. It is hoped that this ethical approach to investigation would elicit reliable information and factual accounts from a person about an alleged offence (Brewer and Williams, 2005).

Since it has been long recognized in the West that standing legal orders and forced instructions have a limited effect on regulating police behaviour in interrogative practices (Leo, 1992; Gudjonsson, 1994), it may well prove to be an advantage that China already has a traditional moral philosophical body of ethical customs. As demonstrated in Chapter 4 and 5, there is a strong emphasis in the Chinese criminal justice system on proper planning and preparation prior to interrogations, and on personal integrity during questioning. In theory, the advantage of the ethical interviewing approach is that it is not manipulative in nature and likely to produce the most accurate types of information (Gudjonsson, 1994; Bull and Soukara, 2009; Kassin, Appleby and Perillo, 2010). Multidisciplinary investigative interviewing research, mainly carried out in the UK since the 1980s, has resulted in a knowledge base for interviewing techniques which is strongly focused on obtaining truthful information through the use of open, non-leading questions and a humanitarian interview style (Williamson, 1993; Gudjonsson, 2003; Bull and Milne, 2004). As Smets (2011: 20) suggests, “a sound investigative interview reflects a humanitarian interviewing technique in which the interviewer employs an open, receptive attitude to establish a good yet professional relationship with the suspect, so that a professional interaction between the interviewer and the suspect consequently makes it possible, using non-suggestive, open and non-leading questions, to gather legally admissible, reliable relevant file information”. Powell, Wright and Clark (2010) state that interviewing deficiencies and poor interview behaviour can be explained in several ways, with a general focus on the importance of adequate training of police investigative interviewers. In practice, however, most Chinese police officers are provided with little training on how to conduct professional interviews (Wang, 2006).

As mentioned in Chapter 5, there is a strong emphasis in the Chinese criminal justice system on the moral duties of both the police and the suspect to conform to their roles in order to eliminate the ambiguity and arrive at the ‘truth’ in criminal interviewing.
As a result, problems obviously arise when suspects are uncooperative, exercise silence, and present the interviewer with repeated denials. As He (2005: 92) points out, coercion often appears in conditions where the police officer is incompetent in persuasion, the evidence base is weak and the suspect is reluctant to talk.

Hence, regular training program of interview skills should be adopted for investigative police officers. Moreover, in order to develop and implement appropriate interviewing training, researchers should seek opportunities to partner with police investigators. Surely, collaboration requires willingness on the part of both research and law enforcement communities. It is not unusual for law enforcement to express a reluctance to cooperate on research projects, and their lack of trust with the scientific community represents a serious obstacle for progress on these issues. Nevertheless, it is believed that such efforts are needed, as collaboration would not only result in the development of better interviewing methods, but should also encourage the continued evaluation of such methods in the field.

4.2 ‘Limiting’ Police Powers

The analysis in Chapter 4 reveals that, historically, Chinese leadership, through the interplay between Confucianism’s moral standards and legalist bureaucracy, relied heavily on informal means to maintain social order and settle disputes, and established a powerful, minimalist law enforcement authority, which was responsible only for conflicts that could not be solved by informal mechanisms and for serious crimes. On the whole, this social control model, which required tremendous ‘faith’ in the credibility of the judicial authorities, failed to adequately address the need to protect individuals against law enforcement interrogation practices that were abusive or overreaching, and therefore indirectly contributed to the prevalence of police-coerced confession both in the past and present. In light of this, how traditional moral obligations, for both the interviewer and interviewee, could best be combined with institutional restrictions, should be a central concern underlying future reform on interrogative practices within the Chinese criminal justice system. As suggested in Chapter 5, one of the most powerful norms of the Chinese legal culture is the belief that both officers and suspects have the duty to conform to their roles in order to eliminate the ambiguity and arrive at the ‘truth’ in criminal investigation. Precisely, the police have the obligation to gather factual accounts and reliable information from the suspect based on evidence and patience, and the suspect has the moral duty to be honest during the questioning process. Although the police are in positions of authority, Confucian’s relationships also stress a sense of reciprocity (bao, 报), that is, those who have increased authority shall also have increased responsibilities\(^\text{151}\). This body of customs may become a body of ideals around which the adjustment of relations and ordering of conduct in police interviewing may be shaped. Indeed, as studies of regulation in this and other fields illustrate, the best discipline is that which is internalized: the police should be compliant rather than obedient to legal

