

Research on Judicial Review of Arrest in China

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Abstract: The arrest and detention of suspects are the most severe criminal coercive measures. In order to protect the rights of citizens from illegal infringements and prevent the abuse of power by investigative agencies, the application of arrest and detention should be subject to judicial review. The review agency should be neutral and impartial. In China, the review of arrest and detention has strong administrative characteristics. First, the People's Procuratorate is responsible for reviewing arrest and detention, which is not wholly neutral as a public prosecution agency. Second, the procuratorate's review and approval of the arrest only passed written materials, which violated the rhetoric principle. Finally, the implementation of the integrated approach of arrest and detention lacks the court's participation and supervision. In the process of improving arrest review in China, judges should be responsible for review and supervision, hearing procedures should be implemented, and the review model should be litigated.

Key Word: Arrest, Custody, Judicial Review

Introduction

The arrest is the most severe form of criminal coercive measure. Due to the different judicial systems and litigation structures, arrests have different meanings in different countries. In common law countries, the arrest usually refers to a measure that forces the suspect to be questioned in court. Japanese scholars define arrest as "a disposition that restricts the personal freedom of a suspect in a short period". The United Nations document *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* states that arrest means the act of apprehending a person for the alleged commission of an offense or by the action of authority. In China, arrest is defined as a compulsory measure that temporarily deprives a suspect or defendant of their freedom and custody (Chen, 2001, 100). It is approved by the People's Procuratorate, decided by the People's Court, and executed by the public security authority. Its purpose is to prevent suspects or defendants from escaping, prevent them from carrying out activities that hinder the investigation, prosecution, and trial, and prevent them from posing a danger to society. Combining the different regulations on arrests, we can find their common characteristics; that is, the arrest is a temporary restriction on citizens' freedom, and it is usually mandatory.

Judicial review is a concept in Western constitutionalism, which contains "separation of power and balance of power." In modern legalized countries, judicial review is a widely used legal system. Judicial review is also called unconstitutional review, that is, judicial procedures to review whether legislative acts and administrative acts are unconstitutional and make a ruling. There are two types of judicial review. One is a review by ordinary judicial institutions, such as a judicial review by the Supreme Court. The other is a judicial review conducted by the Constitutional Court. In criminal

proceedings, judicial review is specifically manifested as whether to issue an order to arrest a suspect, or whether to impose pending detention on the suspect, etc.

Judicial review is a procedure that protects citizens' rights and constitutional rights from being arbitrarily violated. In this procedure, the judiciary acts as a neutral adjudicating subject, restricting state power abuse, reviewing the legality of coercive measures that may deprive citizens of rights and freedoms, and providing relief. Arrest, as a coercive measure in the judicial process, has the attribute of infringing upon the rights of citizens. Only after judicial review can the arrest be legitimate. The United Nations document *International Covenant on Civil and Political Rights* specifically stipulates the judicial review of custody, and it also emphasizes the importance of legality of arrest and detention.

Generally speaking, judicial review of arrest has three characteristics.

First, the review agency is neutral. In most western countries, judges usually exercise the power of judicial review. As the referee, the judge must resolve disputes as a neutral person, make judgments impartially, and ensure fairness and social order. It is precisely based on the judge's neutral status that it is reasonable for him to review and approve the application of compulsory measures. All the implementation of compulsory measures requires judicial review by the pre-trial judge or judge, and then a judicial warrant is issued to implement judicial authorization. The exercise of judicial review power by judges is an essential means by which judicial power restricts the power of investigation.

Second, the startup procedure is passive. In most countries, the judicial review process for arrest is initiated based on an application. Only when the investigative agency submits an application, the judicial agency with the power to approve the arrest will

review the arrest application based on the submitted case materials and other relevant circumstances, such as interrogating the criminal suspect when necessary. The judiciary will not take the initiative to request the review of the relevant circumstances in the case that the investigative agency has not applied for it. However, there are exceptions. For example, in Germany, under particular statutory circumstances, judges can actively issue arrest orders instead of relying on the police or prosecutor's application. This situation is mainly to prevent possible dangers caused by delays in issuing arrest orders. The review procedure adheres to the principle of passivity. First of all, this is determined by the passivity of the judicial power itself. The passivity of judicial power requires that judicial institutions always adhere to the principle of "no prosecution, no trial" and "no application, no review" in both the trial and review procedures. Second, because only by insisting on passivity, the judiciary can better maintain the status of neutrality and truly play a fair judge's function. The third reason is that only when both parties to the dispute need and request the judiciary to make a review and judgment will they believe and agree more with the judgment of the judiciary.

