

The Scope of Application of Fair Trial Rights in Criminal Matters - Comparing ICCPR with Chinese Law

Jixi Zhang*, Xiaohua Liang¹

*Faculty of Law, Southwest University of Political Science and Law, Chongqing 401120, China

¹ Fuwai Hospital, China Academy of Medical Sciences, Beijing 100037, China

*Correspondence to: Jixi Zhang, jixizhang@gmail.com

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Abstract

According to Paragraph 1, Article 14 of ICCPR, fair trial rights applies in the determination of "criminal charge". The definition of "criminal charge" determines the scope of application of fair trial rights. In definition of "criminal charge", the way of autonomous interpretation is adopted in order to avoid the national authorities evading the obligations of guaranteeing fair trial rights. China has a considerable number of administrative sanctions that may belong to "criminal" category. The preliminary investigation before the initiation of criminal proceedings in China amounts to "charge". When ratifying ICCPR, China should make reservations concerning applying fair trial rights in correction of illegal conducts through education and other serious administrative sanctions, and reform the preliminary investigation system and case filing system to make the preliminary investigation be the sign of initiation of criminal proceedings.

Keywords: Fair trial rights; ICCPR; scope of application; China.

Introduction

Article 14 of International Covenant on Civil and Political Rights (simply referred to as ICCPR in the followings) is acknowledged as the provision of fair trial rights. Paragraph 1, Article 14 of ICCPR provides the scope of application of fair trial rights, saying: ".....In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law....." According to Paragraph 1, Article 14 of ICCPR, fair trial rights applies in the determination of criminal charge and the determination of rights and obligations in a suit at law. The definition of "criminal charge" and "rights and obligations in a suit at law" determines the scope of application of fair trial rights.

China signed ICCPR in 1998, though the Standing Committee of People's Congress has not ratified it yet. China has organized related organs of the State Council and scholars to research the disparity between Chinese law and ICCPR since signing ICCPR. In preparing for ratifying ICCPR, one of the most important questions confronted is what "criminal charge" and "rights and obligations in a suit at law" in Paragraph 1, Article 14 of ICCPR mean, i.e. the scope of application of fair trial rights. This article focuses on the definition of "criminal charge" in ICCPR, the disparity between Chinese law and ICCPR on "criminal charge", and the countermeasures China should take before ratifying ICCPR.

1. The definition of “criminal charge” in ICCPR

The words of “criminal charge” raise problems of interpretation, because on this point there are many differences between the legal systems of the Contracting States. If we choose the easy way by adopting that these words only apply to persons charged with offences under the ordinary penal code, it would result in substantial differences in the scope of application of fair trial rights in different national legal orders. The character of a procedure under domestic law cannot be decisive for the question of whether fair trial rights are applicable, since otherwise the national authorities would be able to evade the obligations by introducing disciplinary proceedings with respect to offences which should form part of criminal law, that is to say, the operation of fair trial rights would be subordinated to the sovereign will of state parties. Therefore, the adoption of an autonomous interpretation, independent of the national legal system, was inescapable. The European Court of Human Rights, in the *Adolf* case, stated with respect to “criminal charge”: “These expressions are to be interpreted as having an ‘autonomous’ meaning in the context of the Convention and not on the basis of their meaning in domestic law” [1].

1.1 The definition of “criminal”

The term “criminal” denotes the type of dispute to which fair trial rights apply. The Human Rights Committee interpreted “criminal” as follows: Criminal “relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity” [2]. In the opinion of the Human Rights Committee, there are three criteria to determine whether an act is criminal: the classification of the act under domestic law, the nature of the act, the nature and degree of severity of the sanction incurred. In defining the notion of “criminal”, the Human Rights Committee follows the criteria taking by the European Court of Human Rights [3]. The leading case in relation to the definition of “criminal” in the European Court of Human Rights is *Engel and others v. Netherlands*. In *Engel* the European Court of Human Rights identified three criteria which must be applied in order to decide whether a charge has a “criminal” character or not:

...it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. ...

The very nature of the offence is a factor of greater import. ...

