

## Article

# Crime Control in China's Pre-trial System: A Political Ideology?

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### ABSTRACT

*Crime control has long been the primary goal of China's pre-trial justice system. This paper examines the genuine nature of crime control in the context of Chinese legal culture by reviewing the historical formation of this rationale. The article argues that, by looking at the characteristics of the pre-trial process in the different periods since the founding of the People's Republic of China, the pursuit of crime control in the administration of pre-trial justice in China is under the pressure of political needs. Although the Chinese Communist Party has so far made great efforts to promote China's pre-trial process in terms of its proceduralism and legalization, the administration of justice at this stage has been continuously influenced by political considerations. The article concludes that although the implementation of rule of law is expected to ideologically revolutionize China's pre-trial process, the deep-rooted political culture of overriding political stability over everything is unlikely to rule out the Party's influence on the pre-trial practices.*

**Keywords:** *Pre-trial Criminal Process, Criminal Coercive Measures, Administrative Detentions, Political Influences*

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## I. INTRODUCTION

The Chinese pre-trial process is generally characterized by legal scholars as the preparatory stage of the Chinese criminal justice system.<sup>1</sup> At this stage, arrest, detention, investigation and prosecution are respectively carried out by the Chinese public security organs (the police) and the procuratorates to serve in preparation for the trial sessions. Professor Chen Ruihua, one of the leading legal professionals in China, further points out that the pre-trial process in China is composed of three separate and independent stages, namely initiation of case (Li'an), investigation and prosecution.<sup>2</sup> Each stage is regulated by self-governing procedural settings, constituting one fragment of the "streamlined work processes" in the Chinese criminal justice system.<sup>3</sup> Therefore, the Chinese legal circle is normally inclined to examine the pre-trial process in the context of criminal justice. In terms of its deficiencies, legal practitioners and academics intend to promote this phase by reforming the current criminal procedure law in order to meet the requirements of rule of law and proceduralism.<sup>4</sup> However, as a stage of implementing law prior to trial, the Chinese pre-trial process should not be defined exclusively as a criminal process. Rather, a uniquely designed administrative justice system that has been long employed in the Chinese legal history is supposed to be considered as another important constituent in China's pre-trial justice system.

In parallel with the formal criminal justice system, China's administrative justice system has been in existence for several decades since its establishment in the 1950s. Unlike the former that is aimed at punishing criminality, the latter serves as an effective means to deal with minor offences. Those who commit deviant acts, such as prostitution, drug abuse and public order offence, are handled by the administrative apparatus

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1. SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS 87 (1985); Daniel C. Turack, *The New Chinese Criminal Justice System*, 7 CARDOZO J. INT'L & COMP. L. 63, 63-65 (1999); Chungyi Fan & Chung Chang, Ch'üanli Paochang Yü Ch'üanli Chihhêng Wokuo Hsingshih Shênch'ien Ch'ênghsü Kaikê Tê Chipên Ssulu [*Rights Guarantee and Balance of Power*], 1 CHUNGKUO SSUFA [JUSTICE OF CHINA] 24, 26 (2005).

2. CHEN RUIHUA, HSINGSHIH SUSUNG TÊ CH'IENYEN WÊNT'I, 496 (Hsienyi Tseng ed., 2d ed. 2005).

3. Chen Ruihua, *Ts'ung Liushui Tsoyeh Tsouhsiang I Ts'aip'an Wei Chunghsin — Tui Chungkuo Hsingshih Ssufa Kaikê Tê Ichung Ssuk'ao* [From "Streamlined Work Processes" to "Judiciary-Centered"—One Thinking of the Reform on the Chinese Criminal Justice], 3 FAHSIAO [LEGAL SCI. MONTHLY] 24, 24-25 (2003).

4. For detailed discussions of revising the Chinese criminal justice system, see Chen Guangzhong, *Hsingshih Susung Fa Hsiukai Chuanchia Chieni Kao* [Overview of Key Issues in Experts' Recommendation on the Re-amendment of Criminal Procedure Law in China], in PROMOTING CRIMINAL JUSTICE REFORM: A COLLECTION OF PAPERS FROM THE CANADA-CHINA COOPERATION SYMPOSIUM 15, 15-26 (2007); Chen Weidong, *The Basic Concepts of Re-modifying the Criminal Procedure Law*, 1(2) FRONT. LAW CHINA 153, 153-63 (2006).

through administrative procedures, and sanctioned by administrative regulations. Therefore, conceptually, the administrative justice system refers to the regulatory framework in which the Chinese authorities, particularly the police, incarcerate minor offenders under a variety of administrative detentions to maintain public order, social and political stability. To distinguish administrative offence from criminality, Article 13 of the Chinese Criminal Law (hereinafter CCL) first defines all crimes as acts that:

...endanger the sovereignty, territorial integrity, and security of the state; split the state; subvert the political power of the people's democratic dictatorship and overthrow the socialist system; undermine social and economic order; violate property owned by the state or property collectively owned by the laboring masses; violate citizens' privately owned property; infringe upon citizens' rights, democratic rights, and other rights; and other acts that endanger society, are crimes if according to law they should be criminally punished. However, if the circumstances are clearly minor and the harm is not great, they are not to be deemed as crimes.

It is noteworthy that a crime defined in CCL is a combination of "criminal characterization" and "criminal quantity."<sup>5</sup> "Criminal characterization" mainly concerns the nature of illegal conduct defined as a crime in CCL, whereas the "quantity" of the criminality refers to the degree of severity of a particular act.<sup>6</sup> As such, the assessment of the "quantity" of the conduct is crucial to determine whether the offender is sanctioned criminally or administratively.<sup>7</sup> However, compared to the relatively detailed stipulation of the criminal act, minor offence lacks a clear definition and a specific measurement for evaluation of "quantity." This deficiency is indicated in the *Public Order Administration Punishments Law of the People's Republic of China* (POAPL), which sets forth several categories of

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5. Huai Chih Ch'u & Yung LêWang, *Tsailun Wokuo Hsingfa Chung Fantsui Kainien Tê Tingliang Yinsu* [Further View of Quantity Factor of the Criminology in Chinese Criminal Law], 2 FAHSIAO YENCHIU [CHINESE JOURNAL OF LAW] 32, 36 (2000).

6. Art. 384 of Criminal Law of the People's Republic of China 1997 provides: "Any state functionary who, by taking advantage of his position... misappropriates a relatively large amount of public funds for profit-making... shall be guilty of misappropriation of public funds and shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention..." Since the "relatively large amount" was vaguely defined in Criminal Law of the People's Republic of China, *The Supreme People's Court's Interpretation on Several Questions Concerning the Concrete Application of Laws in Adjudicating Misappropriation of Public Funds* (a judicial interpretation) was issued in 1998. It defines "relatively large amount" as the amounts within RMB 10,000-30,000.

7. Chao Pin'ei, Chihan Kuanli Ch'ufa Fa Yü Hsingfa Tê Hsienchieh Yü Ch'ung't'u [Connection and Conflict of POAPL and CC], 156 KUNGAN YENCHIU [POLICING STUDIES] 57, 58-59, 61-62 (2007).

infringement that are characterized as minor offences.

With regard to an act of disrupting public order, encroaching upon the right of the person, the right of property or impairing social administration, if it is of social harmfulness and constitutes any crime as provided for in the Criminal Law of the People's Republic of China, it shall be subject to criminal liabilities. If it is not serious enough to be subject to a criminal punishment, it shall, in accordance with this law, be subject to public security punishment by the public security organ.<sup>8</sup>

Accordingly, four major administrative detentions have been created, including Reeducation through Labor (Laodong Jiaoyang), Detention for Education (Shourong Jiaoyu), Coercive Drug Rehabilitation (Qiangzhi Jiuedu) and Public Order Detention (Zhi'an Juliu), to be imposed on different minor perpetrators who commit corresponding offences.

Unlike the criminal justice system, in which the criminal proceedings consist of pre-trial and court trial processes involving participation of the police, procuratorates, courts, suspects and their lawyers, the administrative justice system only concerns two parties, the police and offenders. For example, the Public Order Administrative Punishment Law (hereinafter POAPL) explicitly stipulates that the public security organs are responsible for punishing minor offenders who disturb social order, undermine social security, infringe on citizen's rights of property and person, and hinder societal management with social dangerousness in light of the law.<sup>9</sup> Further, the imposition and subsequent regulation of Detention for Education, Coercive Drug Rehabilitation and Re-education through Labor are all subject to the public security organs alone.<sup>10</sup> The police are effectively given the exclusive discretion to exercise administrative powers without a systematic procedure to guide their practices.<sup>11</sup> Such empowerment, on the one hand, results in the ruling out of the participation of other law institutions or offenders' lawyers, and on the other hand in turn rules out a proper legal procedure to challenge and restrain the police's administrative power.

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8. Chihan Kuanli Ch'ufa Fa [Law of the People's Republic of China on Public Security Administration Punishments] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Mar. 1, 2006) (China), art. 2.

9. *See id.*

10. Chiangchih Chiehtu Fa [Measures on Coercive Drug Rehabilitation], (promulgated by the State Council, Jan. 12, 1995), art. 3; Chunghua Jênmin Kunghan Kuo Chintu Fa [Narcotics Control Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 9, 2007, effective June 1, 2008) (China), art. 40; Maiyin P'iaoch'ang Jên-yüen Shoujung Chiaoyü Panfa [Measures for Detention for Education of Prostitutes and Clients of Prostitutes], (promulgated by the State Council, Sept. 4, 1993) (China), art. 3; Chunghua Jênmin Kunghan Kuo Laotung Chiaoyang Shihhang Panfa [Temporary Measures on Re-education through Labour] (romulgate by the State Council, Jan. 21, 1982) (China), art. 4.

11. *Ch'ang Ch'êngLi, Hangchêng Chüliu Pei Fachih Weiwang Tê Chiaola [Administrative Detention—Ignored by Rule of Law]*, 3 HANGCHÉNG FAHSIAO YENCHIU [ADMINISTRATIVE L. REV.] 54, 56-57 (2006).

Clearly, the administrative justice system is largely employed alongside the state's criminal justice powers to target conduct considered to be socially disruptive.<sup>12</sup> Since the introduction of the economic modernization policy in the late 1970s, the maintenance of social control has been very important to guarantee the success of the economic reforms.<sup>13</sup> Many legal scholars have even argued that the policy of social control itself has been one of the crucial pillars of reform.<sup>14</sup> Therefore, the administrative justice system has been heavily relied on in practice to serve as a "second line of defense" to preserve social order and public security.<sup>15</sup> The use of administrative detention powers is viewed as a flexible tool in the hands of the police to address social order problems, constituting the lower level of crime prevention strategies.

Despite the practical effect the Chinese pre-trial process exerts on crime control and the maintenance of social order, both the criminal pre-trial process as well as the various forms of administrative detentions are often portrayed as representative of China's failure to establish rule of law.<sup>16</sup> One of the most heavily criticized aspects of the Chinese criminal justice system has been the miscarriage of justice in the pre-trial process. Arbitrary detention, misuse of the authorities' unfettered powers and exclusion of judiciary and legal counsel contribute greatly to the malpractices of this procedure.<sup>17</sup> Many legal scholars and practitioners tend to attribute these phenomena to some ideological causes. They, for instance, argue that the authorities' mentality of favoring substantive justice over procedural justice has long dominated the operation of the Chinese criminal pre-trial, hence resulting in disregard of due process.<sup>18</sup> Further, the investigative organs are inclined to circumvent formal legal procedures in an attempt to conserve

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12. SARAH BIDDULPH, *LEGAL REFORM AND ADMINISTRATIVE DETENTION POWERS IN CHINA* 3 (2007).

13. Harro von Senger, *Ideology and Law-Making*, in *LAW-MAKING IN THE PEOPLE'S REPUBLIC OF CHINA* 53 (Jan Michiel Otto, Maurice V. Polak, Jianfu Chen & Yuwen Li eds., 2000).

14. BORGE BAKKEN, *THE EXEMPLARY SOCIETY, HUMAN IMPROVEMENT, SOCIAL CONTROL AND THE DANGERS OF MODERNITY IN CHINA* 4 (2000); Xiaoming Chen, *Social Control in China: Applications of the Labeling Theory and the Reiterative Shaming Theory*, 1 *INT'L J. OF OFFENDER THERAPY AND COMPARATIVE CRIM.* 45, 46 (2002).

15. Professor Sarah Biddulph in her book views the regulation and education based on the community organization and mass-line policing as the 'first line of defense' serving the prevention of criminality in China. When the 'first line of defense' fails, the coercive police powers that serve as the 'second line of defense' take over and function as the stiffer measures to prevent criminality.

16. Randall Peerenboom, *Out of the Pan and Into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detentions in China*, 98(3) *N.W. U. L. REV.* 991, 994 (2004).

17. Ying Hui Sung, *Hsingshieh Shênch'ien Ch'ênghsü Yü HsingsShih Ssufa Kungchêng* [*Criminal Pre-trial Process and Criminal Justice*], 1 *CHUNGKUO FAHSIAO* [CHINA LEGAL SCIENCE] 6, 6-7 (2003).

18. Kam C. Wong, *A Reflection on Police Abuse of Power in the People's Republic of China*, 1(2) *POLICE QUARTERLY* 87, 88 (1998).

valuable and limited police resources for the purpose of pursuing ultimate crime control.<sup>19</sup> More crucially, the hostility of the public toward elements that are destructive of social order and security discourages the effective protection of the legal rights of suspects.<sup>20</sup> These long-standing attitudes enable the authorities to pay more attention to how to serve crime control rather than abide by the rule of law in their implementation of law. Similarly, in a system where the punitive and deterrent elements of administrative detention indicate the authorities' intention to use custodial measures in preventing further crimes,<sup>21</sup> the effort to rationalize administrative detention is compromised by the structuring of a social order policy based on punishment and retribution. Many professionals and organizations thus suggest that all forms of administrative detentions be either abolished or reformed to meet the requirement of proceduralism and rule of law.<sup>22</sup>

This article aims to disclose the inherent nature of the crime control rhetoric by looking at the historical reason why this notion has been shaped and dominant in China's pre-trial process. The paper first reviews the characteristics of China's pre-trial process in different periods since the founding of the People's Republic of China, and then explores the formation of the crime control rationale in the context of the political and social backgrounds in the pre-1978 and post-1978 time frame. By examining the impetus for promoting the administration of pre-trial justice at the different stages of legalization, the paper argues that the legal culture of overriding crime control over everything in the administration of pre-trial justice is greatly influenced by China's unique political atmosphere. More specifically, China's pre-trial justice system is designated to serve the political needs and the Party's pursuit of political stability in the pretense of crime control throughout China's economic, social and legal development.

## II. CHINA'S PRE-TRIAL PROCESS: A HYBRID JUSTICE SYSTEM?

The origin of the Chinese pre-trial process can be traced back to the

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19. *Id.*

20. Liqun Cao & Francis T. Cullen, *Thinking about Crime and Control: A Comparative Study of Chinese and American Ideology*, 11 INT'L CRIM. JUST. REV. 58, 74 (2001).

21. BIDDULPH, *supra* note 12, at 356.

22. Human Rights in China, *Reeducation through Labor: A Summary of Regulatory Issues and Concerns* 5, 5-6 (2001), <http://hrichina.org/sites/default/files/oldsite/PDFs/Reports/HRIC-RTL.pdf>; Veron Mei-Ying Hung, *Improving Human Rights in China, Should Reeducation Through Labor Be Abolished?*, 41 COLUM. J. TRANSNAT'L L. 303, 325 (2002-03); Fu Chün Shên, *Kuanwu Feich'u Laotung Chiaoyang Chih-tu Tê Ssuk'ao* [*The Thinking of Abolishing Reeducation through Labor*], 7 FA Hsiao [LEGAL SCI. MONTHLY] 18, 18-19 (1999); Tsê Hu P'êng, *Shoujung Chiaoyü Weifa Hsing Yenchiu* [*Research on Illegal Nature of Detention for Education*], 23(11) HSINAN MINTSU HsiaoYüEN HsiaoPAO [J. SOUTHWEST UNIV. FOR NATIONALITIES PHILOSOPHY AND SOCIAL SCIENCE] 72, 74 (2002).

early period of China. Prior to the initiation of the legal reforms in 1978,<sup>23</sup> China had undergone years of social disorder and anarchy since the Chinese Communist Party (hereinafter Party) took power in 1949.<sup>24</sup> At that time, mass political movements aimed to extradite “political class enemies” through domination of Chinese people’s daily lives by the central government.<sup>25</sup> Although the Chinese government sought to build a formal legal system with the Chinese characteristics, the actual development of legalization during 1949-1978,<sup>26</sup> as the overwhelming majority of Chinese and western scholars pointed out, had been the period of societal model of law that was largely preferred over a formal justice system.<sup>27</sup> On one hand, a bulk of laws, regulations and decrees were enacted to meet the specific needs of different eras.<sup>28</sup> On the other hand, the emphasis on revolutionary mass-line justice and mass mobilisation tactics enabled the authorities to circumvent law and due process in order to impose suppressive sanctions on political foes.<sup>29</sup> As such, law was deemed to be nothing but an instrument to consolidate political power and maintain the established order. One of the Chinese leading newspapers clearly indicated the purpose of the use of law in this period:

“The law of the people’s State is a weapon in the hand of the people to be used to punish subversive elements of all sorts and is by no means something mysterious and abstruse”<sup>30</sup>

“The law is a tool with which to implement policies...It plays a

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23. The Criminal Law of the People’s Republic of China and the Criminal Procedure Law of the People’s Republic of China were adopted by the Second Session of the Fifth National People’s Congress on 1 July 1979.

