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Chapter 10

Opportunities and Challenges for Legislative and Institutional Reform of Detention in China

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What is Reform?

Throughout this volume, we have used the word ‘reform’ to refer to the changes to legislation governing deprivation of liberty in contemporary China, as well as to the institutions responsible for enforcing such legislation. As many other words do, ‘reform’ carries two distinct connotations, which depend on the ideological and cultural context of the speaker. For most western scholars who are active in the field of China studies, the word ‘reform’ conjures up the idea of a teleological march from Marxism to liberal modernity. This connotation is absent from the word ‘gaige’, the Chinese original for ‘reform’ which lacks such a directional element. Because of this, ‘reform’ is a term all those who, in China, write or speak about detention often want to use cautiously, as it belongs to two distinct universes of meaning at the same time.

The chapters in this book explore and critically evaluate a number of significant positive developments in both discourse in the field of scholarship and practice in the areas of detention and imprisonment that have either occurred over the last decade or are currently under way. But equally, they attest to the problems inherent in marking a change as a ‘reform’ (at least in various and sometimes incompatible senses this term has been used by western scholars and the media). In fact, what we have called reform may be better understood and described as variations or fluctuations over time.

Actors and Factors in Reform

A key theme that runs throughout this book is that change within the justice system and in the practice of and rationale behind deprivation of liberty is a particularly complex process. This change can be better understood only if placed in context. This collection seeks to do that by interrogating the rationale behind specific reformist projects, as well as their short and long-term social, legal and political effects. The broader political, social and legal ramifications of changes in systems of detention sometimes become visible both in debates prior to and following reforms, which make it possible for the voice of public opinion to be heard. At other times, these broader ramifications can be ‘divined’ through a careful analysis of elite discourse on reform. Once enacted as law, the consequences of amending a legislative document can be seen in the practical impact it has on the apparatus of social governance and the justice system at large. The creation or dismantling of an institution, however, does not only produce the concrete consequences normally connected to the closing down or the opening up of new detention facilities. It might have broader systemic effects that require further amendments to existing substantive and procedural legislation. Changes in the justice system can also signal more subtle changes in ideology or, conversely, act as a catalyst for ideological change.

The close nexus between law and politics that characterises the Chinese justice system has been often and rightly criticised in scholarship and the media as placing the individual at disadvantage *vis-à-vis* the institutions of the Party-state. While acknowledging the well-founded nature of this criticism, at the same time, we wish to offer another possible reading of what the outcomes of such a fusion between law and

politics might be. As changes in legislation and in detention institutions require reconciliation of a complex web of institutional interests and ideological positions, the close inter-relationship between Party and state means that an array of political and legal actors, situated at both the central and local levels, are involved (and so implicated) in the dynamics of change.

The chapters in this book illustrate the many sources of impetus for change, and the sometimes shifting coalitions that form to advocate for a particular set of reforms. They document developments that emerge out of political opportunities at the central institutional level, as well as out of those that result from local level initiatives. Developments are neither the sole province of either the Party nor the state alone, and so we must also take into account each of these two faces of the Chinese Party-state when evaluating factors that drive or hold back change. Accordingly, this volume both examines the role of state agencies and acknowledges the key role of the Chinese Communist Party (CCP) in shaping both debates and the reform agenda. Alterations to the ways in which citizens can be deprived of their liberty are highly revealing of the extent to which the CCP is willing to bend its approach to justice administration to initiate or else accommodate changes in societal values and international calls for the protection of human rights.

At the same time the majority of the studies collected here also acknowledge that in China today, discourses on reform are shaped by numerous other factors that develop outside of the Party-state's initiative. This means that while reforms are responsive to political imperatives set by Party authorities in Beijing, the needs and interests of the institutional powers in the justice system and increasingly, the pressures exercised by individual citizens through civil society organisations and the media, are also forces to be reckoned with.