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the “criminal” sphere deprivations of liberty liable to be imposed as a punishment, except those that by their nature, duration or manner of execution cannot be appreciably detrimental. ...[4]

Twenty years later, and after many confirmations of this basic ruling, the formulation has been considerably simplified:

The Court reiterates that the concept of “criminal charge” within the meaning of Article 6 is an autonomous one. In earlier case-law the Court has established that there are three criteria to be taken into account when it is being decided whether a person was “charged with a criminal offence” for the purposes of Article 6. These are the classification of the offence under national law, the nature of the offence and the nature and degree of severity of the

penalty that the person concerned risked incurring...[5]

When deciding whether a person was “charged with a criminal offence”, the European Court of Human Rights takes into account the following three criteria.

1.1.1 The classification of offence under national law

The first criterion to be applied is the classification of the allegedly violated norm under the applicable domestic legal system. Does it belong to criminal law or to disciplinary law? It will be difficult for government to argue that a particular offence lacks the “criminal” character if it is set out in the penal code. Whenever an offence is classified as criminal, fair trial rights apply without there being room for an investigation of whether that classification is the right one according to general objective principles of criminal law. The problem only arises in cases where the behavior in question is not classified as “criminal”. In that case, there is the danger of evasion of the guarantees of fair trial rights. Precisely in view of this danger of evasion, the European Court of Human Rights itself stressed that “this factor is of relative weight and serves only as a starting point” [6]. For that purpose, the European Court of Human Rights has developed two other criteria.

1.1.2 The nature of the offence

While it is a rather tautological observation, it must be said that the offence is “criminal” if its nature is “criminal”. Some indications can be derived from the efforts of the European Court of Human Rights to define disciplinary offences, though there are no definitions in the case-law. A charge is “criminal” in nature if it concerns a norm which is basically addressed to everyone rather than to a restricted group of persons and if the sanction imposed pursues, in the first place, a retributive goal.

A provision of disciplinary law only addresses persons belonging to the disciplinary system. However, there are also several prohibitions of criminal law, which can only apply to certain persons: minors or adults, parents and guardians, spouses, captains, civil servants, etc. The distinguishing feature implied in this criterion is not the number of addressees, but their quality as members of a specific group, combined with the interests protected by the rule. In the *Eggs Case*, the European Commission of Human Rights took into consideration not only that the violated rule was addressed to persons belonging to the army, but also that it governed the operation of the armed forces and did not affect the general interests of society normally protected by criminal law [7]. The purpose of sanction as a subcriterion mainly serves to distinguish criminal sanctions from purely administrative sanctions. The European Court of Human Rights held that administrative sanctions have the character of “compensation”, while criminal sanctions have “deterrent” and “punitive” character.

1.1.3 The nature and degree of severity of the sanction incurred

The third, and in many cases the decisive criterion is that of the nature and the severity of the penalty with which the violator of the norm is threatened. “Criminal” must be interpreted in such a way as to exclude any possibility of abuse by allowing the authorities to have recourse to disciplinary proceedings in order to inflict severe sanctions on someone without the necessity of respecting fair trial rights.

As far as the nature of the penalty is concerned, the case-law shows that imprisonment is considered to be the criminal penalty. It is understood that the same holds good *a fortiori* for capital punishment. However, not every deprivation of liberty renders fair trial rights applicable. Its effects on the person concerned must be of a certain

severity due to its duration. Thus, although the “strict arrest” was held a deprivation, in this case the European Court of Human Rights considered the maximum duration of two days insufficient for it to be regarded as a criminal penalty [8], whereas the European Court of Human Rights took a different position with regard to the detention of some months [9]. Duration as an indication of the seriousness of the consequence of the penalty makes the third criterion a rather unpredictable one as long as fixed standards are lacking. It has not yet been clarified in the case-law if and to what extent other disciplinary penalties than deprivations of liberty may be considered severe enough to make fair trial rights applicable. Outside the sphere of disciplinary proceedings, with respect to “fiscal penalties”, the European Court of Human Rights has adopted the position that those penalties, which are not compensatory in nature, but are of a punitive character, such as fines and disqualification, give the proceedings a criminal character for the purposes of fair trial rights [10]. In our opinion, the same approach should be followed with respect to disciplinary penalties: if they are of a clearly punitive character which makes them similar to criminal sanctions as to their nature and effect, there would seem to be no convincing reason why their imposition should not be subjected to a judicial review that fulfils the requirement of fair trial rights.

