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Chapter 18: Arbitrary detention

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The right to personal liberty is often described as one of the most fundamental human rights in light of its connection to an individual's physical freedom. The right has a long history in both the common and civil law traditions and has been recognized as part of customary international law (Human Rights Council 2012, A/HRC/22/44, para. 79). From this right derives the expectation that individuals may not be detained or imprisoned without justification. This requires states to establish rules and institutions that define and limit the circumstances, procedures and powers under which individual liberty may be deprived. When deprivation of liberty is carried out in a manner that is unlawful or arbitrary—either because it takes place outside of the protection of the law or because the relevant laws and procedures are themselves arbitrary or implemented inadequately—it represents a failure to protect and respect the right to personal liberty.

The use of arbitrary detention can have dire consequences for the pursuit of other human rights. Unlawful or arbitrary deprivation of personal liberty is frequently used as a weapon to attack those exercising their rights to freedom of expression, association or peaceful assembly. When states use arbitrary detention to silence human rights defenders and political opponents, it makes it that much more difficult to achieve legal or institutional changes aimed at enabling or strengthening enjoyment of the entire array of human rights. Used as part of a widespread or systematic attack against any civilian population, severe deprivation of liberty can even be considered a crime against humanity (Rome Statute, Art 7 (1) e).

Unfortunately, the international standards that prohibit arbitrary detention are far from being universally respected. In addition to the sorts of deliberate abuses described above, states also resort to arbitrary detention in responding disproportionately to actual or perceived threats to national security or public safety or in the interest of preventing crime or disorder. Discrimination and fear can exacerbate the problem, and disregard for the procedural rights of detainees and failure to provide access to remedy for violations further institutionalize it.

This chapter shows that, in China, these problems can be seen in the ordinary systems of both criminal and administrative detention, as well as in the uses of those systems to target individuals and even entire populations for political purposes. The lack of an independent judiciary to limit the state's authority and power to detain, poor oversight over policing behavior and the general absence of access to remedy all contribute to a tendency toward arbitrariness in detention, despite nominal legal recognition of the right to personal liberty. Until these underlying problems are addressed, the problems of arbitrary detention in China will continue to be widespread.

1. International Norms and Definition

The primary protections against arbitrary detention are set out in the *Universal Declaration of Human Rights* (UDHR) and the *International Covenant on Civil and Political Rights* (ICCPR). Framed negatively, article 9 UDHR provides that 'no one shall be subjected to arbitrary arrest, detention or exile'. Framed positively, article 3 of the UDHR provides that 'Everyone has the right to life, liberty and the security of the person'.

The ICCPR article 9(1) contains both the positive and negative protections of personal liberty providing:

> Everyone has the right to liberty and security of the person. No-one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

There is no blanket prohibition on deprivation of liberty (CCPR/C/GC/35 16 December 2014, para. 10) in that there are legitimate circumstances where a person may be deprived of liberty under criminal, administrative, or emergency powers (ICCPR article 4). So, the scope of protection against arbitrary arrest or detention has required definition. In formulating a definition of the scope of protection from arbitrary arrest or detention, Nowak (2012) argues that both the negative formulation against arbitrary deprivation of liberty, as well as the positive formulation of a right of liberty and security of the person are relevant.

In seeking to give definition and institutional form to the right of personal freedom, the United Nations (UN) General Assembly set out the guarantees that should be enjoyed by people in detention in the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN General Assembly Resolution 43/173 9 December 1988), and the Commission on Human Rights (as it then was) established the Working Group on Arbitrary Detention (WGAD) in 1991. The WGAD visited China in 1997 (E/CN.4/1998/44/Add.2) and 2004 (E/CN.4/2005/6/Add.4).

The scope of protection against arbitrary detention needed to be specified to determine the mandate of the WGAD. Two elements required definition: what is arbitrary and what constitutes detention. The scope of 'arbitrary' was not defined, but described as 'those deprivations of liberty which for one reason or another are contrary to relevant international provisions laid down in the UDHR or in the relevant international instruments ratified by states (Resolution 1991/42 as interpreted in Office of the High Commissioner for Human Rights Resolution 1997/50 'Question of arbitrary detention': Resolution 1997/50).

Resolution 1997/50 considers that deprivation of liberty is not arbitrary if it results from a 'domestic judicial instance' and it is in accordance with domestic law, and in accordance with other relevant international standards including the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the criteria set out by WGAD based on Resolution 1997/50.

The Methods of work of the Working Group on Arbitrary Detention (Human Rights Council A/HRC/33/66 12 July 2016) set out five categories of arbitrary detention within the meaning of Resolution 1997/50 para. 15. These are reproduced below:

> a. When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her (category I);
> b. When the deprivation of liberty results from exercise of rights or freedoms guaranteed by 7, 13-14, 18-21 of the UDHR and insofar as States parties are concerned, by articles 12, 18-19, 21-22, 25-27 ICCPR (category II);
> c. Where the total or partial non-observance of international norms relating to right to a fair trial, established in the UDHR and in the relevant instruments accepted by the States concerned is of such gravity to give deprivation of liberty an arbitrary character (category III);
> [In this category of relevance is the consideration of ICCPR 9 and 14 and the Body of Principles for Protection of all persons under any form of detention or imprisonment. It will not substitute its decision for that of a domestic tribunal. Also, it does not cover disappearance, torture or inhuman conditions of detention which have their own different working groups.]

d. When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
e. When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

The Human Rights Committee's General Comment 35 on Article 9 of the ICCPR (CCPR/C/GC/35 16 December 2014), which deals with liberty and security of the person and is hereafter referred to as General Comment 35, further sets out the factors that will make particular forms of detention arbitrary. General Comment 35 (para. 12) notes that arbitrary detention may be authorized by domestic legislation but may still be arbitrary if it is 'inappropriate, unjust, lacks predictability and due process of law',[1] as well as 'lacking elements of reasonableness, necessity and proportionality'. General Comment 35 describes the concept of 'detention' as being 'more severe restriction of motion within a narrower space than mere interference with liberty of movement (para. 5), without free consent (para. 6).

2. Constitutional Protections

Chinese law both acknowledges and promises protections for individual liberty. The precise scope of that protection is set out in the Constitution and legislation. China's 1982 Constitution article 37 provides that:

> Freedom of the person of citizens of the PRC is inviolable.
> No citizens may be arrested except with the approval or by decision of the people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ.
> Unlawful detention or deprivation or restriction of citizens' freedom of the person by other means is prohibited, and unlawful search of the person of citizens is prohibited.