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\(^{151}\) The point is that higher standards of behaviour were expected of officials than of common people and common people and that fathers should serve as models of moral behaviour for their families (Johnson, 1995, 229).
rules (McGowan, 1972, 672; Baldwin, 1995, 302). Hence, future regulatory strategies must aim to foster responsibility of the police officers, not mere rule-following.

First, officers throughout police organizations should be consulted about the standards which they are expected to maintain, both procedural and ethical. As discussed earlier, there are three main principles underlying the investigative interviewing: (1) a shift from questioning purely to obtain a confession towards questioning that is more of an inquiry—examining and adding to the existing evidence; (b) encouraging police officers to approach the interview with an open mind rather than ‘presumption of guilt’; (3) encouraging police officers to be fair and ethical in their questioning. This approach, of course, is no ‘soft’. It in fact emphasizes making disciplinary sanctions more effective: if the police use coercive tactics to extract statements, punishment must be available in credible form. Since police internal disciplinary systems have been reported as deeply flawed, all too often ignoring procedural breaches (Ning 2002; Zheng 2007), external supervisory mechanisms must be developed along with procedures for self-governance.

As one of the mechanisms helping to supervise and control the interrogative practices of the law enforcement officers, the supervisory power of the procuracy should be further strengthened in the new CPL. Under the current CPL, the procuracy has two basic functions, namely, to prosecute cases and to supervise the work of the police and the court. A people’s procuratorate must ascertain whether the investigative activities have been lawful through approval or denial of a proposed arrest and by reviewing the case before making a decision on whether or not the suspect should be prosecuted (CPL, Art. 76 and 137). However, as the police and procuracy each control one phase of the criminal process (investigation and prosecution), the procuracy’s supervision of the police cannot be a substantive supervision. Therefore the 1996 CPL gives only a procedural power to the procuracy, that is, when illegalities in the investigative activities of the police are discovered, the procuracy can issue a ‘correcting opinion’ (jiuzhengyijian, 纠正意见), to which the police must respond (Art. 76). However, if the police do not respond to the procuracy’s opinion to correct illegal practices, there is no sanction that the procuracy can exercise. Consequently, as illustrated in Chapter 2, the supposed safeguard against oppressive police practices offered by prosecution control of the investigation and the complaints process is a little more than a façade.

In analysis of the structural contradictions in the CPL, many lawyers and scholars expressed the view that the 1996 CPL was made ‘in a hurry’. By this they did not mean that the lawmaking period was too short, but that many important issues were not clarified in the law (Chen, 2007). Liu and Halliday (2009: 926–927) found that the 1996 CPL revision was “a result of both ideological and structural contradictions in the criminal justice system and collective diagnostic struggles during lawmaking”. On the one hand, the United Nations (UN) covenants and principles has shaped the legislative ideologies of the 1996 CPL. During the 1996 CPL lawmaking process, the initial drafting group, mostly composed of legal scholars, visited France, Germany, Italy, the United States, UK, and Canada, and translated the German, Italian, and French criminal
procedure codes into Chinese (Cui, 1996). On the other hand, representatives of the practitioners (especially the police, procuracy, and court) strongly opposed the ‘foreign principles’ advocated by legal scholars (Cui, 1995). As a result, compromises were built into the final version of the 1996 CPL: both ‘striking crimes’ and ‘protecting rights’ were written in the law (CPL, Art. 1 and 2). In so doing, the law actually incorporated contradictory concepts and ideologies. More specifically, to balance the two ideologies, lawyers were allowed to intervene in the phase of investigation, but they did not have the status of the defender, an ambiguous situation that led to much confusion over their role in criminal defense. In the meantime, the structural contradictions among the police, procuracy, and court led to procedural but not substantive supervisory power of the procuracy over the other two agencies, which further compounded ambiguity and inconsistency in the law.