24. The People Republic of China was founded by Chinese Communist Party on 1 October 1949. In the wake of the victory of civil war (War of Liberation) against Goumingdang (Chinese Nationalist Party).

25. ‘Class enemies’, according to the classifications of Chinese Communist Party in the early years after the establishment of China, were described as ‘five black elements’ (Landlords, Rich peasant, Counterrevolutionaries, Rightists and other bad elements). See STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 73 (1999); See also Zedong Mao, *On the Correct Handling of Contradictions among the People*, in QUOTATIONS FROM CHAIRMAN MAO TSETUNG 52 (1972).

26. The end of Chinese Cultural Revolution in 1976 marks the beginning of new and pragmatic development of legal system. For a general discussion, see LENG & CHIU, *supra* note 1.

27. See Shao-Chuan Leng, *The Role of Law in the People’s Republic of China as Reflecting Mao Tse-tung’s Influence*, 68(3) J. CRIM. L. & CRIMINOLOGY 356 (1977); Victor H. Li, *The Role of Law in Communist China*, 44 CHINA Q. 66 (1970); Xingzhong Yu, *Legal Pragmatism in the People’s Republic of China*, 3 J. CHINESE L. 29, 29-51 (1989); Lung-Sheng Tao, *Politics and Law Enforcement in China: 1949-1970*, in LAW, THE STATE, AND SOCIETY IN CHINA 142 (Tahirih V. Lee ed., 1997).

28. XIN CHUNYING, *CHINESE LEGAL SYSTEM & CURRENT LEGAL REFORM* 330 (1999).

29. There are a number of mass movements initiated by central government after the founding of China in 1949, and such nationwide campaigns considerably caused the political and legal turbulences during the period of 1949-1976. These movements are discussed below.

30. Anonymous, Shè Lun [Editorial], JÈN MÍN JIH PAO [PEOPLE’S DAILY]. Mar. 21, 1952, at A1.



direct part in guaranteeing the realization of State plans”<sup>31</sup>

In response to central guidance, the legal and extrajudicial apparatus, such as public security organs (police) and ad hoc tribunals, were actually assigned to implement the ever-changing political policies in lieu of established laws during the massive political campaigns.<sup>32</sup> However, although the political revolution overweighed everything in the governance of the state during 1949-1978, the administration of “people’s justice” created a socialist pre-trial justice system, which was further developed as a formal legal framework along with the economic reform and the “Open-Door” policy since the late 1970s.

In the wake of the Cultural Revolution (1966-1976), China has made significant steps towards the advancement of legality. After the death of Chairman Mao Zedong in 1976, China’s legal system was reformed to keep pace with the country’s modernization efforts, rapid commercial and economic liberalization. In this context, an institutionalized pre-trial process that comprises both criminal and administrative elements has been formed. In this regulatory framework, the criminal and administrative justice system were separately shaped with the promulgations of corresponding laws and regulations. For example, the Chinese Standing Committee of the People’s National Congress enacted the Criminal Law and the Criminal Procedure Law in 1979 to systematize the authorities’ criminal practices. At the same time, a number of administrative regulations in relation to the handling of administrative offences were passed to serve as an adjunct to the criminal justice system.<sup>33</sup> Unlike the pre-1978 period where the country lacked a proper justice system to regulate the sanctioning of offenders, the post-1978 legal reforms have constructed a more legalized regulatory scheme to formulate the administration of pre-trial justice based on justice and rationality.

Therefore, the legislative and ideological evolution of the Chinese pre-trial process can be historically divided into two phases, namely the pre- and post-1978 period. While the first stage exhibits the Chinese authorities’

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31. Anonymous, Shê Lun [Editorial], JÊN MIN JIH PAO[PEOPLE’S DAILY]. Nov. 18, 1954, at A1.

32. JEROME A. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA 1949-1963: AN INTRODUCTION 9-10 (1968).

33. *E.g.*, Kuowu Yüen Kuanwu Laotung Chiaoyang Tê Puch’ung Kuiting [Supplementary Provisions of the State Council for Rehabilitation Through Labor] (promulgate by the Standing Comm. Nat’l. People’s Cong. Gaz., Nov. 29, 1979) (China); Ch’üankuo Jênta Ch’angwei Kuanwu Yenchin Maiyin P’iaoch’ang Tê Chüehting [Decision of the Standing Committee of the National People’s Congress on the Strict Prohibition Against Prostitution and Whoring] (promulgate by the Standing Comm. Nat’l. People’s Cong. Gaz., Sept. 4, 1991) (China); Ch’üankuo Jênmin Taipiao Ta hui Ch’angwu Weiyüen Hui Kuanwu Chintu Tê Chüehting [Decision of the Standing Committee of the National People’s Congress on the Prohibition Against Narcotic Drugs] (promulgate by the Standing Comm. Nat’l. People’s Cong. Gaz., Dec. 28, 1990) (China).

obsession with political movements in which the operation of pre-trial justice was subject mainly to the political needs rather than law, the second period rationalizes the legal basis and objectives of this framework and seemingly regularizes its use based on systematic procedural requirements. Although these two periods reflect different legal and political features, one common characteristic has been observed. At the pre-trial phase, law often takes the form of general principles and shifting policies rather than constant rules to attack crime and deal with broader problems of social order. More specifically, although the pre-trial process has been legislatively strengthened in terms of its expanding scope and increasing use, the Chinese legal culture that emphasizes crime control and state power exerts a chilling effect on the administration of justice at this stage.

A. *The Pre-trial Process in Mao's China*

Professor Leng Shao-Chuan and Chiu Hungdah claim in their book that two forms of legal system coexisted and competed with each other in the Maoist era, namely the formal and informal model.<sup>34</sup> They argue that although China had built a jural model and a regular judicial system consisting of courts, procuratorates and people's assessors, Mao's China in reality preferred the societal model that is filled with informality and flexibility in approaching legal matter.<sup>35</sup> Clearly, pre-1978 China lacked a genuinely implemented legal system, let alone an institutionalized pre-trial process in the implementation of law. Yet, by reviewing the employment of extrajudicial organs and mass line devices and procedures in imposing sanctions,<sup>36</sup> it is arguable that there existed an informal pre-trial process in Mao's China, carrying out the "people's justice" during the political campaigns. This legal framework was dominated by the public security organs which undertook the major duties of detaining and investigating "class enemies" without due process. Interestingly, although since 1978 the socialist administration of justice has been outdated, its ideological and practical patterns have significantly influenced the practice of the pre-trial process at present. Specifically, even though a comprehensive justice system has been shaped in the context of the legal reforms, the Chinese law enforcement agencies are still prone to carry out their powers in an unlimited

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34. LENG & CHIU, *supra* note 1, at 7.

35. COHEN, *supra* note 32, at 9-10.

36. The Mass Line is the Political, organizational or leadership method developed by Mao Zedong and the Chinese Communist Party during the political campaigns. According to Professor Frederick Teiwes, for all the CCP rhetoric concerning the 'mass line,' the unions and other mass organizations functioned more as Stalinist 'transmission belts' in laying down the party line and extending the reach of the state. Frederick Teiwes, *The Chinese State During the Maoist Era* in *The Modern Chinese State*, in THE MODERN CHINESE STATE 106 (David Shambaugh ed., 2000).

and unsupervised manner as in the Mao's era. Moreover, the authorities are still periodically required to administer justice in line with political guidance in some specific politic-legal actions, such as the "Hard Strike" campaigns. Thus, it is essential to look into Mao's China to examine its philosophical impact on the legal advancement of the Chinese justice system as a whole. The pre-1978 period is divided into three sub-phases, coupled with the corresponding political movements instigated by Chairman Mao Zedong. 1) Mass Trials Period during 1949-1953, 2) Anti-Rightist Campaign during 1957-1958, 3) Proletarian Cultural Revolution during 1966-1976.

### 1. *The Mass Trials 1949-1953*

#### (a) Criminal and Administrative Justice System

1949 to 1953 was a period where the CCP was intended to entrench its political power and to eliminate undesirable class enemies. Mao Zedong, in his speech 'On the People's Democratic Dictatorship', publicized the theoretical basis of the political movements:

"...All the experience the Chinese people have accumulated through several decades teaches us to enforce the people's democratic dictatorship, that is, to deprive the reactionaries of the right to speak and let the people alone have that right...The state apparatus, including the army, the police and the courts, is the instrument by which one class oppresses another. It is an instrument of the oppression of antagonistic classes; it is violence and not benevolence..."<sup>37</sup>

Such an announcement was viewed as the political guideline for Chinese people's democracy in the Common Program (Gongtong Ganglin).<sup>38</sup> In this document, China was deemed to commit itself to wiping out all the undesirables that might pose a threat to country's sovereignty and

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37. The speech was made in commemoration of the Twenty-eighth Anniversary of the Communist Party of China on 30 June 1949.

38. Common Program was adopted by the Chinese People's Political Consultative Conference in September 1949 in Beijing, and served as interim constitution before the implementation of Constitution 1954 as Common Program had the general features of a constitution. Art 7 of the *Common Program* says: 'The People's Republic of China shall suppress all counter-revolutionary activities, severely punish all Kuomintang counter-revolutionary war criminals and other leading incorrigible counter-revolutionary elements who collaborate with imperialism, commit treason against the fatherland and oppose the cause of people's democracy. Feudal landlords, bureaucratic capitalists and reactionary elements in general, after they have been disarmed and have had their special powers abolished, shall, in addition, be deprived of their political rights in accordance with law for a necessary period. But, at the same time, they shall be given some means of livelihood and shall be compelled to reform themselves through labor so as to become new men. If they continue their counter-revolutionary activities, they will be severely punished.'

governance. As a result, existing laws and codes of the previous government, that is, Goumingdang, were abolished,<sup>39</sup> judicial personnel formerly appointed by Goumingdang were purged,<sup>40</sup> and a communist legal system aimed at eliminating class enemies emerged fueled by the Soviet legal regime.<sup>41</sup> Together with the adoption of socialist laws and regulations, the People's courts, procurator-general offices and public security organs were established to carry out the mass-line rules, and required to deal with political foes in a "justified" fashion.<sup>42</sup>

Over the course of the nationwide campaigns against political enemies, a spate of regulations was adopted to rationalize the imposition of harsh criminal sanctions on targeted people. For example, the Land Reform Law was promulgated in the 1950 land reform movement to eliminate the old landlord class. In the meantime, the Act for Punishment of Counter-revolutionaries and the Act for the Punishment of Corruption were enacted in 1951 and 1952 respectively during the purges against counter-revolutionaries and corruption. Despite these specified laws, the 1954 Arrest and Detention Act was enacted to further the justification of imposing incarceration on class enemies by the police.<sup>43</sup> It is clear that although the passage of laws during this period attempted to create a legal foundation for the execution of criminal penalties, these laws were not employed to dispense justice, but to better serve the state's political policies in the form of implementation of law.<sup>44</sup>

Other than politically motivated crime, another category of offences that undermine social order and morality such as using narcotic drugs, gambling and prostitution was identified and targeted. Unlike political foes that were sanctioned criminally, those who had committed wrongs were considered not sufficiently serious to warrant criminal imprisonment. Therefore, they were subjected to administrative measures such as control, or labor under the

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39. LENG & CHIU, *supra* note 1, at 11.

40. Almost all Nationalist (Goumingdang) legal personnel were replaced by Communist Cadres during the Judicial Reform Campaign in 1953, see Chiu Hungdah, *Chinese Law and Justice: Trends over Three Decades*, 52 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES, 1, 6 (1982).

41. Harold J. Berman, *Soviet Perspectives on Chinese Law*, in CONTEMPORARY CHINESE LAW RESEARCH PROBLEMS AND PERSPECTIVES 318 (Jerome Alan Cohen ed., 1970).

42. The Supreme People's Court was established in 1950, and the People's Court of provincial level came into existence in late 1950. Before 1949, there had never been an independent people's procuratorate existing in any Chinese Communist regimes, even though the prosecutor-general office was not technically regarded as the legal organ until 1953, when the Organization Law of the Procuratorate was adopted, and the power of procuratorate was incorporated in *Constitution 1954*. Franz Michael, *The Role of Law in Traditional, Nationalist and Communist China*, 9 CHINA Q. 124 (1962).

43. Li, *supra* note 27, at 79. For a detailed discussion of Chinese criminal justice legislation in the early years, Luke T. Lee, *Chinese Communist Law: Its Background and Development*, 60(4) MICH. L. REV. 439 (1962).

44. Tao, *supra* note 27, at 108.

supervision of the masses to undergo the educational rehabilitation.<sup>45</sup>

Prostitution was the first social evil phenomenon targeted by the Chinese government. Having been labeled as the remnant unethical behavior from the old society,<sup>46</sup> prostitution was prohibited in cities across the nation.<sup>47</sup> Although specific civil strategies were adopted by the local community and government by virtue of local particularities,<sup>48</sup> the authorities consistently used Detention for Education as the ultimate instrument to eradicate prostitution. As a result, China has established many small detention centers in big and medium cities since the consolidated strike on prostitution. Interestingly, to distinguish from harsh mass-line policy on political opponents, incarceration of prostitutes and their clients was required to deliver rescuing and reformative elements in its practice. Therefore, during detention, the authorities were supposed to test and cure sex-related diseases, to teach detainees new working techniques and to transform them from unethical social disrupters to self-supporting citizens.<sup>49</sup> These objectives were further reflected in post-release arrangements. Instead of simply releasing detainees, the authorities placed them in the care of families or spouses, under the supervision of local resident committees and communities. Many former prostitutes were reportedly assigned to work in the factories or state farms, developing their capabilities of living decently.<sup>50</sup>

The problems of drug use and addiction had been considered as acute as prostitution since the founding of the People's Republic of China.<sup>51</sup> Concerted actions were then taken by the authorities to eliminate drug use and drug-related offences. Not surprisingly, many people involved in drug transportation and trafficking were particularly targeted in the campaigns. They were arrested and punished with great severity as their criminal offences were suspected of having links to counter-revolutionaries and overseas drug cartels.<sup>52</sup> Drug users, on the other hand, were to be subject to

45. LEI YU, TANGTAI CHUNGKUO TÊ KUNGAN KUNGTSO [PUBLIC SECURITY WORK IN CONTEMPORARY CHINA] 5 (Fang Wang et al. eds., 1992).

46. Christian Henriot, 'La Fermature': *The Abolition of Prostitution in Shanghai, 1949-58*, 1995 CHINA Q. 467, 473 (1995).

47. Wei Kang Ma, *Chienkuo Ch'uch'i Chinch'ang Shulieh* [*The Outline of Prohibiting Prostitution in the Early Period of China*], 34 KUNGAN YENCHIU [POLICING STUDIES] 55, 56 (1994).

48. For example, Shanghai tended to utilize registration, restriction and gradual closure of brothels over a comparatively long period of time in order to minimize the impact of suddenly losing income and unemployment of prostitutes. See BIDDULPH, *supra* note 12.

49. Henriot, *supra* note 46, at 477.

50. GAIL HERSCHATTER, DANGEROUS PLEASURES: PROSTITUTION AND MODERNITY IN TWENTIETH-CENTURY SHANGHAI 319 (Min Chung Han & Ning Shêng eds., 1997).

51. Ying Lan Chao, *Lun Chintai Chungkuo Shêhui Tê Minchien Yentu Wént'i* [*Drug Problems in the Modern Chinese Society*], 3(1) PEIHUA TAHSIAO HSIAOPAO [J. BEIHUA UNIV.] 41, 41 (2002).

52. Li Li Chung, *Shihlun Hsin Chungkuo Ch'Êngli Ch'Uch'I Tê Chinyen Chintu Yüntung Chi Chi Ch'êngkung Chingven* [*An Preliminary Discussion on Anti-Drug and Anti-Prostitution Movements and Their Successful Experiences in the Early Period of People's Republic of China*] 31 (2) CHUNGKUNG SHANHSI SHÊNGWEI TANGCHIAO HSIAOPAO [ACADEMIC JOURNAL OF SHANXI

detention for coercive rehabilitation. Analogous to Detention for Education, drug users in rehabilitation centers was required to receive education based on mass mobilization. The local governments and big administrative regions were encouraged to enact their own directives to operate coercive detoxification in light of local conditions.<sup>53</sup> But in practice a wide range of social and community groups, such as the Community Youth League, the Women's Federation and the trade unions, were involved in the process of treatment along with the public security organs responsible for administrative matters. They frequently organized large or small-scale educational meetings to remold drug users' moral values and provide them psychological aids. While undertaking coercive drug treatment, detainees were also subjected to the supervision of the masses, in which people, including family members, were encouraged to inform on drug offenders.

Public order offenders (minor offenders) were also the targets of China's primary administrative justice system. Unlike prostitutes and drug addicts, the categories of persons labeled as public order offenders were broad. The Security Administrative Punishments Regulations 1957 (hereinafter SAPR) stipulated that those who disturbed public order, harmed public security, infringed a citizen's personal rights or damaged public or private property should receive administrative punishments enforced by the public security organs, including warnings, fines and detention.<sup>54</sup> This catch-all provision was later reinforced in the legislation of Reeducation through Labor. The Chinese authorities commenced Reeducation through Labor in the first round of legal progression after the founding of the Peoples' Republic of China, in an attempt to target class enemies such as counter-revolutionaries and "bad elements".<sup>55</sup> Over time, this unique measure has been developed as a coercive tool for handling minor offences that are considered not sufficiently serious to warrant criminal punishment. In light of the social needs, the targets of Reeducation through Labor have been significantly expanded in the political campaigns. The SAPR, for example, provided that those without employment and vagrants who repeatedly disturbed public order would be sent to Reeducation through Labor.<sup>56</sup> The Decision of the State Council on the Question of Reeducation through Labor 1957 affirmed

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PROVINCIAL COMMITTEE PARTY SCHOOL OF C.P.C] 56, 58 (2008).