This constitutional protection does not perfectly correspond with the requirements of international law in relation to freedom of the person in several respects. A more detailed analysis of the provision itself makes these limitations apparent. The protections in article 37 appear to be restricted to PRC citizens and not people more broadly. But this narrow interpretation of the scope of recognition of freedom of the person may have been broadened subsequently by a 2004 amendment to article 33 of the Constitution stipulating that the 'State respects and protects human rights', which is not restricted in its application to citizens only. Following the general assertion of the principle of personal freedom, specific protections are specified in respect of arrest (para. 2) and deprivation of freedom by other means (para. 3). The second paragraph refers only to arrest, a specific procedure in the *Criminal Procedure Law*. It requires that arrest be approved by either the procuratorate or a court. In practice, the power to approve arrest is exercised by the procuratorate. As discussed below in the section on criminal justice, empowering the procuratorate to approve arrest has been criticized as failing to meet international standards both because the person is not 'brought before' a judicial organ and because the procurator making the decision is not sufficiently independent

[1] 1134/2002, *Gorji-Dinka* v. *Cameroon*, para. 5.1; 305/1988, *Van Alphen* v. *Netherlands*, para. 5.8.

to be considered to exercise judicial power within the meaning of ICCPR article 9 para. 3 (E/CN.4/2005/6/Add.4 29 December 2004 para. 32).

Finally, the third paragraph relates to deprivation of liberty 'by other means' and so includes at least other forms of deprivation of liberty imposed under the criminal law as well as administrative powers exercised outside the scope of criminal law. Paragraph 3 of article 33 of the Constitution prohibits unlawful detention or deprivation of liberty; establishing a requirement only of formal legality. This prohibition is narrower in scope than international prescriptions which include the added requirements of proportionality, necessity, appropriateness and reasonableness (Malmgren 2013).

Finally, the protections for individual liberty in article 37 must be read in the context of corresponding duties of citizens, which limit the exercise of freedoms and rights in that they 'may not infringe on the interests of the state, society or the collective' (article 51) and subjects them to a duty to 'safeguard the honor and interests of the motherland' (article 54). These provisions have been relied upon by the state to justify limits on personal freedom and to rebuff allegations that detention was arbitrary. For example, both articles were relied upon by the Chinese state in its response to investigation by the UN WGAD into the prosecution and conviction of Liu Xiaobo for inciting subversion of state power under Criminal Law article 105(2). In this case the opinion of the WGAD was that Liu's detention was arbitrary as he was denied fair trial rights (Category III) and was convicted for exercising his right to freedom of expression (Category II). It rejected China's assertion that this was a case where freedom of expression was properly limited by the operation of articles 51 and 54 of the Constitution (A/HRC/WGAD/2001/15 5th May 2011).

It is still the case that constitutional rights are not directly justiciable, despite the increasing reference in court judgments to constitutional provisions and even some indirect interpretations (Malmgren 2013). Revocation of the case of Qi Yuling (which involved a direct interpretation of the constitutional protection of the right to education) in 2008 confirmed the continuing limitation on direct application of constitutional rights (Hand 2011, p. 69; Tong 2010). As a result, the specific form of this and other constitutional protections and the mechanisms available to defend rights are determined by legislation. The discussion below focuses on the key pieces of legislation that define the scope and limits on powers to deprive people of their personal freedom.

3. Legality of Detention Powers and Arbitrariness

General Comment 35 makes clear that lack of a legal basis to justify detention renders that detention arbitrary (within Category I). It also specifies that detention may be lawful yet still arbitrary. As discussed above, the constitutional protection of personal liberty focuses on formal legality. This section first addresses the question of legality and then the factors that might make both detention powers in their entirety and individual cases of detention arbitrary under Category I.

Framed as a protection against unlawful deprivation of liberty, the Constitution raises the preliminary question of whether there is a legal basis to justify the detention. The question of legality is one where there has been very considerable change since 1979, when the first Criminal Law and Criminal Procedure Laws were passed.

Law in China has divided detention powers into the categories of criminal and administrative. Criminal detention is primarily authorized under Criminal Law and Criminal Procedure Law. There is a wide variety of administrative powers under which a person may be deprived of their liberty, and the legal regulation of administrative detention powers is even more fragmented. In the reform era (since 1979), development of the legal system under the evolving policy of governance according to law has imposed increasingly stringent

requirements for the minimum criteria for legality of administrative detention powers (Biddulph 2007). The process of legalization of administrative detention powers, many of which previously had no legal basis, is ongoing. Administrative detention powers may fall within the legal categories of punishments, coercive measures and handling measures (a controversial residual category) (Biddulph 2017, p. 324). A detailed account of these powers and their legal bases can be found in Biddulph, Nesossi, Sapio, et al. (2017).

Since passage of the *Legislation Law of the People's Republic of China* (Legislation Law) in 2000 (amended in 2015), all powers to deprive a person of their liberty must be authorized by 'law' (法律 article 8(5)). Further, 'law' is defined by the Legislation Law article 7 as laws passed by the NPC or its Standing Committee. The Legislation Law article 9 prohibits delegation of law-making power to the State Council with respect, inter alia, to powers to deprive a person of their liberty. This prescription is replicated in other sectoral legislation, including the *Administrative Punishments Law* (Xingzheng Chufa Fa 1996 as amended 2009, article 9(2)) and the *Administrative Compulsion Law* (Xingzheng Qiangzhi Fa 2011, article 10). The Administrative Compulsion Law at article 11 further provides that it is not permitted for the scope of targets, conditions and types of administrative coercive measures (which can amount to detention) to be expanded by way of administrative or local regulations.

On its face these laws provide very clear criteria to conclude that any other type of legal instrument—administrative regulation (passed by the State Council), Ministerial rule, or local regulation—cannot provide legal authorization or justification for any form of detention. Legislation has subsequently been passed to render lawful some forms of detention that had failed to meet this standard of legality. Some, including detention for repatriation (shourong qiansong 收容遣送) and re-education through labor (劳动教养, RETL) have been abolished (Hand 2006; Fu 2009; Biddulph, Nesossi, Sapio, et al. 2017; Biddulph 2016). Some have been legalized—for example, the administrative power to detain drug dependent people for compulsory treatment and rehabilitation. Until 2008, two separate measures were used to detain drug users: coercive drug rehabilitation (qiangzhi jiedu 强制戒毒)—under which public security organs could detain a person for between three and six months, with a possible extension of up to one year—and, for recidivists, RETL which permitted detention for between one and three years with a possible extension up to four years. Neither power had a lawful basis (Biddulph 2007, pp. 177-90). The PRC *Drug Prohibition Law* replaced these two administrative detention powers with the single administrative detention power of coercive quarantine for drug rehabilitation, enabling the public security organs to detain a person for drug rehabilitation for a period of two years (强制隔离戒毒) (Biddulph and Xie 2011, pp. 986-89). Whilst the reform has not significantly reduced police powers, the legal basis is now clear (Drug Prohibition Law article 38). The Drug Prohibition Law also provides for two additional compulsory orders, each of three years' duration: 'rehabilitation in the community' (article 33) and 'giving up drugs and recovering health' (article 48), which may be served either in the community or a closed facility (article 49). Whilst the law states that a decision to enter a closed facility is voluntary, in practice, many who enter these facilities do not do so voluntarily (Biddulph and Xie 2011, p. 990). The powers of civil and criminal committal are examples of other detention powers that have recently been legislated (see Guo Zhiyuan in this volume).