After having examined the different criteria which the European Court of Human Rights applies in order to determine whether a specific sanction is of a “criminal” character or not, the question arises as to the relationship between these criteria. The European Court of Human Rights has said that they are alternative, which means that fair trial rights applies if any one of them is fulfilled [11]. For example, if the purpose of the sanction does not make the second criterion applicable, because the scope of the violated norm is not of a general character, the nature and severity of the penalty may still make fair trial rights applicable. In *Campbell and Fell*, the European Court of Human Rights remained hesitant after examining the first two points and looked to the third in order to make a general assessment. On the other hand, if the proceedings must be deemed to be of a criminal character based on the second criterion, the nature and severity of the penalty are not relevant anymore.

1.2 The definition of “charge”

According to ICCPR, fair trial rights apply once the individual concerned has been “charged” with a criminal offence. That is to say, the term “charge” denotes when the application of fair trial rights begins in criminal cases. There is a clear possibility that states could postpone access to a lawyer, to the file, or perhaps even to the free assistance of an interpreter by organizing their criminal proceedings in such a way as to ensure that the formal “charge” occurs at a very late point in the proceedings, i.e. at the close of the investigation. Therefore, it is important that the term “charge”, as is the case in relation to the term “criminal”, be given an autonomous definition.

The Human Rights Committee has not yet interpreted the word “charge” in Paragraph 1, Article 14 of ICCPR. The famous scholar on international human rights law Manfred Nowak pointed out that the word “charge” in Paragraph 1, Article 14 of ICCPR should have the same meaning as the word “charge” in Paragraph 1, Article 6 of the European Convention on Human Rights.

In the *Deweer* Case the European Court of Human Rights gave the following description of the concept of “charge” in the sense of Article 6: “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence” [12]. The notification marks the beginning of the applicability of fair trial rights, even if it is formulated in a language which the person concerned does not understand or if it did not reach him. In the *Foti* Case the European Court of Human Rights made it clear that the existence of a charge is not always dependent of an official act: “it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect” [13]. Examples of such

measures are the search of the person's home and/or the seizure of certain goods, the request that a person's immunity be lifted and the confirmation by the judge of the sealing of building. In *Funke v. France* customs officers searched the applicant's home for evidence of his involvement in certain exchange control offences. When they were unable to find the documents, they brought criminal proceedings against the applicant for the compulsory disclosure of bank statements relating to accounts, which the applicant held with a number of foreign banks. The European Court of Human Rights held fair trial rights to be applicable, given the criminal character of the investigation [14]. In *Allenet de Ribemont v. France*, the applicant was arrested for the murder of a French M.P. on December 29, 1976. On the same day, the French Interior Minister and two senior police officers gave a press conference in which they made comments suggesting that he was guilty of the offence for which he had been arrested. The applicant was charged on January 14, 1977, but released on bail two and a half months later. The proceedings were eventually discontinued without a trial in March 1980. The European Court of Human Rights held that the applicant had been "charged" with a criminal offence from the moment of his arrest, and that the remarks made during the press conference infringed the presumption of innocence [15].

2. The disparity between Chinese law and ICCPR on "criminal charge"

2.1 The disparity between Chinese law and ICCPR on "criminal"

According to the above standards defining "criminal" set by the Human Rights Committee, China has a considerable number of administrative sanctions, which may belong to "criminal" category.

First, the administrative sanctions address to everyone rather than to a restricted group of persons and pursue a retributive goal. The objects of administrative sanctions are natural persons, corporations and other organizations, which do not subject to the administrative organs. That is to say, the object of administrative sanctions is not a restricted group of persons. The contents of the administrative sanctions are restriction or deprivation of personal liberty, property, reputation or other rights and interests, reflecting the punitive goal.