Challenges and Opportunities

The studies collected in the present volume suggest that the reformist path that has been followed so far has brought about a number of the key opportunities and challenges. Authors discuss some of the wider social, legal and political processes which influence the nature of contemporary Chinese penal policy. In so doing, they have identified pressures that shape ideas about punishment and the administration of criminal and administrative justice that may pull in different directions with different degrees of intensity. Of central importance is continuing adherence to a philosophy of punishment which is highly utilitarian in its orientation. Aside from the sometimes–conflicting imperatives of rehabilitation versus retribution, detention has the most immediate goal of maintaining social stability, as well as control over individual citizens and, indirectly, society as a whole. And so, despite rapid changes in social and economic conditions in China, change within the justice system does not always seem to obey that logic. While a number of places of detention and imprisonment are undergoing significant and relatively rapid changes in their design, functions, organisation and legislation, others have been left untouched.

The paradox of coexistence of opportunities and challenges is that they are not inevitably connected, respectively, to actual change in detention on one hand, or the lack thereof of the other. Opportunities may exist where an institution has been left untouched, while the occurrence of extraordinarily rapid changes within an institution may present challenges that their reformers never foresaw and *vice versa*.

In the sections below, we explore the elements identified in the chapters of this book that we think operate to produce both opportunities and challenges for reform in the

area of detention. They are: shifting institutional coalitions around questions of reform, Party–state interactions with civil society and media, the role of scandals in reform, and changing ideas, values and sensibilities. Political authorities and political will are significant factors in initiating any penal reform. However, we also see how, in China today, factors other than political motivations and opportunities may also contribute to or trigger change. Even though we can see that increased civil society dynamism and media activism may facilitate the development and popularisation of new ideas and sensibilities, it is also clear that deep conceptual shifts are possible only if supported by those in power, as they are the ones who have the final say in legal and institution–making processes. Governmental needs and interests are far from being homogeneous and often diverge both institutionally and geographically. Thus, legislative and institutional reforms in the area of detention and imprisonment – as in many other areas of the justice system that are strictly related to the maintenance of social order – are just the tip of an iceberg. They are built upon complex social and political dynamics which form a crucial component of any investigation into the broader themes in law, politics and sociology in China.

Political Will and Institutional Compromise

The chapters in this book build their analysis more or less explicitly around the fact that China is a country where law and politics are intermingled. In areas of justice administration that touch the core of the relationship between the state and individual citizens, the hand of the Party in state administration is clearly visible. Drastic changes or subtle reformist turns happen only if sanctioned by Party authorities, and only when the time is considered politically ripe. The activist disposition of the Party–state (Trevaskes et al. 2014) extends to both higher and lower level political levels. Thus, politics involves negotiation between CCP authorities in Beijing and at the local

levels, state agencies and key figures within ministries and justice departments responsible for the administration of public order. Understandably, it is difficult for reforms to be approved if there are important unresolved issues between agencies, or where reforms hamper their powers and interests.

The abolition of the system of Re-Education Through Labour (RETL) at the end of 2013 is one clear example of the complexity of political interactions in the justice arena. This form of detention had been the subject of vigorous debate and criticism among scholars, justice officials, legal practitioners and NGOs in China, and internationally for decades. In early 2013, RETL was designated by the Central Political–Legal Committee as one of the four priority areas for reform in the politico–legal system (see Biddulph’s chapter in this volume). At the end of that year, it ceased to exist. Suddenly, finally, the public security agencies had lost one of their most flexible and abused tools for dealing with rapidly changing social order problems.

However, the abolition of RETL had also a number of positive political effects. For one, the abolition of RETL was greeted with almost unanimous public and official approval, both domestically and internationally. It enabled the Xi Jinping leadership to mark the beginning of a renewed approach toward justice and social stability. It both signalled a retreat from the politics of law and order of Zhou Yongkang’s stability maintenance program and underlined his political demise.

A series of institutional changes instituted since 2008 also meant that the social order impact of the closure of RETL was minimised. The Ministry of Public Security (MPS), in almost full control of the complex system of administrative detention, had over a number of years put in place a series of alternative institutional mechanisms to ensure that its power over the administration of public order would not be undermined

by the eventual reform or abolition of RETL. Thus, as Biddulph explains, at the time RETL was dismantled, many detainees had already been transferred into other institutions like drug detoxification centres, detention centres for prostitutes, or into the criminal justice system.