Finally, the review is continuous. The duration of judicial review of arrest is mainly manifested in two aspects. First, before arresting the suspect, the judge needs to review whether the suspect needs to be arrested. Secondly, after arresting the suspect, the judge needs to review whether the suspect needs to continue to be in custody. The continuity of judicial review of arrests makes the functions of arrest review include not only the action (arrest) review but also the status (custody) review. On the one hand, maintaining the continuity of the judicial review of arrests reflects the state's emphasis on citizens' constitutional rights and conforms to the international community's requirements to respect and protect human rights. On the other hand, if there are errors in the arrest

procedure, the problems can be discovered in time, and the errors can be corrected during the review of the necessity of detention after the arrest, thereby reducing the harm to citizens.

I. Arrest Review Model and Legal Framework in China

(i) Mode of arrest

According to Article 81 of the *Criminal Procedure Law of the People's Republic of China (2018)* (CPL), in China's criminal procedure, the arrest of a criminal suspect or defendant includes two situations, shall be arrested and may be arrested.

A suspect or defendant who "shall be arrested" should meet three types of conditions. The first condition is evidence. There is evidence to prove the existence of criminal facts. The second condition is the possibility of punishment. A criminal suspect or defendant may be sentenced to imprisonment or heavier punishment. The last condition is the possible danger to society. The possible danger to society is divided into two situations. One is that the application of residential confinement to suspects or defendants is insufficient to prevent any of the following dangers to society. Article 81 of CPL lists five possible situations, a) the criminal suspect or defendant may commit a new crime; b) there is an actual danger to national security, public security, or social order; c) the criminal suspect or defendant may destroy or forge evidence, interfere with the testimony of a witness, or make a false confession in collusion; d) the criminal suspect or defendant may retaliate against a victim, informant, or accuser; e) the criminal suspect or defendant attempts to commit suicide or escape. The other is the suspect or defendant who once committed an intentional crime or has not been identified.

The range of suspects or defendants who may be arrested is narrower than those who shall be arrested. The applicable object which may be arrested is a criminal suspect or defendant waiting for trial on bail or under residential confinement. The applicable requirement is that they seriously violate the provisions on bail or residential confinement.

(ii) Mode of examination and approval of arrests

According to Article 3 of CPL, People's Procuratorates are responsible for the approval of arrests. According to different criminal investigation agencies, the cases examined and approved by the People's Procuratorate can be divided into three types.

The first type is criminal cases investigated by the public security authorities. A public security authority shall prepare a written request for approval of a criminal suspect's arrest, which shall be submitted along with the case file and evidence to the people's Procuratorate at the same level for examination and approval (Article 87 of CPL). A people's Procuratorate shall make a decision to approve or disapprove an arrest within seven days after receiving a written request for approval of arrest from a public security authority (Article 91 of CPL). If the people's Procuratorate decides to approve the arrest, the public security authority shall execute the decision immediately and notify the people's Procuratorate regarding execution on time (Article 90 of CPL). If the people's Procuratorate decides to disapprove of the arrest, it shall explain the reasons for disapproval (Article 90 of CPL). If the people's Procuratorate disapproves of the arrest, the public security authority shall release the detainee immediately after receiving a notice (Article 91 of CPL).

The second type is the case investigated by the People's Procuratorate. There are two types of cases directly accepted by the People's Procuratorate. a) Where, in performing its statutory duty of supervision of legal proceedings, a people's Procuratorate discovers that any justice functionary commits a crime of false imprisonment, extortion of a confession by torture, or illegal search, or any other crime that infringes upon a citizen's rights or damages the fair administration of justice by taking advantage of his or her functions, the people's Procuratorate may open an official investigation into the crime. b) Where a case regarding a serious crime committed by any staff member of government authority by taking advantage of his or her functions under the jurisdiction of a public security authority needs to be directly accepted by a people's Procuratorate, the people's Procuratorate may open an official investigation into the case upon the decision of the people's Procuratorate at or above the provincial level (Article 19 of CPL). If the suspect in the above two types of cases meets the circumstance, a) shall be arrested and maybe arrested (Article 81 of CPL); b) the person attempts to commit suicide or escape after committing a crime or is fugitive (item (4) of Article 82 of CPL); c) the person may destroy or forge evidence or make a false confession in collusion (item (5) of Article 82 of CPL). When it is necessary to arrest a suspect, the people's Procuratorate shall make a decision, which shall be executed by a public security authority (Article 165 of CPL). The People's Procuratorate shall make a decision whether to arrest the suspect within 14 days after detention; if the arrest is not necessary, the detainee shall be released immediately (Article 167 of CPL).