Detention for education (*shourong jiaoyu* 收容教育, or *shoujiao*) is another example of a detention power that is arbitrary (under Category I) because it is exercised without legal authorization. The administrative power of *shoujiao* enables detention of sex workers and their clients for between six months and two years. This power is authorized by the 1991 National People's Congress (NPC) Standing Committee Decision on Strictly Prohibiting

Prostitution and Using Prostitutes (Guanyu Yanjin Maiyin Piaochang de Jueding 关于严禁卖淫嫖娼的决定) (1991 Standing Committee Decision). The administrative power to detain sex workers and their clients, *shoujiao*, is regulated in a way that squarely raises the question of whether the requirement that detention be authorized by law also includes a minimum requirement about the content of this legal authorization in terms of both substance and procedure (Biddulph 2017). On its face, the Legislation Law merely requires that the power to detain be authorized by law, a very minimalist and formalistic requirement. The lack of a clear requirement of necessity, proportionality and reasonableness in Chinese law creates uncertainty about determining lawfulness, in that it leaves unaddressed the question of whether legal authorization must incorporate those principles. It also leaves a wide space for the exercise of powers to be lawful but still arbitrary under international norms. Technically, this is a law within the meaning of 'law' in the Legislation Law. But the terms of authorization are exceedingly vague. Article 4(2) provides:

> Those who prostitute or use prostitutes may be coercively gathered up by the public security organs in conjunction with other relevant departments to carry out legal and moral education and to engage in productive labor to give up this evil habit. The time limit [for detention] is between six months and two years. The State Council will pass specific measures [for implementation].

The State Council Measures for Detention for Education of Prostitutes and Clients of Prostitutes (Maiyin Piaochang Renyuan Shourong Jiaoyu Banfa 卖淫嫖娼人员收容教育办法) (1993 as revised in 2011) provide minimal detail on how this power is to be exercised. Three questions of legality arise from this type of legal authorization for which there are not yet any authoritative answers. The first is whether the form of authorization, with virtually no substantive or procedural content, is too vague. The second is whether the implementing regulations constitute an unauthorized delegation of lawmaking power proscribed by the Legislation Law article 9. Finally, there is a slight question about whether this decision falls within the scope of instruments described as 'law' by the Legislation Law, because the decision was not passed in accordance with the mandatory procedures specified in the Legislation Law. The argument that it should be considered a 'law' is that it was passed by an authorized body (the NPC Standing Committee), and even though it was not passed according to mandatory procedures, this decision predates the Legislation Law. But, taken together, these criticisms suggest that Chinese law has progressed to the point that the question of legality may not be simply addressed by pointing to the existence of a law that mentions a detention power (Biddulph 2017, pp. 321-33). Arguably, it also means that there are even fewer legal grounds for authorization of detention by a vague reference to 'transformation through education', where the fact of detention is not mentioned at all. This issue is discussed in the section below.

4. Detention in the Criminal Justice System

Detention is authorized in the Criminal Law and Criminal Procedure Law as both punishment (as set out in the Criminal Law) and coercive measures designed to ensure the smooth functioning of the criminal justice system (Criminal Procedure Law). The risks of these forms of detention becoming arbitrary exist where coercive measures are used to punish, or legal time limits are exceeded, where criminal punishments are imposed to punish political dissent or exercise of fundamental rights and where fair trial rights are denied.

4.1 Coercive measures

Criminal investigators are authorized by the Criminal Procedure Law to use detention as a means of securing suspects in the course of their investigation. The goal of detention is supposed to be to ensure that suspects are available for questioning or trial, do not tamper with witnesses or evidence and are not able to commit additional crimes. Ordinarily, investigators will impose criminal detention (*xingshi juliu*) at the initial stage of an investigation, then apply to hold a suspect longer in pre-trial detention by seeking formal arrest (*daibu*).

The 2004 Report of the Working Group on Arbitrary Detention to China commented on pre-arrest and pretrial detention as raising the risk of arbitrary detention (E/CN.4/2005/6/Add.4). One ground is the length of detention prior to arrest and lack of promptness of review of detention both before arrest and before trial. A person may be held in detention for up to 37 days prior to arrest (CPL 2012 article 89). Once arrest is approved, pre-trial detention can last up to three months (CPL article 154) and is subject to additional extensions under some circumstances (CPL articles 156, 157) or restarted (articles 158, 171), making it not uncommon for suspects to be held in pre-trial detention for a year or even longer.

Another ground for concern is the lack of transparency in procedures for approving arrest, failure to bring the suspect before a decision-maker and lack of independence of the procuratorate in making the arrest decision (E/CN.4/2005/6/Add.4 para. 32). At present, the law makes no provision that a detained criminal suspect be informed that an application for arrest has been made. The procuratorate may approve an application for arrest without informing the accused or enabling him or her to be heard in the decision-making (article 59) (E/CN.4/2005/6/Add.4 para. 30). As the application for arrest is made, in many cases, whilst a person is already in detention, the accused person is not even aware that they have been arrested until after the decision has been made. At the time of writing, although the procedures for approval of arrest have not been reformed, there are pilot programs underway to introduce a hearing procedure for determining whether to approve arrest or grant bail, which include the accused or their legal counsel. Adoption of this reform nationwide would improve the transparency of the process but would not address the lack of independence of the decision maker.

Serious concerns have been raised about the arbitrary nature of another detention power available to criminal investigators, one known as ‘residential surveillance in a designated location’ (*zhiding jusuo jianzhi juzhu*) (Rosenzweig 2016; Caster 2017). In its ordinary form, ‘residential surveillance’ is a relatively lenient measure that restricts a person to their residence for a period of up to six months (1996 CPL articles 57-58; 2012 CPL article 72). Beginning with the 1996 revision to the CPL, those without a ‘fixed domicile’ could be held in a ‘designated location’ instead (1996 CPL article 57). Because there was no clear definition of what constituted a ‘fixed domicile’, there evolved a practice of holding certain suspects under residential surveillance in designated locations as a form of ‘disguised’ (*bianxiang*) detention—depriving individuals of their liberty outside the formal system of detention and holding them in this manner without having to seek arrest approval for the full six-month period (Rosenzweig 2016).