Other reforms to legislation regulating institutions and powers of detention may also be interpreted according to the same utilitarian logic of political advantage and institutional compromise. Various chapters in this book address this issue. The limited and problematic reforms to the system of residential surveillance in the process of amending the *Criminal Procedure Law* 1996, for example, were connected to the Party–state’s obsession with social and political stability. Notwithstanding the numerous requests for its abolition, residential surveillance was retained in the 2012 version of the law for its demonstrable utility as a law enforcement mechanism (see Rosenzweig’s chapter). By maintaining it in both its ‘ordinary’ and ‘exceptional’ forms, public security authorities could continue to maximise their ability to detain alleged trouble–makers *incommunicado* without onerous limits imposed by the legislation. Indeed, the compromise implicit in the legislation may be seen as legalising previously unauthorised practices by the public security authorities.

When official commentators claim that ‘the time for reform is not yet ripe’, very often they are implying that internal institutional debates are not settled and new power–sharing arrangements have not yet been clearly defined or agreed. As both Cheng and Nesossi (chapter 6) and Macbean (chapter 7) discuss, pre–trial detention offers a key example in this respect. The institutional battle over these reforms again involves the key interests of public security authorities. The MPS maintains its monopoly over criminal pre–trial detention, with its firm control both over criminal pre–trial proceedings and pre–trial detention institutions. From its perspective, any suggestion

that procedures of arrest and detention may be separated may be interpreted as a challenge to its authority. Besides, the MPS does not see any advantage in either separating such procedure, or in giving up its control of pre-trial detention centres. Consequently, institutional and legislative reforms have, for a long time, been considered to be a prerogative of public security authorities. As public security authorities have the most significant and direct concerns in any reform of the system they administer, it has been in their interest to keep discussions about reform away from public scrutiny.

A similar link between reforms and institutional interest has been identified in the process of creating new laws. In her chapter, Guo delves into the *Mental Health Law* 2012 to reveal the extent to which the document is the result of a process of negotiation amongst the institutions involved in the treatment of the mentally ill and in the governance of mental health institutions. Thus, drafting the *Mental Health Law* 2012 largely involved internal debates among the MPS, the Ministry of Justice, and authorities involved in health management.

From Scandal to Reforms

Party and institutional politics retain their central position in the process of reform, but, in contemporary China, politics can no longer be insulated from public and media scrutiny. At different moments in the reform era, the Chinese media and the Internet have become key sites in exposing cases of egregious abuse by justice officials. As highlighted in chapter 1 in this volume, since the early 2000s, publicity surrounding a number of deaths in custody and wrongful detention both raised public awareness of problems concerning deprivation of liberty and galvanised public dissatisfaction with the institutional *status quo*.

The landmark case that brought problems with administrative detention into the spotlight was the death of Sun Zhigang in a centre for custody and repatriation. In March 2003, the young fashion designer was beaten to death while in custody in the city of Guangzhou. Official attempts to cover up the event, denunciations by the media of an obsolete and brutal system used indiscriminately to deprive citizens of their liberty and the feeling of empowerment brought by the then recently enacted *Legislation Law* 2000 paved the way for the issue of detention under *shourong qiansong* to be brought into the public discourse on justice reforms. Three young law graduates – Xu Zhiyong, Teng Biao and Yu Jiang – wrote to the National People’s Congress (NPC) to demand the abolition of custody and repatriation. The time was no doubt politically ripe and the system was abolished (Hand 2006).

Allegations of mistreatment and cases where criminal suspects were either ‘forgotten’ in places of detention or subject to abuse by other inmates or detention guards similarly opened up debates about the various faults and failures inherent in China’s complex systems of detention. Growing official sensitivity to public exposure of abuses and unnatural deaths in detention centres contributed to an increased official appetite for legal reform. In 2008, strengthening the supervision of police stations and detention centres, and improving their legislative framework were listed among the priorities of criminal justice reforms. In January 2009, the MPS was made responsible for amending the *Regulations on Criminal Detention Centres* 1990 and, as discussed in Cheng and Nesossi’s chapter and Macbean’s chapter, a few months later the debate on reform reached its apex. However, even these modest reforms of pre-trial criminal detention were soon overshadowed by scandals. This time the media reported that a young man, Li Qiaoming, had died in the Jinning detention centre in Yunnan Province playing a game of ‘hide and seek’. Once again, attempts to cover-up the

circumstances of Li's death by the authorities with a completely unbelievable story as well as the terrible circumstances of his death generated widespread public indignation. At the official level, the immediate response was fault finding, but in the longer term this incident provoked serious more systematic reflections on possibilities for reforms of pre-trial detention institutions administered by the MPS.