The third type is the case investigated by the supervisory commissions. Supervisory commissions conduct supervision of public officials exercising public power, investigate duty-related violations and crimes. The supervisory authority has held a criminal suspect

in custody in a case transferred to a people's Procuratorate for prosecution. The people's Procuratorate shall first detain the criminal suspect, and the holding measure taken by the supervisory authority shall be automatically removed. The people's Procuratorate shall, within ten days after detention, make a decision on whether to arrest or grant bail to the detainee or place the detainee under residential confinement (Article 170 of CPL).

II. The Value of a Judicial Review of Arrests

(i) Protect human rights from being illegally violated

The *British Magna Carta* states that *No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.* The *Universal Declaration of Human Rights* provides in article 9 that *no one shall be subjected to arbitrary arrest, detention, or exile.* The *International Covenant on Civil and Political Rights* states that *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and under such procedure as are established by law.* The concepts of "people-oriented" and "protection of human rights" are widely recognized and promoted worldwide.

In the field of criminal litigation, the idea of human rights protection is expressed explicitly as protecting the rights of life, freedom, and property rights of participants in litigation procedures from illegal infringements. Whether the right can be guaranteed and whether it can be remedied is an important factor in whether the right can be realized. There must be a relief if there is a right; otherwise, this right cannot be realized. As a pre-procedure for applying arrest measures, the judicial review system for arrest restricts

administrative powers' arbitrary use through judicial review and approval. On the one hand, the judicial review process of arrest ensures that the rights of innocent citizens will not be illegally violated. On the other hand, it ensures that the coercive measures applied to suspects or defendants are lawful and appropriate.

(ii) Prevent the abuse of power by investigators

The French philosopher Montesquieu stated that *"To prevent this, power should be a check to power"*. The modern political system based on the theory of *"Separation of Powers"* mostly insists on the judicial power to supervise the legislative and administrative power. In China, the public security agency enjoys the power of investigation. It is both an administrative and a violent agency. As an administrative agency, its main job is to combat criminals and ensure social order and safety. Its violent nature determines that the power it enjoys is extensive and powerful. Its investigative behavior against criminal suspects is obviously mandatory. Therefore, the power enjoyed by public safety agencies must be restricted and supervised in order to achieve the purpose of "power limiting power".

The arrest is the most severe coercive measure that violates citizens' rights, and it must be used with caution and lawfulness. The duty of investigators is to investigate illegal and criminal acts, understand the situation of the case, and collect relevant evidence. The function of the investigator determines that he is on the opposite side of the suspect. In this process, investigators may violate the legal rights of the suspect for the convenience of investigation. For example, investigators may intimidate or beat suspects in order to obtain confessions or detain or arrest them in unnecessary circumstances. When investigators are opposed to citizens with the backing of national coercive power, and

there is the possibility of infringement of citizens' privacy rights, the judiciary should be the last line of defense to protect citizens' rights. The judicial review procedure is used to review the legality of the coercive measures applied by investigators, which meets the requirements of "power limiting power".

(iii) Realize due process of law

The *Fifth Amendment to the U.S. Constitution* states that "no one shall be deprived of life, liberty or property without due process of law". The essential requirement of due process of law in criminal proceedings is that individual rights, especially the right to personal freedom, shall not be violated without due process of law. The arrest is the most likely compulsory measure to violate the personal freedom of citizens (Wang, 2014, 89). Therefore, the application of arrest must comply with the requirements of due process and be implemented through legal procedures in accordance with the provisions of the law. Judicial review of arrests ensures that all arrests made by investigative agencies have been reviewed and approved by judicial organs, and the power to execute arrests obtained complies with due legal procedures. It reduces the possibility of illegal infringement of citizens' rights, strengthens the legality of litigation procedures, and is conducive to the realization of procedural justice.

III. Problems with Arrest Review in China

(i) The review agency is not wholly neutral

In most countries, under the rule of law, whether to arrest and detain suspects is determined by judges, not by police and prosecutors through self-authorization. The police are responsible for investigations, and the prosecutors are responsible for prosecution. In order to achieve the purpose of collecting evidence and bringing suspects

to court for trial, police and prosecutors will be more inclined to arrest and detain suspects. They cannot guarantee the objectivity and fairness of the arrest, so it is not appropriate for them to be responsible for reviewing and approving the arrest. Regardless of the common law system or the civil law system, judges are neutral and independent, so they are more objective and fairer (Sun, 2006, 539). These countries generally recognize the issuance of arrest warrants by judges.

