

# Rethinking and Reshaping the Right to Counsel in China: under the Perspective of Anti-corruption

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**Abstract:** For countering rampant corruption, a blueprint in China for rebuilding the anti-corruption mechanism had been drawn. A brand new national institution, National Supervisory Commission, under the constitutional structure, had been set up in 2018. The function of National Supervisory Commission will focus on fighting against corruption. The Reform of the National Supervisory mechanism should be considered as an opportunity to ameliorate and reshape the status quo of the right to counsel for balancing the value conflict between human rights and anti-corruption, focus on topic of the right to counsel in a global scenario and reshape the mechanism of the right to counsel in China by assimilating the quintessence of the legislations from the whole international community, indicate precisely the maximum time limitation for delay of the right to counsel, and enshrine the legal consequence of violating the right to counsel, otherwise, the evidence will be inadmissible before the court.

## 1. Introduction

The achievement of anti-corruption campaign of China was remarkable, at the same time, such campaign triggered a reform in anti-corruption regime, National Supervisory Commission, a new national institution will instead the People's Procuratorate to investigate corruption, which will be empowered more power contains *quasi* coercive measures to realize the goal. In other words, the principle of protecting human rights, which was enshrined in the criminal procedure law, is facing a challenge: the investigative activities of the Commission may go beyond the criminal procedure law.

Date back to 2012, the principle of respecting and protecting human rights was introduced in Article 2 of the criminal procedure law of China. Meanwhile, the code provides that the counsels of the suspects of extraordinarily significant bribery are subject to the permission of the investigation authority, which is the People's Procuratorate, rather than the court. Further, Supervision Law of the People's Republic of China entry into force in 2018, which leaves a legislative gap for the right to counsel. However, for all the criminal suspects, in general, the right to counsel should be exercised immediately, directly and unconditionally [1]. In this context, conflicts between combating corruption and protecting the fundamental rights are inevitable.

By virtue of the International Covenant on Civil and Political Rights, the sole justification of derogating the right to counsel was stipulated in Article 4[2], which is merely the public emergency. Otherwise, the right to counsel cannot derogated arbitrarily. This principle had been transferred into the domestic laws spread all over the world. However, under the background of anti-corruption, the preliminary matter is whether the derogation of the right to counsel could be justified by anti-corruption.

### 1.1 Description on the right to counsel.

The criminal procedure law embraces dual values. First of all, the criminal procedure law could be deemed as a tool to combating the crime, an internal matter[3]. Secondly, but most significant, the law is to protecting human rights, particularly, is to prevent innocent person suffering from unfair trial. The right to counsel, a subset of human right, the cornerstone of the criminal procedure.

The definition of the right to counsel is that, normally, the suspects or the accused are entitled to access to the legal assistance. Generally, such right is regarded as an indispensable part of the right to a fair trial. Lawyers in criminal cases are necessities, not luxuries [4], as Justice Hugo Black argued.

Actually, the right to counsel is different from country to country. In US, typical common law country, to some extent, the mechanism of right to counsel in US should be considered as a paradigm, which associated with Lockean liberal values, restraint of state power, which appeared “to best safeguard the individual against state abuses” and given the maximum protection to the accused [5], the right to counsel is a part of constitutional rights. The legal basis of the right to counsel is The Sixth Amendment to the United States Constitution, which provides that the accused shall enjoy the right to have the assistance of counsel for his defence in any criminal prosecutions [6]. And the right is a symbol of due process which is enshrined by the Miranda Rule. Further more, the time beginning to exercise the right is when the standard of “critical stage” were met [7].

In Italy, the right to counsel had been considered as an absolute fundamental right which cannot be derogated by any excuse. Particularly, during the interrogation, any self-incriminating statements without counsel at present are inadmissible in court [8]. The *indagato* (the suspects) are endowed the right to counsel at the very beginning of the criminal procedure [9], preliminary investigations, which is under the surveillance of the court. In Italian Constitution, the right of defence is enshrined in the article 24, the right of defence is inviolable at every stage of proceeding. In order to assess the respect of those provisions the judge must analyze each act of the prosecutor during the trial, also before. In any case the Constitutional Court affirmed that prosecutor and police collecting evidences also through interrogation must respect the article 24 of the Constitution and ensure the right with the lawyer at present.