Secondly, some of the administrative sanctions belong to "criminal" category due to their nature. In China, administrative sanction can be divided into four types: physical sanction, property sanction, sanction concerning behavior and sanction concerning reputation. (1) physical sanction. Physical sanction refers to the administrative sanction, which deprives of the liberty of law violators, including administrative detention and re-education through labor. Re-education through labor is the most severe physical sanction. Under "Supplementary Regulations on the Re-education Through Labor" promulgated by the State Council, the term of re-education through labor is one year to three years, if necessary, may be extended for 1 year. (2) property sanction. Property sanction refers to the administrative sanction, which deprives of the property rights of law violators, including fine and confiscation. "Administrative Sanction Act of PRC" restricts the object of confiscation to illegal gains and illegal property, but does not provide the amount of fine. The amount of fine is provided by other acts, rules and regulations. The amount of fine in these acts, rules and regulations varies widely. The amount of fine provided by "Food Hygiene Act of PRC" is less than 50,000 RMB, or less than a certain multiple of the amount of illegal income. The amount of fine provided by "The Implementing Regulations of the Customs Administrative Sanction of PRC" is less than one million RMB, or less than a certain multiple or proportion of the value of the goods or the tax evaded. (3) sanction concerning behavior. Sanction concerning behavior refers to the administrative sanction, which limits or deprives law violators of their capacity for act, such as temporary suspension or revocation of permits, temporary suspension or revocation of business licenses. (4) sanction concerning reputation. Sanction concerning reputation refers to the administrative sanction, which set a negative impact on the reputation of law violators, including warnings, notices of criticism and

deprivation of honorary title.

In the above-mentioned four types of administrative sanctions, re-education through labor, the great amount of fines and confiscation, suspension or revocation of permits or business licenses accords with the characteristics of penalty as to the severity of the punishment. According to ICCPR, the law violators should be subject to the protection of fair trial rights. However, because these administrative sanctions exist outside the Criminal Code, and correspondingly the imposition of these sanctions does not apply the Code of Criminal Procedure, the perpetrator cannot be protected by fair trial rights.

2.2 The disparity between Chinese law and ICCPR on "charge"

In China, the stage of filing a case is the sign of the initiation of criminal proceedings. Only after filing a case, the suspect begins to enjoy the rights provided by the Code of Criminal Procedure of PRC. Article 86 of the Code of Criminal Procedure of PRC states: An investigating organ "shall, within the scope of its jurisdiction, promptly examine the materials provided by a reporter, complainant or informer and the confession of an offender who has voluntarily surrendered. If it believes that there are facts of a crime and criminal responsibility should be investigated, it shall file a case. If it believes that there are no facts of a crime or that the facts are obviously incidental and do not require investigation of criminal responsibility, it shall not file a case and shall notify the complainant of the reason. If the complainant does not agree with the decision, he/she may ask for reconsideration." According to this article, the condition for filing a case is "there are facts of a crime and criminal responsibility should be investigated". In judicial practice, it is very difficult to judge whether the condition for filing a case is met only relying on written materials. Therefore, articles 127 and 128 of "Rules of Criminal Procedure for People's Procuratorate" provide that people's procuratorate can take "preliminary investigation" before filing a case. During preliminary investigation, people's procuratorate can take measures without limiting personal rights and property rights including inquiries, authentication, etc.. In judicial practice, preliminary investigation before filing a case, instead of the formal investigation, becomes the critical stage in investigation of corruption, bribery or dereliction. In order to examine whether a certain case accords with the condition for filing a criminal case, preliminary investigation is also widely used by other investigating organs, such as public security organs.

According to the definition of "charge", preliminary investigation no doubt amounts to "charge" because investigating organs can implement inquiries, authentication and other measures, which substantially affect the situation of the suspect. Thus, from the perspective of ICCPR, the person under preliminary investigation should enjoy the protection of fair trial rights. However, according to the Code of Criminal Procedure of PRC, criminal proceedings have not yet started during preliminary investigation; therefore, the person under preliminary investigation can not enjoy the protection of fair trial rights.

