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Punishments in the Post Re-Education through Labour World

Questions about Minor Crime in China

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1 Introduction

Sometimes reform in a particular area can highlight the need for more thorough-going change.* The decision in China to abolish the much-maligned administrative detention power of re-education through labour (*laojiao*) in December 2013 was one of these reforms. *Laojiao* was abolished without putting a clear alternative power or powers in its place. Its abolition thus left open questions about what, if anything, should replace it. But more than that, it highlighted fundamental questions about the scope and structure of China's system of punishments. Announcing its decision to abolish *laojiao*, the Central Committee of the Chinese Communist Party (CCP or Party) also announced the need for work to be done to 'perfect the system of laws for punishment and

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¹ Effected with the decision of the Central Committee of the CCP's *Decision on Several Major Issues in Comprehensively Deepening Reform* (*Zhonggong Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Zhongda Wenti de Jueding*).

correction of unlawful and criminal acts'.² In this formulation, 'unlawful and criminal' acts (*weifa fanzui*) is an ambiguous term that covers both administrative and criminal punishments. Hence, the Central Committee effectively called for a review of the whole system of punishments. This major policy decision, coupled with the lack of a simple substitute for *laojiao*, has prompted renewed interest in the legal structure of both punishments and other measures for the correction of unlawful conduct and criminal offending.³

This chapter examines how reforms, both undertaken and proposed, have been shaped by perceptions that the abolition of *laojiao* has left a gap in the system of punishments that needs to be filled. To what extent have these reforms and reform proposals also drawn on foreign models and experiences, or have they been primarily shaped by the existing structure and priorities of the domestic system? It asks to what extent these reforms are purely a technical readjustment, or do they also reflect a change in the values and priorities of the system of punishments? In addressing these questions, the focus of this chapter is on the punishment of minor offending: the space allegedly left by *laojiao*. Its main argument is that whilst responding to the abolition of *laojiao* has had an identifiable influence on specific reforms, more broad-ranging reform proposals have drawn extensively on foreign systems and experience. In terms of normative change, it argues that some of the incremental reforms have sought to ameliorate areas of entrenched abuse, such as extended detention prior to trial,

² Section IX point 34; translation at www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm

³ Dong Wei, 'Reform of the security punishment after China's abolition of re-education through labor' (2015) 1 *Journal of Sichuan University*, 81.

but that the reforms and reform proposals reveal no sustained shift towards greater protection of individuals when they encounter the state's punitive power.

The structure of punishments has commonly been described along a continuum ranging from least to most severe. At the bottom, minor offending is punishable under the provisions of the 2006 Public Security Administrative Punishments Law (PSAPL; *Zhi'an Guanli Chufa Fa*) (amended in 2012).

Administrative punishments include a warning, administrative fine or period of administrative detention imposed by the police of up to twenty days (PSAPL article 16).⁴ This law empowers the police to question suspects and to take coercive measures to prevent persons from harming themselves or others.

Above the PSAPL, in the middle range, is a group of more severe administrative detention powers, of which *laojiao* was the harshest. Under *laojiao*, a person could be detained (administratively) for between one and three years (with a possible one-year extension). The powers in this middle range are used to sanction socially harmful conduct that is considered to be too serious to be punished under the PSAPL but not sufficiently serious to warrant a criminal sanction or which by its nature is outside the scope of criminal law. At the top of this conceptual structure is the criminal justice system and criminal punishment.

After the abolition of *laojiao*, an open question about which there is no ready consensus is whether there is now a gap in the system of punishments. If such a gap exists, how is it to be filled? Should it be filled at all? This chapter considers this question. It examines the extent to which there is an overlap

⁴ In this chapter, reference to the police is to the public security organs (*gong'an jiguan*) organised under the Ministry of Public Security.

between *laojiao* and existing powers, both criminal and administrative. As the abolition of *laojiao* took decades to achieve, a number of reforms were put in place that reduced the scope of *laojiao* and transferred punishment of some types of offending to other administrative and criminal powers.

In terms of proposals for reform after the abolition of *laojiao*, some scholars argue that the system of punishments is already gap-free.⁵ There was thus no need for a power such as *laojiao* to occupy an intermediate space for the system of punishments, as administrative punishments under the PSAPL and criminal punishments under the Criminal Law (CL) already cover all conduct that *should* be punished. These scholars advance both a positive and a normative position. As a question of analysis, there is no gap in the system of punishments. At a normative level, the intermediate category of administrative punishments is unnecessary. Others approach the normative question in a more cautious manner, focusing on technical arrangements of power and arguing that the gap, which they posit does exist, can be addressed by disaggregating the conduct targeted under *laojiao*. More serious offending, they argue, can be diverted into the criminal justice system as ‘minor crime’, with less serious offending handled by the administrative punishments system. In fact, from the mid-1980s this was an influential proposal, effectively to reform *laojiao* out of existence.⁶

⁵ Benson Li, ‘Security punishments should not be the direction for reform of re-education through labour’, Chinese Social Science News, 9 September 2013, p. 499.

⁶ Renwen Liu, ‘Thoughts on bringing public order detention and re-education through labour in the criminal law’ (*Zhi’an jiliu he laodong jiaoyang naru xingfa de sikao*) (2010) 8(1) *Journal of the China Procurators College*, 94–100; Chuanwei Zhang, ‘From embarrassment and subversion to rebirth: an analysis of the reform of re-education through labour to community corrections’

After examining the question of whether there is a gap in the punishments system, this chapter goes on to explore two main areas in which there has been a reappraisal of the system of punishments: minor crime and security punishments. Minor crime is a major focus of this reappraisal, both because of the extent of overlap with the now defunct *laojiao* and because, at a practical level, the abolition of *laojiao* has contributed to a significant increase in the number of minor criminal cases being tried in the Chinese courts.⁷ The Fourth Five-Year Court Reform Plan (2014–2018) (*Renmin Fayuan Di Sige Wunian Gaige Gangyao, 2014–2018*) (Supreme People’s Court (SPC) Opinion on Comprehensively Deepening Reform in the People’s Courts (*Guanyu Quanmian Shenhua Renmin Fayuan Gaige de Yijian*)) has given policy priority to the question of minor crime, identifying the task of ‘completing systems for the expedited handling of minor criminal cases’ as one of the core areas for judicial reform (point 12). However, the CL does not currently acknowledge the category of minor crime, and it was not created upon the abolition of *laojiao*. Accordingly, the chapter explores some of the basic questions about minor crime. What is minor crime? Should this category be established in law, and if so how should it be defined? How should minor offending be dealt with? Should it be through

(‘*Cong ganga, dianfu zouxiang xinsheng: laodong jiaoyang gaizao wei shequ jiaozheng zhi fenxi*’) (2009) 1 *Journal of Beijing Administrative College* (*Beijing Xingzheng Xueyuan Xuebao*), 80–85; Qihan Jiang and Kaiyin Yuan, ‘Discussion of problems of re-education through labor’ (*Laodong jiaoyang wenti shulue*) (1990) 4 *Public Security Studies* (*Gong’an Yanjiu*), 46–48.

⁷ Na Li, Min Zhang and Yuanyuan Sun, ‘A study on the mechanism of expedited justice for minor criminal cases after abolition of the system of re-education through labor’ (2014) 1(1) *Journal of the Beijing Police College*, 14–19.

simplified investigation and adjudication, through the establishment of a specialist minor offences division in the courts, through different punishment regimes or other programmes such as diversion?⁸ In searching for answers to these questions, both local and international experience and institutional solutions are drawn upon.