The most brilliant paradigm is the International Covenant on Civil and Political Rights, which stipulated a minimum standard of protection of the suspects in Article 14(3). Significantly, the right to communicate with counsel, a chosen one [10], is embraced. The right to counsel creates a fair game between the suspects and the public prosecutors by balancing their status equally. In a word, the truth could not be distorted by the realization of the right to counsel. On the contrary, the truth needs a kind of competition mechanism to make the truth finding process more effective.

## **1.2 Justification of derogating the right to counsel.**

The right to counsel is an ancient right which cannot be derogated arbitrarily. However, nothing is changeless, as an international consensus, in December 1966, the International Covenant on Civil and Political Rights stipulated justification of derogating the right to counsel in article 4, which is solely public emergency.

First of all, there are some crucial right cannot be derogated in any circumstances, such as the right to life, the prohibition of torture, etc. Meanwhile, the Covenant gives a certain definition of the public emergency, which is a situation threatens the life of the nation. What is more, such threaten must be exceptionally, actually, seriously enough, affects the whole of the population, or the territorial integrity of the State, likely wise, and even economic difficulties cannot meet the requirements. Further, the formal requirements should be satisfied, which is official proclaim, which means officious statement cannot meet the requirements to justify the derogation [11].

In December 1988, to enhance the level of the protection of human rights of the persons under detention, UN adopted a Resolution of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which also giving some inspiration of the right to counsel, Principle 18, sub3. enshrined some rights of both detained person and imprisoned person who have three categories of rights of the legal assistance, the right to be visited, right to counsel and right to communicate, all these rights should be exercised in full confidentiality, and without censorship.

Meanwhile, several derogations of these rights can be justified when the stringent conditions are satisfied. The first, the certain situation has to be specified by law or lawful regulations. The second, a judicial or other authority, which is defined as *impartiality and independence* authority by the Resolution. The crucial question here is that the standard of an *impartiality and independence*

authority cannot be merely interpreted as an authority which empowered by law, the most significant feature is *impartiality and independence*, which means cannot be *arbitrary and discriminatory*. And, the third condition could be considered as substantive element, the aim of the derogation is to keep *security and good order*. Here the question is that what is the exactly meaning of *good order* or whether the *good order* could be interpreted in a broad way? Moreover, the last provision of the Resolution explicitly provide that this Resolution cannot use to justify any derogation from any right stemming from the International Covenant on Civil and Political Rights[12]. If the *good order* exceed its boundary and overlapping with some rights, which are stemming from the Covenant, such as right to counsel, consequently, it will be incompatible with the Covenant. In a word, the *good order* has to be narrowed down to the extremely serious degree which constitute an actual danger to the public order rather than a normal one.

In the light of the foregoing, the right to counsel should be given a divine statue among the whole bundle of rights of criminal procedure.

## **2. Similar Regimes in a Global Senario**

### **2.1 The UK.**

The basic idea of Lockean constituted the root of the adversarial model, especially, deep rooted in Anglo-American legal system, which has a tradition of adversarial procedure and pays more attention to protect the rights of suspects. “The creed that the individual enjoys natural or inalienable rights that a state may not infringe has a long history. It appeared in the writings of medieval natural law and Enlightenment philosophers throughout Europe” [13]. In the light of the Police and Criminal Evidence Act 1984, article 58, clearly outline the right to counsel of the suspects so called access to legal advice, and specified the details of the delay of the right. However, The legislation of the UK has not met the requirement of the UN, especially, the decision of the delay could be made by the police officers, and it is contrary with the doctrine of impartial and independent, obviously. However, in practice, the delay of right to counsel almost has never ever happened [14]. The most important element of the UK legislation is the maximum time limitation. “In any case he must be permitted to consult a solicitor within 36 hours from the relevant time” [15]. The maximum time limitation could be considered as a most useful mechanism to restrain the power of the state, which makes the investigation more effective.