3. The countermeasures China should take when ratifying ICCPR

3.1 Making appropriate reservations concerning the scope of application of fair trial rights

As the definition of "criminal" by the Human Rights Committee goes far beyond the provision of domestic law in a number of State Parties, the State Parties which are unable or unwilling to amend their domestic law made appropriate reservations concerning the scope of application of fair trial rights, such as Austria, France, Ireland, Switzerland. Vienna Convention on the Law of Treaties and the Human Rights Committee permits this kind of reservation. Taking into account of the actual situation in China, we believe that China should also make appropriate reservations concerning the scope of application of fair trial rights. Our proposal is: to change the system of re-education through labor to the system of correction of illegal conducts through education, and to make

reservations concerning applying fair trial rights in correction of illegal conducts through education and other serious administrative sanctions [16].

Re-education through labor has no substantial differences with imprisonment because it is also characterized by deprivation of liberty. In practice, re-education through labor is more severe than some of the criminal penalties. Therefore, according to ICCPR, fair trial rights should protect those who are sentenced to re-education through labor. However, simply introducing fair trial rights into the system of re-education through labor is not feasible because re-education through labor does not accommodate to the development of our society. According to the opinion of CPC, the system of re-education through labor will be reformed. The reform program is: Drug users will be incorporated into the scope of compulsory drug treatment and rehabilitation; the conducts of organizing and using a cult organization to undermine social order and social stability as well as endanger national security will be punished by criminal penalty; the rest of situations applied by re-education through labor will be transformed into the system of correction of illegal conducts by education.

Though fair trial rights should be applied in the cases of correction of illegal conducts by education and other serious administrative sanctions according ICCPR, China cannot bring them under the protection of fair trial rights due to the following three reasons. Firstly, the traditional legal culture in China requires that reservations should be made concerning the scope of application of fair trial rights. Implementing fair trial rights fully in China requires bringing correction of illegal conducts through education and other serious administrative sanctions into the domain of criminal code. One of the traditional characteristics of penalties in China is their severity. As the penalties are very severe, the domain of crime provided by the Criminal Code cannot be too broad; otherwise, it will result in the confrontation between the public and the government. As long as this traditional legal culture still exists, correction of illegal conducts through education and other serious administrative sanctions cannot be brought into the domain of criminal code. Secondly, China should make reservations concerning the scope of application of fair trial rights in order to focus the resources on striking criminal activities endangering national security, social stability and security of lives and property. Coping with correction of illegal conducts through education and other serious administrative sanctions by executive authorities can also take advantage of the efficiency of executive authorities. Thirdly, it is favorable to reduce the burden of courts if China makes reservations concerning the scope of application of fair trial rights. If correction of illegal conducts by education and other serious administrative sanctions were brought into the Criminal Code of PRC, the court caseload would increase rapidly. In that case, the courts will be overwhelmed.

3.2 Reforming the preliminary investigation system and case filing system

According to the definition of "charge", China should reform the preliminary investigation system and case filing system and make the preliminary investigation be the sign of initiation of criminal proceedings. That is to say, "two-step" investigation system should be established in China, which divides the investigation process into preliminary investigation and formal investigation. If the investigating organ believes that the condition for filing a case is met through preliminary investigation, it shall file a case and initiate formal investigation. The investigating organs cannot take measures limiting personal rights and property rights until formal investigation starts.

Establishing "two-step" investigation system means that the process of filing a case is no longer a separate stage of the proceedings, but is only the boundaries of preliminary investigation and formal investigation. The aim of filing a case is not to control the initiation of criminal proceedings, but to determine when investigating authorities can take measures limiting personal rights and property rights. Preliminary investigation is no longer the means to examine whether the condition for filing a case is met, but the sign of initiation of criminal proceedings. Therefore, fair trial

rights from the preliminary investigation protect the suspects.

References

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- [2] Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2.
- [3] Paragraph 1, Article 6 of European Convention of Human Rights is similar to Paragraph 1, Article 14 of ICCPR. It says: "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 by an independent and impartial tribunal established by law....."
- [4] *Engel and others v. Netherlands*, Judgment of 8 June 1976, Series A, No.22; (1979-80)1 European Human Rights Report 647, §82.
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