The chapter then turns to an examination of a second concept that has been thrown open to debate by the abolition of *laojiao*: 'security punishment' (*bao'an chufen*) or 'security measures' (*bao'an cuoshi*).⁹ Security punishment focuses on the risk that certain conduct and people pose to society. It includes preventative measures and prohibition orders of various types. As with minor crime, the category of security punishment is not enacted in Chinese law. In the same way that minor crime was linked to debates about *laojiao*, debates about security punishments were also originally linked to debates about the reform or abolition of *laojiao* and criminal law reform from the mid-1980s. If a security

⁸ The term *jianyi chengxu* can also be translated as 'summary procedure'. However, in this chapter, I have chosen the term 'simplified procedure' because it is closer to the actual Chinese term and to distinguish the scope and operation of simplified procedure in the Chinese system from the quite different ways in which summary procedure operates in foreign jurisdictions such as Australia.

⁹ I previously translated this term as 'security defence punishment', that is, punishment for defending security (see Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China* [Cambridge: Cambridge University Press, 2007], pp. 345–348) but have now decided that that translation is more convoluted than it need be and could be misunderstood. There is no convenient translation for *bao'an*, which literally means protecting order/peace. The use of this term in Chinese (both in Republican China and in the PRC) has been drawn from and is an interpretation of European conceptions. In other jurisdictions such as Germany, terms such as preventive detention or preventive measures are used to cover similar types of powers.

punishment category were to be recognised, where should it be located conceptually and what powers should be included? The normative desirability or otherwise of introducing such a category into the Chinese legal system has been hotly debated for decades. It is a debate that has drawn heavily on the European experience of the abuse of security punishments in the mid-twentieth century.

Some post-*laojiao* reform proposals suggest that the Criminal Law should be amended to include provisions addressing either minor crime or security punishments or both, a reform that would expand the reach of criminal law and criminalise a number of administrative sanctions.¹⁰ These proposals are by no means uncontroversial. Expansion of the scope of criminal law and the creation of new categories of minor crime and security punishments are fiercely opposed by those who see them as unwarranted and readily productive of injustice. They instead advocate minor, incremental reforms to address any reform issues left after the abolition of *laojiao*. Embedded in each technical question, the gap in the system of punishments and the scope and nature of reforms to establish minor crime and security punishments lie unresolved normative questions about China's justice system: what and who should be punished and how?

¹⁰ Liu, 'Thoughts on bringing public order', 94.

2 Is There a Gap in the System of Punishments?

2.1 Scope of *Laojiao*

One of the notable features of *laojiao* was its flexibility. As the political and social order environment changed, the scope of *laojiao* was constantly adjusted and readjusted to encompass new and emerging social problems. Beginning from the 1950s, this process of incremental expansion continued throughout the reform period to encompass newly emerging forms of socially disruptive or unlawful conduct. As the problem of drug use and dependency deepened from the 1980s, the proportion of drug-dependent people in *laojiao* increased dramatically. Repeat and nuisance petitioners, people criticising government and Party officials, and those committing petty theft, fraud or other conduct considered to be anti-socialist or anti-Party could conveniently fall within the amorphous bounds of *laojiao*. Chen Xinliang in a 2001 article estimated that approximately one-third of the total *laojiao* population was drug dependent; that about one-third had committed minor crimes such as theft, fraud, fighting and public brawling; and that the other one-third had engaged in other types of conduct (including prostitution, repeat and nuisance petitioning, public advocacy and criticism of government officials).¹¹ The Regulations on Public Security Organs Handling Re-Education through Labour Cases (*Gong'an Jiguan Banli Laodong Jiaoyang Anjian Guiding*) issued on 1 June 2002 by the Ministry of Public Security

¹¹ Xingliang Chen, 'Research on China's system of re-education through labour: from the perspective of criminal rule of law' (2001) 13(6) *Peking University Law Journal*, 694.

was the last regulatory consolidation of *laojiao* targets, although the scope of targets continued to be expanded on an ad hoc basis after that.

Based on that consolidation, Xie Chuanyu has divided the types of conduct punishable by *laojiao* into four categories. The first (category A) includes conduct that could constitute a criminal offence but where a decision has been made not to prosecute because the circumstances are clearly minor.¹² Such conduct, an example of which might be the acceptance of a bribe whose amount falls below the threshold of a criminal offence, is not otherwise punishable by administrative sanction as it falls outside the scope of administrative laws. Category B offences are those where formal procedures to prosecute as a criminal offence have commenced, but because the circumstances are minor a decision has been made not to pursue the matter or to exempt the person from punishment. The Procuratorate or court may determine either not to prosecute or not to proceed with the trial.¹³ Category C offences encompass those where the conduct constitutes a public order offence and so is liable to administrative punishment, or where the circumstances are comparatively serious, but not

¹² Chuanyu Xie, *On the Sanction System of Offences* (*Weihai Shehui Xingwei de Zhicai Tixi Yanjiu*) (Beijing: Law Press, 2013).

¹³ The Procuratorate may decide not to prosecute if it considers that the evidence is not reliable and sufficient (Criminal Procedure Law (CPL) 2012 article 171), where the offence is minor and the Procuratorate determines that the offender need not be punished (CPL 2012 article 173), or if it considers that the provisions of CPL 2012 article 15 apply: i.e. the acts are obviously minor, caused no serious harm, and it is deemed that no crime exists (CPL 2012 article 173). For a discussion of the regime under the 1996 CPL, see Mike McConville, Satnam Choongh, Pinky Choy, Eric Chui, Ian Dobinson and Carol Jones, *Criminal Justice in China: An Empirical Inquiry* (Cheltenham, UK: Edward Elgar, 2011), pp. 106–110. The court may also determine to dismiss a case under CPL 2012 article 15.

sufficiently so to constitute a criminal offence. Category D offences are administrative breaches where the person in question has repeatedly failed to reform after having been punished (*lujiao bugai*).¹⁴ This characterisation of the types of conduct punished under *laojiao* helps to shape an evaluation of what, if any, gaps exist in the punishments system as well as the impact and reach of reform proposals.

2.2 Alternative Punishments: Sex Workers and The Drug Dependent

Whilst many of those detained under *laojiao* were punished for having committed criminal offences too minor to warrant criminal punishment, a significant proportion of detainees were people whose conduct was only ever an administrative wrong, i.e. a category D offence in Xie's schema.¹⁵ Two large groups within this category were sex workers and their clients who had been repeatedly sanctioned and drug-dependent individuals who had been repeatedly sent for coercive drug detoxification. Since the abolition of *laojiao*, both types of conduct remain punishable, albeit under different administrative powers.

Engaging in sex work, unless knowingly infected with a sexually transmissible infection (STI), has never been a criminal offence in China. The legal regime proscribing sex work enables a first offence to be punished under

¹⁴ The term *lujiao bugai* literally states that the person has been 'educated repeatedly and has not reformed'. In this situation, education means that the person has been punished and has failed to learn from that punishment by reforming and ceasing to engage in unlawful conduct. See Xie, *On the Sanction System*, pp. 110–114.

¹⁵ Xie, *On the Sanction System*.

the provisions of the PSAPL (article 66). Where the circumstances are minor or solicitation occurs in a public place, the police may impose a fine of up to RMB500 or administrative detention of up to five days. In other circumstances, the person may be punished by between ten and fifteen days' administrative detention and a police-imposed fine of up to RMB5,000. Sex workers and their clients may also be gathered up for detention for education (*shourong jiaoyu*) for between six months and two years in accordance with the provisions of the 1991 National People's Congress (NPC) Standing Committee's Decision on Strictly Prohibiting Prostitution and Using Prostitutes (*Guanyu Yanjin Maiyin Piaochang de Jueding*) (paragraph 4.2).¹⁶ This form of detention may be imposed either instead of or subsequent to punishment under the PSAPL. The law provides no guidelines for enforcement agencies in determining which punishment to impose or the length of detention within the legally prescribed range. The abolition of *laojiao* reduced the number of interlinked administrative powers available to sanction the parties to a prostitution transaction, but left a similar form of administrative detention, *shourong jiaoyu*, in place.

