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Chapter 2

What to Make of the Abolition of Re-Education Through Labour?

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Introduction

In 1979 two of the first laws to be passed in the People's Republic of China's (PRC) era of reform and opening up were the *Criminal Law (Xing Fa)* and the *Criminal Procedure Law (Xingshi Susong Fa)* 1979. Whilst a number of legislative instruments had been in place prior to 1979 that authorised arrest and criminal punishment, this was the first time in the history of the PRC that comprehensive codes of criminal law and procedure had been passed. Of course, the lack of legislation had not prevented the dispensation of criminal justice. In fact, the system of punishments was not limited to criminal punishment, but also included a very extensive array of punitive administrative powers. At that time and continuing into the reform period, the public security organs (the 'police') exercised (and continue to exercise) a wide range of administrative measures that empowered them to sanction crime and other conduct considered to be harmful to social order. These powers were mostly not defined by law, or if so, were poorly defined. They lacked any detailed description either of their scope or the procedures to be applied in their exercise. Needless to say, the use of these powers was not under any effective supervision and abusive practices were common. So, passage of criminal and criminal procedure laws in 1979 was not the end of the process of legalisation of punishments, but was merely one step in still incomplete process of subjecting punishments to rules.

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As legal reform has progressed, one by one these administrative powers have been abolished. This Chapter discusses the abolition of one of these powers, re-education through labour (RETL) (*laodong jiaoyang*). It evaluates the significance of its abolition. It also considers what impact this abolition might have on the shape of the Chinese sanctioning system and on the principles reflected in China's version of the rule of law more broadly. Re-education through labour was not the first administrative power exercised by the police to be abolished in the reform era. So, before discussing abolition of RETL, this chapter considers the ways in which these other administrative powers were abolished as these also provide some keys to evaluating the significance and impact of abolition of RETL.

History of the Abolition of Administrative Detention Powers

First to go was the power of detention for investigation (*shourong shencha*).² It was formally established in 1961 as a power to detain, investigate and repatriate unauthorised rural migrants in cities. After 1975 this power was used by the police to detain for interrogation people who were suspected of going from place to place committing crime, committing many crimes, being a member of a criminal gang, or who were suspected of committing a crime where their name and address could not be established (see discussion in Biddulph 2007, 10–11). These people could be detained for interrogation

² In other places this power has been translated as 'shelter and investigation'. The term *shourong* literally means 'to receive' or 'take in' or 'gather up'. I remain unwilling to translate *shourong* as 'shelter' as in substance what happens is that a person is taken into a form of detention and not given 'shelter'. To ensure consistency in translation I have translated all other detention powers that include the term *shourong* in their name as detention.

for up to 30 days, or with an extension up to three months (Ministry of Public Security 1985, *Notice on Strictly Controlling the Use of Detention for Investigation Measures* Article 3). In practice this power was used well outside its nominal scope to include people who were mentally ill, alcoholics, people who co-habited illegally or breached family planning regulations and people involved in economic disputes. Many were detained for extended periods, with some unfortunate people still in detention after 10 years or even longer (Cui 1993, 93; Zhang 1993; Ministry of Public Security *Notice on Urgently Rectifying the Abuse of Detention for Investigation Measures* 1992). Being detained under this power was terrifying and unsafe with many confessing to crimes purely to get themselves transferred out of this form of detention and into the regular criminal justice system. In practice the police used detention for investigation as a substitute for the coercive investigation powers set out in the *Criminal Procedure Law* 1979. One estimate was that between 80–90 per cent of people convicted of criminal offences had first been taken in to detention for investigation (Zhang 1993, 20; Zhang and Li 1994, 58).

Detention for investigation was abolished at the time of passage of the 1996 amendments to the *Criminal Procedure Law* (see Gu 1996 and discussion in Biddulph 2007, 338–9). In exchange for giving up this detention power, the Ministry of Public Security had managed to negotiate inclusion of compensatory provisions into the amended *Criminal Procedure Law* 1996. The *Criminal Procedure Law* 1996 made provision for extended detention prior to formal arrest of the categories of people who had originally fallen within the scope of detention for investigation (Article 69(2)) and lowered the standard of evidence required for an application for arrest to be approved (Article 60). An interpretation of *Criminal Procedure Law* 1996 Article 128(2) by the Ministry of Public Security (1998) enabled the calculation of time for detention not to commence until the

true name and address of a person suspected of committing a crime had been ascertained. Whilst such an interpretation was not foreshadowed in the law, it was tolerated (Wang 2000, 93–5).

When detention for investigation was abolished, one commentator suggested that the police would be required to change their traditional approach to obtaining evidence through interrogation of suspects and to develop new investigation and interrogation methods (Cui 1996, 36–7). It was hoped that this legislative reform would push the police toward developing more sophisticated investigation techniques that were not solely reliant on obtaining a confession from a suspect in custody as basis for a criminal prosecution. However, that the use of torture to obtain confessions continues to be a serious problem nearly 20 years later and detention of suspects for excessive periods has not been eradicated, demonstrates that legal reform alone is not sufficient to bring about changes in policing practice.