### **2.2 France.**

French set rules to derogate the right to counsel in te criminal procedure law solely concerning the organized crime, drug trafficking, terrorist. All these three categories of crimes are compatible with the standard of the UN. The crime of the terrorist could be considered as public emergency and security; drug trafficking is concerned with good order; organized crime could be interpreted into all the three exceptions, because both the drug trafficking and terrorist usually are organized crime, simultaneously. Coincidentally, the maximum time limit is also enshrined in the legislation. In the organized crime case, the lawyer can participants the procedure after 36 hours; in drug trafficking or terrorist crimes, the lawyer can participates in the procedure after 72 hours only [16].

### **2.3 Germany.**

In light of German criminal procedure law, Article 138 stipulated the exclusion of defense counsel, What is noteworthy is that it focuses on the counsel’s fault behaviors, such as the counsel is strongly suspected of involved in the offense which constitutes the subject of investigation, or abusing the right of communication in the purpose of committing a crime or handling stolen goods, etc. Moreover, for protection of national security, defense counsel will also be excluded for endangering national security. The most significant issue is that, In the light of Section 138c, the decision of the exclusion of defense counsel shall be given by the court [17]. Even if the public prosecutor just play the role as a commander to conduct the investigation, rather than a investigator, the decision also has to be made by the court in order to make sure the decision is compatible with

the doctrine of *impartial* and *independent*. Obviously, German legislation does not restrict the suspects who want to meet the counsel, which means the right to counsel is fully realized. However, the lawyer's fault behavior will be strictly restricted, such as collusion. At the same time, the derogation is only on the spectrums of counterterrorism and national security, and which is specified by the penal code, rather than general and vague.

## 2.4 The UN.

As mentioned before, the right to counsel was enshrined not only in the International Covenant on Civil and Political Rights and the Resolution of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment as mentioned before, but also be stipulated in the Basic Principles on the Role of Lawyers, article 3, principle of nondiscrimination, conjunction with article 7, 48 hours should be considered as the “cap” concerning the maximum time limitation of the right to counsel. Which means the maximum time limitation cannot exceed 48hours [17]. It's notable that the principle of nondiscrimination, under the well established case law in US, *Gideon v. Wainwright* 372 U.S. 335 (1963), the doctrine of nondiscrimination comprised nondiscrimination of the guilty of charge, “regardless of the charges against them or the specific criminal case at issue”.

The most significant convention in the spectrum of anti-corruption is the United Nations Convention against Corruption. China is also a contracting party enjoys the rights and carries out the obligations at the same time. The most vital mechanisms are extradition and asset recovery. The right to counsel is concerning with the extradition. In the light of Article 44 of the UNCAC, particularly, sub (14)[18], the treatment of the suspects cannot less favor than the present resident country, which means the standard of the criminal procedure is based on the original country, rather than the destination country. However, if the domestic law of the destination country, China, the level of access the right to counsel were lower than the original country, consequently, the criminal procedure law itself will become a “obstruction”. In order to accelerate the campaign of anti-corruption, it's necessary for China to open the gate widely for the right to counsel.

Compare with Germany, the UK or France, the document of the UN, the general principle of right to counsel is unconditionally and immediately, however, in order to protect some significant interests of the nation, time limitation was introduced concisely and precisely, especially, the maximum of the time limitation is usually 36 or 72 hours.

Table 1

	UN	UK	France		Germany
Justification	Public emergency , Security and good order	An indictable offence and authorized.	Organized crime	Drug offense or Terrorist crime	Exclusion of Defense Counsel: Abusing communication or being involved in certain offense.
Maximum time limitation	48hours	36hours	36hours	72hours	Moreover, national security

## 3. A comprehensive approach for improving the right to counsel

The procedural justice will make more efficiency of fact finding, rather than hindering. In the near future, National Supervisory Commission should also show more respect to the right to counsel of the suspects universally.