One of the major reforms to *laojiao* that arguably cleared the way for its abolition was the transfer of drug-dependent people out of *laojiao* and into a

¹⁶ A number of different translations have been used for the term *shourong*, including 'shelter', for example (*shourong shencha*), meaning 'to shelter for investigation'. In other situations, it has been translated as 'custody', in the case of custody for repatriation (*shourong qiansong*). In this chapter, I have chosen to translate the term *shourong* as 'detention'. My reasoning is that the term itself means 'to take in or shelter'. However, shelter is a very inaccurate term to describe what actually happens to people taken in under these powers. The word 'custody' as well implies a comparatively short period of deprivation of liberty. The period of confinement under these powers, however, can be for up to two years, rather more substantial than the word custody implies.

specialist form of detention for treatment under the provisions of the 2007 Drug Prohibition Law (DPL). The DPL reorganised the state's approach to regulating and sanctioning drug use and dependency (amongst other things). It replaced two pre-existing detention powers, coercive drug rehabilitation for between three and six months in police-run detention facilities, and *laojiao* for between one and three years, with another form of administrative detention, i.e. Coercive Quarantine for Drug Rehabilitation (CQDR; *qiangzhi geli jie du*).¹⁷ The DPL also created two new community-based compulsory treatment orders, giving up drugs in the community (*shequ jiedu*) and recovering health (and giving up drugs) in the community (*shequ kangfu*),¹⁸ each for a maximum of three years. The DPL specifies that CQDR may be imposed for an initial period of two years, which may be either reduced by a maximum of one year if the detainee reforms or extended for one year if the detainee does not (articles 38 and 47). The period of detention under this new power is thus between one and three years, the same as the period of detention originally imposed under *laojiao*. We can thus reasonably see it as a substitute for *laojiao* with respect to the drug dependent.¹⁹

¹⁷ Taiyun Huang (ed.), *Explanatory Reader on the PRC Illicit Drugs Prohibition Law (Zhonghua Renmin Gongheguo Jindu Fa Jiedu)* (Beijing: China Legal System Publishing House, 2008); Hong Yang and Chun Zhang, 'The necessity and feasibility for forced detoxification replacing detoxification via re-education through labour' (*'Qiangzhi geli jiedu qudai laodong jiaoyang jiedu de biyao yu kexing'*) (2008) 23(6) *Journal of Guangxi Administrative Cadre Institute of Politics and Law*, 82–86.

¹⁸ Sarah Biddulph and Chuanyu Xie, 'Regulating drug dependency in China: the 2008 drug rehabilitation law' (2011) 51(6) *British Journal of Criminology*, 1–19.

¹⁹ *Ibid.*

As a result of this legal reform, those detained in police-run coercive drug rehabilitation and *laojiao* were transferred to specialist drug treatment facilities. This group represented a substantial proportion of the total population of detainees under *laojiao*. By 2005, official estimates suggest that the number of drug dependent individuals in *laojiao* had increased to 580,000, constituting over 50 per cent of the total *laojiao* population, with more than 200 *laojiao* camps designated as specialist camps for the drug dependent.²⁰ Another estimate suggests that by the time the DPL came into effect, two-thirds of the total *laojiao* population was transferred to this new form of detention.²¹ In fact, the *laojiao* camps that were effectively already specialist drug detention facilities simply changed their names.

2.3 Overlap between Administrative and Criminal Laws

Particularly in the area of public order offences, there is a strong overlap between conduct punishable under the PSAPL, *laojiao*, and the CL. For example, each authorises punishment for ‘picking quarrels and causing trouble’: in PSAPL article 26(4), Regulations on Public Security Organs Handling Re-Education through Labour Cases article 9(4) and CL article 293(4). Such public order

²⁰ Bixue Wang, ‘The basic shape of my country’s re-education through labour drug rehabilitation model’, *People’s Daily*, 24 June 2005.

²¹ ‘Prospects for reforming China’s re-education through labor system’, Congressional Executive Committee Meeting, 9 May 2013. Official statistics show that in 2009 173,000 people were sent to CQDR. See Office of the National Narcotics Control Commission (NNCC), *Annual Report on Drug Control in China*, Section 4: Deepen Giving up Drugs and Prevention of Drug Use (Beijing: Office of the NNCC, 2010). Available at www.jhak.com/jdzy/zgjdzy/20100327/1674.html

offences originally punished by *laojiao* would constitute a category C offence in Xie's schema²² if the circumstances were not seen as sufficiently serious for prosecution as a criminal offence or a category D offence if the person in question were a repeat offender. Where the definition of the offence in criminal law is broadly worded and the criteria vague, the police retain discretion to determine whether to pursue administrative or criminal sanctions. The boundary of the CL is also vague, and, for that reason, public order offences such as those under article 293 of the law have been labelled 'pocket' offences, so-called because the police have enormous flexibility in determining what conduct falls within the scope of the provision.²³

In fact, there is evidence to suggest the increasing use of that discretion to initiate criminal prosecutions for disrupting public order. Since the abolition of *laojiao*, the offences of 'picking quarrels and causing trouble' (article 293) and 'gathering a crowd to disturb social order' (article 290) have attracted a great deal of critical attention. Human rights NGOs have noted a dramatic upswing in the conviction under these offences of rights lawyers, civil society activists, public intellectuals and anyone engaged in conduct construed as opposing the party-state, who might otherwise have been punished with *laojiao*.²⁴ The degree of overlap in the legal provisions defining the offence of disrupting public order

²² Xie, *On the Sanction System*.

²³ Qianfan Zhang, 'Extending "picking quarrels and causing trouble" to Internet speech' (*Yanshen dao wangluo yanlun de "xunxin zishi"*) FT Chinese Web, 4 February 2015.

²⁴ Dui Hua, 'Criminal detention as punishment in the post-RTL era', *Dui Hua Human Rights Journal*, 22 January 2014.

certainly makes it possible to use existing criminal offences to punish people who might previously have been punished administratively.

2.4 Lowering the Threshold of Some Criminal Offences

Reforms to lower the threshold for filing a case against certain types of criminal offences have also captured certain types of conduct that were previously punished only under *laojiao*.²⁵ These types of conduct would fall within category C of Xie's schema (serious administrative infringements that do not constitute a criminal offence). The eighth amendment to the CL in 2011 and subsequent judicial interpretations²⁶ lowered the threshold for filing a criminal case in areas such as disturbing social order, traffic and driving offences, theft, forgery, bribery, fraud and corruption-related activities that could be punished by up to

²⁵ Hongxian Mo and Dongli Ma, 'Cohesion and coordination of criminal and administrative punishments – from the perspective of abolition of re-education through labour' (2014) 141(1) *Journal of Henan Finance and Economics Politics and Law University*, 43.

²⁶ These interpretations were incorporated into the ninth amendment to the Criminal Law (CL) in 2015 and include the Supreme People's Court (SPC) and Supreme People's Procuratorate's (SPP) *Interpretation on Several Questions on the Applicable Law for Handling Criminal Cases of Theft* (*Guanyu Banli Daoqie Xingshi Anjian Shiyong Falu Ruogan Wenti de Jieshi*), effective from 2 April 2013 (reproduced at www.spp.gov.cn/zdgz/201304/t20130403_57894.shtml) and SPC and SPP's *Interpretation on Several Questions on the Applicable Law for Handling Criminal Cases of Picking Quarrels and Causing Trouble* (*Guanyu Banli Xunxin Zishi Xingshi Anjian Shiyong Falu Ruogan Wenti de Jieshi*), effective from 22 July 2013 (reproduced at http://news.xinhuanet.com/legal/2013-07/20/c_125038626.htm).

three years' imprisonment.²⁷ The ninth amendment in 2015 also increased the scope of conduct punishable in areas such as disrupting order and spreading false information, which can conveniently be used to punish conduct construed by the state as dissent or anti-state (conduct originally targeted for punishment under *laojiao*). Article 290 now extends punishment to people who have been repeatedly punished for disruptive conduct and have not reformed. Provisions have been added to article 308 to punish lawyers and other participants in litigation for revealing information disclosed in court proceedings that had not been made public. Article 309 makes disruptive behaviour in and around courts an offence, including gathering a crowd to disrupt the courtroom; beating and abusing judicial officers or other participants; insulting, slandering and threatening judicial officers; disobeying an order to stop; damaging court property and litigation documents; and seriously disrupting court order.