In China, the People's Procuratorate is not exactly a judicial institution; it still has the nature of an administrative agency. According to Article 2 of *Rules of Criminal Procedure for People's Procuratorates* (2019), "*the tasks of people's procuratorates in criminal proceedings shall be to open and investigate directly accepted cases, examine arrests, conduct examination for prosecution, initiate a public prosecution, and exercise legal supervision of criminal proceedings...*". It can be found that the People's Procuratorate not only has the function of public prosecution but also has the function of review and supervision. Moreover, the administrative functions of the People's Procuratorate are very obvious. For example, Article 2 of *the Provisions on the Application of Arrest Measures in accordance with the Law* state that "*if the public security agency believes that it is necessary for the People's Procuratorate to send personnel to participate in major case discussions, it should promptly notify the People's Procuratorate. After receiving the notice, the People's Procuratorate should promptly send personnel to participate in the case discussion. The prosecutors participating in the discussion should provide opinions and suggestions on the investigation activities based on a full understanding of the case*". The Procuratorate's practice participating in case discussions and putting forward suggestions and opinions does not meet the requirements of a neutral agency (Liu, 2012, 129). This approach will enable prosecutors to pre-judge the suspect during the process of case discussion. It will cause the prosecutor to make a

biased decision in the subsequent review and approval process and cannot guarantee the lawfulness and appropriateness of the arrest measures.

(ii) Administrative approval mode

Article 89 of the CPL state that *"A people's Procuratorate's approval of arrest of a criminal suspect shall be subject to the decision of the president of the people's Procuratorate. Significant cases shall be submitted to the procuratorial committee for discussion and decision"*. It can be seen from this article that the president of the people's Procuratorate and the procuratorial committee are the decision-makers of the arrest. During the review process, the case-handling personnel who personally review case materials and evidence, personally interrogate suspects, interview witnesses, and hear lawyers' opinions do not have the final decision. After a series of 'examine' activities, he can only put forward his opinions in the form of written opinion on the criminal suspect's arrest. As a result, in reviewing and approving arrests, the subjects who have the absolute power to decide on arrests did not personally participate in review activities. They issued a compulsory arrest order only by reviewing written materials.

The arrest review mode, which is handled by procuratorial personnel, reviewed by departmental leaders, and decided by the chief procurator, has obvious administrative features (Long, 2013,182). There are many shortcomings of the administrative review mode in which the reviewer does not decide, and the decider does not review in judicial practice. On the one hand, it is not easy to guarantee the impartiality of case-handling personnel. Since the people's Procuratorate president did not interrogate the suspect face-to-face, the final arrest decision may be guided by the case-handling personnel if the investigator tends in the arrest opinion. As a kind of judicial review power, the right to

approve arrest's core requirement is that the judicial institution makes a fair judgment based on its neutral status (Sun, 2017, 38). However, the administrative approval mode of arrest will increase the possibility that the decision-maker will interfere with the arrest result's fairness. It does not conform to the concept of judicial independence, and it is also not conducive to the development of the credibility of the power of review.

(iii) Not interrogating all the suspects

Article 88 of the CPL states that *“During the examination and approval of an arrest request, a people’s procuratorate may interrogate the criminal suspect; and, under any of the following circumstances, must interrogate the criminal suspect: a) it has any doubt on whether the arrest conditions are met; b) the criminal suspect requests a statement before prosecutors, or c) any gross violation of law may have occurred during the criminal investigation”*. It can be seen that in the process of reviewing and approving arrests, the People's Procuratorate does not interrogate all suspects and will only be adopted under particular circumstances. Article 280 of the *Rules of Criminal Procedure for People’s Procuratorates (2019)* provides supplementary provisions for suspects who will not be interrogated during the review and approval of arrests. It states that *“when a case transferred for examination of arrest is handled, if the criminal suspect in detention is not required to be interrogated, a notice of hearing the opinion of the criminal suspect shall be served, promptly recovered after being filled in by the criminal suspect, examined, and attached to the case file”*.

