



COMPARATIVE STUDY OF BAIL

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Executive Summary

Pre-trial procedure as the very first beginning of criminal procedure can be the very stage in interrupting individuals' rights since criminal investigations mostly happen in this procedure, and the possibility of abusing criminal suspects is much higher. For theoretical aspect, an individual's liberty is restricted if they are remanded even before judgment from courts challenge a modern practice of criminal justice. Moreover, the large number of pre-trial detainees burden state budget so much, which causes deteriorated facilities, shortage of staff of detention centers or prisons and worsen criminal suspect's health situations. Naturally, how to reduce pre-trial detention grasp international attentions, and bail mechanism is introduced into these countries which have a demand of transforming their criminal procedures.

The main research methods used in this article are empirical studying and comparing studying. This article checks the decision making body, grounds of deciding bail, and remedy of bail so as to make some contributions to higher application rate of bail in China.

1. Introduction

In 2006, an estimated 7.4 million people around the world were held in detention while awaiting trials¹. It has been well-known that “everyone charged with a penal offense shall have the right to be presumed of innocence until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”² How can such a big number of people be detained in prisons before being proven guilty? This astonishing number is enough to cause every country’s attention in approving the situation during criminal procedures.

Bail, among the most common practiced methods, plays significant role in reducing pre-trial detentions. On the other side, “The bail/ custody decision raises some of the most conflicts in the whole criminal process. On the one hand there is the individual rights to liberty, safeguard by Article 5 of the Convention, and the interest of a person arrested and charged with an offence in remaining at liberty until the trial has taken place. On the other hand, there is a public interest in security and in ensuring protection from crime.”³ How to recognize the relations between the two, and then how to deal with both guarantee of human rights substantially also ensure the smoothly going of criminal procedures are of great meanings and guiding.

¹ The data comes from the Justice Initiatives, the Publication of the Open Society Justice Initiative, spring 2008. Available at http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial_20080513. The last log in date is 29th Nov. 2009.

² Article 11(1) of Universal Declaration of Human Rights, see <http://un.org/Overview/rights.html>.

³ Andrew Ashworth, Mike Redmayne.: The Criminal Process (Oxford University Press, third edition) pp 207.

In the year 2004, the Amendment put the “respect and protect of human right” into the Constitution of China, which shows the wonderful intentions of improving human rights situation in China. Naturally, practical issues of protection of human rights in different aspects are on the agenda, among which is the criminal procedure, especially the pre-trial detention. As a Human Rights LLM in CEU from China, I want to make my best contribution to my home country’s legal reform and human rights protection. The beginning is to dig into the research of bail so find out the practical ways in dealing with reduction of pre-trial detention by higher application of bail. Something has to be clarified here is that, of course, bail is not the only way to reduce pre-trial detention. However, at present criminal regulations, only the bail may in a large scale help in solving the problems, and the bail itself has huge problems.

In this paper, I am going to have a close review of the bail system in U.K, U.S.A, China, Mexico, South Africa, and Ukraine, compare them, find out how the bail is working in different countries, also the legal cultures which are working behind the bail, so as to review specifically the status quo of bail, which is the one of the most important pre-trial procedures in China, also analyse the reasons why application rate of bail is low, finally initiate possible resolutions.

The main method here used is the comparative method. Through the comparing of the structure, such like the decision-making, grounds on which to make decision, principles on which to practice bail in different countries so as to find out detailed issues about bail. Also, empirical method is used in this article. Specific numbers, relevant data will be given for the analyzing the issues.

2. Overall Review of bail

2.1 The definition and specific forms of bail

2.1.1 Definitions

Bail is release by the police, Magistrates' court, or Crown Court of a person held in legal custody while awaiting trial or appealing against a criminal conviction. And The Bail Act of 1976 of UK defines that: bail in criminal proceedings means—(a)bail grantable in or in connection with proceedings for an offence to a person who is accused or convicted of the offence, or (b)bail grantable in connection with an offence to a person who is under arrest for the offence or for whose arrest for the offence a warrant (endorsed for bail) is being issued.(2)In this Act bail means bail grantable under the law (including common law) for the time being in force.⁴

2.1.2 Forms of bail

Conditions may be imposed on a person released on bail by the police. A person guaranteed bail undertakes to pay a specified sum to the court if he fails to appear on the date set by the court. This is known as bail in one's own recognizance. Often, the court also requires guarantors (known as sureties) to undertake to procure the accused or to forfeit the sum fixed by the court if they fail to do so. In these circumstances, the bailed person is, in theory, released into the custody of the sureties. Judges have wide discretionary powers as to whether or not bail should be granted and for the sum. Normally an accused is granted bail unless it is likely that he will abscond, or

⁴ http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1976/cukpga_19760063_en_1#pb1-l1g1. The last log in date is 3rd Nov. 2009.

interference with witnesses, or unless he is accused of murder, attempted murder, manslaughter, rape, or attempted rape and has a previous conviction for such an offense. The accused, and the prosecution in limited circumstances, may appeal.”⁵ the direct quota from the Oxford dictionary gives a very generally introduction of bail, also main feature of bail is to guarantee the suspect to appear in court or special time so as to make sure the smoothly going of criminal process. Also, the definition sorts out 2 different forms of bail like bail by a guarantor and bail by a sum of money. However, there is also bail with no conditions, which requires no financial guarantee or a guarantor. If categories according to the happening time in criminal procedure, then there is “street bail” in some countries which means “the power of an officer who arrests a person from an offence to release the arrestee on bail, to report to a police station at a specified time”⁶; there is police bail “granted at the police station, pending the first court appearance”⁷; there is bail between first and final court appearance; there is bail pending an appeal against sentence, verdict; there is bail after conviction but before sentencing passed. It can be seen that bail is applied not only in the narrow sense of “pre-trial” stage, also before, during court procedure of first instance, second instance, appellate procedure.

⁵ Elizabeth A. Martin: Oxford Dictionary of Law (Oxford University Press, 5th Edition, 2002) pp 43.

⁶ Andrew Ashworth, Mike Redmayne: The Criminal Process (Oxford University Press, third edition) pp 207.

⁷ Ibid. 207.

2.2 *The nature of bail*

First and for most, bail is not a punishment, should not be used as a legal tool to punish a defendant during the period before a court convict him.⁸ It is a procedural guarantee for criminal suspects or criminal defendants to appear before court to be trialed by law guided under the principle of presumption of innocence rather than a punishment anyway.

Second, under common law system, bail has been recognized as a right belongs to individuals. Without enough evidences and going through legal procedures, the right can not be deprived. So it is usually seen that legislations are enacted in the pattern of except certain conditions, an individual can not be detained. For example, English law is largely governed by the Bail Act 1976, along with some important later additions. Section 4 (1) provides that a defendant shall be granted bail except as provided with in Sch 1 to this Act’.

There is a controversial point here whether it is an absolute right not to be detained in pre-trial stage. It has been alleged that courts have indulged in ‘punitive remands’ remanding a person in custody when it is known full well that a custodial sentence would not be appropriate on conviction. Remand for these reasons is plainly an abuse.⁹

In Rose Case (1898) 78 LT 119, Lord Russell stated that “it can not be too strongly

⁸ Also see Christopher S. Hall: Review of Selected 1997 California Legislation: Restricting Bail Adjustment for Persons Charged with a Serious Felony, McGeorge School of Law , University of the Pacific McGeorge Law Review. The author cited Re Ruef, 7 Cal, App. 750,752, 96P. 24, 25(1905) (stating “bail should be extracted to set bail at any amount that he or she considers sufficient to assure the defendant’s appearances”).

⁹ Andrew Ashworth, Mike Redmayne: The Criminal Process (Oxford University Press, third edition) pp 210.

impressed on the magistracy that bail is not to be withheld as a punishment but that the requirements as to bail are merely to secure the attendance of the prisoner at his trial.”