These reforms to the CL do not criminalise all types of minor offending that were previously punished under *laojiao*, but they go some way towards it (and may even encompass some category A offences in Xie's schema, offences too minor to punish as criminal offences and not otherwise punishable administratively).

²⁷ Including article 291 (spreading rumours on the Internet), article 133 (in relation to drunk and dangerous driving), articles 267 and 280 (in relation to theft and forgery) and articles 164, 302, 383 and 390 (in relation to fraud, bribery and corruption related offences). Text available at www.npc.gov.cn/npc/xinwen/2015-08/31/content_1945587.htm.

2.5 Other Areas of Flexibility in the Criminal Justice System

There are circumstances in which the use of criminal coercive powers for the investigation of suspected criminal offences can be used in ways that are punitive even if the matter under investigation does not proceed to criminal prosecution. They include criminal detention, investigative detention (after arrest) and residential surveillance. The criminal coercive power of detention (*xingshi jiliu*) enables the police to detain for interrogation a major criminal suspect under article 80 of the Criminal Procedure Law (CPL; *Xingshi Susong Fa*). The police may ordinarily detain a person for three days before applying for an arrest warrant, but in some circumstances a person may be held for a maximum of thirty-seven days before an arrest is approved by the Procuratorate or he/she is released. Following their arrest, suspects may be detained for long periods prior to trial, either unlawfully or through the use and misuse of a range of lawfully available extensions and other devices such as commencing the investigation of a new and different offence when the period of detention for another has expired.²⁸

The criminal coercive power of residential surveillance also enables the police to exercise close control over a person's life and actions. Particularly the power to hold individuals in residential surveillance away from their homes at a location designated by the police (under CPL article 73) has become a de facto

²⁸ McConville et al., *Criminal Justice in China*, pp. 45–46.

alternative to detention.²⁹ *Shuanggui*, the power exercised by the CCP's Discipline Inspection Committee to detain for interrogation Party officials suspected of breaching Party discipline (i.e. suspected of corruption), is also commonly used prior to or instead of arrest. This power has been used extensively to investigate official corruption, and these cases are transferred to the criminal justice system once a decision has been made to prosecute and sufficient evidence has been obtained.³⁰

During investigation, there is a strong preference for keeping suspects in detention rather than using a non-custodial coercive measure such as bail. As McConville et al. note, the conditions in detention centres 'may be appalling'.³¹ Thus, in practice, the use of these forms of detention when a person may be eligible for a non-custodial measure to be imposed, or when there is no real prospect that a criminal investigation or prosecution will proceed, becomes punitive.

2.6 Mind the Gap

The foregoing discussion shows that, to a certain extent, there is an overlap (and hence no gap) between conduct punishable under both *laojiao* and other

²⁹ Joshua Rosenzweig, 'Residential surveillance: evolution of a Janus-faced measure' (12 October 2013). Available at SSRN: <https://ssrn.com/abstract=2641010>; Joshua Rosenzweig, Flora Sapio, Jue Jiang, Biao Teng and Eva Pils, 'Comments on the 2012 revision of the Chinese criminal procedure law', in Mike McConville and Eva Pils, eds., *Comparative Perspectives on Criminal Justice in China* (Cheltenham: Edward Elgar), pp. 455–503.

³⁰ Flora Sapio, 'Shuanggui and extralegal detention in China' (2008) 22 *China Information*, 7–37.

³¹ McConville et al., *Criminal Justice in China*, p. 45.

administrative punishments, or *laojiao* and criminal punishment. Some of this overlap stems from the vague and expansive descriptions of an offence. In other cases, revisions to the CL have lowered the threshold for filing a criminal offence and the flexibilities in the CPL have enabled coercive powers to be used in ways not apparent from the text of the law. The supposed 'gap' in the system of punishments has also been reduced by the existence of alternative administrative powers to impose extended periods of detention on those whose conduct did not and still does not fall within the purview of criminal law: that is, the drug dependent and sex workers and their clients. The imposition of administrative sanctions in these types of cases remains legally ill defined, and the police retain wide discretionary powers and are subject to limited procedural controls in exercising those powers.

However, the abolition of *laojiao* has in fact changed the punishment landscape. Whilst some forms of conduct punished under *laojiao* may now be subject to criminal punishment, pursuing a criminal prosecution is not as institutionally convenient as imposing *laojiao* because of the involvement of a greater number of agencies – the police, Procuratorate and courts – each with its own powers and institutional interests. In the case of administrative detention, the abolition of *laojiao* removed a layer in the overlapping web of administrative punishments for category D offences (repeated infringements).

That abolition has also resulted in certain types of conduct no longer being subject to punishment. In cases where the conduct does not fall within the generally more rigidly defined boundaries of the PSAPL or CL, or where the police are unable to obtain sufficient evidence to file a case and obtain approval

from the Procuratorate for an arrest (e.g. in the case of category A or B offences in Xie's schema),³² a person may escape punishment. There are good policy reasons for not expanding the scope of criminal punishments to cover this type of conduct, as the debates concerning minor crime and security punishments examined later attest. For conduct falling within category A or B, both the CL (article 13) and CPL draw a lower limit with respect to very minor offending to prevent such offenders from entering the criminal justice system or to enable them to exit the system before a criminal conviction is recorded. These are important protections for those who have committed very minor offences, as the recording of a criminal conviction has detrimental implications for all aspects of a person's work and life.

3 Minor Crimes

A number of changes have converged to underpin the current interest in minor crime (*qing zui*). One is the adoption of the criminal justice policy of 'balancing leniency and severity' (*kuanyan xiangji*), which acknowledges that criminal law is not merely a tool for harsh punishment. Another important factor is that the proportion of minor offences has increased dramatically both in absolute numerical terms and as a proportion of the overall number of criminal cases. For example, one report states that in 1978, in 39.7 per cent of criminal cases, punishment of five years or longer fixed-term imprisonment was imposed. In 2007, that percentage had declined to 16.22 per cent of all criminal cases (with there being no suggestion that the decrease was attributable to increasing

³² Xie, *On the Sanction System*.

leniency in punishment).³³ In some economically developed areas with a large migrant labour population and a crime rate higher than the national average, the proportion of minor crimes is very high. For example, in Jiangyin city in Jiangsu province, a punishment of less than three years' imprisonment was imposed in 88.9 per cent of the 2,420 criminal cases adjudicated in 2013. Of those cases, over 14 per cent involved drunk or dangerous driving.³⁴

Discussions of minor crime include concerns about definition and policy, that is, what constitutes a minor crime, where does it sit in the overall criminal justice system, and how should minor offending be punished? This, in turn, is linked to another set of questions about the procedural issues raised in responding to the increased cost and institutional workload of the police, Procuratorate and courts.³⁵ What forms of investigation, prosecution and adjudication are appropriate or necessary for dealing efficiently and fairly with minor offences if they are to be handled using expedited procedures? In terms of reform proposals, another question is whether minor crime should be embraced as a category, requiring both formal legal and institutional changes to establish it as such, or whether it should remain descriptive in terms of identifying certain types of offending and the expedited processes and lenient treatment in place to handle them.