Although this article clarifies the handling of suspects who will not be interrogated, there are still some problems. First of all, it applies to suspects who have been detained, and the Procuratorate has decided not to interrogate them. At this time, the suspect is already in custody. The content of the prosecutor's review is whether to arrest him. If the

prosecutor agrees to approve the suspect's arrest, he will be detained for a longer time. As a result, from being detained to being arrested, the suspect did not have the opportunity to make a face-to-face statement to the prosecutor. If there is a false arrest, indiscriminate arrest, or procedural infringement, the suspect lacks effective remedies, and his rights cannot be protected. Secondly, it is difficult to truly reflect the suspect's thoughts and demands in the form of a notice of hearing the opinion. Even if the suspect has opinions and appeals, it may be difficult to attract the attention of the prosecutor in the form of notice and obtain the opportunity to be interrogated. Since the sending and receiving of opinions will be reviewed by investigators, the suspect is afraid of investigators' retaliation, so the opinions filled in may not be true.

(iv) Insufficient effectiveness of the review of the necessity of custody

In some foreign countries, judicial procedures generally set approval of arrest and custody permission as two independent procedures. Usually, a suspect goes through two steps and three checks from arrest to custody. The first step is the judicial review of the arrest; the judge will review the arrest's necessity before the arrest. The second step is the judicial review of the custody; the judge will review the legality of the arrest and the custody necessity after the arrest.

For historical reasons, China has always practiced the method of combining the arrested step and the custody step into one step (Min, 2016, 68). The review agency only reviews whether to arrest the suspect before approving the arrest. The review procedure for arrest and custody has been simplified to one review. Once the only review is granted, the suspect will continue to be in custody. It also means the legality of the arrest and the inevitability of custody. Combining arrest and custody into one step has caused a series

of judicial problems, such as excessively high arrest and detention rates and excessively prolonged pre-trial detention.

In order to improve this unreasonable setting, Article 95 was added to the CPL when it was revised in 2012, which for the first time provided for the review of the necessity of custody after arrest. Article 95 of CPL states that *“After arresting a criminal suspect or defendant, a people’s Procuratorate shall continue to examine the necessity of custody. If custody is no longer necessary, it shall suggest a release of the arrestee or modification of the compulsory measure for the arrestee”*. Besides, the *Provisions on the Handling of Cases about Examination of Custody Necessity by People’s Procuratorates* promulgated in 2016. It provides comprehensive and detailed regulations for the review of the necessity of custody after arrest. Although in legislation, there has been significant progress in the review of the necessity of custody. But overall, there are still many shortcomings in the review of the necessity of custody. One of the most obvious is the insufficient effectiveness of the review of the necessity of custody. It can be seen from Article 95 of the CPL that the People’s Procuratorate only has the power to make a suggestion on the results of the review of the necessity of custody and does not have the power to decide directly. This contradicts the power of the procuratorial agency to approve arrests. The People’s Procuratorate decided to approve the arrest. In the same way, after a suspect is arrested, if it is deemed unnecessary to continue to custody him after review, the People’s Procuratorate should also decide to lift the custody or change the compulsory measures. The People’s Procuratorate can “decide” the arrest, but it can only “suggest” the release. This unbalanced distribution of power cannot effectively perform the supervisory function of the Procuratorate.

(v) Lack of court participation and supervision

In the pre-trial stage, the public security agency can independently implement any criminal coercive measures excluding arrest. The People's Procuratorate is responsible for the review and approval of arrests and the review of the necessity of custody. It can be found that the approval and review of criminal coercive measures at the pre-trial stage lack the participation of the court. The lack of participation of the people's courts is mainly manifested in three aspects. First, the court cannot decide the approving application of compulsory measures. Second, the court cannot hold a judicial hearing on whether to extend the custody. Finally, the court cannot accept complaints about the legality of compulsory measures. As a judicial institution, the content of the trial includes not only the facts and evidence of the case itself but also the substantive issue of whether the suspect is guilty and the procedural issue of whether the judicial process is legal. The people's court does not participate in the pre-trial proceedings, making it difficult to review whether the proceedings are legal.

In actual judicial practice, because public security agencies have strong investigative powers and procuratorial agencies review arrests through written materials, there are a large number of wrongful arrests, extended custody, and other violations of citizens' rights. The people's court neither participates in procedural review nor accepts litigation related to procedural infringement, which results in a lack of supervision and effective restriction on the review activities of procuratorial institutions. Moreover, the litigation rights of suspects or innocent citizens are not effectively protected.

IV. Causes of Problems with Arrest Review

(i) Reason for litigation structure

The division of functions among public security agencies, people's procuratorates, and people's courts is the root cause of arrest review problems.