The power of detention for repatriation (*shourong qiansong*, also called custody and repatriation, C&R) was the second administrative detention power to be abolished in 2003. This power was used from 1949 but was formalised in 1961 (Ministry of Public Security *Internal Work Party Group Report on urgently preventing free population movement approved by the CCP Central Committee* 1961). It was originally combined with detention for investigation discussed above (Fan and Xiao 1991, 142). This power was designed to prevent rural migrants from entering cities as well as to investigate suspected criminal or counter-revolutionary offences (Cui 1993, 90–1; Fan and Xiao 1991, 142–3). The power to detain and repatriate migrants (ostensibly the welfare aspects of the original combined detention power) was separated from the criminal investigation aspects of detention for investigation after 1975 (Cui 1993, 91). Detention for repatriation was used to house and forcibly repatriate migrant workers and others

who did not have permission to reside in the city (State Council *Measures for Detention for Repatriation of Urban Vagrants and Beggars* 1982 Article 2). In theory detention under this power should not exceed 30 days (Ministry of Civil Affairs, Ministry of Public Security *Implementing Regulations for the Measures for Detention for Repatriation of Urban Vagrants and Beggars (For Trial Implementation)* 1982 Article 13). Police delivered people to detention centres that were operated by the local civil administration. As with other forms of detention, detainees were required to work (Ministry of Civil Affairs *Notice on Several Issues on Strengthening the Work of Detention for Repatriation* 1994). This power transformed into a flexible way to ‘clean the streets’ ahead of important events and visits, to round up migrants, vagrants, sex workers and mentally ill people with nowhere to go. Some people were forcibly repatriated, some released after conclusion of the event or visit or, often in the case of sex workers, after paying a fine to procure their release. Abuse of this power and of detainees in detention centres was rife. In the same way as detention for investigation above, the scope of detainees was expanded well beyond that originally intended, people were held for extended periods and the conditions in detention were abusive and unsafe (Human Rights in China 1999; Liu 2001; Wang 2002; Xie 2000)

A number of factors coincided to seal the fate of this power. Calls to reform or abolish it provided the background against which other factors combined. First was the change of leadership to Hu Jintao and Wen Jiabao and adoption of a more people-oriented governance focus. Second was the public uproar that arose after the beating death in custody of Sun Zhigang in early 2003. As Hand notes, Sun Zhigang, a young university graduate pursuing a career in Guangzhou, was the ‘ideal figure to capture public attention ... and focus it on abuses in the C&R system’ (Hand 2006, 137). In addition to the public furore over this death in custody, a group of three scholars presented a petition

to the National People's Congress (NPC) Standing Committee asserting the unconstitutionality and illegality of this power. A further petition was presented calling for an investigation into the handling of Sun Zhigang's case and the operation of the system of detention for repatriation (Hand 2006, 124). The perpetrators and other people held responsible for Sun Zhigang's death were quickly prosecuted and convicted. Shortly after that the State Council (2003) issued the *Measures on the Administration of Aid to Vagrants and Beggars Having no Means of Livelihood in Cities (Chengshi Shenghuo Wuzhuo De Liulang Qitao Renyuan Jiuzhu Guanli Banfa)*. The measures were issued on 18 June 2003 and became effective on 1 August 2003, effectively abolishing the power. These measures substituted for the old detention power a system to provide for the shelter and welfare of vagrants and beggars in the city. It was purported to be voluntary, so that residents could enter and leave these facilities at will (Article 5). Hand reports that abolition of this power was met with great enthusiasm by academics, the media and the general public (Hand 2006, 128–9). Police, especially those responsible for maintenance of social order in urban areas, were less enthusiastic. For a period after abolition of detention for repatriation, in many cities the number of itinerants on city streets increased dramatically with police enforcement activities noticeably absent.

Finally, after years of criticism and debate on 28 December 2013 probably the most infamous of the administrative detention powers, re-education through labour, was abolished. This occurred as a result of the passage by the NPC Standing Committee of the *Resolution on Abolishing Laws and Regulations on Re-Education through Labour (Quanguo Renda Changweihui Guanyu Feichu Laodong Jiaoyang Falü Guiding De Jueding)*.

Abolition of each of these powers shares some similarities. Abolition followed extensive

public, official and international criticism about the extent of abuse under these powers and the lack of any effective controls over their use and misuse. Each of these powers clearly lacked proper legislative authorisation as they were not sufficiently established by a law passed by the NPC or its Standing Committee. For the latter two, this illegality was made explicit in Article 8 of the *Legislation Law (Lifa Fa)* 2000. With social, political and legal reforms, they were all becoming less and less defensible on the grounds either of efficiency, or that they reflected China's particular situation or 'national spirit' (*guoqing*). There are some differences as well between the ways in which each was abolished. Detention for investigation was largely incorporated into the revised *Criminal Procedure Law* 1996. Detention for repatriation was replaced by a welfare measure, which purported to represent the original intent of the power. RETL was abolished without its functions being clearly substituted by another power. What happens after abolition of RETL is not yet clear and evolving.