³³ Xiaodong Zhang, 'How much do you know about speedy criminal determination?' (2014) 15 *Fangyuan Magazine*, 56-59.

³⁴ Ibid.

³⁵ Li, Zhang and Sun, 'A study on the mechanism'; Zaishang Chen and Xiangqian Cui, 'Three-dimensional defects and remodelling of the system of re-education-through-labour' ('Laodong jiaoyang zhidu de sanwei quexian yu chongsu') (2008) 4 *Journal of the Railway Police College (Tiedao Jingguan Gaodeng Zhuanke Xuexiao Xuebao)*, 32-38.

A number of incremental changes have been made in criminal law, procedure and practice to deal more efficiently with less serious crime. These reforms have enabled certain types of minor offending originally punished by *laojiao* to be dealt with through the criminal justice system. The reforms began prior to the abolition of *laojiao* and include expanding the scope of matters that fall within the definition of crime, expanding the scope of matters that may be dealt with by simplified procedures and instituting non-custodial sentences for minor crimes. If a decision is ever made to establish the legal category of minor crime, then more far-reaching structural reforms will be required.

3.1 Policy Issues

Instituting systems for the expedited handling of minor criminal offences is identified as a core area for reform in the Fourth Five-Year Court Reform Plan (SPC's Opinion on Comprehensively Deepening Reform in the People's Courts, point 12). On 23 October 2013, SPC Chief Judge Zhou Qiang, in reporting on a meeting convened to discuss SPC work, including its response to the abolition of *laojiao*, urged local-level courts to establish procedures for expedited adjudication to cope with the increase in the number of minor offences anticipated after that abolition, as well as to promote the scope of community corrections to ensure an early return to the community of minor offenders.³⁶

Whilst a degree of momentum has built around defining the scope and institutional mechanisms for handling minor criminal offences, there is by no

³⁶ *Zuigao Fa Tichu Tansuo Wanshan Qingwei Xingan Kuaishen Kuaijie Jizhi*, 24 October 2013, available at <http://news.sina.com.cn/c/2013-10-24/023928515178.shtml>.

means unanimity about the desirability of reforms to establish a category of 'minor crime'. Wei Dong, for example, suggests that establishing such a category would do violence to the long-established policy of the scope of criminal law remaining small (*xiao xingfa guannian*). He argues that the threshold for criminal offences should not be lowered to include a wide range of conduct currently punished as administrative infringements, and goes on to argue that the legislative and institutional changes required to establish such a category would be too extensive and disruptive of the established system.³⁷

The opposing view recognises the fact that there has been a marked increase in the number of minor offences being tried in the criminal division of the People's Courts and points to the inadequacy of existing procedures for expediting the handling of such cases. Existing procedures, this point of view holds, are currently geared to a criminal justice system that is orientated towards harsh punishment, are too cumbersome and costly and are, in fact, inappropriate for dealing with minor offending. The danger of failing to introduce expedited investigation, prosecution and adjudication measures in respect of minor offences is that many people will be held in pre-trial detention for unnecessarily long periods when their case could have been dealt with quickly. With the increasing use of non-custodial sentencing for minor offences, this view argues that a more comprehensive reform is clearly warranted.

³⁷ Wei, 'Reform of the security punishment', 82.

3.2 Definitional Issues

China's CL itself does not categorise crime as minor or serious, unlike the criminal laws of many other jurisdictions. So, at present, the category of minor crime has no legislative definition, and nor does it have any specific institutional structure such as a magistrate's court or minor crime division or any special procedures for expedited prosecution and adjudication. Some suggest that the boundary for minor crime should be offences for which punishment of less than three years' fixed-term imprisonment, criminal detention, control or a fine may be given. They suggest that the definition should also encompass certain categories of offenders who are eligible for lenient treatment under the policy of balancing leniency and severity, including juvenile offenders, first time offenders and chance offenders (*oufan*).³⁸

The distinction between minor and serious crime, to the extent it exists at present, lies in the circumstances in which the given offence takes place or the circumstances that render the offence serious, very serious or odious. However, such degrees of distinction do not map well onto the categories of minor and serious crime, as some offences such as murder are serious by their very nature. The law at present does not specify a clear boundary between minor and serious crime in the way that Australian jurisdictions, for example, draw a legal distinction between summary and indictable offences.

³⁸ Huawei Gong, 'A study of the criminal policy of minor crime' (2006) 89(3) *Journal of Tianjin Administrative College of Politics and Law*, 8.

3.3 Criminal Procedure Reforms

In the absence of a substantive category of minor crime, reforms to criminal procedure to expedite the handling of certain types of cases correspond only partially with minor offending. However, two reforms have been identified as particularly relevant to handling minor offences: the expansion of simplified procedure (*jianyi chengxu*) and criminal reconciliation (*xingshi hejie*).

3.3.1 Simplified Procedure

Simplified procedure was introduced into criminal procedure in the 1996 amendments to the CPL following the first trial conducted in the Haidian district court in Beijing in 1995.³⁹ The 1996 amendments confine the use of simplified procedure to publicly prosecuted cases for which the possible sentence is less than three years' fixed-term imprisonment, criminal detention, control or a fine; cases filed on complaint; or privately initiated prosecutions where there is evidence of a minor crime (article 174). In simplified procedure the Procuratorate may decide not to attend the court hearing, the proceedings of which must be completed by the court within twenty days of accepting the case (articles 175, 176).

The 2012 reforms to the CPL expand the jurisdiction to try matters with a single judge using simplified procedure to basic level courts and remove the restriction concerning the maximum punishment (article 208). Simplified procedure may be used in cases where the facts are clear and the evidence

³⁹ Zhang, 'How much do you know?'

sufficient, and the defendant confesses to the crime, raises no objection to the charges and does not object to simplified procedure being used (article 208). A distinction is still drawn between cases where the maximum punishment is three years' imprisonment and more serious offences in that the former may be tried by a single judge, whilst the latter must be tried by a collegiate bench (of three) (article 201).

Such reforms enable the expeditious processing of criminal trials when the main facts are not in contention, or at least when the defendant does not raise any objections to the evidence and/or charges. However, the extensive fieldwork of McConville et al. indicates that simplified procedure has not been universally welcomed, by judges at least. Many have indicated that they feel simplified procedure places much greater responsibility on the individual judge concerned. It also adds to their workload because of their felt need to adduce and check evidence in addition to their responsibilities for adjudication.⁴⁰

Simplified procedure is thus not confined to, and nor does it perfectly correspond to, the prosecution and trial of minor crime. However, the expansion to basic level courts in the 2012 CPL amendments has made its use attractive in trials of minor offences where the evidence is clear and uncontested. Initial research suggests that the number of offences tried using simplified procedure has expanded dramatically.⁴¹ Such an expedited trial procedure does enable the

⁴⁰ McConville et al., *Criminal Justice in China*, pp. 206–207.

⁴¹ Meng Fang, 'Current situation, existing problems, causes and perfection of summary procedure since the implementation of new criminal procedure law – a case study of Q county in Sichuan province' (*Xin xingsufa shishi hou jianyi chengxu kaizhan xianzhuang, cunzai wenti, yuanyin ji wanshan duice*) (2014) 4 *Journal of Guizhou Police Officer Vocational College*, 35–40.

courts to deal with straightforward matters quickly, and goes some way towards addressing concerns that the diversion of people originally punished by *laojiao* would increase the criminal justice system caseload and overwhelm the courts' capacity to deal with minor crime.

