LAW IN EAST ASIA SERIES
ANTHONY DICKS & MICHAEL PALMER (SERIES EDITORS)

CHINA'S PRE-TRIAL JUSTICE

Criminal Justice, Human Rights and Legal Reform in Contemporary China

Elisa Nesossi

WILDY, SIMMONDS AND HILL PUBLISHING

CHINA'S PRE-TRIAL JUSTICE

Criminal Justice, Human Rights and Legal Reforms in Contemporary China

ELISA NESOSSI

WS
&H

Wildy, Simmonds & Hill Publishing

China's Pre-Trial Justice: Criminal Justice, Human Rights and Legal Reforms in contemporary China

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN 9780854901036

First published in 2012 by

Wildy, Simmonds & Hill Publishing Ltd.
58 Carey Street, London WC2A 2JB
England

Website: www.wildy.com

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

PREFACE

The book examines the relationship between international human rights standards and local legal norms in the People's Republic of China (PRC). Focussing on the realm of criminal justice in post-Deng China, Criminal Procedure Law reforms and their impact on the PRC's ratification of and future accession to the International Covenant of Civil and Political Rights, the book examines the limits to the protection of criminal suspects rights during pre-trial proceedings.

Building on existing analysis of the major changes to the criminal justice system of the PRC that have been taking place since the mid-1990s, the study considers whether discourses on human rights elaborated by scholars, officials, legal professionals and civil society are having an impact upon the administration of criminal justice in China today, an area where informality and weak procedural fairness still survive side by side with features characterizing a 'thin' rule of law system. It assesses the scope and the significance of this impact against the paradigm of localization, and reflects upon whether localization of human rights principles might be a concrete possibility in the context of a developing country goverened by a one-party regime.

Specifically, the book examines the manner in which discourses on the "first generation" of human rights manifest locally in the administration of criminal justice and potentially challenge existing power structures. By considering elements related to the "law on the books" and issues that influence legal practice, the study identifies the various factors that work against individual rights' compliance in criminal proceedings in the contemporary PRC. Thus, it questions whether there are ways through which legalized principles of humanity defined internationally to protect the individual from the state may infiltrate the ganglia of the bureaucratic activist state, or whether this attempt reveals an *a priori* contradiction making localization impossible. The analysis of the system of pre-trial justice demonstrates that the state is progressively allowing some entry points but that localization proves hard.

Following an ongoing debate on criminal justice reforms in the PRC, the study examines the limits to the protection of the rights of criminal suspects at the pre-trial stage of the criminal process with

particular reference to pre-trial detention. Indeed, a great number of criminal justice human rights related abuses in the PRC happen at the pre-trial stage of criminal proceedings; however, a key and hitherto unresearched area in China's pre-trial proceedings is the criminal detention centre (*kanshousuo*), the place where criminal suspects are generally detained during investigation under the quasi-exclusive supervision of the police and all too often without the minimum basic legal safeguards. The evident lack of legal protection at the pre-trial stage of criminal proceedings is emblematic of the difficulties in implementing and protecting international human rights standards, particularly individual rights, in the local administration of criminal justice in China.

Notwithstanding the significance of pre-trial proceedings in the Chinese criminal justice system, to date no other publication in a Western language has systematically focussed on this important issue. The present work thus fills a serious gap in the literature by offering a detailed discussion of this aspect of criminal justice and human rights in contemporary China. The book is intended as a contribution to the study of Chinese law, human rights law and comparative criminal justice, and by considering developments in Chinese local legal culture, it also explores issues of broader interest to comparativists and legal sociologists.

ACKNOWLEDGEMENTS

I should like to express my gratitude to my supervisor, Professor Michael Palmer, for his constant encouragement, understanding and critical reading on various drafts of the thesis project that led to this book. His vast knowledge and steady support added considerably to my PhD experience.

Many thanks also go to the teachers, administrators and students at the Chinese University of Politics and Law for allowing me to research and participate in their activities during the academic year 2007–2008. Gratitude also due to all the Chinese academics and lawyers who have kindly agreed to share with me their valuable experience and knowledge, notwithstanding the sensitivity attached to some of the issues addressed in this study. My research in China could not have been possible without the financial support provided by the Arts and Humanities Research Council (AHRC), the University of London, the Universities' China Committee in London and SOAS.