In 2012, the case of Tang Hui helped cement public consensus around the need to reform the long-criticised system of RETL. Driven by a mother's insistence on seeing justice done to those responsible for the rape and forced prostitution of her 11 year old daughter, Tang Hui responded to the indifference of local law enforcement agents by petitioning for the intervention of provincial and central officials (Rosenzweig 2014). After a protracted trial process in which two defendants were eventually sentenced to death (though these death sentences were subsequently overturned on review by the Supreme People's Court), police responded to Tang's on-going efforts to hold individual officers accountable for alleged acts of dereliction or malfeasance by sending her to RETL for 18 months. When news of Tang's detention became public, a surge of public opinion put pressure on provincial authorities to announce a thorough investigation and to quickly release her on 'humanitarian' grounds.

Other scandals within China most probably have helped channel public attention toward other problematic mechanisms for detention, including administrative measures like RETL and other extra-legal measures like 'black jails' or extra-legal forms of 'residential surveillance'. Following a number of denunciations by international organisations and NGOs, in 2010, the Chinese authorities admitted to the existence of 'black jails' which were mainly used to detain petitioners, and at the same time acknowledged the need to solve this problem.

As Macbean's chapter concludes, scandals have acted as powerful catalysts for recent reforms. Chinese law scholar Fu Hualing has described this as a 'from scandal-to-reform' pattern of reform (Fu 2009, 164). It is important to acknowledge though that such cases were most probably 'sentinel events', exemplifying a series of longstanding and widespread problems in the system of administration of justice in the PRC that the media was then allowed to discuss openly. Enabling such public discussion has an additional institutional benefit of strengthening the hand of those who have an interest in promoting reform. While some observers might have seen such grim reports of deaths in custody as confirmation of their fears concerning repeated violence within these places, for reform-minded scholars and officials, these cases also represented a useful opportunity to move their proposals for legal and institutional reforms into the spotlight to be heard and debated. Scandals triggering public debate offer opportunities for initiating processes to revise systems that may have been in place for years. Cases exposed in the media also provide an opportunity for authorities to gauge changes in public attitude and tolerance levels of those in civil society who can no longer abide abusive behaviours within places of detention, thus stimulating a public outcry and calls for legislative change.

Ideas, Values and Sensibilities

Our account above of the impact of institutional interest and scandals on attitudes toward detention points to the existence of three distinct constituencies: political power holders and their representative institutions, civil society and the media. From that discussion we can also point to at least three overlapping, but possibly divergent, sets of conceptual approaches to the deprivation of liberty that in turn influence the development of new ideas, values and sensibilities. The first are political ideas about maintenance of social order and crime control which underpin the general orientation

of policy and official decision-making about detention. In this volume two sets of political ideas in the form of policies emerge as central. One is ‘stability maintenance’; the other is the criminal justice policy of ‘balancing leniency with severity’.

The second set of conceptual approaches concerns the issue of the legal and fundamental human rights of individual prisoners and detainees. The third relates to broader social values that have arisen out of economic development, new cultural and social interactions and non-official political discourses. Social views and sensibilities about criminality, punishment and exclusion more generally have evolved alongside changes in social values. Each of these three approaches has been developed in the Chapters of this book. We summarise some of the ideas that have emerged in these three areas below.

First, top-level political ideology has been decisive in defining the terms in which criminal justice is discussed and in setting the parameters for criminal justice reforms. As Nesossi and Trevaskes explain in their chapter, political ideology has long defined the parameters within which the idea of punishment is articulated in the literature and translated into practice. In the post-Mao era, the continuing use of Marxist discourse of reforming the individual has had a significant impact on both the approaches to and institutions of punishment. Another discursive trope originating in the Mao era is ‘balancing leniency and severity’. This form of rhetoric has shaped the way that institutional practices are described and debated both in prison literature and by practitioners in prisons.