3.3.2 Pilot Sites on Expedited Investigation, Prosecution and Adjudication

Particularly since 2010, trials concerning different aspects of the expedited handling of minor offences have proliferated. These pilots do not correspond exactly to the simplified procedure parameters discussed previously, as they generally focus on criminal offences for which the maximum punishment is three years' fixed-term imprisonment, whilst simplified procedure can also be used in serious cases. Many of the pilots relate to such offences as dangerous driving, theft, deception, blackmail, damage to property, picking quarrels and causing trouble, crimes related to drug addiction or sex work and criminal cases where a civil compensation agreement has been reached, and some have involved the physical relocation of the court to the detention facility where suspects are awaiting trial (e.g. Yangpu district in Shanghai, Dezhou in Shandong).

Following the inclusion of expedited handling for minor criminal cases in the Fourth Five-Year Court Reform Plan, on 27 June 2014 the NPC Standing Committee authorised the SPC and Supreme People's Procuratorate (SPP) to carry out a range of trials over the two-year period between 2014 and 2016.⁴²

⁴² Decision on Authorising the SPC and SPP to Conduct Trials on Expedited Decisions in Criminal Cases in Some Locations (*Guanyu Shouquan*

The scope of criminal offences covered in these pilots includes dangerous driving, traffic offences, theft, deception, robbery, causing injury, and provoking quarrels and causing trouble. Cases must also meet the criteria set out for simplified procedure: that is, the facts are clear, there is (legally) sufficient evidence, the accused acknowledges guilt and there are no disputes about the applicable law. Pilots authorised under this 2014 NPC Standing Committee decision apply only to offences with a maximum of one-year fixed-term imprisonment, in contrast to earlier trials that applied to offences punishable by a maximum of three years' imprisonment.

Whilst much consideration has been given to expediting court adjudication, expediting the investigation and prosecution of minor offences for which the evidence and law are straightforward has also been mooted. A range of reforms in this respect have been undertaken, with more proposed. For example, in December 2006 the SPP mandated the expedited prosecution of minor criminal cases that could be tried using simplified procedure under the 1996 version of the CPL (articles 3 and 4).⁴³ In expedited matters, the time limits for approving arrest and deciding whether to commence prosecution are truncated. Documentation of arrest and prosecution decisions and evidence lists may be completed in simplified form. In the prosecution recommendation, the Procuratorate should also recommend that the court use simplified procedure to try the matter (article 9).

Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Zai Bufen Diqu Kaizhan Xingshi Anjian Sucai Chengxu Shidian Gongzuo de Jueding).

⁴³ Opinion on Expedited Handling of Minor Criminal Cases According to the Law (*Guanyu Yifa Kuaisu Banli Qingwei Xingshi Anjian de Yijian*).

Some suggest that the expedited handling of minor criminal cases should also include expedited investigation by the police. A trial was launched by the Beijing police in 2011 to establish a system for expedited investigation, and the Henan provincial court, Procuratorate and public security organs subsequently set up a trial led by a specialist team to consider systems for expediting the handling of minor criminal cases.⁴⁴ A stated objective of the latter was to reduce the number of suspects detained during the investigation period, or at least reduce the amount of time they spent in detention.⁴⁵ Other solutions to issues of pre-trial detention can be found in locations such as Guangzhou, where a second detention facility is being planned to allow people charged with serious offences to be separated from minor offenders.

As is evident from this account, significant incremental reforms to expedite the handling of minor offences have already been undertaken and are being trialled throughout the country. Another pilot reform was authorised by the NPC Standing Committee on 3 September 2016 to run between 2016 and 2018; *Decision on Authorising the SPC and SPP to Conduct Pilots on Plea Agreements for Lenient Punishment in Criminal Cases in Some Locations*. However, these reforms appear to be designed to streamline the existing regulatory framework rather than to devise a model for more systematic reform of the existing system of criminal law and procedure.

⁴⁴ Li, Zhang and Sun, 'A study on the mechanism', 15.

⁴⁵ Ibid.

3.3.3 Criminal Reconciliation

Whilst not directed explicitly at minor offending, criminal reconciliation has in practice played a role in facilitating the quick resolution of minor offences since its inclusion in the 1996 amendments to the CPL (article 172). It was expanded and included as a special procedure in the 2012 amendments to the law. Under this process, the offender negotiates for forgiveness from the victim in exchange for an expression of regret and payment of an agreed amount in compensation for losses suffered as a result of the criminal conduct (article 277). Criminal reconciliation may be conducted at all stages of investigation, prosecution and trial, and will be led by the agency responsible for the stage in question. If an agreement is reached, that agreement may be taken into account by the police in recommending to the Procuratorate that a lenient approach be taken, possibly prosecution for a lesser offence or a decision not to prosecute under CPL article 142(2). If reconciliation is successful at the investigation or trial stage, the Procuratorate may recommend that the court take this into account as a mitigating factor in sentencing (article 279). Liebman's study of everyday justice in selected lower level courts in Henan during 2010 indicates the widespread use of criminal reconciliation to resolve ordinary criminal matters. His work suggests that reaching an agreement and paying compensation to the victim or his/her family are the most important factors in a court's determination to impose lenient punishment or even discharge the case.⁴⁶

⁴⁶ Benjamin Liebman, 'Leniency in Chinese criminal law? Everyday justice in Henan' (2014) 14-406 *Columbia Law School Public Law & Legal Theory Working Paper Group*, 25, 33.

Criminal reconciliation is not confined to minor offences, but is used primarily in cases involving criminal infringement upon a person or property (CL part 2, chapters 4 and 5) where the sentence that could be imposed is less than three years' imprisonment, control, or a fine and in negligent crimes (article 278). Over 70 per cent of mediated cases involve crimes of intentional (minor) injury, stealing and traffic offences. Like the trials on the expedited handling of minor crimes, one aim of criminal reconciliation is to reduce the amount of time those who have committed a minor crime spend in pre-trial detention.⁴⁷

3.4 Sentencing Minor Offending

Courts have a range of sentencing options in punishing minor offenders. They may impose lenient sentences (including successful reconciliation with and payment to the victim), suspended sentences or a sentence served non-custodially as community corrections. Whilst sentences may be suspended for serious crimes for which the death sentence is imposed, suspended sentences are also a particularly common way of imposing a lenient sentence in respect of minor crimes.⁴⁸ Community correction may be imposed in a range of circumstances: where the person is sentenced to the criminal punishment of control (CL article 38), given a suspended sentence (CL article 76), granted parole (CL article 85) or ordered to serve the sentence out of custody. The number of people given community corrections has increased dramatically in recent years. In November 2014, Deputy Justice Minister Zhang Sujun stated that

⁴⁷ Ting He, 'The practice and legislation of criminal reconciliation in China' (March 2012) *Melbourne Law School Conference Proceedings*, 6.

⁴⁸ Liebman, 'Leniency in Chinese criminal law?', 24–25.

since the beginning of trials in selected locations from 2003, a total of 2,113,000 people had been punished under the community correction system.⁴⁹ Whilst community correction does not act as a substitute sanction for *laojiao* (as a person must first be convicted of a criminal offence), its inclusion in the 2011 revisions to the CL has expanded its use nationwide and provides a convenient alternative for punishing minor offences that might previously have been punished by *laojiao*.

4 Security Measures and Punishments

The abolition of *laojiao* spurred renewed interest in minor crime as the prospect of transferring the punishment of serious administrative infringements (Xie's category C offences) into the criminal justice system was considered. The discussion of security measures (*bao'an cuoshi*) and security punishments (*bao'an chufen*) has also been entwined in debates about reform or *laojiao* its abolition. In the mid-1990s, one option mooted for reforming *laojiao* was to include it in the broader category of 'security punishments' or 'security measures'. At that time, it was argued that *laojiao* was not so much a punishment as a coercive measure for education and correction (discussions on this point are set out in my own prior work).⁵⁰

⁴⁹ 'Deputy Minister of Justice: the draft community corrections law for examination has been completed' (*Sifabu fubuzhang: shequ jiaozheng fa cao'an songshengao zheng wanshan*) Chinanews.com, 5 November 2014.