I should also like to express my gratitude to The Rights Practice and in particular its director, Ms Nicola Macbean, whose stimulating conversations and vast network of international contacts have challenged and inspired many ideas in this book. My SOAS PhD studies' colleague, Ms Marica Moscati, with whom I have shared the many joys and frustrations of the early stages of my academic life, is also a scholar and lawyer to whom I wish to express my sincere appreciation.

I am particularly grateful to my mum and Mario for their endless support over the years and without whom I would never have enjoyed so many opportunities in my life. I also wish to thank Luca, who has closely followed each step of this research and always been extremely encouraging and patient.

This book is dedicated to my father, Alfonso Nesossi.

Elisa Nesossi,
London,
December 2011

CONTENTS

CHAPTER 1: INTRODUCTION: LOCALIZATION OF HUMAN RIGHTS IN AN ACTIVIST STATE?

1.1 Introduction

In 2008, the People's Republic of China (PRC) celebrated the 30th anniversary of the onset of the post-Mao reforms. Domestic newspapers highly praised the country's realization of the rule of law and the progress made in the protection of human rights. Chinese media commended the 2007 amendment of the 1996 Lawyers Law as a substantive improvement for the legal profession as well as being a significant step forward in the protection of the rights of criminal suspects and defendants. One year later, the media in the PRC applauded the enactment of the National Human Rights Action Plan (2009–2010) by the State Council;[1] and in 2010, Wang Cheng, then director of the State Council Information Office, opened the Third Beijing Forum on Human Rights by claiming that the Chinese government has long pursued modernization and human rights, and that improvements in human rights were 'obvious'.

Official statements such as these contrast starkly with the voices coming from Chinese civil society that contest and denounce abuses by the state against its citizens. A number of lawyers, scholars and civil society representatives claim that the governmental discourse does not necessarily indicate a genuine commitment to the protection of individual rights in that it fails to question critically the existing relationship between the individual and the state – the core element for the realization of human rights. Moreover, official discourse does not challenge the political and institutional *status quo*, and it is often used by the authorities merely an instrument to ease the PRC's relationships with foreign countries. The official commitment of the PRC to the protection of individual rights is also seriously questioned internationally, especially when the country fails to acknowledge domestic

[1] The PRC is one of the 26 countries that have issued a National Human Rights Action Plan, based on the recommendations stemming back from the World Conference on Human Rights held in Vienna in 1993. On 13 April 2009, the Information Office of the State Council released the PRC's first National Human Rights Action Plan for the years 2009–10; though already expired, to date no other plans have been issued.

flaws in the administration of justice, as seen, for example, during the Universal Periodic Review in February 2009.[2] Overall, the PRC remains an authoritarian state in which basic principles of humanity are secondary to officially perceived political necessities, so that abuses against individual rights are something of a way of life.

The fact that official statements demonstrate a significant but primarily rhetorical commitment to the safeguard of human rights in the country does not come as a surprise. At an ideological level the official discourse still draws inspiration from the Marxist-Leninist theory of rights (Wu 2002, p. 362) and tends to reject any link between human rights and the "very nature of man" (*renxing*) by privileging the view according to which human rights must be fitted into the actual circumstances of a given society and linked with the socio-economic development of a country. As explained by Hintzen (2002, p. 55), "human rights are thereby identified as a moral issue that is naturally derived from socio-economic development itself. In this sense, as long as the party-state rules in the interests of the people, it respects human rights".

The discourse on human rights in China has generally been looked at through the lens of cultural values, strictly related to politics and framed within a set of dichotomies: cultural relativism versus universalism, communitarian values versus individualism, authoritarianism versus democracy and the rule of law. At different stages in the history of the PRC, human rights – particularly individual rights – have been condemned as "bourgeois concepts" connected with foreign imperialism and rejected in the name of communitarianism, Confucianism and broadly defined Asian values.[3] Intellectuals in China have always

[2] The PRC's report and the outcomes of the review are available on the website of the Office of the High Commissioner for Human Rights (OHCHR) at: http://www.ohchr.org/EN/HRBodies/UPR/PAGES/CNSession4.aspx.