53. Ch'ên Kê Ch'u, *Wokuo Chintu Lifa Tê Lishih Yenchin* [The Historical Evolution of China's Anti-Drug Legislation], 23(2) CHIANGSU CHINGKUAN HSIAOYÜEN HSIAOPAO [J. JIANGSU POLICE OFFICER C.] 20, 23 (2008).

54. Chunghua Jênmin Kungshan Kuo Chihan Kuanli Ch'ufa T'iaoli [Regulations on the People's Republic of China on Administrative Penalties for Public Security] (promulgate by the Standing Comm. Nat'l. People's Cong. Gaz., Sept. 5, 1986, effective Jan. 1, 1987) (China), art. 2.

55. BIDDULPH, *supra* note 12, at 81, 193.

56. Chunghua Jênmin Kungshan Kuo Chihan Kuanli Ch'ufa T'iaoli [Regulations on the People's Republic of China on Administrative Penalties for Public Security] (promulgate by the Standing Comm. Nat'l. People's Cong. Gaz., Sept. 5, 1986, effective Jan. 1, 1987) (China), art. 30.

such expansion by incorporating minor offenders, transients, troublemakers who did not work properly or who refused to comply with work assignments, and those without means of support into its controlling scope.<sup>57</sup> Functionally, Public Order and Reeducation through Labor detention, analogous to Detention for Education and Coercive Drug Rehabilitation, were designed as educational measures. They were employed to detain offenders for coercive education and employment, to teach them the habit of labor and to ensure that detainees had properly reformed and had acquired the habit of work before release.<sup>58</sup> This guideline was later confirmed by the 1957 Decision, which provided that settlement and employment were two major rationales of Reeducation through Labor, and detainees were to work and receive remuneration appropriate to their work during incarceration.<sup>59</sup>

(b) Law Enforcement Agencies

In the implementation of political tasks, the public security organ played the most salient role. During the mass-line movements, the police enjoyed extensive powers in investigation, detention and punishment.<sup>60</sup> More specifically, while arresting and interrogating those who were targeted as “reactionaries” and “counter-revolutionaries”, the police were given exclusive power to impose criminal measures, ranging from control (Guanzhi) to confinement in police-run “Labor Reform” camps depending on the seriousness of misdemeanors.<sup>61</sup> The exercise of these powers, however, did not derive from solid legal footings, but from the Party’s political empowerment. Not infrequently, the public security organs disposed of cases of both serious criminals and class enemies without resorting to the courts.<sup>62</sup> This was also because in judicial and procuratorial practices, the courts and procuratorates were given inadequate legal guidance as to how to prosecute and adjudicate the cases, and organize the court sessions in the trial process. As such, the administration of justice by the police in the period of early political campaigns was in reality subject to neither formal procedural requirements nor external review by other law enforcement agencies. Instead, in order to obtain support from the masses, the police were required by the Party to hand over the cases to the mass tribunals for adjudication.<sup>63</sup> Not surprisingly, due to the lack of the participation of other

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57. Kuowu Yüen Kuanwu Laotung Chiaoyang Wënt’i Tê Chüehing [Decision of the State Council on the Question of Reeducation through Labor] (promulgate by the Standing Comm. Nat’l. People’s Cong. Gaz., Aug. 1, 1957) (China), art. 1.

58. BIDDULPH, *supra* note 12, at 84.

59. Kuowu Yüen Kuanwu Laotung Chiaoyang Wënt’i Tê Chüehing [Decision of the State Council on the Question of Reeducation through Labor] (promulgate by the Standing Comm. Nat’l. People’s Cong. Gaz., Aug. 1, 1957) (China), art. 2.

60. COHEN, *supra* note 32, at 10.

61. LUBMAN, *supra* note 25, at 72.

62. LENG & CHIU, *supra* note 1, at 12.

63. COHEN, *supra* note 32, at 275-95; BIDDULPH, *supra* note 12, at 66.

legal actors, indiscriminate arrest, arbitrary detention, lengthy interrogation and corporal punishment were very often observed in the exercise of the police's paramount powers in the pre-trial process in the early period of Communist China.<sup>64</sup>

It is true that due to the ideological influences of the Soviet Union on the socialist countries, China established its judicial infrastructure and system based on the Soviet model in the aftermath of the liberation.<sup>65</sup> The three-tiered Chinese judicial and procuratorial institutions were built with the promulgations of the 1954 Organic Law of the People's Courts and the 1954 Organic Law of Procuratorates,<sup>66</sup> which absorbed a number of advanced legal concepts, such as judicial independence, equality before the law and public trials. Indeed, the construction of a judicial system reflected the Party's primary determination of setting up a complete and normative legal system.<sup>67</sup> Such effort, however, was largely undermined by the emerging mass movements where the extrajudicial apparatus and the public security organs were exclusively relied on to administer justice.<sup>68</sup>

During the campaigns, the operation of ad hoc people's tribunals made the people's court and procuratorate meaningless, literally turning the administration of justice in the political movements into a pre-trial process. The ad hoc adjudicators held mass trials on the cases handed to them by the police and dispensed revolutionary justice against "reactionaries" and "black elements". Such trials and struggle meetings (public judgment meetings) were in effect deployed nationwide by the Party as a general form of adjudication in the handling of class enemies.<sup>69</sup> At the practical level, a mass tribunal was set up in a factory, commune, or even store, usually being led by domestic government under the provincial level.<sup>70</sup> During a mass trial, hundreds and thousands of spectators were present to hear the trial, and they were encouraged to raise their accusations against defendants.<sup>71</sup> Many scholars thus assert that the widespread use of mass trials was not to adjudicate in a fair and legalized manner, but to mobilize the masses and heighten their vigilance against the undesirables.<sup>72</sup> Numerous class enemies were convicted and sentenced to death, and many more were sent to long

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64. LENG & CHIU, *supra* note 1, at 12.

65. Lee, *supra* note 43, at 447-51.

66. Yu, *supra* note 27, at 315; Berman, *supra* note 41, at 318.

67. The hierarchical structure of Chinese 'Basic-Level' Organization of judicial system can be found in LUBMAN, *supra* note 25, at 46.

68. LENG & CHIU, *supra* note 1, at 24.

69. See also Organization Regulations of People's Tribunals 1952, art. 1.

70. LENG & CHIU, *supra* note 1, at 24.

71. For detailed information, see Chow Ching-Wen, *Ten Years of Storm*, 5 CHINA Q. 145 (1961). In this article a number of cases of mass trials witnessed by the author through the mass political movements are vividly presented.

72. Leng, *supra* note 27, at 367.



terms of “reform through labor” after ad hoc trials.<sup>73</sup> In so doing, the procuratorial and adjudicative duties of the procuratorates and courts were completely taken over by the extrajudicial committees. The whole criminal justice system in essence functioned as a pre-trial process where investigation and detention largely constituted the authorities’ criminal justice practices, punishing political enemies at the expense of due process.

In the system of administrative justice, the roles of law enforcement agencies were more unbalanced than those in the criminal pre-trial process. The SAPR gave public security organs exclusive power to detain a person up to fifteen days.<sup>74</sup> Furthermore, they were empowered to impose sanctions on acts not specifically prohibited in the SAPA by analogy.<sup>75</sup> Meanwhile, the Decision of the State Council on the Question of Reeducation through Labor 1957 indicated that the Reeducation through Labor organ was responsible for the implementation of Reeducation through Labor, and such an enforcement body should consist of the public security organ and the civil affairs department.<sup>76</sup> These settings evidently ruled out the involvement of other law enforcement agencies and organizations, such as the courts and procuratorates, in the approval and execution of administrative detention. Unlike the criminal justice system where the mass trials were existent as a formality to adjudicate criminals, the imposition of administrative detention lacked a formal legal procedure to ensure its legality and reasonability. Without complete due process, whether a minor offender should be detained administratively was subject to the police’s ex parte understanding of statutory provisions. Not surprisingly, the police’s paramount power in implementing social order programs enabled them to use administrative detention as a routine instrument to preserve public order and political stability. While it served the prevention of crime, the lack of procuratorial review and judicial supervision deepened the arbitrariness and unjustness of this coercive means, which makes it philosophically consistent with criminal sanctions imposed on class enemies. In this context, although administrative detention was designed to target minor perpetrators as opposed to criminals, it in actuality served as another salient tool employed by the public security organs to freely handle the “so-called” political enemies. The lack of legitimacy of imposing administrative detention contributed greatly to the

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73. Around 800,000 “class enemies” faced the death penalty in mass trials. See WooMargaret Y. K., *The Right to a Criminal Appeal in the People's Republic of China*, 90 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES 1, 3 (1989).

74. *Chunghua Jênmin Kungfan Kuo Chihan Kuanli Ch'ufa T'iaoli* [Regulations on the People's Republic of China on Administrative Penalties for Public Security] (promulgated by the Standing Comm. Nat'l. People's Cong. Gaz., Sept. 5, 1986, effective Jan. 1, 1987) (China), art. 3(3).

75. See *id.* art. 31.

76. *Kuowu Yüen Kuanwu Laotung Chiaoyang Wên'ti Tê Chüehing* [Decision of the State Council on the Question of Reeducation through Labor] (promulgated by the Standing Comm. Nat'l. People's Cong. Gaz., Aug. 1, 1957) (China), art. 5.

political nature of this measure in the context of the preference of class-struggle campaigns by the Party.

## 2. *Anti-Rightist Campaign during 1957-1958*

The Chinese authorities' passion for political campaigns had faded since 1953 due to the new national strategy. After many mass movements in the early period of Communist China, many leaders realized that the building of a sound legal system toward a stable legal order was essential to the nation's economic development.<sup>77</sup> This rationale effectively prevented the administration of informal justice.<sup>78</sup> Over 600 laws, decrees, regulations and decisions were enacted during the period of 1954-1957.<sup>79</sup> Liu Shaoqi, then Vice Chairman of the CCP Central Committee, clearly expressed the Party's political rhetoric in the Eighth National Congress of the Communist Party of China:

“..... the period of revolutionary storm and stress is past, new relations of production have been set up, and the aim of our struggle is changed into one of safeguarding the success for development of the productive forces of society..... It is necessary, in order to maintain a normal social life and to foster production..... All state organs must strictly observe the law, and our security departments, procurator's offices and courts must conscientiously carry out the system of division of function and mutual supervision in legal affairs.”<sup>80</sup>

China's progress toward a formal justice mechanism came to an abrupt end in 1957 when another devastating political movement took place. In 1957, the Anti-Rightist Campaign was launched by the Communist elites to counterattack the immense criticism unleashed during the nationwide activity of “Let a Hundred Flowers Bloom and a Hundred Schools Contend.”<sup>81</sup> The movement of “Hundred Flowers” initiated by Chairman Mao Zedong was intended to encourage the Chinese people, in particular the non-party intellectuals to freely express their thoughts and opinions on

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77. COHEN, *supra* note 32, at 15-16.

78. The First Five Year Plan (1953-1957) embarked on an intensive program of industrial growth and socialization, underscoring the importance of economic development during that period.

79. For detailed information, see *Zhongyang Renmin Zhengfu Fazhi Weiyuanhui (The Legal Committees of the Central People's Government)*, 1 ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN [COLLECTION OF LAWS AND DECREES OF THE CENTRAL PEOPLE'S GOVERNMENT ] (1958).

80. See THE CHINESE COMMUNIST PARTY, EIGHTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA (1956).

81. For the insights of the ‘Hundred Flower Campaign’, see JOHN BRYAN STARR, CONTINUING THE REVOLUTION: THE POLITICAL THOUGHT OF MAO (1979).

helping 'rectify' the Party's policy. Unexpectedly, a strong criticism of nearly every aspect of the country's infrastructure emerged, in which the defective administration of justice was one of the most attacked aspects.<sup>82</sup> Many scholars claimed that the Party's power overrode law, which enabled the authorities to judge cases based on suspects' "class status" without due process.<sup>83</sup> While criticizing, they advocated that some western legal rules, such as an independent judiciary and equality before law, ought to be incorporated into the Chinese legal context.<sup>84</sup>

From the authorities' perspective, the fierce criticism was inconsistent with the original goal of "Hundred Flowers" Campaign. An "Anti-Rightist" Movement was launched in the name of cleansing bourgeois theory and ideology.<sup>85</sup> By the time the movement ended, a well-integrated and police-dominated justice system was in place.<sup>86</sup> Akin to the previous political movements where the police played an exclusive role in handling criminal and administrative offenders, the police were granted paramount power again in the "Anti-Rightists" Movement. More specifically, in addition to the authorized discretion of investigation, detention and filing of case, the police were afforded sole latitude to determine the imposition of criminal and administrative penalties in the absence of the procuratorate and judiciary.<sup>87</sup> Unlike the period of 1949-1953 where class foes and minor offenders were treated and sanctioned separately, the Anti-Right Movement began to utilize "Control" (Guanzhi)<sup>88</sup> and "Rehabilitation through Labor" (Laojiao) as two major measures to penalize both criminal and administrative offenders.<sup>89</sup>

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82. LENG & CHIU, *supra* note 1, at 58.

83. LUBMAN, *supra* note 25, at 79.

84. STARR, *supra* note 81, at 175.

85. *E.g.*, the theory of independent judiciary was harshly criticized as the people's court was supposed to exercise its power on the behalf of the people's democratic dictatorship.

86. Jerome Alan Cohen, *Reflections on the Criminal Process in China*, 68(3) J. CRIM. L. & CRIMINOLOGY 323, 332 (1977).

87. *Chunghua Jênmin Kungfan Kuo Chihan Kuanli Ch'ufa* [Regulations on the People's Republic of China on Administrative Penalties for Public Security] (promulgate by the Standing Comm. Nat'l. People's Cong. Gaz., Sept. 5, 1986, effective Jan. 1, 1987) (China), art. 3(3). *Kuowu Yüen Kuanwu Laotung Chiaoyang Wënt'i Tê Chüehiting* [Decision of the State Council on the Question of Reeducation through Labor] (promulgate by the Standing Comm. Nat'l. People's Cong. Gaz., Aug. 1, 1957) (China), art. 5. These two statutes declared the power of police to punish persons who committed minor breaches of public order and 'petty criminals' by imposing fines, warnings, short periods of confinements and the measure of Reeducation through Labor.

88. 'Control' was initially devised in 1951 to deal with the situation that prisons were swamped by a variety of prisoners because of the emergence of mass mobilizations. *See* Kuanchih Fan Kêming Fêntzu Chanhang Panfa [Temporary Measures on Control of Counter-Revolutionaries] (promulgate by the Central People's Government Council, Jun. 27, 1952, effective Jul. 17, 1952) (China).

89. 'Reeducation through Labor' has been used in China since 1957 as a system of punishment imposed on those who are deemed to have committed minor offences but are not legally considered to be criminals. *See* *Kuowu Yüen Kuanwu Laotung Chiaoyang Wënt'i Tê Chüehiting* [Decision of the State Council on the Question of Reeducation through Labor] (promulgate by the Standing Comm.

(a) Control (Guanzhi)

Control was arguably deployed as a criminal justice measure for mass supervision by local communities, schools and work units.<sup>90</sup> This tool applied to those who had committed wrongs that were not sufficiently serious to warrant imprisonment.<sup>91</sup> A number of groups were identified as targets for Control such as anti-Party elements, counter-revolutionary and bad elements.<sup>92</sup> Under Control, offenders were allowed to remain out of custody, but were subjected to a severe stigma, required to engage in appropriate labor and special indoctrination programs, and to report periodically on their activities to the police and semiofficial “mass organizations”.<sup>93</sup> Although the legal status of Control remained uncertain until the passage of the Chinese Criminal Procedure Law in 1979,<sup>94</sup> it is clear that this instrument was widely employed by the police against political foes and criminal offenders who had expressed a willingness to repent. Therefore, the police relied heavily on Control as an effective measure to serve the purposes of punishment and political education.<sup>95</sup> Given its abusive use, many professionals claim that Control was often imposed in an illegal and arbitrary fashion because it fell within the scope of police jurisdiction.<sup>96</sup> The police were given exclusive discretion to determine whether offenders should be subjected to Control and on what basis Control should be imposed on certain people. As such, scholars further argue that Control was in practice used to advance different political agendas in mass mobilizations rather than on solid legal grounds, and its nature varied according to the characteristics of subjects this measure was imposed on.<sup>97</sup>

(b) Reeducation through Labor (Laojiao)

During the “Anti-Rightists” Movement, many critics were also sent to the labor camps to undergo so-called ‘Reeducation through Labor’. The camps for Reeducation through Labor had been set up all over the country

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Nat'l. People's Cong. Gaz., Aug. 1, 1957) (China), art. 1.

90. BIDDULPH, *supra* note 12, at 64; MICHAEL DUTTON, *POLICING CHINESE POLITICS: A HISTORY* 167 (2005).

91. YU, *supra* note 45, at 5.

92. BIDDULPH, *supra* note 12, at 64; DUTTON, *supra* note 90, at 66, 103.

93. COHEN, *supra* note 32, at 21.

94. In Cohen's book (*the Criminal Process in the People's Republic of China 1949-1963: An Introduction*), ‘control’ was regarded as one of the criminal sanctions. In contrast, Yu Lei in his book (*Public Security Work in Contemporary China*) noted that ‘control’ should be thought as one means of administrative sanction as it had not been characterized as criminal punishment till the implementation of Chinese Criminal Procedure Law 1979.