⁵⁰ Biddulph, *Legal Reform*, pp. 260–264, 345–248.

After the abolition of *laojiao*, some suggested that the ‘gap’ should be filled with a range of security punishments.⁵¹ They pointed out that a number of administrative detention powers occupying the middle ground in the structure of punishments similar to *laojiao* still exist, so much so that they are characterised as *laojiao*-type powers (*lei laojiao*) or ‘Big Laojiao’ (*da laojiao*).⁵² These powers include the detention for education of sex workers and their clients (*shourong jiaoyu*), and for compulsory treatment of drug-dependent people (*qiangzhi geli jiedu*), and the administrative detention of juvenile offenders who fall outside the scope of the criminal justice system. Just because *laojiao* was abolished, it does not automatically follow that *laojiao*-type powers were also abolished. However, pressure to provide a coherent and acceptable legal justification for these powers certainly increased after its abolition.⁵³

The concept of security punishments has been revived in an attempt to rationalise and provide a more defensible legal basis for the remaining administrative detention powers. The argument for creating a category of security punishments runs that their rationale is ‘education, reform and rescue’ (*jiaoyu, ganhua, wanjiu*) and not punishment at all.⁵⁴ Their function is to prevent

⁵¹ Ying Song, ‘An exploration of problems of the nature and convergence with criminal punishment of detention for education after abolition of re-education through labour’ (*Hou laojiao shidai shourong jiaoyu de xingszhi yu xingfa xianjie wenti tanjiu*) (2015) 1 *Western Region Law Review*, 113–114.

⁵² See, e.g. Renwen Liu, ‘Security punishments and the reform of China’s administrative detention system’ (*Bao’an chufen yu zhongguo xingzheng jujin zhidu de gaige*) (2014) 6 *Rule of Law Studies*, 13.

⁵³ Wei, ‘Reform of the security punishment’, 82.

⁵⁴ Weihong Li, ‘The balance between security defence punishments and criminal punishments’ (*Bao’an chufen yu Zuixing junheng*) (1997) 3 *Journal of Yantai University* (*Yantai Danxue Xuebao*), 30; Weixin Gao and Xin Chen, ‘The

the risk to society caused by habitual offenders (category D in Xie Chuanyu's schema, including administrative offences where a person is punished repeatedly but fails to reform).⁵⁵ However, one of the problems confronting those who would create a category of coercive powers defined around the prevention of risk is that there is no consensus that this is a sound or desirable approach. More specific questions concern whether such a category is warranted and, if it is, what types of powers should be included and where they should be located in the overall system of punishments. A number of different approaches have been mooted.

Liu Renwen would distinguish security punishments from criminal punishments and coercive measures by including all types of administrative action involving the deprivation of personal freedom that are not for the purpose of criminal investigation or criminal punishment.⁵⁶ He would thus include *laojiao* (before it was abolished), the detention for education (*shourong jiaoyu*) of sex workers and their clients for a period of between six months and two years, compulsory detention for the rehabilitation of drug-dependent people, compulsory community rehabilitation orders under the DPL, detention for re-education (*shourong jiaoyang*) for between one and three years of juvenile

jurisprudential basis of the system of security defence punishments and their establishment in China' (*'Bao'an chufen zhidu de falu jichu ji qi zai woguo de goujian'*) (2003) 3(1) *Journal of Shihezi University (Shihezi Daxue Xuebao)*, 57.

⁵⁵ Haiying Song and Yan Song, 'The mechanisms for protection of human rights in the system of social defence punishments and the criminal law' (*'Bao'an chufen zhidu yu xing fa zhong de renquan baozhang jizhi'*), in Weiguo Zhu (ed.), *Reflection on the Public Order Regulation (Zhi'an Guanli Zhidu Sicun)* (Beijing: Falu Chubanshe, 2003), pp. 232-235.

⁵⁶ Liu, 'Security punishments'.

offenders who are ineligible to be punished under the CL, compulsory testing and medical treatment for STIs under the 1991 NPC Standing Committee's Decision on Strictly Prohibiting Prostitution and Using Prostitutes 4(4), and administrative detention (*xingzheng julu*).⁵⁷ These powers would be used as a supplement or alternative to criminal punishment.⁵⁸

Others define the scope of security measures with reference to their purpose, which is to protect the safety of society (and the individual in cases of self-harm). Their targets are people who pose a definite risk to society, such as habitual offenders, people with mental illness who pose a danger to themselves and society, and juveniles who have committed serious offences but because of their youth are ineligible for criminal sanction. With sex workers, for example, the theory is that detention protects society by enabling compulsory medical examination and treatment for STIs, as well as the stated objective of education, reform and rescue to prevent repeat offending.⁵⁹ They are thus seen as measures to be taken against specifically defined 'dangerous people' to correct (*jiaozheng*), transform (*ganhua*), give medical treatment (*yiliao*) and/or impose prohibitions (*jinjie*).⁶⁰ Such a purposive definition encompasses both criminal and administrative compulsory measures, and would extend to a court order that persons undergoing community correction be subject to 'supervision of their activities' (*xingwei jiandu*) and involuntary committal to a psychiatric facility under the 2012 amendments to the CPL and the 2013 Mental Health Law. In addition to

⁵⁷ Ibid., 18.

⁵⁸ Ibid., 13; Xuewu Qu, 'Security punishments and China's criminal law reform' (1996) 18(5) *Chinese Journal of Law*, 55–68.

⁵⁹ Song, 'An exploration of problems', 115.

⁶⁰ Liu, 'Security punishments', 13.

measures for the deprivation of liberty, a range of prohibition orders – from driving for habitually drunk or dangerous drivers to a prohibition order under CL article 38(2) preventing people sentenced to control (*guanzhi*) from engaging in certain designated conduct or entering certain locations – would also fall within this definition of security punishments.

In the lead-up to the 1997 revisions to the CL, a group of influential criminal law academics led by Zhao Bingzhi argued unsuccessfully that a chapter on security measures be included in the revised law. The scope of measures that they would have included was much narrower than the more broadly inclusive approaches described earlier, and was limited to the detention for education of juvenile offenders and compulsory rehabilitation of the drug dependent.⁶¹ Their proposal was reinvigorated after the abolition of *laojiao*.⁶² In fact, the 2012 reforms to the CPL to transfer the power to issue an involuntary committal order for mentally ill offenders from the public security organs to the courts has been seen by some as a step in this direction.⁶³

Perhaps more critically, there is a great deal of wariness about embracing this category at all. As with minor crime, the category of security punishments does not exist in the Chinese legislative regime. The concept, its necessity, scope and purpose remain highly controversial topics.⁶⁴ Proponents argue that whilst the term ‘security punishment’ does not appear in the text of any legislation, the

⁶¹ Bingzhi Zhao, Xingwang He, Maokun Yan and Zhonghua Xiao, ‘Research into several questions on the reform of China’s criminal law’ (1995) 18(5) *CASS Journal of Law*, 10.

⁶² Liu, ‘Security punishments’, 19; Qu, ‘Security punishments and China’s criminal law reform’, 59–60.

⁶³ Song, ‘An exploration of problems’, 113; Liu, ‘Security punishments’, 19.