The policy of ‘balancing leniency and severity’ (attached to Hu Jintao’s harmonious society policy) was proclaimed by Party and judicial authorities alike to be China’s

new foundational criminal justice policy. In court and prosecution practices, its main gist is to ensure that a range of minor offences can be decriminalised or subjected to lighter penalties, while a relatively narrower range of serious criminal offences can be treated with severe punishment (Trevaskes 2010). Clearly this policy was intended to focus on the trial process involving conviction and sentencing decisions. Nevertheless, as growing emphasis came to be placed on the harmonious society agenda, by extension the policy of ‘balancing leniency and severity’ also increasingly came to influence the rhetoric and practice of prison organisation. Since 2012, it has enabled authorities to justify and advocate for political choices which displace old prison discourse and enhance new ideas about prison organisation. After the Eighth Amendment to the *Criminal Law* in 2012, which highlighted the importance of ‘balancing leniency and severity’, prison authorities began to adapt ‘balance’ to recast longstanding prison discourses related to prison organisation and prison life. Terms such as ‘security’, ‘rehabilitation’ and ‘criminal reconciliation’, as well as the ways prisons and prisoners are classified nowadays is couched in the language of balancing leniency and severity. Changing the context and so the meanings ascribed to the language spoken by political–legal agencies creates the possibility that practice may become more respectful of the substantive and procedural rights of individuals.

The substantive and procedural rights of individuals provide the second set of ideas that underpin the analysis of a number of chapters in this volume. In the area of prison reform, the introduction of rights–related discourse in the mid to late 1990s gave reformist–minded scholars and practitioners a new vocabulary with which to argue about the failures of longstanding prison discourse and policy. While some scholars fully embraced rights discourse, others like Zhang Shaoyan took advantage of the increasingly rights–related debates on prisons in the 1990s to argue for a thorough

rethinking of the entire concept of reform through labour (*laogai*). Zhang, one of the most outspoken scholars who questioned not only the concept of *laogai* but also explicitly denounced its political nature in the late 1990s, offered one of the first examples of an approach critical of the Maoist idea that prison and punishment were designed to reform (as opposed to punish) the individual. In a seminal article, Zhang (in Chu, Chen and Zhang 2002) argued:

When we talk about reform we talk about reforming an individual's thinking since behaviour is dependent upon thought. This means that only by reforming their thoughts, can we modify their behaviour. I see a problem here: can we really reform somebody's thought patterns? Anybody can change, but can this be considered a reformation [of thinking]? I believe that this is not the case. A person can change, but [changing one's thinking is] not the same as coerced reform. This is because one's thoughts are free, and can only ever be free. In this case, how can we coercively reform their thoughts? This is impossible. Secondly, if we do assume that somebody's thoughts can be reformed, do we also assume that the reformer has the power to do so? Reform in China has quite powerful ideological and political connotations; it does not simply mean that you change into well-behaved person [sic]. It signifies [a deeper] change in thought and reform. And, I believe it is crucial to reflect about whether we actually have the capacity to reform a person's thinking.

Rights discourse is not the sole province of individual scholars and practitioners. The Chinese government itself and its agencies have been increasingly inclined to utilise rights discourse in the international arena. As Macbean (chapter 7) has noted in her study, at the official level, China has made several undertakings to respect international law regarding the treatment of persons deprived of their liberty. China's

second National Human Rights Action Plan (2012–2015) makes specific promises to improve the protection of detainees’ rights including to prevent unnecessary detention, to supervise detention time limits and to improve oversight and investigations into deaths in custody. In its report for the *Universal Periodic Review by the UN Human Rights Council* in 2013, China outlined a number of measures it had taken to strengthen safeguards of detainees’ rights, including the promulgation of regulations on detention centres (*juliusuo tiaoli*). As in other areas of justice administration, such official commitments, though not reliably translated into practice, at least to some extent help to change the baseline in domestic scholarly narratives and in the official language used to discuss deprivation of liberty.