95. Counter-revolutionaries, landlords, rich peasants and bad elements were all identified as targets of ‘control’.

96. Shao Hua Yen & Hsiu Ch'un Yang, *Tui Kuanchih Tê Lishih K'aoch'a Yü Tsai Jênshih [The Historical Review and Redefining of Control]*, 116 LILUN HSIK'AN [THEORY J.] 101, 103 (2003).

97. Jerome Alan Cohen, *Due Process in China?*, in *LAW, THE STATE, AND SOCIETY IN CHINA* 243 (Tahirih V. Lee ed., 1997). For a detailed discussion, see Victor H. Li, *The Public Security Bureau of Hui-yang Hsien*, in *THE CITY IN COMMUNIST CHINA* 51 (John W. Lewis ed., 1971).

since its establishment in the early 1950s.<sup>98</sup> Unlike Control, Reeducation through Labor detained people by separating them from society in isolated camps with a lengthier term.<sup>99</sup> Detainees were normally assigned heavy labor with a small salary as a part of educational and rehabilitative programs. However, Control and Reeducation through Labor bore the similarity in terms of targets, which ranged along a spectrum with “rightists” at one end and minor offenders at the other.<sup>100</sup>

Although the 1957 statute was designed to justify the use of Reeducation through Labor,<sup>101</sup> this administrative measure faced a great deal of accusations in respect to its questionable legality and unreasonableness at the time.<sup>102</sup> Above all, the legal grounds on which Reeducation through Labor was employed were unsound. Philosophically, Reeducation through Labor was created to target minor offenders in order to reform them through labor. Its scope of application, however, was poorly defined by law. As the political campaigns were continuously launched, the targets of Reeducation through Labor were accordingly expanded. The wide scope of targets in practice made this measure a universal tool in dealing with those who were not suitable for criminal sanctions. Both political enemies and minor offenders were sent to the Reeducation through Labor camps for education and reform when public security organs thought fit. Clearly, although Reeducation through Labor was expected to deliver educative and corrective functions, the police, influenced by the rhetoric of striking antagonistic classes, tended to use it as a complementary instrument in conjunction with criminal punishments to serve political demands. Procedurally, the police enjoyed unlimited power to use Reeducation through Labor. Although an internal review system within the structure of public security organs was required by law, aiming to monitor the police's use in practice of Reeducation through Labor, the extent to which it may exert a restrictive influence is dubious.<sup>103</sup> There is little doubt that in order to comply with the constantly changing political policies and social needs, the police were inclined to bypass the existing legal procedures to carry out their legal duties. The circumvention attempted to ensure that the state's central guides were fully implemented without any hindrances, so the police

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98. Martin King Whyte, *Corrective Labour Camps in China*, 13(3) ASIAN SURV. 253, 255 (1973).

99. COHEN, *supra* note 32, at 21.

100. For detailed cases, see COHEN, *supra* note 32; LENG & CHIU, *supra* note 1.

101. The *Decision of the State Council of the PRC Relating to Problems of Reeducation through Labor*, approved by the Seventh Meeting of the Standing Committee of the National People's Congress on 1 August 1957 and promulgated by the State Council on 3 August 1957.

102. E.g., Hung, *supra* note 22, at 304-26; Amnesty International, *Abolishing 'Reeducation through Labor' and Other Forms of Punitive Administrative Detention: An Opportunity to Bring the Law into Line with the International Covenant on Civil and Political Rights* (2006).

103. Cohen, *supra* note 86, at 331.

could fulfill their political commitments set out in the Constitution.<sup>104</sup>

Second, how to define a successful operation of Reeducation through Labor was legally unclear.<sup>105</sup> The 1957 Decision failed to spell out the incarcerative term of Reeducation through Labor. It is because the government believed that it was necessary to ensure that detainees had properly reformed before release. As such, inmates were normally told that they would remain confined until they had truly reformed, at which point they would be released.<sup>106</sup> The release of those who had difficulties in finding employment was sometime even delayed until the then current unemployment situation had improved.<sup>107</sup> However, the discretion to determine whether the detainee was rehabilitated lay solely with public security organs again.<sup>108</sup> In practice, the police were keener to hold offenders in custody to avoid unnecessary unease in the society upon their release, which made people only go in and never come out.<sup>109</sup> Many scholars thus characterized this administrative custodial tool as an effective measure for handling contradictions between people and the enemy, because its nature appeared more punitive and retaliative rather than educative and persuasive in its operation.<sup>110</sup>

### 3. *Proletarian Cultural Revolution during 1966-1976*

In the early 1960s, work to develop a formal legal system was resumed. Codification efforts on several basic laws were made by the state to stress the importance of building a societal legal model. Of these legislative activities, the most remarkable conduct is that the draft of the criminal and criminal procedure laws was presented to the government for examination.<sup>111</sup> In the propositions, procedural guarantees and the citizens' fundamental

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104. The *Chinese Criminal Procedure Law* enacted in 1979 is the first code regulating the criminal justice procedure. Prior to the passage of the CPL 1979, The *People's Republic of China for Security Administrative Punishment Act 1957* played a crucial role in administrating justice accorded to government's policies.

105. There was no fixed term of imprisonment set out in the *Security Administrative Punishment Act 1957*, or in the *Provisional Measures for Dealing with the Release of Reform through Labour Criminals at the Expiration of Their Term of Imprisonment and Placing Them and Getting Them Employed 1954*, the complementary legislation regulating re-education through labour inmates.

106. Whyte, *supra* note 98, at 257.

107. BIDDULPH, *supra* note 12, at 86.

108. The measure of 'Re-education through labour' has been furiously denounced for decades as having a negative impact on the protection of human rights. The existence and use of 'Re-education through labour' is a focus of discussion among legal scholars and human rights groups. China, according to one report published in *China Daily*, on 1 March 2007, is willing to pay more attention on the possibility of abolishing this administrative system. This issue is elaborated in the following chapter.

109. CHONGSU XIA, RESEARCH ON THE REFORM OF REEDUCATION THROUGH LABOR 17 (2001).

110. *Id.* at 19.

111. Leng, *supra* note 27, at 358.

rights were advocated in an attempt to construct a more balanced criminal justice system. Therefore, emphasis was placed on rebuilding legal professionalism and the judicial sector. Judicial independence and autonomy were again brought up in the hope of shifting from the people's justice to legal justice. On the whole, nevertheless, Chinese legal development continued to experience a steady decline in significance. The justice procedure was still controlled by the Party and solely administered by the public security organs with little regard to due process. This trend peaked in the Cultural Revolution where Maoist values and norms completely outweighed formal legal structure and order. The Cultural Revolution initially launched by Mao Zedong generated far-reaching effects in nearly every aspect of China<sup>112</sup> Scholars inside and outside China agreed that this "ten-year great calamity" of the Chinese people and society is the most regressive and harrowing period since the founding of the People's Republic of China.<sup>113</sup> Politically, the ideology of "class struggle" was restated. The resurgence was reflected in one of the constitutional documents, the Decision of the Central Committee of the Chinese Communist Party Concerning the Great Proletarian Cultural Revolution, which was passed to specifically rationalize this movement.<sup>114</sup> Accordingly, the mass line and ad hoc groups were reused to serve Mao's rationale of eradicating class enemies, namely the "counter-revolutionaries", including "revisionists" and "capitalist roaders in the Party".<sup>115</sup> Three major law enforcement organs (the police, courts and procuratorates) were rendered worthless and smashed to give way to the proletarian legal order.

The advocacy for smashing "Gongjianfa" was strongly expressed in the People's Daily in 1967 based on Mao's intention to eliminate bourgeois concepts and thoughts.<sup>116</sup> A specialized group named the Red Guards was

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112. Chinese Cultural Revolution started with the release of the *Decision Concerning the Great Proletarian Cultural Revolution* (known as 16 points) on August 8 1966, and essentially ended with the downfall of the 'Gang of Four' in 1976. This massive-scale movement, arguably, was an attempt made by Mao Zedong to rid China of its 'bourgeoisie' elements and regain the absolute leadership of the Party in conjunction with the propagation of Maoist thought.

113. Xiuyuan Lu, *A Step toward Understanding Popular Violence in China's Cultural Revolution*, 67(4) PAC. AFF. 533, 533 (1994-95). For detailed insights about China's Cultural Revolution, see LOWELL DITTMER, LIU SHAO-CHI AND THE CHINESE CULTURAL REVOLUTION: THE POLITICS OF MASS CRITICISM (1974); HONG YUNG LEE, THE POLITICS OF THE CHINESE CULTURAL REVOLUTION: A CASE STUDY (1978); LOWELL DITTMER & RUOXI CHEN, ETHICS AND RHETORIC OF THE CHINESE CULTURAL REVOLUTION (1981); JOSEPH W. ESHERICK, PAUL G. PICKOWICZ & ANDREW G. WALDER, THE CHINESE CULTURAL REVOLUTION AS HISTORY (2006).

114. Point one, the *Decision of the Central Committee of the Chinese Communist Party Concerning the Great Proletarian Cultural Revolution*, (1966), <http://www.marxists.org/subject/china/peking-review/1966/PR1966-33g.htm>.

115. JAMES P. BRANDY, JUSTICE AND POLITICS IN PEOPLE'S CHINA: LEGAL ORDER OR CONTINUING REVOLUTION? 188-89, 194 (1982).

116. *Wufa Wut'ien Tsan [In Praise of Lawlessness]*, JËNMIN JIHPAO[PEOPLE'S DAILY]. Jan. 31, 1967, at A6.

deployed to achieve this end. The Red Guards was a unique product of China's Great Proletarian Cultural Revolution. They were a mass movement of civilians, mostly students and other young people, empowered to impose violence and terror on the Chinese people by implementing Mao's radical policies.<sup>117</sup> The recruitment criteria of the Red Guards were dependent on family background. Those who were from the "five red types" families were eligible to be a loyal Red Guard.<sup>118</sup> These young people were encouraged and reviewed by Mao Zedong, who entrusted them to undertake the revolutionary tasks in accordance with his teachings.<sup>119</sup> Hence, the Red Guards were closely engaged in every aspect of legal and political work without external interference and restrictions. The main tasks of the Red Guards were wide-ranging, including investigation and arrest of political enemies and criminal suspects, organization of mass tribunals and meetings, and imposition and execution of sanctions.<sup>120</sup>

Due to the domination of Red Guards in the administration of justice in the Cultural Revolution, the judiciary was first struck by removal of its power of adjudicating cases.<sup>121</sup> From the onset of this mass campaign, the general role of the people's court became murkier than ever. Judicial personnel were harshly denounced for their conservative and bureaucratic view of justice. As the purge of bourgeois law continued nationwide, the courts were eventually stormed and occupied by the Red Guards.<sup>122</sup> Counter-revolutionaries, class enemies and common criminals were thus tried by organs of dictatorship, revolutionary committees and military control committees via informal processes. Further, the people's procuratorate played a more limited role in the Cultural Revolution.<sup>123</sup> In the 1966-1976 mass movement, the procuratorial process was largely skipped in order to speedily handle the people's enemies. Political and criminal suspects

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117. Tsang Chiu-Sam, *The Red Guards and the Great Proletarian Cultural Revolution*, 3(3) COMP. EDUC. 195, 201 (1967).

118. 'Five red types' consists of workers, poor and lower-middle-class peasant, revolutionary cadres, revolutionary soldiers, and dependents of revolutionary martyrs. See Lu, *supra* note 113, at 534.

119. Anonymous, *Kungweiping Tsan [In Praise of the Red Guards]*, 39 PEICHING CHOU PAO [PEKING REV.] 15, 15-16 (1966).

120. Li, *supra* note 27, at 104.

121. Dean G. Rojek, *Social Control in the People's Republic of China*, 14(2) CRIM. JUST. REV. 141, 145 (1989).

122. BRANDY, *supra* note 115, at 200.

123. Art. 25 of the *Constitution 1975* transferred the procuratorial powers from Procuracy to Public Security Organ. Also, three years after Cultural Revolution, the *Chunghua Jênmin Kunghan Kuo Hsingshih Susung Fa [Criminal Procedure Law of the People's Republic of China]* (promulgated by the Central People's Government Council, Jul. 1, 1979) (China) and *Chunghua Jênmin Kunghan Kuo Jênmin Chiench'a Yüen Tsuhih Fa [Organic Law of the People's Procuratorates of the People's Republic of China]* (promulgated by the Central People's Government Council, Jul. 1, 1979) (China), adopted in 1979 formally and systematically set out the procuratorate's powers and functions in the criminal justice process.



were usually arrested and interrogated by the Red Guards and directly sent to mass trials for convictions without formal prosecution.<sup>124</sup> Moreover, unlike the past political campaigns where the police were trusted to enforce the state's policies, public security organs were also accused during the Cultural Revolution of failing to carry out the mass line according to Mao's beliefs.<sup>125</sup> Therefore, the Red Guards were assigned to take over police duties in the administration of justice. More specifically, they undertook pre-trial investigation and detention during which the "bourgeois enemies" were physically attacked and psychologically tortured. Clearly, the anger aroused towards the "reactionary" attitude of legal apparatus enabled Red Guards to replace "Gongjianfa" to become the actual law enforcer in the administration of proletarian justice during the Cultural Revolution.

There is no doubt that the Cultural Revolution resulted in political, social and economic disorder. In particular, steps towards a formal legal structure halted and the societal legal system was entirely abandoned during this mass movement. In general, the politically-driven crime polices and social order strategies in the mass campaigns characterized the administration of justice in the Mao era as the enforcement of political policies and tasks. Historically, the death of Mao Zedong and the fall of the "Gang of Four" in 1976 signaled the end of the Cultural Revolution.<sup>126</sup> However, the traumatic consequence of this movement meant that Post-Mao China faced a very challenging task of relieving people from their deep suffering. In the meantime, rapid social changes resulting from economic reforms increasingly placed pressure on the government to cope with a wide range of legal and social problems. As the new head of the Chinese government inaugurated in 1978,<sup>127</sup> Deng Xiaoping expressed his commitment to a stable legal order.<sup>128</sup> Considerable efforts have been made since then in terms of the reconstruction of a socialist legal system with Chinese characteristics. Since the phenomenal economic development from

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124. Israel John, *The Red Guards in Historical Perspective: Continuity and Change in the Chinese Youth Movement*, 30 *THE CHINA QUARTERLY* 1, 12 (1967).

125. Stanley Lubman, *Form and Function in the Chinese Criminal Process*, 69(4) *COLUM. L. REV.* 535, 556 (1969).

126. The 'Gang of Four' consisted of four Chinese Communist Party officials, who virtually controlled the power of the Party through the latter stage of the Cultural Revolution. They were finally charged with 'counter-revolution' and 'anti-Party activities' and received a public trial in 1981. The overthrow of the 'Gang of Four' marked the end of the Cultural Revolution. For a detailed account, see CHI HSIN, *THE CASE OF THE GANG OF FOUR: WITH FIRST TRANSLATION OF TENG HSIAO-PING'S 'THREE POISONOUS WEEDS'* (1977).

127. Deng Xiaoping is considered the most prominent and pragmatic politician, reformer and revolutionary in the history of modern China, introducing a brand-new variety of socialist thinking that solidly built the foundation of China's economic soaring in the late twenty century. See RICHARD EVANS, *DENG XIAOPING AND THE MAKING OF MODERN CHINA* (1997); WHITNEY STEWART, *DENG XIAOPING, LEADER IN A CHANGING CHINA* (2001).

128. LENG & CHIU, *supra* note 1, at 35.

the 1970s, China has drafted and implemented numerous substantive, organizational and procedural laws. The vast body of legislation has gradually shaped a proper justice system, where many advanced legal concepts and ideologies are incorporated in an attempt to bring the Chinese pre-trial process more in line with standards of justice and fairness.

#### B. *The Pre-trial Process in Post-Mao China*

Having purged the “Gang of Four” and its followers, the new Chinese government turned its attention to the building of a socialist legal system. Many Party leaders realized that the lack of a sound legal order was the contributing factor that led to the grievances during the course of the Cultural Revolution.

Besides the painful experiences learnt by the Chinese government, the change of the country’s guideline from class struggle to economic development required a standardized legal system.<sup>129</sup> This perception was indicated in one of the instructive speeches by Deng Xiaoping, who explicitly labeled economic reform and “Four Modernizations” as the priority goals of the government from the 1980s.<sup>130</sup>

##### 1. *The Establishment of a Modern Chinese Justice System during 1978-1982*

As of the late 1970s, codification became a focal point of national attention. In the field of criminal justice, China implemented the Criminal Law and the Criminal Procedure Law in 1979 after a long period of drafting and discussion process.<sup>131</sup> The final enactment of the CCL 1979 was intended to form a regulatory framework of socialist legality in the realm of criminal theory. The CPL 1979, however, was aimed at establishing a socialist criminal justice system to punish criminals who posed a threat to social order and security.<sup>132</sup> In the CPL 1979, the roles of law apparatus

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129. LENG & CHIU, *supra* note 1, at 36.