⁶⁴ Li, ‘Security punishments should not be the direction’.

measure already exists in fact.⁶⁵ They argue that the category is justified as it reflects actual powers and actual social needs. Justification for creation of a conceptual category of security punishments also draws heavily on evidence that security measures and punishments are common throughout the world. Proponents point out that every country has in place certain measures to deal with dangerous habitual criminals and people with mental illness who are a danger to society and themselves, even if they are not officially labelled security measures.⁶⁶ Establishing a category of security punishments to cover the remaining *laojiao*-type powers is also advocated by those who object to proposals to expand the scope of criminal law through creation of a category of minor crime.⁶⁷ Even proponents, however, recognise the real risks of serious abuse if the scope of these powers is allowed to expand beyond a narrow and well-defined range and if appropriate procedural safeguards are not in place. The enthusiastic use and abuse of security measures by the Nazi regime are an ever-present element in Chinese discussions about security measures and security punishments.⁶⁸ For those advocating the legalisation of security punishments, the question is how these punishments should be regulated to mitigate the risks. For those opposed, it is precisely the propensity for abuse that constitutes the core problem. For them, the

⁶⁵ Yan Zhou, 'Proposals for reform of my country's re-education through labour system' (*Woguo laodong jiaoyang zhidu gaige chuyi*) (1999) 42(6) *China Criminal Science* (*Zhongghuo Xingshifa Zazhi*), 23.

⁶⁶ An oft-cited example is Title 6 of the German Criminal Code Measures of Rehabilitation and Incapacitation, which sets out custodial orders, including the mental hospital order, the custodial addiction treatment order and detention for the purpose of incapacitation.

⁶⁷ Wei, 'Reform of the security punishment', 82.

⁶⁸ Liu, 'Security punishments', 14–15.

criteria of 'dangerousness' and 'risk' are just too imprecise and malleable to justify their general application.⁶⁹ Those opposed to the reform of *laojiao* by transforming it into a security punishment (prior to its abolition) pointed out that, reclassified as such, it would have been very easy for its already broad scope to have been expanded even further to cover habitual drunks, the unemployed, vagrants and beggars.⁷⁰

5 Conclusion

This chapter has documented the ways in which debates about proposed legislative and policy reforms in China's post-*laojiao* punishment landscape have been shaped by perceptions that the abolition of *laojiao* has left a gap in the system of punishments. Most proceed on the basis that there is indeed a gap and that the gap needs to be filled at least in part. Some reforms, such as lowering the threshold for certain criminal offences, have gone some way towards absorbing the more serious end of transgressions originally punished under *laojiao* (Xie's category C offences) within the criminal justice system. The existence of overlapping administrative powers means that in some areas (category D offences) there is no gap at all. The extent to which some conduct originally punished under *laojiao* is no longer punished reflects a tacit acknowledgement that there is no need to punish very minor offending.

⁶⁹ Li, 'Security punishments should not be the direction'; Zhongdong Zhai, 'The bottleneck on application of security defence punishments and its resolution' (*Bao'an chufen shiyong de pingjing ji qi jiejie*) (2002) 17(6) *Legal Forum* (*Faxui Luntan*), 28; Song and Song, 'The mechanisms for protection', 245.

⁷⁰ Li, 'Security punishments should not be the direction'.

To date, reforms have been incremental and appear to be primarily responsive to domestic concerns. However, in formulating these reforms and, more transparently, in the debates over more wide-ranging reforms on subjects such as minor crime and security punishments, the influence of foreign models and experience can be seen. Debates about minor crime and the mechanisms that might be introduced to give it substantive and procedural form draw extensively on the experience of both civil law and common law systems. Particular emphasis has been placed on the systems for conducting a document-based examination of minor offences and issuing a criminal penal order (*chuxing mingling*) in Germany (*Strafbefehl*), Taiwan and Japan.⁷¹ Explorations of the desirability of establishing a specialist minor crime division draw on the Australian magistrates' court and the procedures in place for handling summary offences. Similarly, the experience of the USA and other common law jurisdictions with regard to court-ordered diversion programmes, suspended prosecutions and sentences, community-based orders, and plea bargaining have all been considered in Chinese debates about minor crime and its expedited handling. The use of criminal fines and suspended sentences in civil law countries such as Germany has also been influential in shaping proposals for reform. In considering the scope and form of security punishments, too, there has been very close examination of the history, development and legal form of

⁷¹ Zhang, 'How much do you know?'; Liu, 'Thoughts on bringing public order detention'. In Germany a penal order may be imposed without a trial but the punishment is limited to a fine or a suspended prison sentence of less than one year; see Hans-Jörg Albrecht, 'Sentencing in Germany: explaining long-term stability in the structure of criminal sanctions and sentencing' (2013) 76 *Law and Contemporary Problems*, 216.

those powers in civil systems, whether as a single-track or dual-track system, which are seen as being their conceptual home.⁷² Consideration of German and Swiss regulatory history and the perils of the uncontrolled expansion of the scope of such orders has influenced both the proponents and opponents of security punishments.⁷³ Even though common law systems have not established a separate category of security punishments, reference is also made to the experiences and systems in place in those jurisdictions for dealing with mentally ill offenders, the extension of sentences for serious habitual offenders and measures taken outside the formal criminal justice system against juveniles committing serious offences. In this area at least, the discussion of foreign systems and experience has been central in formulating concrete proposals for the reform of China's system of punishments for minor offending in the post-*laojiao* world.

It is perhaps not surprising that reforms and reform debates have revealed no clear normative shift towards the protection of individual rights. *Laojiao* was abolished without engagement with the broader debates about how to balance the empowerment of state agencies with the protection of individual rights. There has been no real incentive, so far, to dive into that contentious area when it has been possible to use incremental reforms to reshape the system of punishments in the post-*laojiao* world. However, throughout the debate, there

⁷² Germany is seen as having a dual-track system, with one track being criminal punishment based on findings of guilt and the other being measures for rehabilitation and the protection of security by the imposition of treatment or preventive detention based on dangerousness and the continuing risk posed by the offender to society; see Albrecht, 'Sentencing in Germany', 213.

⁷³ See, e.g. Liu, 'Security punishments'; Qu, 'Security punishments and China's criminal law reform'; Wei, 'Reform of the security punishment'.

has been sensitivity to the desirability of shaping reforms in a way that addresses outstanding abuses. One is to minimise the problem of extended periods of detention prior to trial, particularly for minor offenders who may not ultimately be sentenced to a custodial term. Trials of the expedited handling of minor cases and criminal reconciliation, for example, have had this as an explicit objective.

In the broader reform proposals, such as those for the establishment of a category of security punishments, the potential for abuse is clearly recognised. Debates about what types of measures should be included within any category of security measures lack criteria beyond statements that security measures are 'preventative' and that they address 'risks to society' posed by 'dangerous people'. Such a description is dangerously vague and may result in a range of powers being included without adequate consideration or justification. Particularly controversial is the power of detention for the education (*shourong jiaoyu*) of sex workers and their clients. This power is criticised on all the same grounds that *laojiao* was. In particular, it lacks proper legal justification in the terms required by the Legislation Law, the description of targets is excessively vague, it imposes a disproportionately heavy punishment of detention for between six months and two years on people who have not committed a criminal offence, the police have excessively broad discretionary power in determining a sanction, and it lacks procedural safeguards and cannot effectively be supervised. It is also unnecessary.⁷⁴ The urgent need for a reappraisal of each existing power

⁷⁴ Lang Chen, 'Discussing security punishments and the retention or abolition of China's system of detention for education' (2014) 9 *Managers Journal*, 241.

discussed under the moniker of 'security punishments' is highlighted by the abolition of a number of them in recent years: *laojiao*, detention for repatriation (*shourong qiansong*), retention for in-camp employment (*liuchang jiuye*) and detention for investigation (*shourong shencha*). There is now evidence that the use of *shourong jiaoyu* is being severely curtailed in the same way that *laojiao* was prior to its abolition. It is now possible that *shourong jiaoyu* will ultimately also be abolished.

Despite the attraction of broad concepts such as security punishments and minor crime, the evidence so far suggests unwillingness to engage in a radical reorganisation of the system of punishments. A more conservative, incremental approach to reform may remain the preferred option, even though this approach makes it more difficult for reforms to be made to the institutional structures that underpin abusive practices.