What is the significance of abolition of RETL and what are the implications for further reforms of the system of coercive and punitive powers? What does abolition of RETL suggest in terms of further reforms of police administrative powers and to law reform more generally? These are questions examined in this paper. To give up a coercive power it would be naïve to think that concern for integrity of the legal system and protection of citizens' rights is in itself a sufficient motivation. The discussion above suggests that at least three practical and policy issues also arise for consideration in understanding both the reasons for and implications of the abolition of RETL. The first is the nature of the pressure for reform, both internal to government and Party as well as from the general public and international sources. Can the abolition be done in a way that is politically advantageous, or at least not disadvantageous? The second consideration relates to the perceived impact on public order. Can the power be

abolished in a way that does not adversely affect public order, or at least keeps that impact within acceptable limits? Here two sets of issues are pertinent. The first is to examine what are currently considered to be the threats to social order and whether RETL was seen as effective in maintaining order. The second is to consider the overall powers remaining for dealing with related public order issues. Thirdly, has there been social or policy change that removes the need and/or desire to punish some or all of the conduct that was originally targeted? If not, then which measures are being put in place to cover the gaps left by abolition of RETL? These three issues are considered in section three of this chapter. Finally in section four the chapter concludes with some thoughts on the implication of abolition of RETL more broadly for legal regulation of state coercive powers.

Abolishing RETL: Three Considerations

Pressure for Reform

There is no doubt that throughout the reform era RETL was one of the most publicly debated and controversial of police detention powers. Both internationally and domestically, RETL was the subject of sustained criticism for being arbitrary and abusive. It lacked proper legal basis, enabled imposition of disproportionately harsh punishment on minor offenders, decision-making was partial and opaque and there was a lack of any credible measures for supervision or control over its imposition. In fact these criticisms have been so well rehearsed over many years that I do not intend to repeat them here (see for example: Amnesty International 1991; 2006; 2013; Human Rights in China 2001; Human Rights Watch 2002; and Hung 2003). In 2012, there was a case of imposition of a term of RETL on Tang Hui on the grounds of ‘seriously

disrupting social order and having a negative impact on society’ for her ongoing petitioning activities demanding serious punishment of the men responsible for kidnapping, raping and forcing her daughter into prostitution (Xinhua Net 10 August 2012). Although Tang Hui was subsequently released, the public furore focused attention on the wide-open potential for abuse of RETL. Further public pressure followed with the exposé in the New York Times of a letter secreted into a packet of Halloween decorations purchased in the USA and made by an inmate in the Masanjia re-education through labour camp. This letter highlighted long hours of work and abusive conditions in the camp (Jacobs 11 June 2013).

Increasingly as well, RETL had become inconsistent with the developing principles of legality articulated in the law and finally came to be seen by interested actors (including the police and justice department) as being unconstitutional and unlawful. In particular, the *Legislation Law* 2000 (as amended in 2015) Article 8(5), the *Administrative Punishments Law (Xingzheng Chufa Fa)* 1996 (as amended 2009) Article 9(2) and the *Administrative Compulsion Law (Xingzheng Qiangshi Fa)* 2011 Article 10, all require that powers for deprivation of personal liberty must be authorised by ‘law’, defined by the *Legislation Law* Article 7 as laws passed by the NPC or its Standing Committee. The *Administrative Compulsion Law* Article 11 further provides that it is not permitted for the scope of targets, conditions and types of administrative coercive measures to be expanded by way of administrative or local regulations. Even though there had been some debate about whether RETL should be characterised as a ‘punishment’ or a ‘coercive measure’ and so which law was applicable, these laws, taken together, gradually backed RETL into a legal black hole. There was a clear need for legislation to provide proper authorisation for any power to deprive a citizen of their liberty. The urgency of efforts to draft and obtain the consensus necessary to pass legislation to

regulate RETL demonstrated official appreciation of the legal vulnerability of RETL (discussed in Biddulph 2015, 211–2).

Abolition of RETL has been widely applauded as a long overdue step and necessary for progress to be made toward rule of law. Police agree that it is a necessary consequence of legal developments, but consider that they are not properly prepared for the challenges its abolition will bring in fulfilling their responsibilities to ensure public order. Since its abolition there have been some complaints that police capacity to maintain social order has been weakened, that the social order situation has deteriorated and morale of local police has fallen (Zou 2014). Others note that social order has not been adversely impacted by its abolition (Huang and Zhou 2014, 32). The only reservation expressed by the Committee on Economic, Social and Cultural Rights in its concluding observations on China's second periodic report in June 2014 was to ensure that RETL was completely abolished throughout China and that no alternative or parallel powers were established to act as a substitute for RETL (Committee on Economic Social and Cultural Rights 23 May 2014, para 22). From the perspective of pressure to reform and praise for effecting this reform, abolition of RETL has been very positive and politically advantageous.

Impact on Public Order

The second set of considerations draw our attention to questions about whether RETL could be abolished in a way that did not have a seriously negative impact on public order. A number of factors combined. The first was a breakdown of the consensus about the effectiveness of RETL in maintaining social order and changes in official evaluations about the types of conduct that seriously undermined social stability. The second was that legal and institutional changes made prior to abolition of RETL reduced the

numbers of people in RETL camps and transferred many to alternative forms of punishment.