130. In December 1978, at the Third Plenary Session of the Eleventh Central Committee, Deng Xiaoping announced the national goal to be the attainment of ‘four modernizations’: modernization of industry, agriculture, science and technology. This official launch formally marked the commencement of China’s economic reform journey. See Foreign Broadcast Information Service, *Communiqué of the Third Plenary Session of the Eleventh CPC Central Committee*, CHINA’S NATIONAL ENGLISH NEWS WEEKLY, Dec. 23, 1978.

131. The Criminal Law of the People’s Republic of China, adopted by the Second Session of the Fifth National People’s Congress on 1 July 1979 and entered into force on January 1, 1980. The Criminal Procedure Law of the People’s Republic of China, adopted by the Second Session of the Fifth National People’s Congress on 1 July 1979 and entered into force on January 1, 1980.

132. Other relevant statutes are  
Chunghua Jênmin Kungfan Kuo Jênmin Fayüen Tsuchih Fa [Organic Law of the People’s Courts of the People’s Republic of China] (promulgate by the Central People’s Government Council, Jan. 1,

were resurrected. The powers and responsibilities of the police, procuratorates and courts were clarified according to the duty requirements of the different stages in the criminal process. Specifically, police powers of investigation, detention and arrest were formally legalized.<sup>133</sup> The people's procuratorates were afforded discretion to approve arrest and undertake procuratorial activities, such as initiation of public prosecution.<sup>134</sup> The ultimate powers to adjudicate and convict offenders were given to the courts exclusively at the last phase of criminal proceedings. Despite the granting of powers, the exercise of these powers was restrained to satisfy the requirement of legality. For example, the CPL 1979 provided that detention carried out by the police prior to trial should not exceed 4 days, and that police were required to apply the procuratorates for arrest if evidence was sufficient.<sup>135</sup>

The most applaudable advance made by the CPL 1979 was that the law provided suspects procedural protections to guarantee the realization of their legal rights in the criminal process, particularly during the pre-trial period.<sup>136</sup> A number of modern legal principles omitted in the past were formally incorporated in the CPL 1979. The suspect's right to access legal counsel, for instance, was explicitly prescribed. Moreover, the suspect's right to defense, treated as one of the bourgeois ideals in Mao's era, was officially acknowledged in the CPL 1979.<sup>137</sup> For example, the legislation stipulated

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1980) (China) and *Chunghua Jênmin Kunguan Kuo Jênmin Chiench'a Yüen Tsueh Fa* [Organic Law of the People's Procuratorates of the People's Republic of China] (promulgate by the Central People's Government Council, Jul. 1, 1979) (China). Along with four criminal justice laws, the *Organic Law of Local People's Congress and Local People's Government, the Electoral Law for the National People's Congress and Local People's Congresses and the Law on Joint Ventures with Chinese and Foreign Investments* were adopted at the same time. Apart from the *CCL*, the *CPL*, the Organic Laws of Courts and Procuratorates, a number of regulations in relation to criminal adjudication and procedure were also implemented including: *Chunghua Jênmin Kunguan Kuo Taipu Chüliu T'iaoli* [Regulations of the People's Republic of China on Arrest and Detention] (promulgate by the Central People's Government Council, Dec. 20, 1954) (China), *Kuanwu Hsünsu Shên'p'an Yench'ung Weihai Shêhui Chihan Tê Fantsui Fêntzu Tê Ch'ênghsü Tê* [Decisions of the Procedure for Prompt Adjudication of Cases Involving Criminals Who Seriously Endanger Public Security] (promulgate by the Central People's Government Council, Sept. 2, 1983) (China), etc.

133. *Chunghua Jênmin Kunguan Kuo Hsingshih Susung Fa* [Criminal Procedure Law of the People's Republic of China] (promulgate by the Central People's Government Council, Jul. 1, 1979) (China).

134. *Id.*

135. *Id.* art. 48 (1979).

136. See, e.g., Shao-Chuan Leng, *Criminal Justice in Post-Mao China: Some Preliminary Observations*, 73(1) J. CRIM. L. & CRIMINOLOGY 204, 204-37 (1982); Yang Cheng, *Criminal Procedure in China: Some Comparisons with the English System*, 37(1) INT'L & COMP. L. Q. 190, 190-207 (1988); Dean G. Rojek, *The Criminal Process in the People's Republic of China*, 2 JUST. Q. 117, 117-26 (1985); Richard Szawlowski, *Reflections on "the Laws of the People's Republic of China, 1979-1986"*, 38(1) INT'L & COMP. L. Q. 197, 197-207 (1989).

137. *Chunghua Jênmin Kunguan Kuo Hsingshih Susung Fa* [Criminal Procedure Law of the People's Republic of China] (promulgate by the Central People's Government Council, Jul. 1, 1979) (China) [Hereinafter *Criminal Procedure Law*].

that the suspect may either defend himself or entrust other people to provide defense in the criminal procedure. Those who were eligible to practice defense included lawyers, citizens recommended by a people's organization or unit to which the defendant belonged or others permitted by the people's court and even a defendant's relatives or guardians.<sup>138</sup> Further, equality before law was reinforced in this code.<sup>139</sup> The authorities realized that the differentiated handling of people based on their class background contributed greatly to malpractice of justice in the past political campaigns. It is therefore imperative to adopt the principle of equality before law into the operation of the criminal justice, in order to prevent suspects from being unfairly and differently treated again.

It is not surprising that the implementation of the CPL 1979 encountered many practical obstacles in the aftermath of its promulgation. Given the domination of "political justice" in the previous mass movements, law enforcement agencies had difficulties in adjusting their new roles and carrying out their responsibilities according to law. For example, in respect of the time limits of pre-trial investigation, the police and procuratorates were struggling to complete their investigatory and procuratorial tasks on time as they had become accustomed to enjoying unlimited periods in the exercise of their powers.<sup>140</sup> In this sense, the police in reality frequently employed extra-legal measures, such as administrative sanctions, to bypass the legal requirements of time limits on handling the criminal cases.<sup>141</sup> The predicament of implementing the CPL 1979 was also attributable to legal conflicts between the underlying law and its corresponding regulations. Over time, a large number of judicial interpretations, directives, decrees and working guides were issued by law enforcement agencies at the different levels, in an attempt to elaborate general provisions in the CPL 1979.<sup>142</sup> The

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138. Criminal Procedure Law, art. 26 (1979).

139. The regulation of 'equality before law' is articulated in Article 5 of the *Organic Law of the People's Courts of the People's Republic of China 1979*, stating 'in judicial proceedings all citizens are equal before the application of law, irrespective of their nationality, race, sex, occupation, social origin, religious belief, education, property status, or duration of residence.' This principle was previously set out in the *Constitution of the People's Republic of China 1954* and the *Organic Law of the People's Courts of the People's Republic of China 1954*, however it had never seriously been considered the operational principle of legal work.

140. LENG & CHIU, *supra* note 1, at 110.

141. For a statistical survey of the abusive use of police investigatory power, see Wong, *supra* note 18, 87-112.

142. See, e.g., Ch'üankuo Jênta Ch'angwei Kuanwu Hsingshieh Susung Fa Shihshieh Wên't'i Tê Chüehing [Decision of the Standing Committee of the National People's Congress Regarding Implementation of the Criminal Procedure Law] (promulgate by the Central People's Government Council, Feb. 12, 1980) (China); Ch'üankuo Jênta Ch'angwei Kuanwu Hsingshieh Anchien Panan Ch'ihshien Wên't'i Tê Chüehing [Decision of the Standing Committee of the National People's Congress Concerning the Question of the Time Limits for Handling Criminal Cases] (promulgate by the Central People's Government Council, Sept. 10, 1981) (China); Jênmin Chiench'a Yüen Hsingshieh Chiench'a Kungtsö Hsitsê Shihhang [The Provisional Detailed Rules of the People's Procuratorate on

enactment of these various regulations, however, had not been of use to the perfection of the operation of the criminal justice system. Rather, it has confused the implementation of the CPL 1979 at the practical level due to many conflicting statutory settings.<sup>143</sup>

As an adjunct to the criminal justice system, the Chinese administrative justice system was legislatively strengthened in the late 1970s and early 1980s to form the "second line of defense".<sup>144</sup> As a result of the "Open Door" national policy, prostitution and drug use re-emerged and soon became characterised by the government as the main harms to social morality and security. Unlike prostitution and drug abuse in the 1950s, the vast majority of prostitutes and drug addicts in the period of economic reforms desired material enjoyment and pursued an exotic lifestyle. To prevent them from causing extensive and multi-layered social order problems, the Chinese government reinstated administrative detention powers to tackle these morally blameworthy behaviours in the form of massive legislation. In respect of the handling of prostitutes, the Notice on Resolutely Prohibiting Prostitution Activities was passed in June 1981 by the Ministry of Public Security to specify Detention for Education to be taken against prostitutes and related activities. Those who had no regular employment, or continued to prostitute themselves after being educated in detention, were to be sent to Reeducation through Labor pursuant to the Temporary Measures on Reeducation through Labor passed in 1982. Accordingly, the first prostitute detention centre was established in Shanghai in 1982 to carry out correction and rescue of prostitutes under the directions of the local police, civil affairs bureau, health department and Women's Federation.<sup>145</sup> The success in Shanghai of specialist prostitute detention was later followed by other cities, which further endorsed compulsory testing for, and treatment of, sexual diseases for prostitutes and their clients.

Akin to prostitution, drug abuse revived as a consequence of the dramatic social changes in the late 1970s. Although drug addiction resumed to be considered as administrative transgression, its related crimes and

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Criminal Procuratorial Work] (promulgate by the Central People's Government Council, Dec. 10, 1991) (China); Ch'üankuo Jênta Ch'angwei Kuanwu Hsingshieh Anchien Panan Ch'ichien Tê Puch'ung Kuiting [The Supplementary Provisions of the Standing Committee of the National People's Congress Concerning the Time Limits for the Handling of Criminal Cases] (promulgate by the Central People's Government Council, Jul. 7, 1984) (China).

143. For example, in the *Supplementary Provisions of the Standing Committee of the National People's Congress Concerning the Time Limits for the Handling of Criminal Cases*, the provincial-level people's procuratorates were authorised to approve the extension of detention during the investigatory stage depending on the severity of crime allegedly committed by the detainee. In this case, the time limits set out in the CPL were not likely to be strictly followed and the criminal justice organs were more likely to exercise their greater power to circumvent the formal procedure in administering criminal justice.

144. BIDDULPH, *supra* note 12, at 152.

145. *Id.*

negative impact drew the authorities' attention to its harm to the state. Therefore, since the beginning of the 1980s, the Chinese government has focused its attacks on preventing and eradicating drug abuse. In doing so, Coercive Drug Rehabilitation has been reinvigorated to carry out special treatment for drug addiction and educational programs for drug users. The first drug regulation, namely the Notice Restating the strict Prohibition of Opium and Drug Taking, was issued in 1981 explicitly stressing the state's strike against drug use and justifying the establishment of drug rehabilitation centres. Thus, a large number of temporary drug rehabilitation organs were set up in some China's cities to enforce compulsory detoxification. On July 1982, the Urgent Directive on the Problems of Complete Prohibition of Opium was issued by the State Council to specifically illustrate that those who refused to voluntarily give up drug use were to be coercively treated in the detention centres, though the educative function of Coercive Drug Rehabilitation was emphasised.<sup>146</sup>

More significantly, the use of Reeducation through Labor was greatly encouraged in the reform era. In contrast to the political upheavals where Reeducation through Labor was heavily relied on as a flexible instrument targeting class enemies, the focus of this tool, in the post-Mao administrative justice mechanism, switched toward targeting socially disruptive behaviour and minor offences for the purpose of preserving social order and maintaining political control.<sup>147</sup> As the harshest coercive measure in the hierarchy of administrative sanctions, Reeducation through Labor expanded its scope of targets by continuing to cover those whose crimes were not sufficiently serious to warrant criminal sanction and incorporating those who had been educated repeatedly and would not reform. Reinvigoration of Reeducation through Labor after 1979 was first marked by the passage of two underlying regulations. In 1979, the Supplementary Regulations of the State Council on Reeducation through Labor were issued by the State Council to reinstate the use of this coercive measure. This document identified Reeducation through Labor as a method for resolving contradictions among the people.<sup>148</sup> Therefore, education, transformation and reform were advocated as the theoretical basis of Reeducation through Labor in its operation. Under Reeducation through Labor a person may be detained between one to three years with a possible extension of a further

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146. Kuanwu Chinchüeh Yap'ien Yentu Wënt'i Chinchi Chihshih [The Urgent Directive on the Problems of Complete Prohibition of Opium] (promulgate by the Central People's Government Council, Aug. 9, 1982) (China), art. 3.

147. BIDDULPH, *supra* note 12, at 193.

148. Fu Hualing, *Punishing for Profit: Profitability and Rehabilitation in a Laojiao Institution*, in *ENGAGING THE LAW IN CHINA: STATE, SOCIETY AND POSSIBILITIES FOR JUSTICE* 220 (Neil Diamant, Stanley Lubman & Kevin O'Brien eds., 2005).

year.<sup>149</sup> The second important directive was the Temporary Measures on Reeducation through Labor approved and issued by the State Council in January 1982. This document broadly defined the targets of Reeducation through Labor by identifying six different categories.<sup>150</sup> The description of targets, however, has become very inclusive and fragmented ever since,<sup>151</sup> which enables the authorities to employ it as a catch-all tool to deal with all administrative offenders.

The legislative reinforcement of all forms of administrative detention during the period of 1978-1982 was to demonstrate the authorities' intention to prevent socially disruptive behaviors from deteriorating into crimes. Particularly, in response to a serious growth in drug problems since the 1980s, the Chinese government made great efforts to cut off drug supplies, punish drug law violators, give treatments to addicts.<sup>152</sup> Therefore, administrative detentions were deployed as a penal system targeting drug abusers. However, although the official rationale of administrative justice system enabled it to aim at the educative and rescuing functions of correcting minor perpetrators, the true nature of the administrative detentions is to preserve social stability and safety in order to ensure the smoothness of this large-scale economic transformation. While economic development overrode everything in the late 1970s, the Chinese government endeavored to break down the immoral behaviors from the old society in an attempt to promote socialist cultural values that facilitate the economic advances.<sup>153</sup> Administrative detentions thus were viewed as ideal measures to achieve the above-mentioned purposes. It is in part because the administrative justice system, since its creation in the 1950s, has gained a great deal of experiences in dealing with increasingly emerging minor offences. But mainly, the lack of legality that resulted in flexibility and arbitrariness of imposing administrative detentions enabled this system to be willfully employed by the public security organs. As a result, administrative detentions have gradually become the handy tool manipulated by the Party not to serve the goal of crime control, but certain political aims.

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149. Kuowu Yüen Kuanwu Laotung Chiaoyang Tê Puch'ung Kuiting [Supplementary Provisions of the State Council for Rehabilitation Through Labor] (promulgate by the Standing Comm. Nat'l. People's Cong. Gaz., Nov. 29, 1979) (China), art. 3.

150. Chunghua Jênmin Kunghan Kuo Laotung Chiaoyang Shihhang Panfa [Temporary Measures on Re-education through Labour] (romulgate by the State Council, Jan. 21, 1982) (China), art. 10.

151. BIDDULPH, *supra* note 12, at 198.

152. JIANHONG LIU, LENING ZHANG & STEVEN F. MESSNER, CRIME AND SOCIAL CONTROL IN A CHANGING CHINA 50 (2001).

153. *Id.*

## 2. *Legal Reforms of the Chinese Justice System during 1983-1997*

With the booming of the Chinese economy and the globalization of trade, the demands for modern laws and legal systems have increased since the 1980s. It is true that while China has played a crucial role in the worldwide economy, the state has been criticized by the international community about the violation of the citizen's rights in the criminal and administrative justice system.<sup>154</sup> Although China is reluctant to admit the external pressure, efforts to safeguard the people's legal and basic rights were made in its legislative activities. In late 1982, a new state Constitution was adopted by the National People's Congress to establish the supremacy of law. It mandated that the state upholds the uniformity and dignity of the socialist legal system and no organization or individual may enjoy the privilege of being above the Constitution and law.<sup>155</sup> More importantly, the 1982 Constitution expressly stipulated that the state respects and safeguards human rights, and the citizens' fundamental rights, such as the right of freedom, should be protected.<sup>156</sup> The spirit of the Constitution was later reflected in the state's legislative efforts. A revised Criminal Procedure Law was passed in 1996 to replace the old code.<sup>157</sup> In this law, sweeping changes with reference to the protection of suspects' legal rights were approved, including seven articles being revised, two articles being abrogated and sixty-three articles being added.<sup>158</sup>

The CPL 1996 has had a profound impact on the advancement of the Chinese criminal justice system, particularly in the protection of suspects' legal rights at the pre-trial stage. In this new law, some ill-defined legal provisions were eliminated, while the principle of proceduralism was embraced to ensure the justice and legality of criminal proceedings. Perhaps the most important amendment was the strengthening of suspects' defense right in the criminal process. Although the CPL 1979 provided that the defendant was entitled to access legal counsel, the prescription was unclear

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154. *E.g.*, a number of international human rights organizations openly criticized the human rights abuse in Chinese criminal justice proceeding by publicizing related surveys and reports. For example, as one of the leading human rights groups, Amnesty International published a spate of works regarding the human rights situation in China, in particular in criminal justice procedure, see AMNESTY INT'L, VIOLATIONS OF HUMAN RIGHTS, PRISONERS OF CONSCIENCE & THE DEATH PENALTY IN THE PEOPLE'S REPUBLIC OF CHINA (1984); AMNESTY INTE'L, CHINA, PUNISHMENT WITHOUT CRIME: ADMINISTRATIVE DETENTION (1991); AMNESTY INTERNATIONAL, CHINA: NO ONE IS SAFE: POLITICAL REPRESSION & ABUSE OF POWER IN THE 1990S (1996). Also, some in-depth discussions were delivered by Lawyers Committee for Human Rights, *see* JONATHAN HECHT, OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW (1997).