[3] In the Asian context, the debate sets Asian values against universal human rights. The discourse developed after 1993 – date of the Bangkok Declaration of Human Rights – denies the universal applicability of human rights, rejects civil and political rights as being specifically Western and culturally inadequate to the Asian communitarian context, and stresses the primacy of economic development over civil and political rights. Mainly led by prominent scholars and officials from Singapore and Malaysia, the Asian values discourse asserts the inapplicability of Western liberal democratic values in the Asian context seen as an imposition from the West contrary

struggled with the assumption that human rights have a universal nature, believing that there is no such a thing as universal rights independent from local circumstances. According to their view, human rights, particularly civil and political rights, are a vested form of imperialism that only speaks the alien language of Western liberalism by emphasizing great individual autonomy, freedom of choice, equality and secularism. By considering cultural specificity, respect for the principles of a country's sovereignty and non-interference in internal affairs, the Chinese government has always maintained that human rights should be guaranteed according to the principles accorded by the domestic jurisdiction of a country.[4]

Even a superficial comparison between the Chinese laws at the onset of the period of reform and the current ones reveals, however, the extensive changes that have occurred, and makes quite credible the observation that justice in China has progressively become more

---

to indigenous values and detrimental to Asian economic development. Creating a sort of unifying cultural mantle over Asia, the extensive body of literature representative of the Asian values discourse put forward the idea of Asian cultural uniqueness on the basis of its Confucian and communitarian roots. On the Asian values debate, see: Jacobsen, Michael and Brunn, Ole (eds.) (2000), *Human Rights and Asian Values: Contesting national identities and cultural representations in Asia*, Curzon Press, Richmond, Surrey; Bauer, Joanne R. and Bell, Daniel A. (eds.) (1999), *The East Asian Challenge for Human Rights*, Cambridge University Press, New York; Weatherley, Robert (1999), *The Discourse of Human Rights in China: Historical and ideological perspectives*, Macmillan Press, Basingstoke; Cauquelin, Josiane, Lim, Paul and Mayer-Konig, Brigitte (eds.) (1998), *Asian Values: An encounter with diversity*, Curzon Press, Richmond, Surrey; DeBary, Wm Theodore (1998), *Asian Values and Human Rights: A Confucian communitarian perspective*, Harvard University Press, Cambridge, MA; Schmiegelow, Michèle (ed.) (1997), *Democracy in Asia*, Campus Verlag Frankfurt, St. Martin's Press, New York; Mauzy, Diane K. (1997), "The Human Rights and 'Asian Values' Debate in Southeast Asia: Trying to clarify the key issues", *The Pacific Review*, Vol. 19, No. 2, pp. 25–44; Chan, Joseph (2000), "Thick and Thin Account of Human Rights: Lessons from the Asian values debate", in Jacobsen, Michael and Brunn, Ole (eds.), *Human Rights and Asian Values: Contesting national identities and cultural representations in Asia*, Curzon Press, Richmond, Surrey, pp. 59–75.

[4] Svensson (1996), Angle (2002) and Svensson and Angle (2001) provide two comprehensive accounts on the evolution of the approaches towards the concept of human rights throughout the centuries until the 1990s. Kent (1999) and Foot (2000) debate the human rights regime in the PRC within the framework of international relations by documenting the compliance of the PRC with international treaties.

standardized and legalized. These changes have generated official and civil society discourses on human rights, which on their part are stimulating new ideas and new approaches to the concept of rights, even in the realm of criminal justice. In this context, building on the existing analysis of the major changes to the criminal justice system in the PRC that have been taking place since the mid-1990s, this study considers whether discourses on human rights elaborated by scholars, officials, legal professionals and civil society are impacting upon the administration of criminal justice in China today, an area where informality and weak procedural fairness still survive side by side with features characterizing a thin rule of law system.[5] The present work assesses the scope and the significance of this impact against the paradigm of localization, and reflects whether localization of human rights principles might be a concrete possibility in the context of a developing country under a one-party regime.