Changing Perceptions about the Effectiveness of RETL in Maintaining Social Order

One of the assumptions, often asserted and accepted without question within China, was that RETL was effective in maintaining social order and that it was a successful way of dealing with troublemakers and crime (see, for example, Chu 2009). This argument formed an important plank in supporting the positions of those calling for reform that fell short of abolition of RETL. There were a small number of scholars and officials who put the opposite argument: RETL was an historical anachronism and was so embedded in the political culture of the 1950s that it was no longer needed (Feng, Liu, and Dai 2008, 246; Wang 1997, 32; Wu 2008, 62). A small number of public intellectuals advanced the argument that RETL was arbitrary and productive of injustice and that it was these elements that produced instability rather than preserved stability. Their argument was that abolishing RETL would benefit social order and stability through improving social justice and the lawfulness of government conduct (Hu et al. 2007). As the proponents of retention and reform of RETL liked to point out, these opposition views were in the minority (Chu 2009, 49).

In public, the tide started to turn against this consensus view around the time of the decision by the Central Political–Legal Committee in early 2013 to designate RETL as one of the four priority areas for reform in the political–legal system (Cui and Liu 7 January 2013). More voices joined those asserting that RETL was an historical anachronism. Professor Mou Yuchuan in late 2012 for example stated that the original objectives of RETL had been transformed and its effectiveness now was lost (Mou 21 October 2013). In January 2013 an editorial in Southern Metropolis Daily reported

that at the Guangdong People's Congress meeting, the Guangdong Police Chief, Xie Xiaodan rejected the 'instrumental value' of RETL. He also opposed the use of RETL in cases involving repeat and nuisance petitioners and people who criticise Party and government officials. His argument was grounded in the view that people who petition because they do not trust the law should not be punished by RETL but should have their dispute returned to legal channels for resolution (Nandu.com 25 January 2013; Southern Metropolis Daily 25 January 2013).³

This specific re-evaluation of the effectiveness of RETL in preserving social order should also be seen in the context of a broader shift in views about the types of conduct that undermine social order and cause social harm. From the early 1980s people committing crime had been identified as the new class of 'enemy' whose conduct undermined the program of economic modernisation and social stability and who were targeted for severe punishment (Deng 1980; 1993, 176–7). The Hard Strike policy of dealing out severe and swift punishment to targeted serious criminal offences gave practical effect to this priority. It was against the background of the Hard Strike against crime that the use of RETL expanded from the early 1980s.

However, alongside the social and economic transformations provoked by economic reform, social order problems were also becoming more complex. By the early 2000s, senior police and political leaders began to focus more directly on public protest and other forms of disruptive behaviour as posing a serious threat to social order and stability (Trevaskes 2013, 62). From 2003 greater policy and policing focus was placed upon mass incidents as undermining social stability. Trevaskes documents five main conflicts

³ The article is also translated in the *Dui Hua Human Rights Journal* at

<http://www.duihuahrjournal.org/search/label/reeducation%20through%20labor>

identified as being the main causes of mass incidents, between: rich and poor, government officials and the masses, people from urban and rural areas, Han and ethnic minorities and people from different regions within China (Trevaskes 2013, 66). By their nature these conflicts arise out of structural social and economic conflicts and are less amenable to resolution purely by the imposition of harsh punishments. The harm to social and political stability caused by mass incidents required a concerted multi-faceted Party-state response, within which the use of punitive powers such as RETL was only one component.

Limiting the Numbers of People Entering RETL

In addition to these attitudinal changes, a number of practical changes reduced the number of people placed in RETL. Prior to abolition of RETL, compliance with procedural rules internally within public security organs was gradually tightened, thus limiting the number of RETL cases being examined and approved. In 2005 the Ministry of Public Security issued the *Opinion on Further Strengthening and Improving the Work of Examination and Approval of Re-Education Through Labour* (*Gong'an Bu Guanyu Jinyibu Jiaqiang He Gaijin Laodong Jiaoyang Shenpi Gongzuo De Shishi Yijian*) which strengthened procedural rules and expanded the scope of the internal hearing procedure (*lingxun*) that had originally been inserted into the decision-making process in the 2002 MPS *Regulations on Public Security Organs Handling Re-Education Through Labour Cases* (*Gong'an Jiguan Banli Laodong Jiaoyang Anjian Guiding*). Instead, police were encouraged to initiate criminal prosecutions where the conduct was amenable to criminal prosecution. A number of changes in sentencing practice were set out in the 2005 opinion as well to bring time limits for detention into line with a draft *Law on the Correction of Misdemeanours* (*Weifa Xingwei Jiaozhi Fa* (*Cao'an*)). This was originally anticipated to be the law that would implement reforms to

RETL. It included a provision to limit the period of detention to 18 months. Police sentencing practice had changed (in what they had thought would be in advance of passage of this law) to favour imposition of sentences of no more than 18 months.