Concepts of individual and legal human rights sit in tension with the current modes of crime fighting and control of public order. The discourse on rights of detainees is an example of this tension. The numerous debates surrounding the revision of the *Criminal Procedure Law* 1996 have brought to light illegal practices like torture in pre-trial detention centres operated by the public security authorities that were both common and routinely condoned. Debates over the system of residential surveillance have equally questioned the meaning of the term ‘coercive measures’ during pre-trial proceedings, by highlighting how easily these measures may be manipulated for punitive purposes by the public security authorities in clear breach of the rights of the criminal suspects. Over the last decade and particularly in recent years, numerous Chinese scholarly debates about administrative detention have been framed in terms of legality and respect for constitutional and individual rights of detainees. We saw this particularly in Cheng and Nesossi’s chapter discussing the drafting of the new detention law.

Reports by the media about abuses in places of detention build on a base of increasing public dissatisfaction with Party–state institutions and may also help to increase rights consciousness within certain segments in society. The reporting of abuse may also be indicative of increasing sensitivity to more inclusive ideas of social justice and individual rights. These reports create expectations among the general public that individuals should be treated equally before the law and not be left at the mercy of arbitrary and abusive conduct by the authorities. Scandals have fuelled critical public discourse on the power of the police and lawyers and legal scholars have contributed to greater rights awareness and stronger demands for these rights to be respected. However, increasing rights awareness in Chinese society, to date, has not resulted in widespread public calls to limit the state’s power to deprive persons of their liberty. There are also real limits to the capacity of these sensibilities to affect enforcement practice.

Indeed, the increasing rights consciousness in many sectors of Chinese society has not translated into a deepening sympathy for all people, especially those caught up in the justice system. As this volume illustrates, general feelings of dissatisfaction and disillusionment toward state–run detention institutions has not lessened the stigma of people labelled criminals. For instance, Macbean, and Cheng and Nesossi, lament the general popular disengagement with the rights of prisoners and detainees. Guo’s chapter shows that this lack of sympathy extends to the treatment of the mentally ill, with continuing lack of attention and concern for their rights. Li explains in his chapter how social stigmatisation and rejection of offenders have generated an environment where ‘community programs are functionally misunderstood and locally repulsed.’ Offenders, sex workers and the mentally ill are perceived by members of

the community to be potential threats to social order and morality as well as a potential drain on community resources.

Conclusion: Looking Behind the Cosmetic

The chapters in this collection highlight the need to view legal and institutional change as the outcome of a complex set of political dynamics and structural transformation. The broader framework of the Party's utilitarian approach toward detention and imprisonment as part of its quest for public order, social stability and power control impedes any form of linear progression from Maoism towards modernity. We see that reforms influenced by economic development and new social dynamics continue to be impacted by a refusal of authorities to relinquish the ideology of the Maoist era. Therefore governance priorities and the development of approaches toward crime and criminality that hark back to the Mao era coexist in tension with newer ideas about justice and individual rights held by the elites and many at the grassroots level.

The abolition of RETL is a prime example of the need to broaden our perspective to see the wider political, institutional and social picture. RETL's abolition needs to be interpreted in light of its historical antecedents and its relationship with other forms of administrative detention. It has to be read in the context of new forms of crime that have emerged with economic development and new approaches toward public order. Its abolition also raises numerous questions for the future, concerning for example, the establishment of viable substitute punishments, and the advantages and risks of such alternatives. As Li has highlighted in his chapter, the difficulty of imposing community corrections penalties on minor offenders also points to broader features of

China's contemporary socio-economic landscape. In particular, institutional conflict with the *hukou* system, the shortage of community resources and local resistance undermine both its implementation and its capacity to realise the objectives of education and persuasion.

The lack of reform to law and practice in pre-trial detention and imprisonment is equally problematic. This lack of movement could prove that the *status quo* is considered by authorities to be satisfactory or that an available alternative to the problems posed by these institutional and legislative settings has not been identified yet.

On the whole, deprivation of liberty in China today still remains a powerful tool in the hand of the authorities to exercise control over society, to influence the direction of politics and to maintain Party rule. As long as the public security organs maintain the discretionary power to detain people, and as long as reformers are prevented from expressing their criticisms of the police even in the most muted tones, claims about 'reform' need to be interrogated in a critical manner. At the very least, this means that scholars and observers of the Chinese system of detention should be careful to distinguish cosmetic changes from genuine reform. Identifying opportunities for future reforms requires sensitivity to the past, a detailed understanding of each form of detention and how change in any one form of detention impacts on the rest of the penal system, and a degree of optimism that more humanist approaches to detention may one day prevail.

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