First of all, according to the *Constitution* and *Criminal Procedure Law*, public security agencies are investigative agencies whose functions are to ascertain the facts of a case and collect evidence. The investigation object of the public security agency is the suspect, and the investigation content is the possible criminal activity. For public security agencies, it is difficult to conduct investigations and obtain evidence without taking coercive measures against suspects. The role attributes of the investigator and the person under investigation determine that the public security agency and the suspect are in opposition (Ren, 2000,23). Therefore, it is difficult to expect public security agencies to advocate not to arrest suspects.

Secondly, according to Article 3 of the CPL, the People's Procuratorate is the approving agency for arrests, as well as the prosecution agency. During the review and approval stage, the People's Procuratorate is responsible for deciding whether to arrest the suspect. At this time, the suspect is the subject of review, and the status of the two is not equal. During the trial stage, the People's Procuratorate is responsible for prosecuting the suspect, and the suspect is the subject of the trial. According to the principle of equality of prosecution and defense, at this time, the Procuratorate and the defendant are in an equal position. In the above two stages, the Procuratorate played the roles of athlete and referee simultaneously, which made it difficult for him to ensure neutrality and

impartiality when reviewing and approving arrests. Therefore, the incomplete neutrality of the Procuratorate also caused problems in arrest review.

Finally, the People's Court acts as a neutral judicial institution. It is the most likely institution to protect the rights of suspects fairly. However, in the pre-trial stage, the court does not participate in the review, approval, and supervision of the investigation work. This makes the function of the neutral judge of the court fail to perform effectively.

It can be seen that due to the litigation structure, three agencies have formed such a situation. In reviewing arrest, for the suspect's rights, the public security agency cannot protect it, the procuratorate does not fully protect it, the court does not participate in protecting it.

(ii) Reason for the litigation concept

Due to historical reasons, the concept of "*presumption of guilt*" is deeply ingrained in Chinese criminal justice. Although, the presumption of innocence was written into the CPL as a basic principle and has been gradually implemented with judicial reform. However, in judicial practice, the concept that a suspect is considered a criminal still exists.

Typically, in most countries, arrests are considered an auxiliary means of investigating, not a penalty measure. The arrested suspect is to ensure the smooth progress of the judicial process. However, the arrest and detention integration practice in Chinese criminal proceedings, the suspects arrested also means being detained. This results in arrested suspects and criminals sentenced to custody in the same state. Their difference

is the detention site. The suspect was detained at jails, and the criminal was detained in prison. In addition, due to the impact of guilty estimates, the suspect before the trial is considered a criminal. Therefore, the practice of arresting and detaining guilty persons is not only considered normal but also popularized.

(iii) Reason for program purpose

According to CPL, the investigation phase's tasks and objectives are to find the actual situation of the case. At this stage, which way is more convenient for collecting evidence, reducing investigation difficulties, then investigating agencies must prefer this way.

An arrest is an effective way to realize the target, which meets the above requirements. The suspect was arrested and detained. First, it is convenient for investigation agencies to ask him at any time to understand the case in detail, collect the suspect's mouth. Second, it is possible to prevent the suspects from destroying evidence and harm witnesses, which will facilitate the witness testimony. Finally, it can prevent suspects from escaping. When evidence is sufficient, the public prosecution can promptly file a lawsuit and pursue its legal responsibility.

Due to the target requirements of the investigation phase, the evidence requirements of the public prosecution, and the convenience of arrest, resulting in a wide range of applications of arrest measures. The extensive use of arrest is also an important reason for the problem of arrest review.

V. Principles to Be Followed in The Judicial Review of Arrest

(i) Principle of neutrality of review subjects

The core of the judiciary is a fair referee. In the judicial review activities, the decision-maker has both the function of the referee and supervision. Therefore, he needs to be independent of the applicant and the examinee. Decisions should be made based on fairness. Under the model of separation of powers, the judiciary is independent of legislation and administration and supervises legislation and administrative activities. In addition, the state requires judicial institutions to resolve disputes and contradictions as neutral judges and guarantee citizens' legal rights. Neutrality is the prerequisite for the review activities of the subject of arrest review, and it is also the basis for the feasibility and credibility of review results. Therefore, insisting on the review subject's neutrality is the primary principle for constructing a judicial review of arrests.

(ii) Principle of Statutory

In the criminal justice field, the Statutory principle refers to that *"If the law is not clear, the judiciary must not do it"* (Chen, & Lu, 2004, 78). It mainly includes three aspects. First, all compulsory measures must be clearly stipulated by law. Secondly, compulsory measures are applied following the clear provisions of the law. Finally, in the process of litigation, the case-handling agency must not arbitrarily create new compulsory measures and must ensure that all parties receive fair treatment.