Finally, in 2013, in the year following the Central Political–Legal Committee announcement that it intended to reform RETL, a number of local areas decided not to impose RETL on certain categories of people. In Guangdong these included nuisance petitioners and people criticising government and Party leaders, in Yunnan it was those suspected of minor conduct threatening national security, nuisance petitioners and people who criticised government and Party leaders and in Chongqing it was sex workers (Biddulph 2015, 215).

Transferring Drug Dependent People from RETL to Other Forms of Detention

In terms of total numbers, legislative reform to the treatment of drug dependent people probably had the most significant impact on the numbers of people actually in detention under RETL. As problems of drug use and dependence increased in China, RETL was increasingly used to detain and punish drug dependent people. In some areas such as Guangdong it was estimated that over 80–90 per cent of detainees in RETL were drug dependent (Li and Huang 2008). By 2008, many RETL camps were specifically designated for the detention of drug dependent people (Biddulph and Xie 2011). Overall, at the time the *Drug Prohibition Law (Jindu Fa)* was passed in December 2007, a significant proportion of detainees in RETL were drug dependent. Subsequently, sex workers, people committing minor offences such as petty theft or repeated public order infringements, including as picking quarrels and causing trouble, and nuisance petitioners were also strongly represented in the population of detainees (for example, see Zou 2014, 36).

The first significant institutional change occurred with passage of the *Drug Prohibition Law* in 2007. This is an omnibus law dealing with both the supply and demand side of illicit drugs, including punishment of drug offences, as well as treatment for drug dependent people. Measures that may be taken for drug rehabilitation include voluntary rehabilitation in medical or other approved drug rehabilitation facilities, registration of drug users, and a range of compulsory orders for people determined to be drug dependent.

The *Drug Prohibition Law 2007* instituted two compulsory, non-custodial orders; community rehabilitation (*shequ jiedu*), overseen by the local street or village committee for a period of three years (Article 33); and recovering health in the community (*shequ kangfu*), also for a period of three years. The latter is an order imposed on a person after they have undergone compulsory drug rehabilitation in a detention centre (Article 48). It may be served in the community or in a closed facility, such as a ‘giving up drugs and recovering health camp’ (Article 49; see also the discussion in Biddulph and Xie 2011). The law also merged two pre-existing administrative detention powers used for compulsory rehabilitation of drug dependent people. The first was coercive drug rehabilitation for between three and six months in detention centres operated by the public security agencies. The second was RETL for a period between one and three years with a possible extension of one year, imposed by the police where coercive drug rehabilitation had failed and operated by the justice department (NPC Standing Committee *Decision on Prohibiting Illicit Drugs* 1990, paragraph 8). The new power which replaces these two pre-existing powers, the compulsory quarantine for drug rehabilitation (CQDR *qiangzhi geli jiedu*), is a form of administrative detention of drug dependent people for an initial period of two years, with the possibility of early release after one year for those who reform well and extension of one year for those who do not

reform well (Article 47). The *Drug Prohibition Law* 2008 authorises the police at county level to impose this period of detention (Article 38).

The *Drug Prohibition Law* 2008 retains the pre-existing procedures for imposing a term of administrative detention which largely parallel (though are not identical to) the procedures for imposing a term of RETL. It provides that the decision is to be imposed by the police at county level upon determination that the person is drug dependent. A person dissatisfied with a decision to send them to CQDR may commence either administrative review, which considers the lawfulness and appropriateness of the decision, or administrative litigation, which enables a court to examine the lawfulness of the decision (Article 40). The only involvement that a court has in this decision-making process is to consider the lawfulness of the decision after it has been made and then, only if the detainee or their representative challenges the lawfulness of the police decision.

The power to register drug dependent people strengthens the surveillance capacity of the police over this group. Connecting the register to resident identity cards enables police to keep track of the movements of drug users and drug dependent people and to carry out random drug tests.

After passage of this law, many detainees in RETL camps were transferred to CQDR centres. In some areas where specialist RETL camps for drug dependent people had been established, this merely required changing the name on the front gate of the detention centre. In other areas, where drug dependent detainees were admixed with people detained for other reasons, physical transfer of people was required. As a result of this law the number of people in RETL dropped dramatically.

By the end of 2013, when abolition of RETL was formally implemented, the people

remaining in RETL in most provinces had shrunk to very small numbers. When the doors of the remaining RETL camps were opened, there were not floods of people left to be released. So, the immediate, physical impact of abolishing RETL on social order had been minimised by reducing the number of people detained in RETL over the previous years.

But the discussion above of the ways the population of RETL camps was reduced does not mean that impact of abolition of RETL on the policing of social order was negligible. RETL for many years had provided a convenient way for police to respond flexibly to social order problems as they developed and were identified. By removing this power, a degree of flexibility was also removed. Section 4 below discusses the remaining institutional structure for punishment of offences and emergence of other, including illegal, forms of detention to deal with some problems, such as repeat petitioning, that were a thorn in the side of local governments.