Specifically, the book examines the ways in which discourses on the "first generation" of human rights manifest locally in the administration of criminal justice and potentially challenge existing power structures. By considering elements related to the "law on the books" and issues influencing the administration of justice both at the micro-level – the individuals responsible for law enforcement and supervision, and the institutions they represent – and the macro-level – elements related to the wider socio-political context – the study identifies the various factors that work against individual rights' compliance in criminal proceedings in the contemporary PRC. Thus, the

[5] Perenboom (2000) distinguishes between substantive or thick theories of rule of law, and formal or thin theories of rule of law and demonstrates that a thin theory of law is the more appropriate standard against which China's efforts to implement the rule of law has to be measured. A thick conception of rule of law includes elements of political morality like economic arrangements, forms of government or conceptions of human rights. Thick rule of law views are further distinguished according to particular substantive elements. Conversely, thin theories privilege formal and instrumental aspects of the legal system, namely those elements that a legal system must possess, independently from the political system: institutions, processes and laws which must be publicly promulgated and then implemented. Accordingly, due to China's present legal and political circumstances, Perenboom concludes that a thin theory is a "better benchmark for making cross-cultural comparison ... and for judging the performance of China's legal system" (Peerenboom, 2000b, p. 4).

book questions whether there are ways through which legalized principles of humanity defined internationally to protect the individual from the state may infiltrate the ganglia of the bureaucratic activist state, or whether this attempt reveals an *a priori* contradiction leading to the impossibiliy of localization. The analysis of the system of pre-trial justice demonstrates that the state is progressively allowing some entry points – whether purportedly or the unforeseeable result of socio-historical changes – but that localization proves hard and its effects are not always positive.

It may also be argued that the difficulties related to the process of infiltration first, and localization later, are also due to the features characterizing human rights principles. A full analysis of the scope of human rights principles and laws is however beyond the reach of this work as the present analysis mainly concentrates on the local level and its interaction with the international rather than vice versa. In addition, it is worth noting that the set of rights considered here mainly includes very basic individual rights, such as the right to liberty, to life, to be free from torture and ill-treatment and the guarantees associated with a fair trial.

The primary focus of this book is in fact criminal justice in the post-Deng PRC. Without underestimating the imperial and Communist influence on contemporary legal institutions as well as the importance of the first years of reforms after 1979, this research considers mainly the Chinese criminal justice agencies and institutions, and the evolution of the human rights discourse from the second half of the 1990s up to the present day – a period of major criminal justice reforms and related discussions. As such, the work is aimed at following an ongoing debate. More specifically, the study examines the limits to the protection of the rights of criminal suspects at the pre-trial stage of the criminal process with particular reference to pre-trial detention. Indeed, a great number of criminal justice human rights related abuses in the PRC happen at the pre-trial stage of criminal proceedings; however, a key and hitherto unresearched area in China's pre-trial proceedings is the criminal detention centre (*kanshousuo*),[6] the

[6] The term *kanshousuo* is differently translated in English as "detention house" or "watch house" (Yuan 2004, p. 502), or "lock-up" (Biddulph 2007). In this study, I privilege the translation "criminal detention centres", which makes clear the distinc-

place where criminal suspects are generally detained during investigation under the quasi-exclusive supervision of the police and all too often without the minimum basic legal safeguards. Thus, they tend to be subjected to prolonged periods of detention, deprived of adequate legal defence and made to suffer abuses during interrogation. The evident lack of legal protection at the pre-trial stage of criminal proceedings is emblematic of the difficulties in implementing and protecting international human rights standards, particularly individual rights, in the local administration of criminal justice in China.

Four main reasons justify the focus of this book on pre-trial criminal proceedings and criminal detention centres in particular. First, on a general level, the system to protect the rights of criminal suspects at the pre-trial stage of criminal proceedings is highly revealing of the difficulties encountered in the process of localization of international standards in circumstances where the interests of the state and the individual seriously collide. It epitomizes the political, legal and cultural obstacles and tensions inherent in the PRC's current process of criminal justice reforms. Indeed, the protection of the rights of suspects implied in the recognition of the right to fair trial is an extremely controversial issue – and this is true not only for China – that touches upon social security and institutional power struggles, and, more significantly, governmental legitimacy both inside the country and internationally.