In the *U.S. v. Salerno*, 481 U.S. 739, 754-55 (1987) case, the Supreme Court of the U.S confirmed that the 8th Amendment was not violated by denial of bail and resulting pretrial detention solely on grounds that defendant was dangerous to community because 8th Amendment does not grant absolute right to bail); The Eighth Amendment does not prevent Congress from defining the classes of cases in which bail is available. *See Salerno*, 481 U.S. at 754; *see, e.g., U.S. v. Bilanzich*, 771 F.2d 292, 299 (7th Cir. 1985) (Congress may restrict category of bailable cases).

2.3 The origin of bail

Generally speaking, the modern practice of bail originated from U.K. the long time performed history of bail in U.K. also showed that common citizens accept this kind of method in criminal procedures. However, it is much different in China. Common citizen believe that it is not fair if a person who has committed a crime can live as normal. And officers are afraid of being scared by public if bailees commit further crimes endangering society. The comparing and the affects towards bail practice will be given in following sections of this article.

2.4 The reasons for bail

2.4.1 Theoretical reasons for bail

1) It follows the principle of presumption of innocence. Presumption of innocent can be expressed in the way that a criminal suspect or criminal defendant can not be presumed

guilty before convicted by courts. Of course, the meaning of presumption of innocence is much more abundant, which has been recognized as one of the cornerstone of criminal process, such as Nicola Lacey and Celia Wells took with rule of law as the main doctrine which informs discussions of due process in criminal law.¹⁰ Presumption of innocence is a direction to officials about how they are to proceed, not a prediction of outcome.¹¹

It May be one of the reasons for the difficulty to raise up the application rate of bail in China is because that if we take the background picture including legal culture, social appreciation as a very board one, “It is clearly that the ‘presumption of innocence’ in this sense finds little support, in any, in Communist societies.”¹² All the structural constructions in criminal procedure are mainly for the purpose of finding truth and punishing crimes instead of balancing with protecting criminal suspects’ human rights. I am not totally excluding the mechanism construction for individual rights protection, such as the policeman shall collect evidences about the criminal suspect is guilty, also these evidences to show he is not guilty. All I want to say is that the main focus and attention are paid to the policeman and prosecutors, also the practice of state power, while individuals as criminal suspects are only objectives in criminal process which partly leads to the low successful application by individuals. I will further explain in the section about role playing in decision making process of bail.

¹⁰ Nicola Lacey and Celia Wells: *Reconstructing Criminal Law-Critical Perspectives on Crimes and the Criminal Process*, (Butterworths publication, second edition, 1998) pp 12.

¹¹ Ibid. 26.

¹² Barton L. Ingraham: *the Structure of Criminal Procedure, Laws and Pracitce of France, the Soviet Union, China and the United States* (Green Press) pp 6.

2) The balancing of personal liberty and social interest.

Bail is not an absolute right, which can be curtailed if certain conditions are met. Bail itself shows the balancing of personal interest and community interest. In common law system, bail is generally applied unless certain conditions barred from. Or we can call it bail as a principle, remand as an exception. Because detaining a person not only damages an individual's liberty, the society also pays for it. However, there are certain situations under which a criminal suspect may endanger the society, then he or she has to be remanded so as to keep the society safe. What is the balancing point and how to find them are crucial in getting both individuals and society protected. .

2.4.2 Practical reasons why bail

Untried prisoners on remand make up around one fifth of the prison population, and therefore contribute greatly to prison overcrowding. Conditions for defendants held on remand are amongst the worst that exist within the prison system. –in one institution prisoners have spent 18.5 hours a day in small cells lacking integral sanitations. Remand prisoners have played an active role in the sporadic outbreaks of rioting that have left some establishments (most notably Strangeways in April 1990) in smouldering ruins.¹³ Bail is also one of these solutions of the overcrowdings of detention centers.¹⁴ especially in countries with a large number of population like China. The detention centers, prisons are not enough.

¹³ See R Morgan and S Jones, Bail or Jail in E Stockdale and S Casale(eds), Criminal Justice Under Stress(London Blackstone 1992)

¹⁴ A prosecutor described the crowding situation as “they have no room to sit, all have to stand in the same gesture , one next to another. In a 20 square-meters room, there are more than 40 people there.” In an interview on the topic on pre-trial detention in China.

For the consideration of detainee's health considerations, bail is also a good choice.

One of the main reasons triggering detainees' health problems are still the over-crowd situations of the places where they are detained. Moreover, unqualified facility situations of these detaining centers make it even worse for individual's basic rights.

Another practical reason to release criminal suspect on bail is for the protecting the criminal suspects' family's social rights. Many detained persons are the main contributors to their families. One more day detained, one less day they can support their families, and much higher possibilities that their families are in serious living problems.

2.5 The reason why selecting U.K, U.S.A, Ukraine, Poland

UK is the country from which begins the modern legal concept of bail, also the legal practices of bail. At present, UK is also a typically a country whose bail application rate is rather high around the world.

Criminal procedures in USA are one of the models for other countries too. The bail system is brought in from UK, however, still some of its own characteristics, such like that the bail bondsmen mechanism. Moreover, the bail reform can provide with so much empirical data, successful experiences and lessons of failing to obtain reform targets. It will be put in the list from which to borrow experiences.

Ukraine used to be in Soviet Union, with all the characteristics of socialist legal system, which is also a good example of underwent legal reform, and then improved application of bail. Moreover, like most innovations in the post-Soviet world, the Ukrainian bail statute represents a compromise between the country's reformers and those elements of

society that remain resistant to changes, particularly Western ones. By chipping away at entrenched prosecutorial powers, the statute also invites resistance from those sectors of society that stand to lose privilege and prerogatives they have long taken for granted.¹⁵

Poland used to a Socialist state, of course with many same legal characteristics with Ukraine, China. Poland, Ukraine, China , all 3 countries had went through some sort of, some degree of criminal justice reform but still have problems in obtaining goals. Through comparing, some valuable information can be found out to make research more reasonable and practical.

2.6 International norms about pre-trial detention and bail

Since pre-trial detention and bail are so closely related to each other, and there are many international norms of bail regulated under the alternative of pre-trial detention, so I put the international norms about pre-trial detention and bail together. Namely these international norms are elucidated in:

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- European Convention on Human Rights

¹⁵ Christopher Lehmann: Bail Reform in Ukraine: Transplanting Western Legal Concepts to Post-Soviet Legal Systems, Harvard Human Rights Journal.pp228.Available at <http://www.law.harvard.edu/students/orgs/hrj/iss13/lehmann.shtml#fn20>. The last log in date is 29th Nov. 2009.

- United Nations Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), 1955 and 1977
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 1985
- Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Body of Principles), 1988
- Resolutions of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990
- United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, 1990
- United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), 1990
- Declaration on the Protection of All Persons From Enforced Disappearance, 1992
- Council of Europe's European Prison Rules (European Prison Rules), 1987.
- Convention on the Rights of the Child

Although not legally binding, Universal Declaration of Human Rights set up an important statement of the basic principles in the, namely, that deprivation of liberty should not be arbitrary, innocence should be presumed and an effective remedy should

be provided for any violation of a fundamental right¹⁶. Then These principles have been given more precise meaning in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) which both start with a clear presumption in favor of personal liberty and an insistence that any deprivation of it be specifically justified.¹⁷ Any arbitrary deprivation of is prohibited by then, and it is required that, once someone is detained on suspicion of involvement in a crime, he or she be brought promptly before a judge or judicial officer who is authorized to determine whether the person concerned can remain in custody.¹⁸ Furthermore, an indication of the need for the overall duration of any such deprivation of liberty to be closely controlled is found in their specific requirement that detained persons must be tried within a reasonable time.¹⁹ Both instruments also require that it should always be possible for the lawfulness of a deprivation of liberty to be challenged in a court.²⁰

The presumption of innocence is embodied in Article 14(2) of the ICCPR and Article 6(2) of the ECHR, which has clear implications for the way in which a detained person is to be treated. Furthermore, ICCPR is more specific on this issue, with a requirement that juveniles be kept separate from adults and that all unconvicted persons not be imprisoned with those who are convicted.²¹

¹⁶ Articles 8, 9 and 11 of Universal Declaration of Human Rights. Available at <http://www.un.org/en/documents/udhr/>. The last log in date is 29th Nov. 2009.