155. XIANFA, art. 5 (1982) (P.R.C.).

156. XIANFA, art. 33 (1982) (P.R.C.).

157. The new *Chinese Criminal Procedure Law* was passed on 17 March 1997 by the Forth Meeting of the Eighth National People's Committee, and came into effect on 1 January 1997.

158. CHEN JIANFU, CHINESE LAW: CONTEXT AND TRANSFORMATION 304 (2008).



as to whether such a right could be fully enjoyed not only in court trials, but also over the course of the investigatory stage and pre-trial detention.<sup>159</sup> In an attempt to implement an adversarial system, the CPL 1996 arms suspects with more legal power by improving the defense lawyer's stature in the criminal process. It stipulates that defense lawyers may serve and represent suspects in both the pre-trial and trial phases. More specifically, the CPL 1996 allows lawyers to meet their clients after the first interrogation by the investigatory organ.<sup>160</sup> Moreover, during the procuratorial period, lawyers are entitled to "consult, excerpt, photocopy and duplicate charging documents and technical materials",<sup>161</sup> while defense lawyers may "consult, extract and photocopy judicial documents pertaining to the criminal acts in the case once the case is transferred to the court."<sup>162</sup>

The considerable changes in the CPL 1996 caused Chinese legal scholars to expect a genuinely mature criminal justice system. In accordance with the CPL 1996, the criminal procedure was divided into three separate but interlocking stages, namely pre-trial, procuratorial and trial phases. The police, procuratorates, and courts were empowered to regulate each stage individually and collaborate at a macro level. An adversarial system was utilized in theory throughout the entire process in an attempt to balance the otherwise unequal powers between the authorities and suspects. Some legal practitioners, therefore, were convinced that the adoption of many advanced legal principles in the CPL 1996 marked the authorities' growing acceptance of the rule of law, and their willingness to comply with international minimum standards of human rights protection in the criminal procedure.<sup>163</sup> However, at the practical level the CPL 1996 was disappointing and encountered many barriers in its implementation. While some legal professionals are inclined to attribute these enforcement difficulties to the legal deficiencies and indeterminacies, the unenforceability of this law is in fact partially attributable to extra-legal elements, such as the constantly changing political practices.

Likewise, the administrative justice system was greatly developed in terms of legislation and philosophical transition in the period of 1982-1997. Although more legislative regulations were passed to justify the use of administrative detention powers, the imposition of administrative detention on minor offenders, in particular prostitutes and drug abusers appeared to be more punitive and deterrent than educative and rehabilitative in nature.

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159. *Id.* at 315.

160. XIANFA art. 96 (1996) (P.R.C.).

161. XIANFA art. 36 (1996) (P.R.C.).

162. XIANFA art. 36 (1996) (P.R.C.).

163. See Kê Ch'uang K'ê, *Lun Hsiukai Hou Tê Hsingsu Fa Tui Jênch'üan Paochang Chih Hsin Kuiting* [The New Rules of Human Rights Protection in the Revised Criminal Procedure Law], 6 SHÊHUI K'ÊHSIAO [SOC. SCI.] 56, 56-59 (1996); Turack, *supra* note 1, at 54.

Legislatively, the National People's Congress Standing Committee issued the Decision on strictly Prohibiting Prostitution and Using Prostitutes in 1991. This regulation provided the authorities with a pivotal legal basis to eliminate prostitution,<sup>164</sup> and hence put a cloak of legality on this administrative power that continues in substance to be poorly defined.<sup>165</sup> In 1993, the State Council passed the Measures for Detention for Education of Prostitutes and Clients of Prostitutes. This directive clearly authorized the public security organs to exercise the administrative power of handling prostitutes, including the discretion in sending a person to Detention for Education and the management of the detention centers.<sup>166</sup> In a manner similar to the Prostitution Decision, the National People's Congress Standing Committee issued the Decision on the Prohibition of Drugs in 1990. This regulation specified that drug abusers may be sent to Public Order Detention, Coercive Drug Rehabilitation or Reeducation through Labor depending on the degree of their addiction.<sup>167</sup> Five years after the Decision, the State Council enacted the Measures on Coercive Drug Rehabilitation, which shared a similar legislative intention with the Measures for Detention for Education. This decree defined Coercive Drug Rehabilitation and specified its length, functions and implementation.<sup>168</sup> The police were also empowered to determine the imposition of Coercive Drug Rehabilitation and be solely responsible for the management of the rehabilitation centers.<sup>169</sup>

It is important to note that the Chinese government failed to completely eliminate prostitution and drug abuse prior to 1982. Perhaps because the emphasis in the handling of administrative offenders was theoretically upon leniency and education, prostitutes and drug abusers were not sufficiently deterred and reformed. Therefore, a hard strike against prostitutes, drug addicts and other socially disruptive elements was soon considered imperative to re-build social order in conjunction with swift and severe punishment of serious criminals.<sup>170</sup> The first round of Hard Strike (Yanda) was launched by the state in 1983 to mobilize all forces of society to stop the

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164. BIDDULPH, *supra* note 12, at 120.

165. BIDDULPH, *supra* note 12, at 166.

166. Maiyin P'iaoch'ang Jên-yüen Shoujung Chiaoyü Panfa [Measures for Detention for Education of Prostitutes and Clients of Prostitutes], (promulgated by the State Council, Sept. 4, 1993) (China), art. 3.

167. Ch'üankuo Jênmin Taipiao Tahui Ch'angwu Weiyüen Hui Kuanwu Chintu Tê Chüehing [Decision of the Standing Committee of the National People's Congress on the Prohibition Against Narcotic Drugs] (promulgated by the Standing Comm. Nat'l. People's Cong. Gaz., Dec. 28, 1990) (China), art. 8.

168. Chiangchih Chiehtu Fa [Measures on Coercive Drug Rehabilitation], (promulgated by the State Council, Jan. 12, 1995) (China), art. 2 [hereinafter *Measures on Coercive Drug Rehabilitation*].

169. Measures on Coercive Drug Rehabilitation, art. 3.

170. Fêng Lin Fan, *Lun Yenta Chêngts'ê* [The Study of 'Strike Hard' Policy], 102 KUNGAN YENCHIU [POLICING STUD.] 62, 66-67 (2003).

crime wave emerging with the economic reforms.<sup>171</sup> The 1983 campaign initially targeted hooligan gang members and gang crimes such as gang fighting and street crime.<sup>172</sup> Its coverage was soon expanded from early 1984 to mid-1985 to a wide range of morally constructed offences including prostitution.<sup>173</sup> Over time, a mixture of hard strike measures began to target prostitutes, drug addicts and serious public order offenders, which were characterized as main objectives due to their harms to the social security and moral values. The 1986 Hard Strike was the first national action aimed at prostitution-related and drug-related offences as well as other socially harmful acts such as gambling and theft.<sup>174</sup> For example, the State Council issued the Notice on Resolutely Suppressing Prostitution Activities and Preventing the Spread of Sexually Transmitted Diseases on 1 September 1986, which required concerted action to eliminate prostitution. In 1989, the strikes on “Yellow Evils” and Six Evils” further equated the seriousness of drug addiction and prostitution with other grave crimes such as organized crime, kidnapping and selling women.<sup>175</sup> In effect, the “Yellow Evils” and “Six Evils” campaigns were directed specifically against socially harmful activities such as prostitution and drug use. During the period between 1989 and 1990, a countless number of people were sent to administrative detention, namely Detention for Education, Coercive Drug Rehabilitation and Reeducation through Labor to undergo the process of “education” and “correction”.

Since the first campaign, the crackdown was initiated to speedily and harshly penalize criminals who jeopardize public security. Although many Chinese scholars debate whether the “Hard Strike” campaigns conformed to the laws, and whether their harsher punishments and quicker criminal procedures were in line with legal stipulations,<sup>176</sup> those particular crackdowns functioned more politically than legally. The 1983 campaign first characterized the “Hard Strike” movement as one form of political struggle. One of the campaign leaders proudly claimed the “Hard Strike” campaign as “the milestone of insisting on the People’s democratic dictatorship in the aftermath of the Anti-Rightist movement held from 1950

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171. Bin Liang, *Severe Strike Campaign in Transitional China*, 33 J. CRIM. JUST. 387, 391 (2005).

172. Murray Scott Tanner, *State Coercion and the Balance of Awe: The 1983-1986 “Stern Blows” Anti-crime Campaign*, 44 CHINA L.J. 93, 96-97 (2000).

173. BIDDULPH, *supra* note 12, at 131.

174. BIDDULPH, *supra* note 12, at 131.

175. Liang, *supra* note 171, at 387, 391.

176. Kuang Chung Ch’ên, *Yenta Yü Ssufa Kungchêng Tê ChkKê Wënt’i* [Few Issues about the Hard Strike Campaigns and Justice], 2 CHUNGKUO HSINGSHIH TSACHIH [CHINESE CRIM. L. MAG.] 3, 5-6 (2002); Wan Huai Sun & Hui Yü Su, *Yenta Fangchên Tê Hsingfa Fahsiao Ssuk’ao* [The Thinking of the Hard Strike Principle from the Perspective of Criminology], 1 FA HSIAO [LEGAL SCI. MONTHLY] 26, 28 (2001).

to 1952.<sup>177</sup> Similarly, Deng Xiaoping specifically advocated the dictatorship on criminals and those who have undermined social order by stating that they ought to be treated harshly as anti-revolutionaries and anti-socialists.<sup>178</sup> He pointed out that under special social circumstances, “striking crimes harshly and swiftly is the best way to combat crimes, and can be justified on the ground of retribution to appease the masses and the maintenance of political stability.”<sup>179</sup> Many scholars further assert that punishing criminals severely was to fulfill a societal need as a requirement of moral boundary and to strengthen the “conscience collective” among people.<sup>180</sup>

Apparently, China’s tradition of ruling the state according to Party policy has not really changed since the inception of legal development in the 1980s. Although rule of law has been invoked by the central leaders on many occasions, Party rule overrides all laws when political needs arise. Moreover, in an authoritarian system where power is concentrated in one party, no doubt it is mandatory for Chinese law enforcement agencies to carry out Party rules as the priority. Although Party rules usually are aimed at special legal problems that pose a threat to social stability, in fact, the Party rules serve political purposes. Thus, their active implementation is in reality in line with the political needs of the state and therefore contradictory to existing laws and legal principles.<sup>181</sup> As demonstrated above, in the “Hard Strike” campaigns, the standard criminal and administrative procedure was in reality largely compromised for the political requirements of preserving social order and political control. As a result, both the criminal and administrative justice were administered in an informal and careless manner. Specifically, much of procedural justice was deliberately ignored and instead, swift and harsh handling of criminal suspects and administrative offenders became the leading mentality of the law enforcement authorities. During their actions, procedural limitations on the exercise of the authorities’ powers were, by and large, unlawfully bypassed. Procedural stipulations that produce lengthy proceedings were barely complied with to meet the mandatory requirement of swiftness in the handling of cases. Clearly, given the Chinese regulatory framework of criminal and administrative justice had been greatly matured since the mid-1980s, the authorities’ maladministration of the law was not the result of the indeterminacy of the law, at least in the

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177. Fu Chih Liu, *Yenta Chiushih Chuancheng* [*Hard Strike is Dictatorship*], KUNGAN SHIH HUA [CHINESE PROCURATORATES], (Jan. 13, 1992).

178. BIDDULPH, *supra* note 12, at 128.

179. XIAOPING DENG, DENGXIAOPING WENXUAN(III) [SELECTED WORKS OF DENG XIAOPING (III)] 33 (1993).

180. Andrew Scobell, *The Death Penalty in Post-Mao China*, 123 CHINA Q. 503, 506 (1990); Beijing Municipal Public Security Bureau Xicheng District, *Kuanwu Jênmin Ch’ünchung Tui Yenta Ch’iwangchih Tê Tiaoch’a Yü Ssuk’ao* [*The Research and Thinking of the People’s Expectation toward the Hard Strike Campaign*], 9 KUNGAN YENCHIU [POLICING STUD.] 24, 24-26 (2001).

181. RANDALL P. PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 214 (2002).

criminal law domain, but largely influenced by the far-reaching ideal of Party policy and political needs overriding law in China..

*C. Developments of the Chinese Justice System from 1997 till Now*

While China's legal system has continued to evolve, the Chinese criminal and administrative justice systems have progressed dramatically in the context of the authorities' recognition of rule of law and human rights protection in the implementation of law. To ensure that the CPL 1996 is fully comprehended, the authorities soon issued a large number of supplementary regulations and judicial interpretations to clarify this law, hence making it more enforceable.<sup>182</sup> There are many corresponding regulations passed by the different legal organs in the wake of the enactment of the CPL 1996. The Supreme Court, for example, issued the Interpretations on Several Issues Concerning the Implementation of Chinese Criminal Procedure Law in 1998, which serves as an important interpretative regulation to elaborate some loosely-defined provisions in the CPL 1996. In the meantime, the Supreme Court, the Supreme Procuratorate, the Ministry of Public Security, the Ministry of State Security the Justice Bureau and the Working Committee on the Rule of Law of the National People's Congress jointly issued the Regulations on Certain Issues Concerning the Implementation of the Criminal Procedure Law, in an attempt to provide operational guidance on some practical problems occurring over the course of the criminal process. In respect of the administration of criminal justice by law enforcement agencies, the Ministry of Public Security promulgated the Procedural Rules of Public Security Organs in Handling Criminal Cases on 14 May 1998 to further formulate police practices in the context of the CPL 1996, while the Supreme Procuratorate issued the Regulations on Criminal Process for the People's Procuratorates in 1999 mainly to regulate the operation of criminal justice at the procuratorial stage. Although the regulatory framework of criminal justice provides a series of modern legal principles to pursue a more balanced criminal procedure, the legal complex has still had great difficulties in following the evolutionary spirit of the new laws. It is in part because the shortage of well-trained personnel and the lack of large-scale propagation have hampered the understanding of the CPL

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182. *E.g.*, Tsuikao Jênmin Fayüen Kuanwu Chihhang Chunghua Jênmin Kunghan Kuo Hsingshih Susung Fa Jêkan Wênshih Tê Chiehshih [Supplementary Provisions of the State Council for Rehabilitation Through Labor] (promulgate by the Supreme People's Court of the People's Republic of China, Jun. 29, 1998) (China); Jênmin Chiench'a Hsingshih Susung Kuitsê [The Decision of the People's Procuratorate Concerning the Administration of Criminal Procedure Law] (promulgate by the Supreme People's Procuratorate, Jan. 18, 1999) (China); Kungan Chikuan Panli Hsingshih Anchien Ch'êngshü Kuiting [The Provisions on Procedures for the Handling of Criminal Cases by Public Security Organs was adopted] (promulgate by Ministry of Public Security, May 14, 1998) (China).

1996 and its related regulations.<sup>183</sup> More likely, the far-reaching rationale of crime control compels law enforcement agencies to focus more on how to punish criminals than to safeguard suspects' legal rights according to procedural requirements.

While philosophical globalization becomes irreversible in the 21st Century, China's criminal justice system has continued to be a hotly debated topic internationally. More specifically, the widespread human rights violations in the criminal pre-trial process merit serious attention. Arbitrary detention, ill-treatment and torture, and the lack of judicial independence and due process contribute greatly to the deprivation of suspects' rights at the pre-trial stage.<sup>184</sup> In fact, although China is singled out as one of the worst human rights violators in the world today, the state has endeavored to promote and protect human rights by joining the international human rights community. China has signed and ratified over twenty human rights treaties, including the International Covenant on Civil and Political Rights,<sup>185</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>186</sup> the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment,<sup>187</sup> and the Convention on the Rights of the Child.<sup>188</sup> In particular, the ratification of the International Covenant on Civil and Political Rights manifests that China is now willing to acknowledge the importance of human rights in the implementation of law and to bring its criminal justice system in line with the international minimum standards of human rights protection.

Since the ratification of these treaties, concern has been raised over the theoretical and practical disparity between international norms and domestic rules. Many legal professionals and practitioners try to fill the gaps by proposing reforms to the current criminal justice system.<sup>189</sup> A great number of scholarly proposals have been presented to the government in an attempt to make the administration of criminal justice consistent with international minimum standards.<sup>190</sup> After nearly 10 years of argumentation, several

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183. Ira Belkin, *China's Criminal Justice System: A Work in progress*, 6(2) WASH. J. MODERN CHINA 24 (2000).

184. Randall P. Peerenboom, *Assessing Human Rights in China: Why the Double Standard*, 38 CORNELL INT'L L.J. 71, 87-88, 92 (2005).

185. China Ratified the *International Covenant on Civil and Political Rights* on 28 February 2001.

186. China Ratified the *International Covenant on Economic, Social and Cultural Rights* on 5 October 1998.

187. China Ratified the *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* on 4 October 1988.

188. China Ratified the *Convention on the Rights of the Child* on 31 January 1992.

189. See, e.g., Chen, *supra* note 4, 153-63; Cai Yongshun & Yang Songcai, *State Power and Unbalanced Legal Development in China*, 14(42) J. CONTEMP. CHINA 117, 117-34 (2005); LUBMAN, *supra* note 25, at 389-98.