Secondly, institutions and practices at the pre-trial stage of the criminal process are worth studying because in the PRC it is during pre-trial proceedings that the guilt or innocence of a criminal suspect is often determined – a practice generally known as "verdict first, trial second" (*xian pan hou shen*) (Clarke and Feinerman 1996, p. 140). Even though the 1996 amendment to the Criminal Procedure Law (CPL) provided the courts and trial proceeedings with a greater role in the criminal process, it is still quite common today for the courts to decide on the disposition of the case before the trial is held. Thus, the final verdict is influenced by both the views of the authorities leading pre-trial proceedings – the people's police and the people's procuratorate – and, in cases of particular importance, by the local

---

tion between criminal and administrative institutions of detention.

Political-Legal Committee of the Chinese Communist Party (CCP) (*zhongguo gongchangdang zhongyang zhengfawei*, generally called *zhengfawei*).

Thirdly, abuses of pre-trial rights in the PRC are a long-standing and thorny issue. Indeed, while various normative instruments regulate pre-trial proceedings, local justice authorities carry out a great number of human rights abuses against criminal suspects at this stage of the criminal process. The first report by Amnesty International denouncing extensive use of torture and abuse of the rights of detainees in the PRC goes back to 1978.[7] More than 30 years have elapsed since then, but the international community and academics are still discussing the very same intractable problems. These discussions have gradually become more sophisticated and specific and have involved not only international but also domestic commentators.

Finally, the topic has been chosen because of a significant gap in Western literature. Notwithstanding its importance, this specific phase of the criminal process in the PRC was neglected by both Western and Chinese literature at least until the beginning of the 21st century. As explained below, it is only very recently that scholars have started to engage in critical discussions on criminal justice reforms and have adopted a human rights oriented language in order to critically face both the lacunae in the law and the strong remnants of traditional legal thinking. After 1998 – the year the PRC signed the International Covenant of Civil and Political Rights (ICCPR) – criminal justice reforms and human rights started to become a favoured topic among Chinese legal scholars who have begun engaging in active debates and concretely proposing new legislation. An increasing number of officials, academics, judges, lawyers, procuratorates and police officers started to admit that the criminal justice system in the PRC falls short of international human rights standards; however still very few have produced in-depth and frank analyses of the system and the problems inherent in criminal pre-trial detention. The monopoly of the Ministry of Public Security (MPS) over pre-trial detention centres

[7] See: Amnesty International (1978), *Political Imprisonment in the People's Republic of China : An Amnesty International report*, Amnesty International Publications, London.

has made this area generally murky and the related discussions particularly sensitive.

1.2 The activist hierarchical state and possibilities for localization

1.2.1 The activist hierarchical state model

It is a known reality that the institutional environment and the political purposes of the administration of justice are crucially linked to the configuration and potential evolution of the laws and practices of procedure and evidence in a domestic legal system. The work by Damaška provides one of the clearest theoretical analyses exploring the link between procedures, the organization of authority and political goals. Damaška identifies two main models to organize authority in the administration of justice – the hierarchical and co-ordinate ideals – and two main state ideals – the reactive and the activist one. While the hierarchical ideal assigns the administration of justice to professional decision-makers who are part of a rigid bureaucratic structure, the co-ordinate ideal allocates the administration of justice to lay decision-makers who are in a horizontal relationship of power and apply community standards of justice. In the second binomy, the activist and reactive state models result from two different aims of the administration of justice: conflict solving and policy implementing. Whilst in the conflict-solving model of the reactive state, the administration of justice is aimed at providing a framework for social interactions to solve conflicts among citizens, in the activist policy-implementing model the purpose of the administration of justice is the implementation of the state will and ideologies about good social life. These two sets of opposition are generally combined to define the final aims of the administration of justice and its main features.[8]

Among the two state models, the activist ideal is certainly the one that more resembles the Chinese state. The activist model is inspired by interventionist political doctrines that impose an active involve-

[8] About the possible combinations see: Damaška, Mirjan R. (1986), *The Faces of Justice and State Authority. A comparative approach to the legal process*, Yale University Press, New Haven and London, pp. 181–239.