¹⁷ Article 9(1) ICCPR and Article 5(1) ECHR .

¹⁸ Article 9(1) and (3) ICCPR; Article 5(1) and (3) ECHR.

¹⁹ Article 9(3) ICCPR; Article 5(3) ECHR.

²⁰ Article 9(4) ICCPR, and Article 5(4) ECHR.

²¹ Article 10 ICCPR

Both of the instruments regulate a fair trial guarantee which requires adequate facilities to prepare a defense and access to legal assistance.²² This aspect provide with huge back up for international court jurisdictions especially before European Court of Human Rights. Fair trial right is such a huge basket, which extends from pre-trial stage until court trial procedure, covers the right to lawyers, the right to be trialed by an impartial court or independent organ, etc. Furthermore, fair trial right provisions must be implemented consistently with the prohibition of discrimination.²³

Some specific obligations with respect to the use of pre-trial detention in cases involving children are found in the Convention on the Rights of the Child. The provisions are generally applicable to anyone under eighteen years of age and they thus cover those persons whom criminal justice systems tend to treat as juveniles. the prohibition of unlawful or arbitrary deprivation of liberty in the case of children is prohibited, and particularly focus that detention - pre-trial or any other form - should be a measure of last resort and used for the shortest appropriate period of time where children are concerned.²⁴ It also requires that children deprived of liberty should be treated with humanity and dignity, with due account being taken of the needs of persons of their age.²⁵ There is a particular obligation to ensure that they are kept separately from adults unless it is considered in their best interest not to do so.²⁶

²² Article 14(3)(b) and (d) ICCPR and Article 6(3)(b) and (c) ECHR.

²³ Article 2(1) ICCPR and Article 14 ECHR.

²⁴ Article 37(b) Convention on the Rights of the Child.

²⁵ Article 37(c) Convention on the Rights of the Child.

²⁶ Ibid.

The UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)²⁷ governments should do their best to reduce pre-trial detentions. Especially that “pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offense and for the protection of society and the victim.” “Alternatives to pre-trial detention shall be employed as early a stage as possible. Pre-trial detention shall be no longer than necessary and shall be administered humanly and with respect for the inherent dignity of human beings. The offenders shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.”²⁸

This instrument encourages alternatives of pre-trial detention so as to have detention as the last resort, which refer to the more popular practice of alternatives of pre-trial detention. For grounds of decision, evidences for the alleged offense, protection of the society and the victim shall be taken into considerations. Moreover, the instrument clearly regulates that there should be a remedy for the rejection of pre-trial release.

Transcending from individual state’s own situations, international instruments usually regulate some framework principles or fundamental principles so as to leave space for each state to practice by their own characteristics. But, for these basic and fundamental principles, it shall be remembered and practiced to reduce pre-trial detentions, apply for alternative of pre-trial detention.

²⁷ United Nations Standard Minimum Rules for Non-custodial Measures, Rule 6 adopted by the General Assembly December 14, 1990.

²⁸ <http://www1.umn.edu/humanrts/instree/i6unsmr.htm>. The last log in date is 8th Nov. 2009.

3. Comparing specific components of bail system

3.1 Comparing decision-making of bail

3.1.1 It is for sure a little bit hard to generalize these organs which make decisions of bail since even within the same countries, situations may differ. Policemen may also be entitled to practice bail immediately after they find it unnecessary to continue procedures detaining suspects. For another reason, after the first time decision that the application of bail had been rejected, appellate procedures may be started so different level of courts are involved to move on criminal procedures, which means even within the model that courts deciding on the issue, still too many pictures to portrait.

For the purpose of this article, the reason why I write this section in such a way is to illustrate 2 things. First, a general idea of a totally independent organ which rules on the bail in comparing with China; second, the role playing of policemen, prosecutors, magistrate court judges, appellate court judges in the process of making the bail decisions.

3.1.2 How to make the decision

1) “in Zander’s study of London Courts, the amount of time spent in discussing whether defendant should retain their liberty was five minutes or less in 86% of the 261 remand cases observed”²⁹ “even where a remand in custody is sought, proceedings are rapid. As many as 60% of such decisions in Zander’s study were reached within 5 minutes.”³⁰ the hearing procedure is really quick. How to make sure criminal suspects

²⁹ M Zander, *Operational of the Bail Act in London Magistrates Courts* (1979) 129 NLJ 108.

³⁰ Ibid.

have time to state his own reasons? Only review of these written documents in checking how much money they have, which crimes they have been suspected are enough?

2) Policemen's or prosecutors' role in bail

“Most remand hearings are uncontested. Hucklesby’s study of 1,524 remand hearings found that in around 85% of cases the CPS did not request a remand in custody. And in only just over a half of all cases where the CPS requested a remand in custody was this opposed by the defence. It is very rare for magistrates to question these agreed proposals. Hucklesby therefore argues that the real decision-makers are the police (who make recommendations to the CPS), the CPS and defense lawyers. She found that in virtually every case where unconditional bail was recommended by CPS, this was granted; in virtually every case where conditional bail was recommended by CPS, this was granted too. And although police or prosecution objections to bail are not invariably upheld by magistrates, unconditional bail is hardly ever granted when bail is opposed. In one respect the analysis by Hucklesby is thin. When she argues that the lack of adversarialism indicates that magistrates are less active in decision-making than are police, CPS and lawyers, she does not refer to her own findings elsewhere that these professionals know their local courts and tailor their application accordingly. In other words, CPS will apply for remands in custody in certain types of borderline cases in some courts but not others, and defense solicitors will oppose this more in some courts than others.” The above example shows the difficulties in analyzing a country’s bail application rate as a whole, because there is a territorial difference³¹, also the practical

³¹ Especially in China, a huge country in which differs very much in the eastern part of China and

problem of collecting data, especially in analysing the role of policemen in bail. However, by Professor M. J. DOHERTY and R. EAST, they found that It was found that the role of the police was of less significance than in previous Studies and that the basic legal provisions were the dominant factor in many decisions.³²

3) In Poland , the official statistics prepared by the Ministry of Justice for years 2001-2007 show that approximately 90% of the motions' of the prosecutor for an application of the pre-trial detention are allowed by courts. It means that per year courts use pre-trial detention in approximately 40 000 cases (the lowest number was in 2002 - 36 230 cases, the highest in 2001 – 42 185 cases).

Courts of second instance very seldom, if ever, changed decisions of district courts. For example, prosecutor submitted 282 motions for the application of pre-trial detention to the District Court in Ostrołęka. Only 23 of them were dismissed. The court of second instance which examined complaints in 93 cases, did not allow any of them. Furthermore, report from two district courts contained information concerning the length of detention. Even if most of the pre-trial detentions were for period of less than three months, in most cases the courts applied the maximum three month detention limit allowed by law, and not limited it to 1 month or 2 months.³³

What is more, the number of the judgments in which the Court has found violation of

Wester part of China. Also great differences between big cities such like Beijing, Shanghai , Guangzhou, Shenzhen, Nanjing and other cities, also between city and rural areas.