The 2012 revisions to the CPL essentially legalized this practice of using RSDL as a form of custodial detention without fully acknowledging it as such (Rosenzweig 2016). Investigators may impose the measure on a person suspected of endangering national security, terrorism or ‘extremely serious bribery’ when use of the ordinary form of residential surveillance is deemed to have the potential to ‘impede the investigation’ (2012 CPL article 73). The authorities are required to notify the individual’s family within 24 hours of the fact of his or her detention, but in practice this does not include any information about the

location of the ‘designated location’ where the person is held (2012 CPL article 73). In addition, investigators may restrict lawyers’ access to suspects accused of state security offences, terrorism or corruption (2012 CPL article 37)—the same categories that define who may be held under RSDL. Since the new provisions were enacted in 2012, the authorities have made extensive use of the measure in a number of politically tinged cases, including many human rights lawyers and activists detained and subsequently imprisoned as part of a crackdown launched in July 2015 (Pils 2013; Pils 2014; Caster 2017).

RSDL has been criticized as arbitrary both for its violation of fair trial rights and for its use as a punishment for activities protected under the UDHR. In July 2015, a group of independent UN human rights experts raised concerns about the ‘physical and mental integrity’ of human rights lawyers and others being held under RSDL in connection with the crackdown against lawyers launched that month (Office of the High Commissioner for Human Rights 2015). In its 2016 concluding observations to its review of China, the Committee against Torture expressed ‘grave concern’ about the practice of RSDL, finding that it ‘may amount to incommunicado detention in secret places, putting detainees at a high risk of torture or ill-treatment’ and urging that the measure be repealed as a matter of urgency (CAT/C/CHN/CO/5, para. 14-15).

4.2 Political uses of crimes: inciting separatism, subverting state power, gathering a crowd to disturb social order

Rights activists are increasingly charged under the crime of endangering national security. The 2004 Report of the Working Group on Arbitrary Detention to China noted with concern the vagueness of the scope of this offence and suggested it be given a more precise definition (para. 23).

This offence is one of the so-called ‘pocket offences’ where the boundaries of the criminal law are so vague as to allow a wide range of conduct that is seen by the Party-state to be ‘dissent’ to be prosecuted. Public order offences such as ‘picking quarrels and causing trouble’ (Criminal Law article 293) and ‘gathering a crowd to disturb social order’ (Criminal Law article 290) have been labelled ‘pocket’ offences, because the police have enormous flexibility in determining what conduct might fall within the scope of that provision (Zhang 2015, Biddulph 2016, 35). For example, blogger Chen Yunfei was imprisoned in 2017 for the crime of ‘picking quarrels and causing trouble’ due to his role in a memorial service and for calling for investigation of the June Fourth massacre (China Human Rights Defenders 2017). Cases such as these have attracted a great deal of critical attention. Human rights NGOs have noted a dramatic upswing in convictions under these offences of rights lawyers, civil society activists, public intellectuals and other people engaged in conduct construed as opposing the Party-state (Dui Hua Foundation 2014).

From mid-2015 there has been a state campaign to stifle the work of NGOs and civil society groups using a range of measures such as criminal detention, bail and charges of pocket offences such as disrupting public order, when the target has been to punish and deter people from exercising internationally protected rights such as freedom of expression (and so arbitrary under Category II). An example is the case of the ‘Feminist Five’. In March 2015 five women were arrested for handing out stickers about sexual harassment on public transportation in Beijing on International Women’s Day. These arrests received critical international attention and after 37 days in detention they were released on bail, charged with gathering a crowd to disrupt public order (Human Rights Watch 2015; see also the chapter by Jiang Jue in this volume).

4.3 Denial of fair trial rights: access to legal representation

In its report on the mission to China in 2004, the WGAD identified restrictions on the right to defense (E/CN.4/2005/6/Add.4 paras 35-37) and the capacity to punish defense lawyers for the crime of 'fabricating evidence' or suborning an accused to commit perjury under Criminal Law article 306 as issues of concern. These concerns have a twofold significance for arbitrary detention (see also the discussion in chapters by Teng Biao, Fu Hualing and Elisa Nesossi in this volume). The first is that lawyers are impeded from providing adequate legal representation to people accused of crime, and so damaging their right to a fair trial. The second is that many rights defense lawyers have been either detained without charge or charged and convicted of pocket offences after extended periods in pre-trial detention, many without access to the lawyer of their choosing (China Human Rights Defenders 2016: Human Rights Watch 2018a). (For related issues of torture whilst in detention see Maggie Lewis's chapter in this volume). One illustration is the appeal issued by Amnesty International on 25 May 2018 for the release of lawyer Wang Quanzhang, who has been detained incommunicado and without charge or trial for over 1000 days.[2]

Recent and proposed reforms to the law exacerbate existing restrictions on access to legal representation. As discussed further below, a person detained on suspicion of having committed corruption offences or breaching party discipline under the Supervision Law may be held in detention (liuzhi 留置) for up to six months without access to legal representation. In addition, a person detained in respect of offences relating to national security, terrorism or especially serious bribery, may be denied access to a defense lawyer (CPL article 37).

Another set of pilot reforms to reduce the length of pre-trial detention for people accused of a minor offence have been underway since 2014 and are now in the process of being codified through inclusion in the 2018 proposed reforms to the Criminal Procedure Law. These pilot schemes have sought to expedite hearing of a matter and apply lenient sentencing in cases where the person acknowledges all charges and the main evidence, and has agreed to a sentencing proposal by the People's Procuratorate (Daum 2018). Even though some have seen this reform as a form of 'plea bargaining', there is in fact no bargaining involved at any stage. The bargain, if any, that the detainee makes, is to have their case dealt with more quickly, and so to reduce the time held in pre-trial detention, and hopefully receive a more lenient sentence. These pilots have included establishment of a 'duty lawyer' system, where duty lawyers are available to meet the accused. Even though this reform appears to be progress toward providing all people in criminal detention with an opportunity to obtain legal representation, it is not clear that this will be the outcome. The reason is that the role of the duty lawyer is poorly specified and is not clearly to represent the interest of their client, but to educate the detainee about the expedited process. Because of the ambiguity about the role of the duty lawyer, a review of these pilots found that most people in detention were unwilling to meet with duty lawyers because they felt there was nothing to be gained and for fear that engaging with a lawyer would indicate they had a 'bad attitude' which could disentitle them to expedited and lenient sentencing. This reflects a common view of officials that if a person challenges a charge, or refuses to plead guilty there is a problem with the case and so these cases are universally excluded from simplified and expedited procedures and from lenient sentencing guidelines (Biddulph, Nesossi, and Trevaskes 2017, pp. 80-81; Biddulph 2018, pp. 32-6).

4.4 Continuing detention after a criminal sentence has been served

[2] www.amnesty.org/en/get-involved/take-action/free-chinese-lawyer-wang-quanzhang/.