Because the 1996 CPL generated structural contradictions and conflicting interpretations, scholars’ focus in the current revision is principally upon reducing indeterminacies and contradictions by redistribution of power between actors in the criminal justice system. Most notably, among all actors in the criminal justice system, lawyers have encountered the most serious problems in the implementation of the CPL and have the strongest incentives to change the status quo. Lawyer representatives strongly call for giving the defense lawyer the status of defender as early as the phase of investigation (Li, 2008; Xu and Sun, 2008). However, it was stated that the power of the police, who resist this unwelcome intrusion of lawyers in their investigation, is as influential in lawmaking as in implementation. An experienced Xi’an lawyer worries that the efforts of leading Beijing lawyers will be made in vain, as the former minister of public security has become a key member of the CCP Politburo, whose composition is heavily weighted toward powerful figures with responsibility for social control. Hence, in his view, even if lawyers’ proposals are seriously considered by the National People’s Congress (NPC), when the dispute reaches the ultimate authorities at the top of the party, the decision is likely to favor the police and social control rather than lawyers and the protection of ‘basic’ procedural rights. In other words, even if there were to be a balancing of actor influence in CPL lawmaking, it would remain largely symbolic (Liu and Halliday, 2009). However, this overemphasis on lawyers’ difficulties and problems in the ‘black letter law’ masks their deep social, cultural and political roots as indicated in Chapter 4 and 5. Given the very different historical and institutional context, the likelihood of an ‘autonomous version’ of the rights of defence in China’s very different soil seems low.

The Chinese lawyers articulated their grievances with two metaphors, namely, “Three Difficulties” (sannan, 三难) and “Big Stick 306” (306 dabang, 大棒). The Three Difficulties refer to lawyers’ difficulties in (1) meeting the criminal suspect, (2) getting access to the procuracy’s case files, and (3) collecting evidence and cross-examining witnesses at trial. Big Stick 306 refers to the abusive use of Article 306 of the Criminal Law and Article 38 of the CPL by the police and procuracy, which allow procuratorates to arrest lawyers who are defending cases against them on grounds that lawyers have conspired with defendants to commit perjury or to give false testimony. Lawyers are most vulnerable when defendants change the story they tell the lawyer from the story they told the police, often as a result of police coercion (Yu, 2002; Halliday and Liu, 2007).
While the defense lawyers’ struggle for defender status continues with no clear direction in sight\(^\text{153}\), it is unlikely that the procuracy’s supervisory power, as a power prescribed by the Constitutional Law of the PRC (Art. 129), will be abolished in the near future. China does not carry out the principle of separation of the three powers (judicial, administrative and legislative). Nonetheless, under the current structure of the state system, the procuracy’s supervisory role embodies the idea of the check and balance of powers. In particular, the procuracy’s supervisory role also fits in with the traditional Chinese administration framework in which the supervision officer (censor, 御史, yushi) has the ultimate responsibility in supervising public officials and in advocating a complaint against the official who infringes a rule (Alford, 1984; MacCormack, 1987). In this sense, since under the current CPL the procuracy only has procedural supervisory power over the interrogative practices of the police, the substantive supervisory power of the procuracy should be further strengthened in the new CPL. For instance, if the police do not respond to the procuracy’s ‘correcting opinion’ (jiuzhengyijian, 纠正意见) to correct illegal interviewing practices, the procuracy should have other remedies to let the ‘correcting opinion’ implemented.

References


\(^{153}\) As Liu and Halliday’s (2009: 945) observed, to accomplish the defender status of lawyers would constitute a “fundamental reorientation of Chinese politics and law”.

Chapter 6. Conclusion


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