The arrest is the most stringent to limit the mandatory of civil liberties. In order to ensure accurate and reasonable applicable arrest, it must be in accordance with the law. Therefore, the arrest of judicial review must also adhere to the statutory principle. Adhere to the statutory principles include four aspects. First of all, the subject is clearly defined

by the law. The agency responsible for approving, deciding, and reviewing arrests must be clearly stipulated by law. Institutions not authorized by law shall not perform the above functions. Secondly, the procedure is clearly defined by law. The arrest review procedure should be prescribed by law in advance, including the four stages of procedure initiation, review, decision, and supervision. Third, the standards for arrest review are clearly defined by law. The standards for approving and disapproving arrest should be included at the same time. Finally, the rights of suspects should be clearly stipulated in advance by the law. The suspect is in a vulnerable position and may be restricted from freedom. His rights may be violated by public power. Therefore, the rights of suspects should be clearly protected in the form of law. It mainly includes the right to know, the right to be treated humanely, the right to get help from a lawyer, the right to obtain relief, and the right to sue and appeal (Li, 2018, 54).

(iii) Principle of proportionality

The proportional principle originated in Germany. Its basic meaning is that when personal interests have to be restricted in order to safeguard the interests of the country or society, the measures taken must be proportional to the goals. The core requirements of the principle of proportionality include two aspects. One is that the interests of protection are more significant than the interests of infringement. The other is to achieve the goal with minimal infringement. The principle of proportionality attempts to balance public welfare and private interests by examining the relationship between ends and means. It advocates preventing the state from causing excessive infringements on citizens' interests in the process of realizing public welfare. In accordance with the requirements of the presumption of innocence, the application of any compulsory measures must adhere to the principle of proportionality. Therefore, in the compulsory

measures, the arrest measures with the highest applicable standards and the most serious violation of citizens' rights should follow the principle of proportionality in their review and approval. In order to balance the conflict between national interests and civil rights.

Judicial review of arrest should include both a review of the necessity of arrest and a review of the necessity of custody. In improving the judicial review of arrests, the principle of proportionality should be adhered to from the following two aspects.

First, before arresting a suspect, the principle of proportionality should be adhered to when examining whether the arrest is necessary. According to the investigating agency's application, the reviewing agency should comprehensively review the following factors: the facts of the case, the evidence, the difficulty of the investigation, and the suspect's age, physical condition, an attitude of repentance, and possible penalties, etc. If the suspect is a minor or a disabled person, or if the crime is minor and has a positive attitude towards a confession. Disapproval of arrest can also achieve investigative purposes. The review agency can follow the principle of proportionality and refuse to approve the arrest. It should be noted that although the principle of proportionality emphasizes the protection of civil rights, it does not mean that this can be used as a reason for wrongful arrest.

Secondly, after the suspect's arrest, the principle of proportionality should also be adhered to when examining whether to continue the custody of the suspect. The principle of proportionality is embodied in two aspects here. On the one hand, the principle of proportionality should be adhered to between continued custody and release or modification of compulsory measures. On the other hand, the duration of custody should adhere to the principle of proportionality. The purpose of the review of the necessity of

custody is to release the suspect in time or change the compulsory measures if there is no need to continue the suspect's custody to restore the suspect's rights as soon as possible. This requires the review agency to comprehensively consider various factors, weigh between maintenance and change, and make a reasonable decision based on the principle of proportionality. The custody period can intuitively reflect the degree of restriction on the suspect. Generally speaking, the length of the custody period should be proportional to the crime's nature and extent. The suspect's criminal behavior is hazardous and has caused severe consequences, so it is highly likely that he will evade trial. More extended custody periods should be applied to such suspects. To prevent them from committing crimes again and to ensure the smooth progress of the lawsuit. On the contrary, if the suspect committed only minor crimes and has an excellent guilty plea, he is less likely to evade trial. If a more extended period of custody is applied to such suspects, it will violate the principle of proportionality.

VI. Suggestions for Perfecting the Judicial Review of Arrests

(i) Review and approval of arrest by a judge

The judge decides to arrest and custody. This method meets the requirement of determining the subject's neutrality and has achieved good judicial practice results in other countries. Participating in the review of compulsory measures at the pre-trial stage may cause the judge to pre-judge (Chen, & Lu, 2004, 78). This may affect the fairness of the final judgment. In order to avoid this situation, common law countries adopt the method of review by the pre-trial judge. This practice can also be used for reference in the reform of judicial review of arrests in China. A special custody court is set up, and the custody court judges are responsible for the review and approval of compulsory measures.