190. See, e.g., KUANGCHUNG CHEN, WEIQIU CHENG & CHENG YANG, KUNGMIN CH'UANLI HAN

regulations and laws designed to reach this goal were eventually enacted. The People's Congress Standing Committee, for example, passed the New Lawyer's Law in 2007 to replace the old one promulgated in 1996. Although the purpose of this law in general is to standardize lawyers' general practice and re-establish the administrative process of management, its partial intention is to enhance the suspects' rights by granting their defense lawyers more legal entitlements in the criminal pre-trial process. For example, Article 33 of the New Lawyer's Law specifies the lawyer's early entry into a criminal case, where the suspect may see and consult his lawyer at the first interrogation. By contrast the CPL 1996 provides that the lawyer is not permitted to see his client until the completion of the first police interrogation.<sup>191</sup> In response to the authorities' superior power in collecting incriminating evidence, Article 35 specifies that lawyers may collect evidence on behalf of suspects from relevant individuals and organs by presenting the lawyer's license and the law firm's proof letter. Most noticeably, Article 33 states that the meeting between the lawyer and the suspect should not be monitored and supervised by law enforcement agencies in order to ensure that suspects' legal rights are genuinely guaranteed.

The administrative justice system has continued its large-scale operation since the late 1990s. Although the use of administrative detention is criticized about its legality due to the legal uncertainty and indeterminacy of administrative legislation,<sup>192</sup> the statistics show that hundreds and thousands of people have been sent to administrative detention to undertake labor work and undergo moral and legal education in the reform era.<sup>193</sup> Unlike past periods where administrative detention was arbitrarily imposed pursuant to political considerations, the state nowadays has enacted several administrative laws to construct a legitimized administrative justice system.

The People's Congress passed the Administrative Punishment Law in 1996 with a view to standardize the establishment and execution of administrative punishments.<sup>194</sup> The law emphasizes that administrative

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CHÉNGCHIH CH'UANLI KUOCHI KUNGYÜEH P'ICHUN YÜ SHIHSHIH WÈNT'I YENCHIU [A STUDY ON THE ISSUES OF RATIFYING AND IMPLEMENTING OF INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS], (GUANGZHONG CHENED. 2002); Hung, *supra* note 22, at 304-26.

191. CPL 1996, art. 96.

192. Article 9 of Law of the People's Republic of China on Administrative Penalty promulgated in 1996 states that all deprivations of personal freedom under administrative punishments should be based on law (*fǎlǚ*).

193. *E.g.*, the survey indicates that around 68,000 drug addicts were sent to drug coercive rehabilitation and Reeducation through Labor in 2004. See BIDDULPH, *supra* note 12, at 184.

194. Hsingchêng Ch'ufa Fa [Law of the People's Republic of China on Administrative Penalty] (promulgate by the Standing Comm. Nat'l. People's Cong. Gaz., Mar. 17, 1996) (China), art. 1 [hereinafter Law on Administrative Penalty].

punishments should be carried out based on the combination of punishment and education and to teach citizens to abide by the law consciously.<sup>195</sup> In 1999, the Administrative Reconsideration Law was promulgated by the People's Congress to prevent or correct any illegal or improper administrative acts.<sup>196</sup> This law offers citizens and legal persons who consider their lawful rights have been infringed by a specific administrative act a chance to apply for administrative reconsideration.<sup>197</sup> In respect of public order offence in particular, China issued the Public Order Administrative Punishment Law in 2005 to regularize the imposition of administrative sanctions on public order offenders.<sup>198</sup> It is noteworthy that the passage of this law in theory rationalizes the use of Public Order Detention, as the requirement of depriving people's liberty based on law in the Administrative Punishment Law is now on the surface satisfied. Further, given the administrative justice system was exclusively implemented by public security organs, a set of procedural requirements were spelt out in the Regulations on the Procedures for Handling Administrative Cases by Public Security Organs issued in 2006. These legal changes appear to demonstrate the growing official acceptance that the authorities' exercise of administrative detention powers should also be subject to the rule of law and uniform procedural requirements.

1. *The Major Issues in the Administration of Modern Criminal Justice: Li Zhuang Case*

Notwithstanding that China has made its efforts to establish an administrative justice system of law-based governance, many legal scholars and human rights activists are still concerned about the legitimacy and reasonableness of the continuing use of administrative detention. They assert that the use of administrative detention not only undermines the rule of law, but also violates detainees' human rights during incarceration.<sup>199</sup> They therefore call for elimination of all forms of administrative detention by either incorporating minor offenders into the formal criminal justice system or borrowing the western concept of "security defense".<sup>200</sup> Other legal

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195. Law on Administrative Penalty, art 5.

196. Hsingchêng Fui Fa [Administrative Reconsideration Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l. People's Cong. Gaz., Apr. 29, 1999, effective Oct. 1, 1999) (China), art. 1 [hereinafter Reconsideration Law].

197. Reconsideration Law, art. 2.

198. Chihan Kuanli Ch'ufa Fa [Law of the People's Republic of China on Public Security Administration Punishments] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Mar. 1, 2006) (China), art. 1.

199. Human Rights in China, *supra* note 22, at 3-5; Hung, *supra* note 22, at 315.

200. Security defense refers to a special measure used by the authorities to rehabilitate reform and treat minor offenders based on the theories of preventing crime and preserving social order. For the



professionals, however, while admitting the inappropriateness of massive use of administrative detention, opt to retain them as an adjunct to criminal penalties. One China-law expert believes that administrative detention powers will continue to form an integral and distinctive part of social order policy which facilitates flexibility in dealing with changing problems of social order.<sup>201</sup> Another leading scholar who specializes in Chinese law claims that eliminating administrative detentions and subjecting minor offenders to criminal sanctions will push them into the harsh and decidedly unfriendly penal system, force them to live with hardened criminals, and result in their being forever stigmatized as convicts.<sup>202</sup>

Although China has made great progress in reforming and legalizing the pre-trial process since the 1990s, its operation is still subject to the Party's control at a macro level. The recent high profile, hotly-debated case of Li Zhuang illustrates this phenomenon. Li Zhuang, as one of the most outspoken lawyers in China, was hired by an alleged gang boss, Gong Mogang, in Chongqing. Gong was implicated in a large-scale crackdown on organized crime in the southwest mega-city of Chongqing. As one of the gang leaders, Gong Mogang was charged on nine counts including running a gang, murder, dealing in and transportation of guns and ammunition, drug trafficking, operation of illegal businesses, bribery, illegal possession of guns and ammunition, operation of a casino, and tolerating drug use. Having taken on the case, Li flew into Chongqing from Beijing to meet his client. Li visited Gong three times on 24, 26 November and 4 December, 2009, respectively in the detention centre of Jiangbei District. After three brief meetings, Li Zhuang was suddenly detained on December 12, 2009. He was later arrested for fabricating evidence and obstructing justice by instructing his client to lie, which contravenes Article 306 of the Chinese Criminal Law.

Seven days after the arrest, the procuratorate brought a public prosecution against Li, and the trial was immediately held on December 30, 2009. During the trial, Li was accused of covertly telling his client by blinking that he should recant and say he was tortured to confess his crimes,

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incorporation into the criminal justice system, see Huaichih Ch'u, *Ilun Laotung Chiaoyang Chihtu Kaidê* [On the Reform of the System of Reform-Labour], 5 CHUNGKUO SSUFA [JUST. CHINA] 27, 27-29 (2005); for the adaption of defense Security, see Ch'inghsia Fang, *Kouchien Wokuo Wanchêng Tê Paoan Ch'ufên Chihtu Tê Shêhsiang* [Envisaging Constructing China's Integrated Security Defense Punishment System], 20(4) HÊPEI FAHSIAO [HEBEI L. SCI.] 13, 13-17 (2002); K'ang Ch'ên, *Wokuo Paoan Ch'ufên Lifa Hua Tê Kênchü* [The Basis of Legislation of Security Defense Punishment in China], 22(5) HÊPEI FAHSIAO [HEBEI L. SCI.] 91, 93 (2004).

201. BIDDULPH, *supra* note 12, at 25.

202. Peerenboom, *supra* note 16, at 993-94. Apart from the likely harsher penalties the minor offences may receive under the criminal justice system, the author also extensively analyses the existing legal and philosophic shortcomings of the Chinese criminal justice system, which leads to the conclusion that the criminalization of minor offences will have significant negative consequences on offenders' mentality and social order policies.

while he was being monitored by the police. In addition, Li was accused of offering to pay police officers for giving false testimony and coaching his client's associates to say that Gong was not head of the mafia group but had been forced to act by other gangsters.<sup>203</sup> As a result, Li was convicted and later sentenced to 30 months in prison at the first instance. However, Li pleaded innocent. Li's defense attorneys argued that Li's trial was hasty and that, although their statements were read into evidence, witnesses testifying against him did not appear in court to face cross-examination. Li Zhuang then decided to appeal to the Chongqing No.1 Intermediate People's Court.

On February 9, 2010, the Chongqing No.1 Intermediate People's Court upheld the previous conviction, but shortened the sentence from two and a half years to 18 months, "considering Li's (cooperative) attitude in pleading guilty during the second trial."<sup>204</sup> It was reported that during the trial "Li made a dramatic U-turn in two trials from being defensive to cooperative."<sup>205</sup> He surprisingly admitted that the evidence against him was "clear and sufficient," acknowledging that his acts "stained the role of lawyers" and he "lacked the ethics an outstanding lawyer should have."<sup>206</sup> This confession astonished even Li's defense lawyers who tended to attribute this unexpected expression of guilt to a plea bargain between Li and senior officials.<sup>207</sup> This speculation was soon substantiated by Li's outrageous statements in the wake of conviction. Upon hearing the 18 months sentence, Li vociferously denied the earlier guilty plea and furiously denounced the dishonesty of the government in luring his confession. Li's lawyers were convinced that "there had been plea bargain deals between Li and the procuratorate and the final sentence without reprieve surely failed Li's expectations."<sup>208</sup>

The conviction of Li Zhuang was not a random occurrence. Li was sentenced in the context of the Chongqing's powerful campaign to crackdown on organized crime. This campaign was initiated by the Chongqing Communist Party Secretary Bo Xilai, who aimed to restructure the rule of law in Chongqing by striking down the protective network

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203. Huazhong Wang, *Lawyer for Gang Boss Suspect Gets Prison Sentence*, CHINA DAILY, Jan. 9, 2010, at 1.

204. *Lichuang Weitsao Chêngchü Fanghai Tsochêngan êrhshên Hsüanp'an Yüenting Tsuiliang Hsing Shao I Nien*[Li Zhuang gets One Year Less Sentence in the Second Trial], FACHIH JIHPAO [LEGAL DAILY], (Feb. 10, 2010), <http://news.sina.com.cn/o/2010-02-10/072417075296s.shtml>.

205. Wang Huazhong, *Lawyer Jailed for Falsification*, CHINA DAILY, Feb. 10, 2010, at 3.

206. Chang Hsiao Hui & FangYing Ting, *Lichuang An Loshêng Mên* [The Complexity of the Li Zhuang Case], CHINGCHI KUANCH'A [ECONOMIC OBSERVATION] (Dec. 31, 2009), <http://www.eeo.com.cn/eeo/jjgcb/2010/01/04/159643.shtml>.

207. Sun Ying, *Lichuang T'ujan Jêntui Tungchi Nants'ê* [Unexplainable Motive of Pleading Guilty by Lizhuang], PEICHING WANPAO [BEIJING EVENING NEWS] Feb. 3, 2010, at A9.

208. Anonymous, *Lichuang Êrhshên Pei P'anch'u Youch'i T'uhsing Inienpan* [Li Zhuang Received a Reduced One-and-a-Half-Year Prison Term in the Artond Tria], WIKIPEDIA NEWS (Feb. 9, 2010).

between the criminal underworld and law enforcement agencies.<sup>209</sup> Analogous to the “Hard Strike” campaigns, this citywide movement arrested thousands of people and convicted hundreds of them within a few months.<sup>210</sup> Perhaps the only difference between the previous “Hard Strike” campaigns and the Chongqing crackdown is that the former targeted citizen criminals while the latter was aimed at both gangs and corrupt officials.<sup>211</sup> Politically, this campaign has earned considerable praise for both the government and Bo. A brief statistical survey shows that an overwhelming majority of citizens have spoken highly of the authorities’ effort to dismantle the “Black Society.”<sup>212</sup> Meanwhile, Bo’s “anti-triad tornado” has gained applause and support from the Party central leadership,<sup>213</sup> which aroused intense debate as to whether similar action is feasible in other regions.<sup>214</sup>

Irrespective of what intentions may have constituted the ground of Chongqing’s “anti-triad crackdown,” obviously its tactics followed the pattern of political movement.<sup>215</sup> Although the leading cadres of Chongqing asserted that the crusade was operated according to law, the swift and severe handling of criminals reflected a strong political impetus. The practices were considered illegal and unconstitutional due to their apparent circumvention of formal procedure. In addition, some commentators claimed that, as a high-profile political figure, Bo Xilai had now become the focus of the national media because of his resolve to wipe out the “Black Forces,” by which his political fortune had been lifted and his career and image had been boosted.<sup>216</sup>

Like the hostility of the authorities toward defense lawyers in the “Hard Strike” campaigns, those who defended gang leaders in the “anti-triad” action were seen as a great obstacle to the success of the campaign. The Li Zhuang case clearly shows the authorities’ political stance toward any “disruptive element.” A review of the judicial process of Li’s case demonstrates that there is little doubt that the conviction of Li Zhuang falls

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209. Austin Ramzy, *China's Dark City: Behind Chongqing's Crime Crackdown*, TIME, (Mar. 15, 2010), <http://www.time.com/time/magazine/article/0,9171,1969642,00.html>.

210. *Id.*

211. Hua Shih Pi, *Ch'ungch'ing Tahei Chiehtou* [Analysis of Chongqing's Campaign of Striking Black Society], 11 CHUNGKUO PAOTAO [CHINA REP.] 3, 6 (2009).

212. More than 98% internet users of a Chongqing local legal website expressed their delight at the crackdown. See Yao Tian, *Evaluating the Chongqing' Campaign of Striking Black Society* (*Shên Shih Ch'ung Ch'ing Ta Hei*), 21 CHIENCH'A FÊNGYÜN [PROCURATORIAL VIEW] 13 (2009).

213. Willy Lam, *Chongqing's Mafia Expose Grave Woes in China's Legal Apparatus*, 9(22) CHINA BRIEF 2, 2 (2009).

214. Ou Li, *Yehshui Ch'ungch'ing Tahei Weihê Puchien Chit'a Tifang Kênchin* [Why the Chongqing Campaign Has Been Followed by Other Regions], 11 CHÜEHHS'Ë T'ANSO [POLICY RESEARCH & EXPLORATION] 85, 85 (2009).

215. Luo Ya, *Fierce Campaign in Chongqing Reminiscent of Cultural Revolution*, EPOCH TIMES (May 10, 2010), <http://www.theepochtimes.com/n2/content/view/29604/>.

216. *Id.*

short of the basic requirements of both substantial and procedural justice. In substance, neither the first instance nor the second trial provided clear facts and sound evidence to criminalize Li Zhuang. All the evidence presented to the court was *ex parte* and collected by the investigatory agencies alone. During the court sessions, the evidence was examined only in written form without the presence of witnesses. Moreover, the written evidence was gathered from Gong Gangmo, Li Zhuang's client in this movement. Procedurally, the Li Zhuang case developed surprisingly fast. Given the low efficiency of the Chinese authorities in handling criminal cases in general, the brief weeklong criminal process of the Li's case is unprecedented in all lawyer-implicated cases. Some legal scholars thus observed that when the proceedings were significantly shortened, Li's procedural rights such as the legal right to apply for bail and the avoidance of the conflict of interests were disregarded as well.<sup>217</sup>

Clearly, the trial of Li Zhuang lacked legality. Many legal professionals agree that the guilty verdict of Li was not according to law, but subject to the political demands.<sup>218</sup> This view is true in at least three particular aspects. Firstly, the extremely speedy process of the Li Zhuang case reflects the Party's attempt to ensure the triumph of the campaign at all costs. By launching the "anti-triad" crackdown, the government needed to show citizens its resoluteness in eradicating any obstructive elements to a secure society. The sentence of Li Zhuang was seen as the best channel to convey that message. On one hand, it signalled that during the campaign any attempt to help gang leaders avoid criminal punishments was in vain. On the other hand, the Li verdict was expected to have a deterrent effect on the actions of other defense lawyers.

Secondly, political influence was imposed over the course of the judicial process. In sharp contrast to Li's insistence on his innocence in the first trial, he unexpectedly pleaded guilty in the second trial. His confessional statement arguably implies that Li's admission of guilt was a result of the compromise with the authorities. Furthermore, Li also implied the Party's involvement in his "6-Point" final statement. The first point states:

"During criminal detention, my thoughts have changed a lot. Thanks to my patient education by leaders and institutions at different levels, I have gradually acknowledged that my behaviours have tarnished the duties of lawyers and have lacked the

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217. E.g., Huapeng Li, *Hsingpien Lushih Tê Chiushu "Lichuang An" Hsiyao Lêngkuan Yü Shênssu* [The Redemption of Defense Lawyers—the Li Zhuang Case Requires Dispassion and Thinking], 2 CHUNGKUO LUSHIH [CHINESE LAWYER] 18, 19 (2010).