From 1954 some people who had served prison sentences were kept on in labor camps after their sentence was finished under a power known as 'retention for in-camp employment' (liuchang jiuye 留场就业) (Seymour and Anderson 1998, p. 190). This power was used to prevent effective release of convicts from reform through labor and people sent to re-education through labor. In 1981 the NPC Standing Committee Decision on Handling Reform through Labour Criminals and RETL personnel who escape or commit new offences set out the categories of people who would be retained in camp after expiry of their terms and provided that their original urban household registration be cancelled. These people were adjudged to be unable to be resettled and, particularly during the period of the 1983-1986 Hard Strike Campaign, were retained for in-camp employment after their terms of imprisonment were complete (Biddulph 2007, pp. 208-10). This form of detention gradually fell into disuse and appears to have been abolished entirely when the Prison Law was passed in 1994 (Biddulph, Nesossi, Sapio, et al. 2017, p. 16).

It appears now that this form of detention has been reinstated in respect of people convicted of terrorist or (religious) extremism offences. The Counterterrorism Law, article 30 provides that where a person is considered to be socially dangerous (有社会危险性), they may be subject to settlement and education (安置教育) after release. Some reports suggest that this provision is being used to detain people convicted of religious extremism after their prison term is complete, where they are considered to be a danger to society. The human rights organization Dui Hua Foundation (2018) reported that this measure was imposed on Ismaili Rozi near the end of his ten-year prison term because 'he refused to admit guilt during imprisonment, refused to accept education and education reform, and was deeply influenced by extreme religious thoughts'.

5. Administrative forms of detention

General Comment 35 identifies administrative detention 'not in contemplation of criminal charges' as presenting a severe risk being arbitrary (para. 15). In China, the legal division between criminal and administrative forms of detention mean that administrative forms of detention are not intended to be a prelude to criminal charges, but operate as stand-alone punishments or coercive measures outside the criminal justice system. The 2004 Report of the WGAD to China noted that imposition of administrative forms of detention are not determined by a court (para. 52) as required by the ICCPR article 9 para.4. While China has signed but not yet ratified the ICCPR it is clearly bound not to defeat the purposes of that treaty by Vienna Convention article 18. Many administrative forms of detention continue to fail to meet the international standard that detention be determined by a court or other officer exercising judicial power, as decisions to impose periods of detention are approved by the public security agencies. The most significant forms of administrative detention include: administrative detention (under the Public Security Administrative Punishments Law), compulsory detention of drug dependent people for rehabilitation (under the Drug Prohibition Law 2007 art. 38), detention of sex workers and their clients (under the Decision on Strictly Prohibiting Prostitution and Using Prostitutes 1991 and the Measures for Detention for Education of Prostitutes and Clients of Prostitutes art. 7 as amended 2011) and detention of juvenile offenders in work study schools and in juvenile correction facilities (Criminal Law art. 17 and Law on the Prevention of Juvenile Crime 1999 art. 38) and detention for questioning (liuzhi panwen 留置盘问 People's Police Law 1995 article 9). An evaluation of the reforms to the law regulating both criminal and civil committal in psychiatric facilities is discussed in Guo Zhiyuan's chapter in this volume.

For many years, much critical international, scholarly and activist attention focused on the administrative detention power of re-education through labor (RETL). It was rightly criticized on the legal grounds of its unconstitutionality and illegality and on practical grounds in that it was one of the most abused of all detention powers (Li 1999). Prior to its formal abolition the scope and use of RETL had been gradually restricted over a period of years (Fu 2009). Its abolition in 28 December 2013 through passage by the NPC Standing Committee of the Resolution on Abolishing Laws and Regulations on Re-Education through Labor (Quanguo Renda Changweihui Guanyu Feichu Laodong Jiaoyang Falü Guiding De Jueding), was widely applauded. However, abolition of RETL did not end the problem of arbitrary exercise of administrative detention powers. While some people originally punished through RETL were now no longer subject to punishment, a combination of administrative powers that overlapped with RETL and reforms to expand the scope of some crimes meant that others could now be punished in different ways (Biddulph 2016). There were unintended consequences of abolition of RETL. One was to push some people into forms of unlawful detention that predated abolition of RETL, but expanded after its abolition (some of these are discussed in sections 6 and 7 below). Another was to push some categories of offender into the criminal justice system.

Another concern with administrative forms of detention is that the procedures for making and imposing a detention decision fail to comply with the requirement in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment that any form of detention shall be ordered by, or subject to the effective control of, a judicial or other authority (principles 4 and 9) and has the right to defense by themselves or by legal counsel (principle 11).

In theory, administrative detention decisions are subject to challenge in the courts on the grounds of lawfulness after the decision has been made (Administrative Litigation Law 2017 articles 2, 6, 12(2) and 12(3)). But in practice it is difficult for a person to commence litigation once they are in detention (Biddulph 2007, pp. 271, 299-300). None of the rules governing the different forms of administrative detention such as: administrative detention (under the Public Security Administrative Punishments Law (PSAPL)), *shoujiao* (under the Decision on Strictly Prohibiting Prostitution and Using Prostitutes) coercive quarantine for drug rehabilitation (under the Drug Prohibition Law) and the general procedural rules governing conduct of public security agencies in exercising administrative powers (MPS Regulations on the Procedures for Handling Administrative Cases by Public Security Organs 2012 (the MPS Regulations)) provide for a hearing procedure prior to a detention decision being made. Hearing procedures are available prior to a decision being made only where the administrative decision is to impose a relatively large fine, is an order to stop production, or to revoke a license or permit (PSAPL article 98; MPS Regulations article 99).

Although courts are empowered to determine that a police decision is unlawful for breaching substantive and/or mandatory procedural rules, in practice it has been difficult for people in detention to exercise their rights. Substantive unlawfulness becomes even more difficult to determine in situations such as detention under *shoujiao*, where the substantive scope of lawful decision-making is vague (Biddulph 2017). Further, the Administrative Litigation Law also takes a very restrictive view of the circumstances in which performance of a specific administrative act will be suspended pending the outcome of administrative litigation. It provides that performance will generally not be suspended unless the court forms the view that ‘performance would result in irreparable losses and suspension will not harm the national or public interest’ (article 56(2)).

6. Questioning the Lawfulness of Particular Detention Powers

This section canvasses three instances of illegal detention: detention of Muslims in Xinjiang for 'de-radicalization' in political re-education centers; detention of nuisance and repeat petitioners in black jails and variously named education centers; and liuzhi, the substitute for the power of shuanggui, for detention for interrogation of officials suspected of corruption. These powers share the characteristic of being unlawful (so a Category I breach), but also in the case of the first two are imposed against those seeking to exercise their rights; to practice religion and culture in the case of Muslims in Xinjiang, and to complain in the case of petitioners (a Category II breach). In the case of liuzhi, denying detainees access to legal representation constitutes a fundamental violation of their right to a fair trial (a Category III breach).