Policy or Social Changes Removing the Need to Punish or Capacity to Punish in Other Ways

Abolition of RETL does not suggest that there has been a decision no longer to punish the conduct that was previously targeted for punishment under that power. This section broadens the focus of inquiry to examine the system of punishments more generally and the available alternative powers that might be brought to bear on conduct originally punished under RETL. It discusses recent reforms, primarily to the criminal law to include certain types of conduct that had previously been punished by way of RETL.

First it is necessary to locate RETL in the overall punishments regime. Conceptually,

RETL was seen as occupying an intermediate space between the criminal justice system and the administrative punishments system enacted by the *Security Administrative Punishments Law (Zhi'an Guanli Chufa Fa)* 2006 (as amended in 2012) (SAPL). However, such a conception is not universally accepted. Some scholars have argued that there is no gap in the system of punishments. They argue that a system of punishments comprising administrative punishments under the SAPL and criminal punishments under the *Criminal Law* 1979 (as amended) already covered the whole range of offending conduct that should be punished and so the system of regulation of punishments was already gap free. So, after its abolition, punishment of conduct originally the target of RETL could, according to this argument, to an extent be disaggregated and diverted into either the criminal justice system (for more serious offences) or the administrative punishments system (for less serious offences). In fact, this was one of the influential proposals for reform of RETL; to deal with some of the more minor offending through existing administrative sanctions regime and the more serious offending through the criminal justice system (Jiang and Yuan 1990; Liu 2010; Zhang 2009).

This question of the structure of the punishment system was not resolved by abolition of RETL and there continues to be discussion about whether this intermediate space exists, and if so whether it needs to be filled and with what. One suggestion is that it should be filled by the 'security punishment' (*bao'an chufen*), a type of preventative detention used against repeat minor offenders or others considered to pose a risk to society (Liu 2013). Another is a discussion of the feasibility of and mechanisms required for creation of a category of 'minor crime' or even to pass the draft *Law on the Correction of Misdemeanours* that had originally been intended to reform (but maybe now to replace) RETL (Wang, Fu, and Du 2014, 140). Yet another is to adjust the administrative and criminal punishment systems to catch those forms of conduct not currently targeted,

effectively to fill the gap left by abolition of RETL (Liu 2013; Song 2015; 113–4; Zou 2014).

For conduct to be punished under alternative administrative or criminal punishment systems without the need to change the law, conduct previously punished by RETL should also at the same time have been punishable under other powers. As the discussion below shows there is a degree of overlap (but not a complete overlap) between the scope of conduct punishable under RETL and conduct punishable by other criminal and administrative punishments. Over time, the scope of people and conduct that fell within the purview of RETL expanded as the forms of socially disruptive and unacceptable behaviour changed. This flexibility in terms of scope of the power was one of the factors that made it convenient for law enforcement officials and an anathema to basic rule of law principles. It also ensured that for some types of proscribed conduct, police had discretion to impose one of a range of punishments of differing degrees of severity. Recent changes in the criminal law, discussed below, have lowered the threshold for certain offences that were previously targeted by RETL and increased the degree to which RETL and the criminal law overlap.

At the outset RETL was primarily designed to target people who were politically unreliable. The *Directive on Thorough Elimination of Hidden Counter-Revolutionaries* (*Guanyu Chedi Suqing Ancang Fangeming Fenzi De Zhishi*) issued by the Chinese Communist Party (CCP) Central Committee on 25 August 1955 provided that ‘for those people who cannot be convicted of a criminal offence and politically who cannot continue to be used, where returning them to society would increase unemployment, in principle they can be sent to re-education through labour.’ Almost immediately the process of expansion of the scope of RETL began. The *Resolution on the Decision of the State Council on the Question of Re-Education Through Labour* (*Guowuyuan Guanyu*

Laodong Jiaoyang Wenti De Jueding) approved in 1957 by the NPC Standing Committee, the NPC Standing Committee *Supplementary Regulations of the State Council on Re-Education Through Labour* (*Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui, Guowu Yuan Guanyu Laodong Jiaoyang De Buchong Guiding*) 29 November 1979 and the Ministry of Public Security's *Notice Promulgating the 'Temporary Regulations of the Ministry of Public Security on Re-Education Through Labour'* (*Laodong Jiaoyang Shixing Banfa*) issued by the State Council on 21 January 1982, each progressively expanded the scope of targets to cover social order infringements, vice, petty crime and conduct deemed to be anti-socialist.

This process of incremental expansion of the scope of RETL continued after introduction of the open door and economic reform policy to cover newly emerging forms of socially disruptive, unlawful or otherwise proscribed conduct. On 1 June 2002 the Ministry of Public Security issued the *Regulations on Public Security Organs Handling Re-Education Through Labour Cases* (*Gong'an Jiguan Banli Laodong Jiaoyang Anjian Guiding*) to consolidate and further expand the scope of RETL. Through the years, the State Council, central level Ministries and Commissions and local governments issued a plethora of regulatory instruments that both fragmented the legal basis of RETL and expanded the scope of targets on an *ad hoc* basis.