³² M. J. Doherty and R. East: Bail Decisions In Magistrates' Courts Brit. J. Criminal Vol 25, July 1985.

³³. Written Comments towards Władysław JAMROŹY v. Poland (Application no. 6093/04) , by Helsinki Foudantion for Human Rights , on 4 March 2008

Article 5 § 3 of the Convention on account of the excessive length of pre-trial detention by Poland is continuously growing. There are over 70 judgments in which the Court has found such violation with regard to Poland. The problem of the use of pre-trial detention in Poland has been noted by Council of Europe in the Committee of Ministers' Interim Resolution CM/ResDH(2007)75 concerning the judgments of the ECHR in 44 cases against Poland relating to the excessive length of pre-trial detention adopted on 6 June 2007. Despite different questions raised in this document Polish authorities has not undertaken yet sufficiently comprehensive plan of action to eliminate this problem.³⁴

4) In China, it is the public security organs, people's procuratorate, people's courts, national security organ, which can make the decisions of bail in accordance with the specific situations. This is a parallel structure, but also involves in supervision and work division.³⁵ For these cases concerning with national security, national security organs decide, practice, execute bail all by themselves. In this article, I want to exclude this part of cases, just focus on criminal cases and bail decision for criminal suspects.

Policemen can directly decide to release a criminal suspect on bail or not, they do not have to go before a judge nor a prosecutor for permission again. After criminal investigation, they send the case to people's procuratorate for reviewing to initiate

³⁴ Ibid.

³⁵ Under Chinese criminal mechanism, People's Procuratorate make decision of arresting criminal suspects if these cases are investigated by themselves. These categories of cases include corruptions cases, malfeasance cases, etc regulated by criminal procedure law and relevant interpretations. People's Procuratorate also ratify public security organ's application to arrest criminal suspects for these cases investigated by public securities organs that are the majority of criminal cases in legal practices.

It has to be mentioned that all execution of bail is supervised by policemen, whoever decides bail except these cases involving in state securities.

public prosecutions. Prosecutors usually do not change the status of detention to bail or surveillance of residence voluntarily even if it is their duty to check relevant information.

3.1.3 The conclusion for this section

One of the most fundamental differences between western model and Chinese is that Chinese policemen enjoy wider powers in restricting individuals' liberty, less confinements in limiting individuals' personal rights. They do not need to go to judges to issue themselves a warrant so as to detain suspects. They can directly decide whether detain criminal suspects or bail them without getting judges involved. Of course, when a criminal case move to trial procedure, Chinese judges still can decide again for whether bail these criminal suspects or not. However, in reality, they usually neglect to check this aspect.

Another apparent feature is that judges in US, UK are involved in deciding whether bail criminal suspects or not, further the form of bail; however, in China, criminal suspects are directly and finally decided by criminal investigation organs that are also in charge of investigating the same cases. There is not another independent organ which evaluates, reviews, or gives independent opinions of bail decisions.

From Poland's data, it can be seen that judges are quite conservative in reviewing bail decision. They are not willing to change decisions. Therefore, only reforming of making courts decide on bails can not make sure the quality of bail decision. Back-up education about bail, information provided mechanism, must also be set up so as to make suitable decisions.

3.2 Comparing the grounds on what can decide bail

3.2.1 UK, USA's legal practices.

1) Personal, social situation of the defendant.

The courts will take the character, antecedents, employment history, family root, associations, and community ties of the defendants into consideration for approval of bail. Because generally speaking, people believe that these homeless or in contemporary residence³⁶ have higher risks of fleeing.

2) "Nature and seriousness of the offence or default" (or probably method of dealing with the offender for it)³⁷ for this issue, the Strasburg Court has "warned against a general assumption of dealing that the seriousness of the charge increases the risk of this defendant absconding"³⁸. Also, in U.K, U.S, courts always check this aspect so as to decide whether approve bail or not.

3) Article 4 of the Act has been described as the principle of the bail, which regulates that "a person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act." The defendant need not be granted bail if the court is satisfied with that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would (a) fail to surrender to custody, or (b)

³⁶ Especially in china, there are a great number of migrant workers(also translated into farmer workers) who are living and working in metropolitan cities in China such like Beijing, Shanghai ,Guangzhou, Shenzhen, they are recognized basically and generally as the persons who can not be bailed because they have less community ties.

³⁷ Andrew Ashworth, Mike Redmayne: *The Criminal Process* (Oxford University Press , third edition) pp 216.

³⁸ Yagci and Sargin v. Turkey (1992) 20EHRR 505, para 52.

commit an offence while on bail, or (c) interference with witness or other wise obstruct the course of justice, whether in relation to himself or any other person).

These grounds correspond broadly with those approved by the European Court of Human Rights in its development of Article 5(3), and have a loose affinity with those subsequently incorporated in the Bail Reform Act of 1984 in the U.S.³⁹

In the 1984 Bail Reform Act, because public fear that crimes committed by individuals out on bail, the enactments of legislation put preventive detention in the Federal Bail Act of 1984.

4) Personal character, antecedents, associations and community ties of the defendant are usually considerations taken by decision makers. And Strasbourg Court has signaled the need for courts to avoid stereotype reasoning and therefore not to make assumptions simply on the basis of a criminal record.⁴⁰

3.2.2 China's situations on the conditions for bail

³⁹ Andrew Ashworth, Mike Redmayne: *The Criminal Process* (Oxford University Press, third edition) pp 215. In the footnote of the book, the author also comments on the 1984 Bail Reform Act that "the US Act refers to a serious risk that the defendant will flee or will obstruct justice; or where the case involves a crime of violence (very broadly defined) a major drug offence or any crime punishable by life imprisonment; or where the case involves a felony against someone previously convicted of two offences in the above categories"

⁴⁰ Andrew Ashworth, Mike Redmayne: *The Criminal Process* (Oxford University Press, third edition) pp 216.

There are 5 compulsory measures in China⁴¹, among which the severity of limitation of freedom and rights of a person lies in the 3 last after arrest and surveillance of residence. Bail functions in 2 aspects in legal practices. First is to guarantee a person appear in court to be trialled, the other is the alternative approach of detention when relevant time period is expelled such as the possible punishment by court is less severe or shorter than detention. It is so important and also interesting about this piece of regulation, I will directly put the articles about the conditions for bail. The Article 51 regulates that “Article 51 The People's Courts, the People's Procuratorates and the public security organs may allow criminal suspects or defendants under any of the following conditions to obtain a guarantor pending trial or subject them to residential surveillance:

- (1) They may be sentenced to public surveillance, criminal detention or simply imposed with supplementary punishments; or
- (2) They may be imposed with a punishment of fixed-term imprisonment at least and would not endanger society if they are allowed to obtain a guarantor pending trial or are placed under residential surveillance.

⁴¹ Article 50 of Criminal Procedure Law, the People's Courts, the People's Procuratorates and the public security organs may, according to the circumstances of a case, issue a warrant to compel the appearance of the criminal suspect or defendant, order him to obtain a guarantor pending trial or subject him to residential surveillance. It has to be mentioned that there is not a binding law in the language of English, the official language is always Chinese, therefore, I just picked up one way of translation. And bail was translated as guarantor pending trial so as to make it even more clear that the understanding, appreciation of bail are very different between common law countries and China. it should be mentioned that the translation of legal binding documents will not affect the understanding of Chinese regulation correctly.