6.1 Political re-education facilities in Xinjiang

Throughout the reform era (from 1979), groups considered to be politically unreliable or opposed to Chinese Communist Party (Party) leadership have been subjected to various forms of detention for compulsory re-education. The original purpose of RETL was to detain troublemakers and people considered to be politically unreliable (Xia 2001, pp. 11-13, Biddulph 2007, 82), a function it maintained until its abolition. Such people included Falungong adherents and others belonging to 'heretical' sects (Human Rights Watch 2002, Keith and Lin 2003, 629, Hung 2003, 35), troublemakers such as repeat petitioners (discussed separately below), adherents to some other unauthorized religious groups (Potter 2003, pp. 328-36) and, from 2001, alleged terrorists and separatists in Xinjiang (Fu 2005, pp. 827-8; Human Rights Watch 2001).

In Xinjiang, the central authorities have focused their attention on achieving social stability and long term security while combatting the 'Three Evil Forces' of terrorism, separatism and religious extremism. This campaign has been carried out with renewed vigor since the mass violent protests that were triggered by alleged mistreatment of Uyghur workers in Guangdong on 5 July 2009. Since 2012—and particularly since the appointment of Chen Quanguo as Party chief in Xinjiang in August 2016—the political focus has been on severe punishment, increased surveillance, de-radicalization and suppression of 'illegal' religious activities.[3] As part of these policies, there has been a dramatic increase in the construction of 're-education' or 'de-extremification' centers, particularly since early 2017 (Zenz, 2017; Human Rights Watch 2017). As there has been no official acknowledgement that these detention centers exist, it is difficult to know what, if any basis they have in law. There appears to be no legal basis to authorize detention for re-education in the absence of conviction for a prior criminal offence.

The Counterterrorism Law (amended in April 2018) provides for 'help and education' (bangjiao 帮教) to be provided to people who had been 'instigated, coerced or induced to participate in any terrorist or extremist activity' (article 29). Bangjiao is a longstanding form of community-based education, surveillance and support that is not custodial in nature (Biddulph 2007, p. 113). The alleged legal basis for these detention centers is article 14 of the Xinjiang Uyghur Autonomous Region De-Radicalization Regulations, passed on 29 March 2017 by the Standing Committee of the Xinjiang Uyghur Autonomous Region People's Congress.

Article 14 provides:

[3] Xinjiang Party Committee Several Guiding Opinions on Further Suppressing Illegal Religious Activities and Combatting the Infiltration of Religious Extremism in Accordance with Law May 20134 (Document 11) discussed in Zhou 2017, 4-5.

> Deradicalization should do a good job of the work of transformative education, implement a combination of particularistic education and concerted education, a combination of legal education and help and education (bangjiao) measures, combine thought education, psychological education, correcting conduct with skills training, combine the work of transformation through education with humanitarian care and concern, and strengthen the outcomes of transformation through education.[4]

These regulations cannot provide a legal authorization for detention, as they are not 'law' passed by the NPC or its Standing Committee within the meaning of the Legislation Law article 7. This interpretation and the requirement for central authorities to pass a law to authorize detention is supported by article 5 of the Law of the PRC on National Regional Autonomy 1984 (as amended 2001), which restricts the sphere of local autonomy. Article 5 requires the organs of self-government to 'uphold the unity of the county and guarantee that the Constitution and other laws are observed and implemented in these areas'. Far from exempting the Xinjiang Uyghur Autonomous Region People's Congress from the obligation to observe the prescriptions of the Legislation Law, this provision emphasizes their obligations to do so. Further, the form of purported authorization does not specifically mention detention, but merely the euphemism 'work of transformational education' (教育转化工作), which does not inevitably have any particular form.

Though the government officially denies the existence of political re-education camps, there is strong evidence to document both their presence and the scale to which they are being used to detain. Because of the secrecy surrounding these detention centers, it is not clear when they first commenced operation. Zenz (2018, pp. 3-4) indicates that re-education centers expanded from targeting purely Falungong practitioners after around 2014. Detention of large numbers of people appears to have started from April 2017 (Human Rights Watch 2017), shortly after passage of the De-Radicalization Regulations (Zenz 2018, p. 6). Zenz estimates that between several hundred thousand and one million Muslims in Xinjiang, as well as politically unreliable officials, either are or have been detained in these facilities since mid-2017. The length of time for which they are held varies but may be up to one year (Zenz 2018, pp. 15-16).

Despite the difficulty of reporting in Xinjiang, especially on such sensitive matters, there have been a number of informative attempts by media outlets to investigate the detentions taking place there (Shih 2017a, 2017b, 2018; Chin & Bürge 2017; Rajagopalan 2017; Feng 2018; Dou et al. 2018). Based on firsthand accounts of people who have been detained, as well as on threads of information provided by relatives unable to contact family members inside Xinjiang, photographic and satellite evidence, the grim reality of this detention system—and the fear that contributes to the secrecy surrounding it—is starting to come into focus. More details emerged an ethnic Kazakh Chinese national who had spent time in a 're-education' camp provided testimony in a Kazakh court while standing trial for crossing the border illegally (Rauhala 2018). In August 2018, the issue was a focus of China's review before the Committee on the Elimination of Racial Discrimination (CERD), where Chinese representatives flatly denied the presence of arbitrary detention but said that some offenders had been 'taken to vocational education and employment training centers' for 'rehabilitation' (Steger 2018).

Detention for political re-education is used in combination with other so-called de-radicalization programs that seek to prevent Muslims from practicing their religion, including wearing beards, fasting at Ramadan or wearing a burqa. They include 'study' programs

[4] 去极端化应当做好教育转化工作，实行个别教育与集中教育相结合，法治教育与帮教活动相结合，思想教育、心理辅导、行为矫正与技能培训相结合，教育转化与人文关怀相结合，增强教育转化成效

where cadres and other reliable volunteers visit and spend periods living in the homes of Muslims to 'foster ethnic harmony' (Human Rights Watch 2018b) and widespread deployment of facial recognition technology to enhance state surveillance capacity throughout Xinjiang (Zhai and Chan 2018).

6.2 Detention of petitioners

Petitioners who attempt to appeal to officials in protest against injustice have frequently faced a range of different forms of illegal detention, particularly when they attempt to escalate their appeals to officials two or more bureaucratic levels above the decision-maker or travel to Beijing to protest against injustice. The Constitution article 41 and the 2005 Letters and Visits Regulations authorize individuals who are dissatisfied with decisions by those exercising public power to make complaints either in person, by written correspondence to a local letters and visits office, or online. These offices are established in all state and party agencies (Minzner 2006). From the early 1990s, a combination of central policies to encourage complaint making and increasing popular grievance with the negative consequences of economic reform resulted in increasingly large numbers of people resorting to this form of complaint (Dimitrov 2013, p. 295). But as local agencies largely failed to respond to these complaints, many started 'skipping a level' to complain to higher-level authorities or using disruptive tactics to gain attention. The state has responded by revising the law to impose greater restrictions on the manner in which complaints may legitimately be made and to increase punishment for those engaged in 'abnormal' petitioning (Letters and Visits Regulations 2005; Luan 2009; Biddulph 2015, p. 186).