(ii) Implement hearing procedures

Both the investigative agency and the suspect participated in the hearing procedure in the form of words. As the application's subject, the investigative agency needs to change the past practice of only submitting written materials. Instead, in front of the judge and the suspect, the police need to explain the reasons for applying for arrest and detention. This can encourage the police to investigate the facts and collect evidence more comprehensively and rigorously to ensure that the application has sufficient grounds to obtain the judge's support. As the respondent, the suspect should also participate in the hearing process. During the hearing process, the suspect may have the power to explain, state his reasons, express his opinions, and apply for an appeal. The hearing procedure changed the previous practice that suspects could only express their appeals in the form of filling out opinions. At the same time, during the hearing process, the suspect can also get a lawyer's help, who will defend him. The hearing procedure changed the suspect's passive image in the past and allowed him to play a subjective role.

(iii) Give the procuratorial agency the power to decide on release

According to the above analysis, in reviewing the necessity of custody, Article 95 of the CPL only gives the procuratorial agency the power to suggest. If custody is no longer necessary, it shall suggest a release of the arrestee or modification of the arrestee's compulsory measure. The review agency has the power to make decisions when reviewing arrests, but only the power to make recommendations when reviewing custody. This power allocation is unreasonable. The law should also give the review agency the power to decide on release. Only in this way can the lawfulness of arrest and the reasonableness of detention be guaranteed, and suspects' rights can be better protected.

(iv) Litigation review model

The current arrest review model is that the People's Procuratorate decides to arrest and custody after reviewing the written case materials and evidence transferred by the investigative agency. This administrative review mode have many drawbacks and cannot fully realize the fairness of review. Therefore, in reforming the judicial review of arrests, a court trial should be adopted, in which the prosecution, defense, and trial parties all participate in the trial. As a neutral referee, the judge listens to the opinions of the prosecution and defense (Chen, & Lu, 2004, 80). Under the judge's auspices, the prosecutor and the suspect held a debate and cross-examination on whether to arrest and custody. This can strengthen the scientific and seriousness of arrest and custody and achieve a fair, just, objective, and scientific review result.

(v) Grant the suspect the right of procedural appeal

At present, there are only two remedies that can be applied to suspects after being arrested. The first is to apply for changes to compulsory measures. Article 97 of CPL state that *"a criminal suspect or defendant or his or her legal representative, close relative, or defender shall have the right to apply for modifying a compulsory measure"*. The other is the situation stipulated in Article 117 of CPL, if the judicial authority or any of its personnel refusing to release a criminal suspect or defendant or terminate or modify a compulsory measure taken when the statutory term of the compulsory measure expires, a party or a defender or litigation representative thereof or an interested a party shall have the right to file a petition or accusation. It should be noted that the prerequisite for the application of this article is the expiration of the statutory period of compulsory measures. Before applying compulsory measures, if the suspect has objections to its, the criminal procedure law does not provide for relief. Moreover, this article only stipulates that the parties have the right to file a petition or accusation with judicial authority and does not give the right to appeal.

At this stage, if the suspect has objections to the arrest, he does not have the right to appeal. The practice of not obtaining judicial relief after power is violated not in line with the judicial concept. Therefore, in the judicial review of arrests, suspects should be granted the right of appeal for wrongful arrest. After the custody court judge makes a ruling, if the suspect has objections, he can appeal against the ruling. The appeal procedure here can refer to the ordinary appeal procedure, which will be heard by the higher court that made the ruling. The ruling made by the higher court's custody court is the final ruling and has the ultimate effect.

Conclusion

When there is a conflict between civil rights and state power, how to effectively restrict public power and protect privacy rights. It should be the primary consideration in the design and reform of judicial systems in all countries in the world today. The deprivation of civil liberties by arrest makes it naturally invasive. How can the state protect citizens' rights to the utmost extent while at the same time achieving governance through judicial measures. It has become the focus of judicial reform. The judicial review of arrests in China is the Procuratorate's responsibility, and the practice of integrating arrest and custody is implemented. It does not meet the requirement of the neutrality of the review subject, and it is also contrary to the theory of procedural justice. In the reform of judicial review of arrests, the subject, procedure, and mode of review should be transferred to the road of judicialization. It has crucial and progressive significance for realizing the goal of China's judicial system reform.

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