The public security organs shall execute the decision on allowing a criminal suspect or defendant to obtain a guarantor pending trial or on subjecting him to residential surveillance.”⁴²

Recently, in China, there is a criminal case⁴³ widely reported and spread through internet. In this case, pre-trial detention alternative is applied even if this girl might commit with a felony of murdering someone. It should not be neglected the policemen doing the criminal investigation found evidenced to show this woman did an excessive defense. However, even taking the panoramic view of this case, seldom under the situation can a criminal suspect be bailed in today's legal practices. As my understanding, one is because the case had been spread so widely, and citizens were so much caring it, for an another, policemen have already understand the role of bail at least in decorating themselves of protecting individual rights. At least, the case tells us that it is possible to bail criminal suspects who are suspected of committing felonies. It is not so unacceptable to have criminal suspects released on bail.

The following is some empirical data from a procuratorate in China so as to have a more detailed review of what effect bail decision.

⁴² <http://www.cecc.gov/pages/newLaws/criminalProcedureENG.php> . the last log in date is 29th Nov. 2009.

⁴³ A woman named Deng Yujiao killed a man while working in a club, and she was bailed even if concerned with killing.

	Education level of Primary school and below			Education level of middle school			Educational level of three-year diploma ⁴⁴ and the above		
	Cases and criminal suspects	Bailed	Percentage	Cases and criminal suspects	Bailed	Percentage	Cases and criminal suspects	Bailed	Percentage
2004	1015 cases, 1457 criminal suspects	177	12.1%	2347,3370	821	24.4%	461,560	263	47%
2005	1214 cases, 1678 criminal suspects	149	8.9%	2775 cases and 3916 criminal suspects	830	21.2%	434 cases and 545 criminal suspects	251	46.1%
2006	1006 cases and criminal suspects	117	8.1%	2679 cases, 3845 criminal suspects	695	18.1%	465 cases and 601 criminal suspects	247	41.1%

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⁴⁴ This education design is something like junior college, but in term of 3 years. In Chinese pinyin ,it is Dazhuan.

⁴⁵ Liu Zhongfa,Qi Jinsong, Zeng Jingyin: Survey on the Actualities of the Implementation of the Recongnizance on Bail, Journal of National Prosecutors College April 2008, Vol 16 No. 2. pp 107.

Educational level plays a very important role in deciding to be bailed or not. The following diagram also shows in this way. For the education level of primary school education and below , the application rate are 12.1%, 8.9%, 8.1% for the year 2004, 2005, 2006. for the same 3 years, relevant data are 24.4%, 21.2%, 18.1% for the educational level of middle school education, and 47%, 46.1%, 41.1% for three-year diploma and the higher education. It can be clearly seen that higher educational background can have better chanced of being bailed.

Gender also plays a role in getting bailed. From this diagram, it can be seen that female are much easier to be bailed than men. The reason might include that women committed less violent crimes, which causes less social harm.

	Male committing crimes			Female committing crimes		
	Cases and criminal suspects	bailed	Percentage	Cases and criminal suspects	Bailed	Percentage
2004	3293,4622 suspects	980	21.2%	530,765	281	36.7%
2005	3843cases, 5252criminal suspects	927	17.7%	580,887	303	34.2%
2006	3632,5093	804	15.8%	518,795	255	32.1%

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⁴⁶ Ibid. 109.

3.2.4 Comparing for this section

First, , it can be find that the so called “bail” is not used in the translation directly, instead, it is the guarantor pending trial , also, even if in Chinese, this a difference between the common law concept of bail and the guarantor pending trial .

Second, Chinese regulation on bail is in the shadow of the UK and USA’s regulation. The similar wording on the refusal of bail is the potential danger to the society. However, partly borrowing from the whole set of rules make the situation really embarrassed.

Third, the Chinese regulation is even wider than the UK and USA’s regulation. The requirement of “should not endanger society” is much wilder than the obstruction of justice, committing crimes again.

Fourth, the grounds for bail in China in restricting bail is much related to the possible punishment such as whether to be sentenced to fix-term imprisonment or not. It does not serve only for the purpose of making sure the criminal suspects will appear in court to be trailed. The standard of proof is closer to arresting, which make it even harder to practice bail.

Fifth, the selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, the background of the offender, the purposes of sentencing and the rights of

victims.⁴⁷ has not been practiced in China since there is not a clear process or mechanism in taking into personal information from different aspects into considerations.

3.3 comparing the relevant mechanism in guaranteeing bail

3.3.1 UK practice

There is not a uniform practice in UK. For the purpose of this article, 2 examples are given here. In some parts of the United Kingdom, bail supervision is undertaken by the local authority. For example, the bail supervision scheme run by the Knowsley Council seeks to ensure that persons released on bail obey relative obligations under bail. Especially, children and young people are safeguarded through their work.⁴⁸ In Edinburgh, Scottish capital, the city council's Social Work and Care Services, together with the voluntary agency Safeguarding Communities-Reducing Offending (SACRO) provides Edinburgh Sheriff Court with bail services. The service offers the court an alternative to remanding an accused person to prison, and reduces the likelihood of the person offending while on bail. Social workers provide Bail Information and Assessment reports for the Court, and SACRO workers provide bail accommodation and bail supervision.⁴⁹

3.3.2 USA practices

⁴⁷ 3.1 UN Guidelines for Treatment of Offenders. pp27 of the PDF form.

⁴⁸ http://www.justice.gov.uk/inspectorates/hmi-probation/docs/knowsley_yos_report-rps.pdf, the last log in date is 29th Nov. 2009.

⁴⁹ http://www.edinburgh.gov.uk/internet/social_care/criminal_offenders/alleged_offenders/CEC_bail_service. The last log in date is 29th Nov. 2009.

The same situation as UK, and there is not a uniformed practice in USA either. One example different from U.K. is given here.

Established in December of 1970, in March of 1984 Lehigh Valley Pretrial Services, Inc., was designated the Court Bail Agency for Lehigh County in order to provide bail supervision and bail recommendations. The Mission of Lehigh Valley Pretrial Services, Inc. is to administer the bail system in Lehigh County as established by Local Rule of Court: to investigate and provide recommendations concerning the bail risk of defendants; to monitor defendants released on bail supervision; and to inform the Court of any breach of conditions of release.⁵⁰

3.3.3 China's regulation and legal practices

It is the public security organs' responsibility to supervise the bailees. there are certain duties for bailees to obey like can not leave the district or the county he had been living, can not obstruct criminal justice by harassing witnesses, etc. in fact, the supervision is quite loose, because policemen know these criminal suspect may not be sentenced to fix-term imprisonment, and they will not run away. Also, since limited stuff, they can not have so much time in checking each individual.

3.3.4 Comparing for this section

The supervision organs differ; there is not a fix standard of making judicial branch or government in supervising bailees. A local government, a company can fulfill the duty, if they meet requirements of supervision work. Therefore, a country just need to find out their own way of structuring will be all right.

⁵⁰ <http://www.lccpa.org/criminal/pretrialservices/>. The last log in date is 29th Nov. 2009.

3.4 comparing the remedy of bail

3.4.1 The court should give grounds and reasoning why the bail is rejected

Whatever under common law system or civil law system, when a court rejects bail application, the court shall give the grounds on what the court based on to rule the rejection, also give reasoning ⁵¹, which is a very fundamental principle so as to provide with further possibility to challenge bail decisions.

3.4.2 Appeal against a refusal of bail

After the rejection of the bail, the defendant should have the right to appeal. In U.K, appeal may be made to the Crown Court under a procedure introduced in 1983, and solicitors enjoy a right of audience for this purpose. ⁵² Also, the converse of defendants appealing against the refusal of bail is the prosecution appealing against the grant. The Bail (amendment) Act 1993 empowers the prosecution the right to appeal against a grant of bail. The case for a prosecution power of appeal is strong in cases where there is thought to be a clear danger to individuals if the defendant is granted liberty, unless the power is shown to be used oppressively, it surely has a proper place in criminal procedure.⁵³

3.4.3 Basic characters of a remedy

⁵¹ Bail Act 1976, s5(3), for low rates of compliance in the early of 1990s, see A Hucklesby *Bail or Jail? The Practical Operation of the Bail Act 1976* (1996) 23 JLS 213-reasons only given for custodial remands in 47% of cases.