Under the 2002 regulations, targeted conduct could now conceptually be seen as lying somewhere between administrative infringements punished under the *Security Administrative Punishments Law* 2006 and offending punished under the *Criminal Law* 1979 (as amended). It could be characterised as either; conduct constituting a public order administrative infringement but which was carried out repeatedly or was particularly serious, or criminal offending that was too minor to be prosecuted or where a decision had been made not to continue a criminal prosecution (Xie 2013, 110–14). The

former included repeated minor troublemaking and sex workers and their clients who had been punished repeatedly. The latter included ‘picking quarrels and causing trouble’ and petty theft. Conduct of those that could be understood to fall generally within the purview of dissent such as democracy and rights activists, Falungong practitioners and repeat petitioners could be pushed into either category.

Alternative Administrative Powers

RETL was seen as targeting offending that was more serious than that which warranted imposition of administrative punishments under the *Security Administrative Punishments Law* 2006. Nevertheless, the SAPL does target a wide range of conduct that constitutes a minor public order infringement. It authorises the police to impose administrative punishments of warning, fine, administrative detention, or revocation of licenses issued by public security organs (Article 10). The SAPL also allows for confiscation of contraband in accordance with relevant laws (Article 11) and adoption of protective temporary detention measures for people who are intoxicated (Article 15). The maximum accumulated period of administrative detention cannot exceed 20 days (Article 16).

A range of other powers exists that empower police to investigate and detain people disturbing public order. For example, police also exercise powers to detain a person for questioning (*liuzhi panwen*) for a maximum period of 48 hours under the *People’s Police Law (Renmin Jingcha Fa)* 1995, or forcibly remove a person from a scene if they pose a threat to public order or security (Article 8). The *Administrative Compulsion Law* 2011 Article 9(1) authorises police to take a number of compulsory measures for temporary restriction of personal liberty to protect order and public health, and for example compulsory testing and treatment for sexually transmitted infections.

'Big RETL'

In addition, there remain a number of administrative powers for detention of minor offenders that are regulated in ways similar to RETL. These powers have been referred to as RETL-type powers (*lei laodong jiaoyang*) or 'Big RETL' (*da laojiao*) (a term used by Liu Renwen; see for example, Liu 2014, 13). As they are in fact punitive powers that involve deprivation of personal liberty for extended periods, there is increasingly a view that it is inappropriate for these powers to remain unreformed. A number of powers, discussed below, fall within this envelope.

Sex workers and their clients were one group previously detained under RETL. In the run up to its abolition, in some places such as Chongqing, a decision was made that it was not appropriate to punish sex workers with RETL. However, abolition of RETL does not exempt sex workers and their clients from punishment as alternative administrative powers to detain and punish them already exist. The SAPL 2006 Article 66 empowers police to impose a fine of up to RMB 5,000 (currently USD 805) and/or up to 15 days administrative detention. Transgressions may also be punished by imposition by the police of a period of administrative detention for education (*shourong jiaoyu*) of between six months and two years in camps run by the police.

Whilst detention for education is authorised by the NPC Standing Committee *Decision on Strictly Prohibiting Prostitution and Using Prostitutes (Guanyu Yanjin Maiyin Piaochang De Jueding)* 1991, it does so in particularly formalistic terms that are arguably inconsistent with at least the spirit if not the text of the *Legislation Law* 2000. Paragraph 4.2 of the 1991 Decision authorises detention for education in the following terms:

Those who prostitute or use prostitutes may be coercively gathered up by the

public security organs in conjunction with other relevant departments to carry out legal and moral education and to engage in productive labour to give up this evil habit. The time limit [for detention] is between six months and two years. The State Council will pass specific measures [for implementation].

In 1993, the State Council passed the *Measures for Detention for Education of Prostitutes and Clients of Prostitutes (Maiyin Piaochoang Renyuan Shourong Jiaoyu Banfa)* providing only slightly more regulatory detail. These Measures were revised in 2011 and stipulate that detention for education may be approved by the public security bureau at county level or above (Article 8). These Measures describe detention for education as an ‘administrative compulsory education measure to gather up prostitutes and their clients to carry out legal and moral education, organise them to participate in productive work and to carry out testing and treatment for sexually transmitted infections’ (Article 2). The 2011 Measures at Article 7 provide that apart from punishment under SAPL Article 66, sex workers and their clients whose conduct is insufficient to warrant re-education through labour may be punished with detention for education. It exempts sex workers under 14 years old, those who are pregnant or nursing a child under one year old, those with a serious infectious disease that is not a sexually transmitted infection and people who have been kidnapped and sold into prostitution. The almost entire lack of legal definition of the targets of this form of ‘compulsory education measure’ allows the police very broad discretion as to the penalty they might impose. Preferred policing practice has been to impose fines rather than detention unless a concerted crack-down has been ordered (Biddulph 2007, 175). A recent illustration (beginning in February 2014) of such a crack-down has been waged in Dongguan (Wong 6 March 2014). In May 2014, high profile actor Huang Haibo was detained for six months; this suggests that the use of this form of punishment is not in abeyance.