218. Tania Branigan, *Chinese Lawyer Jailed for Defense of Alleged Mafia Boss*, THE GUARDIAN (Jan. 8, 2010), <http://www.guardian.co.uk/world/2010/jan/08/chinese-lawyer-jailed-defence-mafia>.

professionally ethical basis of a legal practitioner.”<sup>219</sup>

Although what happened behind it remains mysterious, Li's declaration enabled legal commentators to speculate that his plea of guilty was enticed by “relevant departments” (Youguan Fangmian). As the Li Zhuang case had continued to cause scholarly controversy, the authorities were facing mounting pressure from legal circles, in particular the legal practitioners and professors. Many criminal defense lawyers used their personal blogs to express their doubts about the legality of this case. Prominent scholars, however, were able to employ more influential means to make their voices heard. Professor He Bing from Chinese University of Political Science and Law, for example, held a seminar one day before the first trial regarding the Li Zhuang case and the Chinese criminal defense system. Some legal professionals from prestigious Beijing universities participated in this meeting, and take the view that the current evidence is not sufficient enough to criminalize Li Zhuang, and an unjust conviction of Li is likely to deteriorate the Chinese lawyer's practice of criminal defense.<sup>220</sup> In addition to the scholarly discussion, Professor He attended a TV interview program on the Chinese national channel, in which he publicly stated that the prosecution of Li Zhuang is problematic in terms of legality in the context of the “Strike Black” campaign.<sup>221</sup> The growing scepticism did agitate the authorities to a great extent. While being supportive of the crackdown on the triads, those who with greater legal awareness started to sympathize with the general role of Chinese criminal lawyers.<sup>222</sup> As such, it was reported that five leading local scholars were invited after the first trial to attend an urgent meeting held by the political and legal committee of the Jiangbei People's Court.<sup>223</sup> The aims of this meeting were to regain scholarly support on the criminalization of Li Zhuang, and more importantly, to look for a moderate way to handle the Li's case in order to prevent broader suspicion of the

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219. Ch'ên Li, *Lichuang Ch'ênshu Ts'angt'ou Anshih Pei Pi Jêntsui* [*Hidden Messages in Li Zhuang's Statement Implies His Forced Confession*], CHUNGKUO CH'INGNIENPAO [BEIJING YOUTH DAILY] (Feb. 6, 2010), <http://bjyouth.yinet.com/article.jsp?oid=63216908>.

220. Those Beijing-based law professors include Prof. He Weifang from Peking University, Prof. Ruan Qilin, Wang Jingxi from Chinese University of Political Science and Law, Prof. Zhao Pingzhi from Beijing Normal University and Prof. Yi Youfu from Tsinghua University. For a detailed insight, see You His Ch'ên, *Peiching Fahsiao Mingchia Yen'ao Lichuang An* [*Beijing Legal Scholars Discuss the Li Zhuang Case*] (Dec. 31, 2009), <http://chenyouxivip.blog.sohu.com/141019857.html>.

221. Professor He Bing clearly questioned the ways in which Li Zhuang was arrested and prosecuted in Hsin Wên I Chia I Ch'ungch'ing Tahei Punêng Tatiao Lushih Tê Hêfa Ch'üanli, (Dec. 15, 2009), [http://news.ifeng.com/opinion/politics/200912/1215\\_6438\\_1474689.shtml](http://news.ifeng.com/opinion/politics/200912/1215_6438_1474689.shtml).

222. Chin Tung Sun, *P'ushuo Mili Lichuang An* [*Mysterious Li Zhuang Case*] (Feb. 4, 2010), <http://focus.cnhubei.com/original/201002/t946717.shtml>.

223. Those five scholars are Prof. Li Changlin, Pan Jinggui, Gao Yifei and Mei Chuangqiang from Southwest University of Political Science and Law, and Prof. Chen Zhonglin from Chongqing University.

righteousness of the “anti-triad” campaign.<sup>224</sup> The second trial clearly reflected this intention. Although it still remains disputable, many legal commentators claimed that the Li’ confession was a product of a plea bargain made by the authorities with Li.<sup>225</sup> According to Li’s defense lawyers, the authorities were supposed to promise Li a reduced sentence and probation in return for his confession.<sup>226</sup> In fact, only a plea bargain can explain Li’s sudden change in behaviour and his outburst upon hearing the final verdict of his 18-month incarceration. At the end of the appeal trial, Li furiously accused the authorities of breaking their promises and denied his guilty plea by defining it as merely a defense strategy. Given Li’s tough attitude and aggressive statements throughout the first instance, the legal circle was convinced that Li must have been “educated” and “lured” by some senior political officers, so that his admission of guilt was made in the hope that a lenient sentence would be provided.

Thirdly, media propaganda was widely employed to rationalize the conviction of Li Zhuang. Despite the strong scepticism of legal circles towards the way in which the Li’s case was handled, local and national media uniformly condemned Li. Most of their arguments were based on the justice of the crackdown on gangsters.<sup>227</sup> Such wide-scale instructive reports successfully fanned public sentiment against any discouraging factors to the operation of the “anti-triad” campaign. Even though Li’s charge under fabrication of evidence and obstruction of justice remained highly debatable among legal professionals, the masses were convinced of Li’s immoral behaviour in helping his client escape legal punishment. It is not uncommon that acquiring support from citizens has been integral to the success or failure of Chinese political movements. The Chinese government firmly believe that the launching of political campaigns is to wage war on class enemies and enlist grassroots support to maintain the established proletariat order.<sup>228</sup>

Evidently, the Li Zhuang case is indicative of the lasting domination of political control in the administration of criminal justice in contemporary

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224. Hê Shên & Wang Han Yen, *Lichuang An Tsui Shên-tu Tê Paotao* [Debating the Li Zhuang Case], 5 HSINSHIHCHI CHOUK’AN [NEW CENTURY WEEKLY] 15, 16 (2010).

225. John Garnaut, *Born to Reign*, THE AGE (Feb. 13, 2010), <http://www.theage.com.au/world/born-to-reign-20100212-nxj9.html>; Kuo Sung Kuo, *Shei Shih Lichuang An Tê Shouhaiche* [Who is the Victim of the Li Zhuang Case] (Feb. 26, 2010), <http://www.civillaw.com.cn/art/default.asp?id=48079>; Hsiao T’ao Chang, *Lichuang Tang’ing Jentsui Huo Ts’un Piensu Chiao* [Li Zhuang’s Confession: Plea Bargaining Might Exist] (Feb. 3, 2010), [http://blog.caijing.com.cn/topic\\_art-19-2736.shtml](http://blog.caijing.com.cn/topic_art-19-2736.shtml).

226. Xujun Eberlein, *Lawyer’s Trial in Chongqing Rivets Public and Tests Chinese Court*, NEW AMERICAN MEDIA (Jan. 5, 2010), [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=b90788c09d3de5fe46ef98d6f32baf78](http://news.newamericamedia.org/news/view_article.html?article_id=b90788c09d3de5fe46ef98d6f32baf78).

227. *Id.*

228. Tao, *supra* note 27, at 102.

China. It is true that China has endeavoured to develop and reform its formal legal system, particularly the regulatory frameworks of exercising criminal and administrative justice, in the last decades. However, the imprisonment of Li Zhuang demonstrates that the legal stipulations set out in the laws to guarantee the legitimacy and justness of the criminal procedure can be easily sacrificed for the sake of political consideration. Furthermore, the Chongqing anti-black campaign serves largely as a progeny/successor of previous "Strike-Hard" movements, which reveals that the Chinese government has not genuinely viewed law, if not the rule of law, as a prioritized means to manage the control. Rather, law should be at all times employed by the Party to safeguard political stability and order in China.

### III. CONCLUDING REMARKS—IMPLEMENTING RULE OF LAW IN CHINA?

Over the last 60 years, China has developed a rather standardized and balanced pre-trial process. There is considerable evidence of a shift from a legal regime characterized as rule by law toward a system that complies with the basic elements of rule of law.<sup>229</sup> The enormous amount of legislation, particularly in the reform era, has equipped China's pre-trial process with many advanced legal notions that can theoretically guarantee a fair justice system. However, six decades of practice have proven that the crime control rationale has always been the final goal of administering pre-trial justice. This far-reaching mentality enables the law enforcement agencies to involuntarily focus on how to effectively punish offenders and carry out social order policies at the expense of offenders' legal rights.

By examining the regulatory formation of China's pre-trial justice system throughout the history, criminal and administrative laws and proceedings have primarily been employed as an instrument to combat the upsurge in crime and to punish individuals that have had the temerity to challenge Party rule. The "legalization" of this mechanism during both the pre-Mao and post-Mao period was largely engineered by the Party's unbridled lust for power and domination. It thus literally turns crime control in the Chinese context into a special type of political directive for the regulation of the state.

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229. Professor Randall Peerenboom identifies rule by law as a form of instrumentalism where law is merely a tool to be used by the state to control others without imposing meaningful restraints on the state itself. In such a scheme, law is not supreme and is usually trumped by the dictates and political policies of the rulers. In contrast to the rule by law norm, rule of law, according to Professor Eric Orts, refers to "a normative and political theory of the relationship of legal institutions and the political state that includes, but is not limited to, a theory of limited government through some form of constitutional separation between the judiciary and other state powers." Simply put, rule of law means to rule the country in accordance with law, and requires that law imposes restraints on the state and its rulers. See PEERENBOOM, *supra* note 181, at 64; EW Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 64 (2001).

In response to this ideological deficiency, many legal professionals and practitioners have provided the government their reformative thoughts and proposals, raising a question of whether a rule-of-law legal system may be a prerequisite to the construction of a genuinely regularized pre-trial justice system.<sup>230</sup> Indeed, since the 21<sup>st</sup> century, China has underpinned the supremacy of law and tended to prioritize law over power in the governance of the state. The efforts to promote the legal infrastructure and environment have also been made in the context of ongoing legal reforms. However, the extent to which these intentions are substantialized is doubtful, as the Party has long showed its skeptical and ambivalent attitudes towards the force of law and the impact of legal reform in the regulation of the country.

The reasons are multi-faceted. Above all, the reforms are most likely to result in the radical changes to the institutional and conceptual framework of the pre-trial process, for which the Party may have not yet been prepared. Specifically, to comply with rule of law, the legal duties of law enforcement agencies may be re-assigned to meet the procedural requirement of legality. A judicial checks and balances mechanism, for instance, has proven badly needed at the pre-trial stage. It means that the introduction of such a review system requires the role of the judiciary to be redefined, because the Chinese Constitution explicitly states that the People's Procuratorate is now the only supervisory organ in the Chinese legal system. At the same time, the reforms are to compel the police and procuratorates to adjust to their new roles. It is foreseeable that the adoption of a judicial checks and balances system is going to take over their most exclusive powers, such as the discretion to detain suspects without due process prior to trial, and oversee their practices in the administration of justice. In the meantime, the legalization of administrative detention powers necessitates structural and philosophical reforms as well in the contemporary administrative justice system. For example, as imposing punitive administrative detention is unlikely to benefit offenders' re-socialization and their reintegration into the society, community correction based on educational programs becomes a proper alternative to serve the ultimate goals of correction and rehabilitation.<sup>231</sup> This proposition hence requires a wholesale retreat of the police and increasing reliance on community resources, including the street committees, social organizations,

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230. For detailed discussions, see GUANGZHONG CHEN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND CHINA'S CRIMINAL PROCEDURE* (2005); WENCHANG TIAN & RUIHUA CHEN, *CHUNGHUA JĒNMIN KUNGHAN KUO HSINGSHIH SUSUNG FA TSAI HSIUKAI LUSHIH CHIENI KAO YŪ LUNCHĒNG [THE PROPOSALS AND ARGUMENTS OF THE REAMENDMENT OF THE CPL FROM THE PERSPECTIVE OF LAWYER]* (Falu Ch'upanshĕ ed., 2007); Li Enshen, *Chinese Administrative Justice System: Its Malpractice and Possible Reform*, 6(4) *FRONTIERS L. IN CHINA* 548, 548-79 (2010).

231. For a detailed discussion of using community correction to handle administrative offenders, see *id.*



community voluntary workers and legal practitioners. Moreover, to ensure that community correction will be operated in a rule-of-law manner, the judiciary must be involved, playing an arbitral role in determining whether a minor offender should be sent to receive community treatment. Clearly, these reforms are to re-conceptualize the inherent functions of law enforcement agencies and systematize the legal institutions in accordance with the rule of law in lieu of crime control. It is thus difficult to judge how keen the Party is to make such effort and how deeply China's legal culture will bear the imprint of new characters of law enforcement agencies.

Secondly, notwithstanding that China has begun to accept the international norms, such as human rights, derived from western legal regimes, the Party is reluctant to fully incorporate them into domestic laws. China has always insisted that adaption of universal rules ought to depend on local circumstances, such as cultural, ideological and economic particularities.<sup>232</sup> In particular in the field of human rights protection, the government believes that greater weight should be placed on collective rights, and more importantly, on the interests of the state.<sup>233</sup> The state is therefore hesitant to greatly strengthen suspects' and offenders' rights in the pre-trial process. Influenced by the far-reaching rhetoric of crime control, it is not surprising that the Chinese government has encountered the great difficulties in balancing the goal of punishing criminals to protect the community and the requirement of safeguarding suspects' human rights to ensure legality.<sup>234</sup> In essence, although the supremacy of crime control has been widely used as a pretext to rationalize the state's resistance, the Party is more worried about the threat posed by philosophical globalization to its sovereignty. China, as a single-party country, is concerned that the extensive acknowledgement of international laws and principles may invite external interference into its domestic affairs.<sup>235</sup> Some scholars, for example, take the view that the signing of the international human rights treaties enables the western society to justifiably criticize China's human rights record.<sup>236</sup> It specifically shows in China's attitude towards the annual reports issued by

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232. Peerenboom, *supra* note 184, at 37-38.

233. ROBERT WEATHERLEY, *THE DISCOURSE OF HUMAN RIGHTS IN CHINA: HISTORICAL AND IDEOLOGICAL PERSPECTIVES* 37 (Palgrave Macmillan ed., 1999).

234. Ting Hsiao Lu, *Hsingsu Fa Hsiukai Jénch'üan Paochang Han Chénch'a Hsiaolu Shuhsien Shuhou?* [*The Revision of the Criminal Procedure Law: Is Human Rights Protection Prioritized over Investigatory Efficiency or Vice Versa?*], JËNMIN KUNGANPAO [PEOPLE'S POLICING DAILY] (June 23, 2004).

235. Shijia Li & Jia Nan, *Pieh Chieh Jénch'üan Kanshê Piehkuo Neichêng* [*Don't Interfere with the Internal Affairs of Other Countries under the Excuse of Human Rights*], JËNMIN JIHPAO HAI WAI PAN [PEOPLE'S DAILY OVERSEAS EDITION] Feb. 27, 2009, at A1.

236. Dexiang Guo, *Jénch'üan Paohu Yü Kuochia Chuch'üan Yüentsé* [*Human Rights Protection and the Principle of National Sovereignty*], 30(4) HONAN SHIHFAN TAHSIAO HSIAOPAO [J. HENAN NORNAL UNIV. PHILOSOPHY AND SOCIAL SCIENCES EDITION, BIMONTHLY] 110, 111 (2003).

the US State Department and Amnesty International on China's human rights situation. In response to criticism, the government discontentedly calls the allegations groundless and accuses those making the allegations of interfering in its internal affairs and undermining the state's political stability.<sup>237</sup> It is true that while China has now developed as one of the most open-minded nations in the world, the Party's political supremacy is viewed superior to everything. Therefore, some political academics impliedly point out that the assimilation of some western ideologies in the Chinese social and regulatory frameworks may arouse the expectation of the public towards bourgeois democracy and values, which are in conflict with Chinese political teachings.<sup>238</sup>

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237. *China Accuses U.S of Interference*, CNN POLITICS (Feb. 2, 2009), [http://articles.cnn.com/2009-02-26/politics/china.state\\_1\\_human-rights-practices-global-climate-change-crisis-rights-with-chinese-leaders?\\_s=PM:POLITICS](http://articles.cnn.com/2009-02-26/politics/china.state_1_human-rights-practices-global-climate-change-crisis-rights-with-chinese-leaders?_s=PM:POLITICS).

238. Chen Jianzhong, *Chienshê Shêhui Chui Chêngchih Wênming Yao P'ip'an Ti Hsishou Hsifang Chêngchih Wênming Tê Ch'êngkuo* [Constructing Socialist Political Civilization Requires the Critical Assimilation of the Achievement of the Western Political Civilization], 6 J. CHUNGKUNG HANGCHOU SHIH WEI TANGCHIAO HSIAOPAO [THE PARTY SCH. OF CPC HANGZHOU] 15, 17 (2006).

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# 中國審前程式的犯罪控制 ——一種政治訴求？

李 恩 深

## 摘 要

中國（中華人民共和國）的審前刑事程式長久以來都以犯罪控制作為根本目的。本篇論文透過研究這種理論的歷史形成來探究其在中國法律文化下的真正含義。文章通過審視一九四九年後各個歷史時期的刑事審前程式的特點，提出中國對於犯罪控制的追求很大程度下是受到政治因素影響。雖然中國在現代對於刑事審前程式的程式規範和合法化做出了不俗的努力，但其真正執行還是頻繁的受到政治目的的干涉。文章最後認為雖然「依法治國」方針理論上可以改革現今的刑事審前程式，但考慮到中國根深蒂固的政治文化，尤其是政治穩定至上的原則，事實上很難從根本上根除執政黨在刑事程式操作中的干涉。

**關鍵詞：**審前刑事程式、刑事強制措施、行政拘留、政治影響