Local governments have strong incentives to prevent people leaving the locality to complain at higher levels because of the negative impact on their annual performance appraisal. And so they increasingly dealt coercively with these people who were regarded by local authorities as troublemakers (Human Rights Watch 2009; Human Rights Watch 2005; Lianjiang Li et al. 2012; Biddulph 2015, p. 186). Petitioners who skipped levels, created a nuisance or lodged repeated appeals have been subject to interception in Beijing or the provincial city where they went to protest, followed by periods of detention pending their forcible repatriation. These forms of interception and detention are carried out by agents of local governments in Beijing, sometimes by local officials but also by private security companies and exercised completely illegally. Prior to forcible repatriation petitioners are detained in 'distribution centers', known colloquially as 'black jails' and many set up in converted guest houses (Human Rights Watch 2005, pp. 46-49; Human Rights Watch 2009; Sapio 2011; Biddulph 2015, pp. 200-01). The extent of these forms of unlawful detention reached such a level that from 2010 the central government took steps to close local liaison offices (where many petitioners were held illegally pending repatriation) (Dimitrov 2013, pp. 298-99). But it was not until arrest in November 2011 of the executives of a private security firm, Anyuanding, which had been engaged to intercept and detain petitioners travelling to Beijing on behalf of local authorities, that there was any official acknowledgement of the existence of these black jails (Deng 2011). Despite these arrests, it appears prosecutions were dropped and Anyuanding was able to continue business under another name (Chinese Human Rights Defenders 2014). Subsequent arrests and prosecution for illegal detention of petitioners in Henan suggest that detention of petitioners continues (Winkler 2013; Dimitrov 2013; 299).

Petitioners also face detention after repatriation. Once returned to their home place, they (and other people viewed by the authorities as 'troublemakers') may be placed in illegal detention centers such as 'education and reprimand centers' (xunjie zhongxin) or 'legal education bases' (fazhi jiaoyu jidi) (Liu 2014). There was a huge public uproar when one

such center was discovered in Luoyang city (Henan) in 2014. It and other such detention centers throughout Henan were reportedly closed at this time (Zuo 2014). The existence of these types of detention centers are exposed periodically, and without changes to way in which incentives to preserve social stability are constructed, there is no reason to believe that any fundamental change to these practices will occur.

6.3 Shuanggui/liuzhi

In addition to forms of detention imposed by state agencies under criminal and administrative powers, Party organs also exercise powers to deprive a person of liberty under rules issued by the Party. After recent changes in the law, discussed below, the legal character of these powers is unclear. The most controversial of these is the power to detain Party officials suspected of corruption or breaches of Party discipline for investigation under the power of shuanggui (双规), discussed in more detail here. This power was exercised by the Party agency, the Central Commission for Discipline Inspection (CCDI). It has been regulated by Party (not state) regulations issued from 1994. Since 1993, the CCDI has shared offices (and personnel) with the state Ministry of Supervision, which is empowered under the *Administrative Supervision Law* (1997) to investigate and discipline state officials (not necessarily Party members) for breaching the law and state disciplinary rules (a power known as lianggui) (Sapio 2008; Sapio 2010, pp. 71-7).

Technically, lianggui (in contrast to shuanggui) was not intended to be a disguised form of detention (Administrative Supervision Law article 20 (3)). However, both lianggui and shuanggui (which were not separated in practice) were in fact used to detain officials for investigation and interrogation. These powers are controversial not only because of their uncertain legality, but also because they have been associated with long periods of incommunicado detention, torture and suicide (Sapio 2008, p. 20). From 2005, Party regulations departed from persisting with the fiction that the person under shuanggui was not being detained, by prescribing a six-month maximum period of detention. If the person detained confessed and provided evidence of a crime, then they could be transferred from shuanggui to criminal detention to enable investigation and prosecution on criminal charges (Sapio 2008, 10, 15). Unlike the Criminal Procedure Law, detainees are not permitted to obtain representation from a lawyer, nor are their families notified.

If we apply the criteria of the Legislation Law, shuanggui is clearly unlawful as it is not authorized by state legislation (Sapio 2008, p. 24). According to international standards, shuanggui is arbitrary under both Category I and Category III. Backer and Wang (2014) have argued, on the contrary, that shuanggui is in fact constitutionally authorized (and hence lawful) because it is authorized by documents issued by the Party and that these documents should be considered to be part of—indeed superior to—state legislative documents and the requirements set out in them. This argument rests on a broader constitutional argument that China should be seen to have two, inter-related constitutions: the state Constitution (1982 as amended) and the Party Charter, which is superior law. Any powers authorized by the Party Charter or by Party rules authorized by the Party Charter, they argue, are thus constitutionally justified (Backer and Wang 2014). A forceful counter-argument is that Party documents themselves provided for application of the basic protection of personal liberty articulated in the state Constitution (article 37), and the requirement of legality in the Legislation Law extended to all people and to all powers to deprive a person of their liberty, irrespective of whether they were exercised by state or Party agencies (Sapio 2008, p. 10).

Amendments made to the State Constitution in March 2018 have called even the basic separation of Party from state into question, specifically through establishment of the National Supervisory Commission, a Party-state hybrid body. The rhetorical relationship

between Party and state is now one of 'separation of function' (dangzheng fengong 党政分工), where power is unified under the Party and tasks are allocated to different agencies. This changes the principles articulated by Deng Xiaoping about the relationship of Party and state as being one of separation of Party and state (dangzheng fenkai 党政分开) where Party and state agencies exercised their own powers and which has been the basis for analyzing China's constitutional structure (including the relationship between state Constitution and Party Charter noted above) (Ling Li 2015).

The full implications of these changes for deprivation of liberty and the requirement of legality are not yet fully clear.[5] However, the power of shuanggui has now been subsumed within the power of liuzhi (detention for interrogation, referred to here by its pinyin; liuzhi) and given formal legal authorization in the *Supervision Law* (2018) (Zhonghua renmin gongheguo guojia jiancha fa passed and effective on 20 March 2018). Under liuzhi, a person may be subject to liuzhi without access to a lawyer for up to 6 months (article 43).[6] The place of detention is not specified, but it is not within the established pretrial detention centers (kanshousuo) operated by the police under the provisions of the State Council Regulations on Criminal Detention Centers (Zhonghua Renmin Gongheguo Kanshousuo Tiaoli) 1990 and Methods for Implementing the Regulations on Criminal Detention Centers (Kanshousuo Tiaoli De Shishi Banfa) 1991.

Another significant change has been to expand the scope of people subject to supervision under the Supervision Law. The work of the CCDI was previously limited to Party officials and the powers of the Ministry of Supervision under the Administrative Supervision Law were confined to civil servants. The jurisdiction of the supervisory commissions extends beyond those existing categories to include all people who exercise public power (行使公权力的公职人员 article 3), or perform public duties including people in management positions in state-owned enterprises, public entities such as hospitals, universities, and schools and other public entities (article 15).[7] The targeted conduct has expanded from corruption to include abuse of power and breach of discipline (arguably extending to officials who for example breach the prescriptions of the 8 Regulations).[8] The coercive powers exercised by and for the Supervision Commission under this law extend to witnesses who may also be subject to 'interrogation' (article 21).