⁵² Criminal Justice Act 1982, s22.

⁵³ Andrew Ashworth, Mike Redmayne: *The Criminal Process* (Oxford University Press, third edition). pp 230.

Human rights violations committed by the state are quantitatively different from private injury because of the motives and nature of the conduct as well as the identity of the wrongdoer.⁵⁴

Even remedy for bail can not be a judicial one, it still can not exclude that other forms of independent remedies are provided with by laws or legal regulations. At least a remedy should have the following characters: 1) an independent organ reviews the case again; 2) there is a routine complaining procedure regulated accordingly, not to take some big guy' mercies; 3) the routine complaining procedure regulated shall be accessible, which requires there should not be too restrictive qualifications nor technical barriers to apply for it; 4) the routine complaining procedure must be efficient. It requires that people apply for a remedy can get prompt answers so as to possibly change the result.

3.4.4 China's remedy for bail

Once criminal suspects and their lawyers' application of bail have been rejected, there is not a remedy at all. There is not a review procedure in form of neither administrative procedure nor criminal procedure to check the result decided by relative Authorities. Definitely, there is not a judge or the third party to go through the procedure about how bail was decided, which issues was taken into considerations.

Since public security organs are a party of government which is governed by administrative law. However, it is clearly regulated that criminal procedure activities regulated by law are not subject to Administrative Procedure Law. From the case law,

⁵⁴ Page 50 of the textbook of Remedies in International Human Rights Law in CEU.

for sure, these activities in the name of criminal procedure activities, actually illegally abstract individual rights cannot be recognized as these activities exempted from Administrative Procedure Law, however, these decisions rejecting bail by legal procedures have no chance to be challenged under Administrative Procedure Law. So, this channel still does not work as a remedy for bail.

When the time limit of bail is due, bail does not lose its effect automatically, criminal suspects and their lawyers have the right to apply for the termination of bail. Then, the prosecutor chief shall be responsible for deciding finally.⁵⁵ All regulation refers to that criminal suspects and lawyers only have the chance to apply for the termination of bail, once their applications have been turned down, there is nothing they can do to challenge the result.

3.5 conclusion for this section

In western model, defendants in criminal proceedings generally are entitled to a prompt, often automatic, appearance before a magistrate or judge following their arrest, who will review the propriety of the arrest, and decide whether pre-trial detention or imposition of some forms of bail is appropriate.⁵⁶ For remedy issue, it means that a prompt

⁵⁵ According to Article 59 of Criminal Procedure Rules for People's Procuratorate, removing or cancelling bail, it is the case conducting officer issues opinion, reviewed by department, and finally decided by prosecutor general. It must be explained that judges, prosecutors and policemen all enjoys the right to decide, remove and cancel bail. However, in legal practice, judges seldom practice bail since they do not want to make more troubles for themselves. Prosecutors also seldom change arrest to pre-trial detention alternatives like bail or supervision of residence since the arrest decision is made by another department's prosecutors.

⁵⁶ Christopher Lehmann :Bail Reform in Ukraine: Transplanting Western Legal Concepts to Post-Soviet Legal Systems, Harvard Human Rights Journal. pp 208. Available at <http://www.law.harvard.edu/students/orgs/hrj/iss13/lehmann.shtml#fn20>. The last log in date is 29th Nov. 2009.

checking of the result made by an independent organ, usually courts, is set up by law, and fulfilled in reality. In this article, the author summarized that the western model of bail is with the following characteristics: a normal strong presumption in favor of pre-trial release, this presumption will normally be overcome only where a showing is made to the court that specific conditions warrant detention (a risk of flight, a risk to the conduct of the investigation, a risk of further criminal activity), a range of alternatives to pre-trial detention is available, a belief that pre-trial detention should be proportional to particular cases and the charges made against the defendant.⁵⁷

Comparing with the generalized western model of bail by Christopher Lehmann, there is not enough remedy for the bail rejection in China, or can say no remedy at all. The administrative remedy itself can not provide with sufficient remedy. The structural design makes the bail very fragile. On the other side, there is not any negative result for prosecutors or policemen to make the decision of remanding criminal suspects, instead, they will be held responsible if the bailed suspects flee or conduct activities in obstructing criminal justice. It has to be admitted that this aspect is one of the most difficult points in legal reform.

4. Several possible ways in working out the problems about the low application of bail in China

4.1 Education

4.1.1 Education for legal officers.

⁵⁷ Ibid. 209.

Here, legal officers refer to prosecutors, judges, also policemen, especially these legal officers working in county and district level⁵⁸. They are undertaking everyday work which is mostly relates to criminal suspects. For younger generations, a law diploma from a university gradually becomes a must qualification to become a judge, prosecutor. And relative major requirements and educational level are also requires becoming a policeman. They still are not educated enough for human rights protection. No need to mention these legal officers from older generations, their legal backgrounds are weaker than younger generations but mostly in charge of daily work after long time working in their work unit. How to balance human rights protection with punishing crimes is a necessary lesson for their work. And how to make human rights protection stream into their work culture matters very much in improving the situation. If they are with the idea with the least possibility to detain criminal suspects instead of only facilitating their work, bail situation will be improved. Of course, I am not rejecting other matters which may also make a decisive role. What I am arguing here is that the underlined work culture or legal culture can rewrite legislation to some extent since they are the ones interpreting written words, conducting every detailed cases which may no be regulated at all. Moreover, international instruments and covenants are still strange for legal officers in China. Such as what regulates in ICCPR in criminal justice, or what relevant UN Guidelines require in criminal detention.etc. Only through education, can they be refreshed so as to make situation improved.

4.1.2 Education for common citizens.

⁵⁸ Under Chinese legal framework, county and district level are the basic unit of judicial construction. They are the main force of getting involved the procedure of bail at present.

For ordinary Chinese citizens, there are a huge portion of them believe it unfair or weird to see some one still working and living as before if he or she is investigated or charged especially with felonies. In less developed areas, more educational work shall be done because their sense of law and justice are more undeveloped.

Generally speaking, education must make them realize that before final judgments by judges(here, I am not using the word independent third party, because only courts have the right to trial criminal cases, make sentences.), criminal suspects are still innocent, and they shall not be punished in advance.

Moreover, many criminal suspects know nothing about their rights. They do not even know there is a thing called bail regulated in laws and regulations. More often, once legal officers let them go, they think the cases are over, and they are free to go back home even if officers have noticed them relevant duties including staying in designated district, showing up before officers when asked. During the interview with a prosecutor, she told us that although she had noticed many times criminal suspects with obligations during bail procedure, these criminal suspects with low educational level still think the case is over, and prosecutors are intimating them. And they do not follow her instructions, even went back to their hometowns locating far from the area where they are designated to stay.

4.2 Legal reform

It has to be admitted that the legal reform is a necessity in perfecting bail in China since the framework of bail are not wholly constructed. Only the depth and the width of the reform matters. An example of legal reform goes to the subject of deciding bail, if for

some contemporary measures, may a third party like the ministry of justice and its relative lower level's organs or public security organs of provincial, municipality level found to be in charge of deciding bail, or for final solutions, courts shall take up the responsibility in deciding bail.

4.2.1 The focus would be the remedy for bail.

No remedy means no right is the very fundamental principle for a country whatever under civil law or common law. An individual can get no right or just wrote in paper right if he or she gets no legal tunnel of complaining. For bail, there should at least a basic request for public organs in writing clearly the reasons, evidences, reasoning of rejecting bails, or deciding the number of the money, after which there shall be a hearing procedure if criminal suspects are not satisfied with the result. Of course, the most influential design shall be an appellate procedure. If for contemporary regulations, only a hearing procedure or review procedure may also be accepted. At least, there is another step going on instead of only noticing the result towards criminal suspects.