### 3.1 Maximum time limitation.

Maximum time limitation refers to the investigation department, such as National Supervisory Commission, may be vested priority to exclude the right to counsel of the suspects of certain categories crime in a specific time, nevertheless, the priority should be regulated strictly. Such mechanism is the most reasonable way to derogate the right to counsel, explicitly stipulated the

maximum time limitation, 36hours, 48hours or 72hours.

### **3.2 Unequivocal benchmark of exception.**

Any restriction of the fundamental rights must be unequivocal and unambiguous. Actually, the aim of such exceptional restriction is protect the interests situated in the higher hierarchy than the right to counsel, “the obstruction to the investigation” may only derogated by the value in a higher hierarchy, such as national security and public order, protection of the victim, or prevention of collusion. Accordingly, the interpretation of “the obstacles or interferences” should be narrowed down as follows: firstly, access the right may lead to a any new crime, *inter alia*, retaliate against a victim, informant, or accuser, etc. Secondly, destroy or forge evidence, interfere with the testimony of a witness, or make a false confession in collusion. Thirdly, leak the information of the suspects to other person who at liberty but having committed such an offence. Include the escape of the partners in the same crime, etc.

### **3.3 Burden of proof (*onus probandi*) for derogating the right to counsel should be undertaken by the National Supervisory Commission.**

The reasonable distribution of the burden of proof is considered as a symbol of justice. Meanwhile, the allocation of the burden of proof highlights the protection of the weaker party. The investigator of National Supervisory Commission shall also have to prove that the right to counsel will lead to “the obstruction of the investigation” which mentioned above. Further, the standard of proof should be regulated strictly, and the standard should achieve *Preponderance of the evidence or Balance of probability*.

### **3.4 Remedy of the court.**

The most important condition is that the judicial or other authority which is defined as an *impartiality* and *independence* authority. There is no doubt that the court is the classical neutral party in the judicial system. The judicial remedies of the criminal procedure law should be established to fill the loophole of the remedy mechanism. Of course, the most important issue is enshrining the right to counsel explicitly in the criminal procedure law even in the constitution law to establish the legal basis of the right to counsel. Finally, the most classic legal consequences of violating the right of counsel is, similar with the legislation of Italy, the evidence collected by the investigation department without the right to counsel of the suspects will be regarded as invalid evidence by the court.

## **References**

- [1] “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.” *Rothgery v. Gillespie County*, 554 U.S. Slip Opinion, p. 20
- [2] Information on: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- [3] AMANN Diane Marie. Harmonic Convergence? Constitutional Criminal Procedure in an International Context [J]. *Indiana Law Journal*, 2000, 75:809, 810.
- [4] Information on: <http://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-gideon-v-wainwright>
- [5] ELISABETTA Grande. Italian Criminal Justice: Borrowing and Resistance [J]. *The American Journal of Comparative Law*, 2000, 48:227, 228.
- [6] Information on: <https://www.law.cornell.edu/constitution/overview>
- [7] Information on: <https://caselaw.findlaw.com/us-supreme-court/554/191.html>.

[8] Articles 63 of the Italian Code of Criminal Procedure.

[9] Id. Articles 391-bis.

[10] Article 14(3). [.....] everyone shall be entitled to the following minimum guarantees, in full equality: (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

[11] Information on: <http://hrlibrary.umn.edu/instree/siracusaprinciples.html>

[12] Information on: <http://www.un.org/documents/ga/res/43/a43r173.htm>

[13] Menon P K. The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine [J]. J.transnatl L. & Poly, 1992:151, 154-55.

[14] JEFFRY, Wilson. The criminal judicial procedure in the UK[M].2003: 89.

[15] Police and Criminal Evidence Act 1984(PACE), Article58.

[16] Information on: <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>

[17] Information on: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>

[18] Information on: <http://www.unodc.org/unodc/en/treaties/CAC/>