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[5] In its 2017 *Submission to the NPC Standing Committee's Legislative Affairs committee on the draft "Supervision Law"* Amnesty International has critiqued the power of *liuzhi* as offending international prescriptions against arbitrary detention at www.amnesty.org/download/Documents/ASA1775532017ENGLISH.pdf ASA 17/7553/2017.

[6] In the circumstances set out in article 22.

[7] Article 15 provides that Supervisory organs shall conduct supervision of the following public officials and relevant personnel:

(1) Civil servants of organs of the Communist Party of China, organs of people's congresses and their standing committees, people's governments, supervisory commissions, people's courts, people's procuratorates, organs of CPPCC commissions at all levels, organs of democratic parties and associations of industry and commerce, and personnel managed, mutatis mutandis, by the Civil Servant Law of the PRC;
(2) Personnel engaged in public affairs at organizations managing public affairs upon authorization by laws or regulations or lawful entrustment by state organs;
(3) Managers of state-owned enterprises;
(4) Personnel engaged in management in public entities in education, scientific research, culture, health care, and sports, among others;
(5) Personnel engaged in management at basic-level self-governing mass organizations;
(6) Other personnel who perform public duties in accordance with the law.

[8] The Eight Regulations (八项规定) were issued by the Political Committee of the Party's Standing Committee on 4 December 2012.

Inclusion of liuzhi in the Supervision Law might accord with the barest requirement of formal legality required by the Constitution (article 37) and the Legislation Law (article 8(5)). However, in denying a person in detention access to legal counsel this power offends basic requirements for a fair trial (see Nesossi's chapter in this volume) and, by placing people in ad hoc or informal detention centers, it undermines the capacity to provide for the protections for detainees set out in the UN's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (including principle 18).

6.4 Arbitrary acts of detention

Some forms of illegal deprivation of liberty are imposed *sui generis* as a form of soft detention or house arrest. One notable example is the detention of Liu Xia, wife of the late Liu Xiaobo. Liu Xia was held in effective detention, prevented from moving freely outside her home (or current place of confinement) and communicating with friends and family between October 2010, when Liu Xiaobo was awarded the Nobel Peace Prize, and July 2018, when she was allowed to travel to Germany (Connor 2018). During this period, no legal process or explanation was ever initiated or provided to justify the restriction of her personal liberty.

In May 2011, the UNWGAD adopted an opinion that the restriction of Liu Xia's movements and communications amounted to arbitrary detention. Her detention was held to be arbitrary under both Category II, as she was detained 'as a direct consequence of her exercise of the right to freedom of expression', and under Category III, as she was detained without ever being subject to any criminal proceeding and denied rights associated with a fair trial (A/HRC/WGAD/2011/16).

It was difficult to avoid the conclusion that Liu Xia's detention was intended both to prevent her from being able to seek public support for Liu Xiaobo and also as a way to influence the behavior of her imprisoned husband. When Liu Xiaobo died from liver cancer in July 2017, therefore, it was expected that Liu Xia might finally be released. Instead, after brief, staged appearances to mourn her husband's death, Liu Xia once again disappeared, and a formal complaint was again lodged with WGAD in August 2017 in respect of her ongoing detention (Mu 2017).

In a formal sense, the Chinese government's repeated denials that Liu Xia had ever been detained appear to have been factual. But no pretense could hide the fact of her extended lack of freedom from the outside world. The pathos of her situation became ever more apparent after recordings of a telephone conversation with her friend, the exiled writer Liao Yiwu, were released to the public in May 2018 (Buckley & Eddy 2018). In them, a sobbing Liu Xia expressed despair at being repeatedly denied release from her isolation and permission to leave China. The despair behind her words that 'it would be easier to die than to live' intensified the international campaign to seek her freedom. The timing of her release, one day after a human rights dialogue with European Union officials, fueled speculation that authorities had prolonged her detention while calculating the most advantageous—or least disadvantageous—moment to let her go.

General Comment 35 identifies 'detaining family members of an alleged criminal who are not themselves accused of any wrongdoing' as an 'egregious example' of arbitrary detention (para. 16). However, confinement of the family members of political detainees and restriction over their freedom of movement has also featured in the crackdown against human rights lawyers and other activists launched on 9 July 2015. Observers think this use of effective collective family punishment in what has become known as the '709 Crackdown' is being used by the authorities to pressure suspects in these cases to 'confess' to wrongdoing

that they never committed (Cohen 2015). After Bao Zhuoxuan, the 16-year-old son of detained lawyer Wang Yu, was refused permission to travel to Australia to attend school, a failed attempt to smuggle him out of China via Myanmar resulted in him being held under house arrest for two years before being given permission to travel to Australia for education (Ng and Lam 2018).

A number of lawyers have also appeared giving televised confessions for offences for which they had not been convicted. As discussed in Lewis' chapter in this volume, there is strong evidence of their torture and mistreatment in custody.

All these cases share the misfortune of being 'political' in that the detainees are portrayed as opposing Party leadership or as dissenters to the existing political order. One difficulty in studying these illegal forms of detention is that they are illegal, and so information about them becomes available only episodically. As such it is difficult to study their extent, reasons for their use and whether they are tacitly or explicitly supported by central political or legal authority.

7. Conclusion

Just as the right to personal liberty has many linkages to the exercise and enjoyment of other human rights, the myriad ways in which this right is regularly violated in China expose a tangled root system of formal and informal norms and practices that keeps arbitrary detention firmly entrenched. These roots extend so broadly and deeply into the Chinese legal and political structure that hacking away at individual measures through ordinary legal or policies reform—as with the abolition of RETL—has little overall effect.

When it comes to arbitrary detention within the formal institutions of criminal justice or administrative punishment, it is at least possible to envision the creation or strengthening of systems that could give an individual some avenue to challenge state actions. Providing detainees with access to legal counsel and proper oversight of detention authority by an independent tribunal would be a start. Amending or repealing over-broad legislation that enables state agents to penalize people for peaceful exercise of their rights would be another way to reduce the practice of arbitrary detention.

But what about the deprivations of liberty that take place in grey areas or that are clearly outside of the law? Here, the remedy is institutional in both senses of the word. On the one hand, it would require China to recognize the PRC Constitution and its right to personal liberty as a true limit on all other norms and actions and provide the institutional wherewithal to ensure that such limits are respected and enforced. On the other hand, it would require a fundamental change in the way that those who wield the power of the Chinese state think about that power in relation to individuals. As long as belief that the rights and interests of individuals must remain subordinate to those of the state and "the people" it purports to represent, the sense of license to exert control over individuals and their bodies will persist.

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