4.2.2 The usage of electronic equipments

This technical equipment application shall be regulated to save police force in supervising the whereabouts of bailees. The application of electronic equipments can directly tell that the case is not over, and bailees can clearly realize that they are under control so that they will refrain themselves from escaping. Moreover, the guaranteed bail can encourage prosecutors, policemen use bail more frequently. The active circle can finally build a more trustful relationship among the parties concerned.

4.2.3 Information evaluation mechanism

An information evaluation mechanism shall be set up by law or regulations in the process of considering, deciding bail. This information mechanism can provide with multi-layer information about the criminal suspects applying with bail, such as in relating to evaluating to fly risks.

4.3 Pilot project

Bail relevant information Evaluation Pilot Project

Wuzhou District Procuratorate of Suzhou piloted that if these criminal suspects who are suspected of committing misdemeanors confessed, and then they are usually not subject to criminal compulsory measures such as detention, arrest.⁵⁹ They also built a risk evaluation mechanism which takes the seriousness of crimes they commit, subjective culpability of the mind, identity of the guarantor, etc into considerations. For 87 criminal suspects in criminal investigation procedure, there are 57 criminal suspects bailed; in other word, the percentage of bail runs to 65%. And there is no case of jumping bail.⁶⁰

4.4 What NGOs can do

4.4.1 There is much technical work that NGOs can do in helping rebuild the bail mechanism. In Latvia reform concerning with pre-trial detention, during 2002-2003, the Project conducted by the cooperation between OSJI and a local NGO analyzed almost 300 criminal cases selected randomly involving accused persons assigned

⁵⁹ http://www.suzhou.jcy.gov.cn/Article_Print.asp?ArticleID=9418. The Last log in date is 8th Nov. 2009. In this article, the author said that the reduction of detention rate is also one goal of their work.

⁶⁰ Ibid 49.

pretrial detention.⁶¹ This sort of case study will definitely provide valuable empirical data for researches of bail.

Empirical study to find out specifics relating with bail, like how much money can usually be affordable, why they escape from bail, how prosecutors, policemen make bail decisions will shorten the distance between legislation and legal practices.

4.4.2 It is for sure that only the borrowing of some western legal concept, instead of transferring theory can not succeed. However, the research on imperfection of the enactment relating to bail like motivation, scholar participation, and even oral debate process still deserves more work and attention of NGOs. Since the research of relevant information in the process of legislation can have better chance of improving legislatures, or at least in understanding where to go to find legislative questions. Theoretical study in this aspect shall be included.

4.4.3 Education work can be taken by NGOs in China, which is one of the most important tasks. Only through education can make judges, prosecutors, policemen in understanding the idea of protecting criminal defendants' human rights at the same time of collecting justice for victims; only through education, can make more common citizens involved in criminal procedures in knowing there is a mechanism called bail, then applying for it, even refuting public officers when they send wrong messages.

⁶¹ Benjamin Naimark-Rowse, Martin Schonteich, Mykola Sorochinsky, Denise Tomasini-Joshi: *Studies in Reform: Pretrial Detention investments in Mexico, Ukraine, and Latvia*, Publication of the Open Society Justice Initiative, spring 2008. pp 166 , by current and former personnel of the OSJI's National Criminal Justice Reform Program.

4.4.4 Another aspect goes to legal aid work so as to get legal representations for criminal suspects when they apply for bail. If lawyers can be more involved in, the situation may get cautiously optimistic.

5. Conclusion

Only the function of crime control can not function well in collecting criminal justice and protection individuals' human rights in a modern society. For the pre-trial procedure, how to reduce detention while guaranteeing the smoothly going of criminal procedures, also public safety deserves attention since it involves a serious of issues covering individuals' personal rights also state budgets in maintaining criminal procedures.

Criminal procedure law practice in China is a good mini-architecture to review the law and society, legislature and law practice. On the one side, democracy, rule of law, modern criminal justice is gradually grasping people's attentions, and relevant legal reform, political reform, value reform are still in process so as to get these goals.

The transition it self provide with a historic opportunity to get criminal justice model changed.

5.1 challenges and chances

5.1.1 General review of bail practice

From the above mentioned comparing, it can be seen that there is not a whole set of rules governing bail. The missing of the challenge procedure of bail decision, remedy of bail, the supervision of bail, the result of escaping from bail make practices of bail

totally a disaster. Of course, the lacking of modern pre-trial alternative mechanism can explain partly why officers do not practice bail. Moreover, how come only part of bail related issues are regulated through law and relevant effective legal regulations deserves our research since if legislators really want to make a mechanism working, they really need to give a set of rules. There is no reason to doubt their personalities as legislators, so how come it had been regulated in this pattern deserves our attention.

5.1.2 Challenges of raising the application rate of bail under the whole legal system and the legal culture.

1997 Criminal Procedure Law is the one revised under the continental law system, however cannot be categorized into Germany style since Communism way of recognizing state power, organizing criminal justice. Public officers representing public power still are playing totally leading roles, which make almost no way for criminal suspects and their lawyers to make substantive changes.

Second, Bail can not be recognized as an individual right, but only under the first and most important consideration of safeguarding, facilitating criminal investigations. It has been mentioned in the above that application by criminal suspects almost make no meaning since the full consideration fall into the relevant state organs. Criminal suspects and their representing lawyers have no way of challenging the result by another organ at all. Furthermore, there are almost no negative effects for officials to make the decision of rejecting bail.

Third, crime control means heavy financial budget, there are at present many constructions going to build new facilities for detention centers and prisons. Of course,

more officers are needed to keep facilities running. There is a data to show that “Since 1965, US crime control expenditures have grown from 4.6 million USD to over 100 million USD and the rate of incarceration in the United States is now one of highest in the world.”⁶² For China, the huge financial burden is too heavy to always have enough money put in.

Fourth, China is still in the transitional stage under which how to understand state power and individual rights are still shaping, and “The antipathy of National Socialist doctrine towards individualistic, liberal legal formalism was rooted precisely in its conviction that revelation of the ‘objective truth’ was the exclusive purpose of the criminal process”⁶³ is still deeply in many public officials thoughts.

5.1.3 The unbalanced development leads to diversified samples

The unbalanced economic develop which can be divided geographically leads to the unbalanced development of legal construction. Of course, the logic here is more complicated than only speaking of more developed areas’ legal construction is better, less developed areas’ is worse. However, it can be generalized that areas like Beijing, Shanghai, are of better situations then other cities, and the Eastern is better then the Western. Therefore, the samples are very important in researching bail in China. Moreover, during to the financial limitation, least development of civil society, it is very hard to document bail practices in reality.

⁶² Penny Green Andrew Rutherford: Crime Control American Style: from Social Welfare to Social, Criminal Policy in Transitions Control. (Hart Publishing.2000) pp15.

⁶³ Karoly Bard: Fairness in Criminal Proceedings-article 6 of the European Human Rights Convention in a Comparative Perspective (Hungarian Official Journal Publisher Budapest 2008) pp 54.

5.1.4 The low application rate of bail by empirical analysis

For one sentence conclusion, pre-trial detention in China is the normal practice, and bail or pre-trial releases are exceptional cases. Even in more developed areas such as Beijing, the conclusion still applies, not mention these less developed areas. The low application of bail is not only a fact also the biggest challenge for legal reform relating to pre-trial stage.

Liu Fangquan collected some data from 3 districts and county in Sichuan Province, which are C City J District, Y City Y District, N City N county (3 districts and county). C City J District is in developed area of the Capital city of Sichuan Province, Y City Y District is mediate developed city's district, N City N county is among one of the less developed small county.

J District Data

items	Years			
	2002	2003	2004	2005
Bailed after arrested	4	6	9	3
Bailed	134	140	180	300
Arrested	1026	884	900	883

64

⁶⁴ Liu Fangquan: Empirical study of the ratification of bail, Journal of Gansu Institute of Political Science and Law, May 2008, the 98th of the entire Journal. pp 116.

This diagram is a statistic about bail in J District of Sichuan Province, there are only 4 people in 2002, 6 people in 2003, 9 people in 2004, 3 in 2005 bailed, which relatively take up to 3%, 4.4%, 5%, 1% of the rate of bail application at the same time. For the J District, the rates of bailed criminal suspects against arrested relatively are 0.39%, 0.69%, 1%, 0.34%. In other word, most of criminal suspects have been waiting for trial in detention.

Years and items	Cases collected	Bailed	percentage
2004	3823 cases and 5387 criminal suspects	1261	23.4%
2005	4423 cases and 6139 criminal suspects	1230	20%
2006	4150cases and 5888 criminal suspects	1059	18%

65

⁶⁵ Liu Zhongfa,Qi Jinsong, Zeng Jingyin: Survey on the Actualities of the Implementation of the Recongnizance on Bail , Journal of National Prosecutors College April 2008, Vol 16 No. 2

From the year 2004-2006, the HD District Procuratorate has conducted 12396 criminal cases in which there are 17414 criminal suspects transferred by public security organs for initiating public prosecution. In the year 2004, there are 1261 criminal suspects had been bailed among 5387 criminal suspects in 3823 criminal cases, which take up to 23.4%. In the year 2005, there are 1230 criminal suspects bailed in 6139 criminal suspects in 4423 criminal cases, which is 20%. In the year 2006, there are 1059 criminal suspects bailed among 5888 criminal suspects in 4150 criminal cases, which is 18%.

For juvenile delinquency, the situation is still very bad.

	Cases collected	Bailed	Percentage
2004	342 cases and 490 criminal suspects	136	27.8%
2005	327 cases and 471 criminal suspects	133	28.2%
2006	303 cases and 45 criminal suspects	113	27.9%

66

The data from HD Procuratorate shows that even the percentage of bail for juvenile is still quite low, lingering around 28% among 2004, 2005 and 2006. Juvenile delinquency

⁶⁶ Liu Zhongfa, Qi Jinsong, Zeng Jingyin: Survey on the Actualities of the Implementation of the Recongnizance on Bail , Journal of National Prosecutors College April 2008, Vol 16 No. 2 pp 107.

should be recognized as more as social responsibility instead of cursing these young people.

5.1.5 Fortunately, there are optimistic positive sides too. The 21 century is the information age, also the globalization world, the information spread at an astonishing speed. A simple example, if go to www.google.cn, to search by using the key word “bail”, you will get more than thousands of thousands of pieces of articles, relevant news. Also, the international human rights protection mechanism bound governments more significantly at present, which means that the improvement of human rights protection especially in criminal procedure is necessary.

Furthermore, common citizens are increasingly realizing, practicing their rights. They are more willing than before to fight for their rights through legal procedures, also better accessed to legal regulations since the improvement of education and advertisements for enactments by Government, NGOs.

5.2 The possibility of the improvement of bail

5.2.1 Sequence the right to decide bail in relevant upper organs.

Under common law system, bail is decided before magistrate judge, instead of by policemen or prosecutors. However, if under today’s legal mechanism, under the situation of no dramatic revising of criminal procedural law, it will be practical to sequence the decision-making power to upper organs under police system, like only police force in city level can decide. Under procuratorate system, only their upper level’s relevant department can make decisions about bail.

5.2.2 It has to be admitted that “France do not utilize the bail system much”⁶⁷, neither “the writ of habeas corpus, but it does have provisions whereby vision from the investigation judge after the latter has consulted with the prosecutor and the civil party. Judicial supervision is a conditional release on such term as the magistrate may wish to impose, such as not leaving the area, not visiting specific places, presenting oneself to persons specified in the release order at stated intervals, and so forth.”⁶⁸ If china can set up an independent force under leadership of ministry of justice to make decision of bail, it still can be accounted as a huge progress.

5.2.3 The automotive endness of bail

As mentioned above, when the time period of bail is due, it does not lost its effect automatively, there must a procedure to end bail legally. This design should be deleted because if policemen or prosecutors do not take further actions against individuals, it should be recognized that this individual is free.

5.2.4 it is for sure that the board regulations in form of law and regulations make a good excuse for policemen to reject bails on one side. But, legal regulations should not be the main reason for the low application rate of bail in China. Positive answer, there is great possibility to improve it. There is a group of scholars think that they have solved the legal question of bail such as the definition, the nature, the scope, etc., and it is not their job or responsibility to improve the low application of bail, since policemen and

⁶⁷ For note 51 and 52, the author E. Adason Hoebel, the Law of Primitive Man, Pp 63. Barton; I read them from 63 of the Structure of Criminal Procedural Laws and Practices of France, the Soviet Union, China, and the United States by Barton L. Ingraham.

⁶⁸ Page 63. Barton Diamand, Primitive Law, call this period of the Early Codes. Ibid 63.

prosecutors do not execute laws nor regulations. It is not their job to ask officers to practice law.

For the positive side, most scholars in criminal justice field have reached a common sense that bail should not be a punishment, moreover, more prosecutors and judges have been educated that human rights protection should never be put aside as the same time of punishing crimes, preventing crimes. Moreover, they think that the non-execution of law make up a portion of their research. With more attention of legal practice, the distance between theoretical study and legal reality can be shortened, and situation may get much better.

5.3 The expectation of change

There is also a long distance between legal regulation in terms of whatever laws, internal regulations such as for judges, prosecutors, or policemen, and legal practices. What I am referring to here are not these rule-breaking activities, but a whole set of unwritten rules, but effectively operational in legal practice like “The informal norms of work groups permit predictable routines to develop which reduce risk and uncertainty and provides for the efficient disposal of cases. The court’s routine is regulated through relationship between participants who are rewarded or punished for their co-operation or conflict by other members of the group (Lipetz 1980)”. The author of this article mentioned a “court culture” which is “a set of informal norms which are mediated through the working relationships of the various participants.”⁶⁹ “Courtroom work

⁶⁹ Anthea Hucklesby: Variations in the Use of Bail By Magistrate’s Courts, Howard Journal Vol. 36 No.2 May 1997. pp 130.

group” are used by Eisenstein and Jacob to describe the relationships between prosecution and defense lawyers and judges. Also “Eisenstein and Jacob argue that the strength and cohesion of these work groups can explain variations in what happens to defendants who appear in different courts.”⁷⁰

It is part of the reasons why there is also a huge variety in China too. Therefore, it is a basket of questions under the tremendous problem of low application rate of bail, but high rate of pre-trial detention.

At present, the social control of the society is not a strong one to exactly know single individual’s details with economic costs. The credit system is right in the very first beginning. And the understanding of modern criminal justice and its relevant mechanism is also in the preliminary stage. All the elements make us not so optimistic in proving bail in a large scale in a short term anyway.

Furthermore, the model that courts decide bail is not suitable for China. In these western countries, usually courts are the only organ to decide to eliminate an individual’s freedom. However, in China, policemen do not need to go before a judge to ask for the opinion to arrest someone, or detain someone. Also police has the ability and strong willingness to execute their own decisions. In other words, police system is a powerful also independent branch. Therefore, if there is a setting up to come before a judge to decide on bail issues, which have to be executed by police become a paper regulating mechanism only.

⁷⁰ Ibid.

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