Another in the category of ‘Big RETL’ is the power to impose a period of administrative detention on minors who have committed offences that are not punishable as criminal offences under the power of detention for re-education (*shourong jiaoyang*). The *Criminal Law* 1979 (as amended) (Article 17(4)) stipulates that where a person cannot be criminally punished because they are not yet 16 years old, the family may be ordered to subject them to discipline or where necessary they may be given detention for education. This provision is repeated in Article 39 of the *PRC Law on the Protection of Minors (Weichengnian Ren Baohu Fa)* 2006. The period of detention is between one and three years and may be approved by the county level public security bureau (Ministry of Public Security 1982, *Notice on the Scope of Juvenile Offenders to be Taken in and Detained in Juvenile Correctional Facilities (Gong’an Bu Guanyu Shaonianfan Guanjiaosuo Shouyan, Shourong Fanwei De Tongzhi*). The scope of detainees is given more detailed description in the *Notice on Issues of Detention for Education of Juvenile Offenders under 14 years old (Guanyu Dui Buman Shesi Sui de Shaonian Fanzui Renyuan Shourrong Jiaoyang Wenti De Tongzhi)* issued by the Ministry of Public Security 1993 (Sun 2013, 37). It authorises the use of detention for education for juveniles under 14 years old who have committed a serious crime (for example, murder, armed robbery, and causing explosions) but who are too young to be subject to criminal sanction. In practice, detention for education is primarily imposed on offenders between 14 and 16 years old (Sun 2013, 37). This power suffers from the same legal shortcomings as RETL did, that is, there is no proper legal basis for the power; decision-making is in the hands of the police and there are no proper procedural safeguards or oversight mechanisms in place. The detention facilities in which detention for education may be

served vary from place to place and may include, juvenile prison, work study schools (*gongdu xuexiao*) and before its abolition, RETL (Zhang 2014, 285).

Other administrative powers exist which on their face are directed toward well-defined conduct and situations. However, in practice they provide a degree of flexibility to local authorities who may have incentives to detain people illegally for reasons not related to the targeted conduct, particularly where the procedures for applying the power are ill-defined and mechanisms for oversight and accountability weak or non-existent. These include detention and interrogation of Party officials suspected of corruption (*shuanggui*) (Liu 12 May 2014) and the power of involuntary commitment in psychiatric hospitals. Whether recent legal reforms under the *Mental Health Law (Jingshen Weisheng Fa)* 2012 to strengthen protections for involuntary commitment will be sufficient to curb abusive practices by local agencies remains to be seen (Munro 2000; LaFraniere and Levin 11 November 2010).

Shuanggui is not officially a legally sanctioned criminal investigation power, but instead is exercised by the Party Discipline Inspection Committee to detain Party officials for interrogation who are suspected of breaching Party discipline (that is suspected of corruption) (Sapio 2008). This power has been used extensively to investigate official corruption and often these cases are transferred into the criminal justice system where a decision has been made to prosecute and sufficient evidence has been obtained.

Criminal Justice Reforms

At the more serious end of the punishment spectrum a number of changes have been made in criminal law, procedure and practice that, taken together, have made it more feasible to deal with some categories of minor criminal offences through the criminal

justice system. These reforms to the Chinese criminal justice system began prior to abolition of RETL. They include expanding the scope of matters that fall within the definition of crime, expanding the scope of matters that may be dealt with by summary procedure and instituting non-custodial sentences for minor crimes.

Expanding the scope of some crimes

Prior to abolition of RETL a number of changes were made in the 8th amendment to the *Criminal Law*, passed in 2011, to lower the threshold for conviction of a number of minor criminal offences. Of these, a number correspond to categories of people targeted for RETL. An incomplete list includes:

- Article 133 on traffic offences to include the offence of driving whilst exceeding the limit of alcohol and dangerous car racing;
- Article 141 to lower the threshold for punishments for producing or selling fake medicines by removing the requirement that the fake medicine seriously endangers health;
- Article 143 to increase the scope of liability for breaching food safety standards or adding non-food or hazardous materials to foodstuffs;
- Article 205 to expand the scope of the crime of falsely issuing invoices;
- Article 210 to increase the scope of offences for stealing invoices to include carrying or using counterfeit invoices;
- Article 226 to expand the categories of the offence of forcing or intimidating someone to engage in sex work or to provide or accept a service, to include voting, participate or withdraw from an auction, transfer or acquire shares in a company or

enterprise or other property, to engage in or refrain from engaging in designated production activities;

- Article 264 to increase the scope of theft to include pickpocketing, committing thefts many times or committing burglary;
- Article 274 to increase the scope of the crime of extortion of public or private property to include committing the offence many times; and
- Article 293 to increase the scope of the crime of picking quarrels and causing trouble to include assembling other people many times to pick quarrels or cause trouble.

The reforms to expand the scope of Article 293 adds further flexibility to an offence that has been labelled a ‘pocket’ offence, so-called because its vague definition enables a wide range of conduct to be stuffed in (Zhang 4 February 2015). The pocket offences that have been attracting significant attention since the abolition of RETL are ‘picking quarrels and causing trouble’ (*xunxin zishi zui*) (Article 293) and ‘gathering a crowd to disturb social order’ (*juzhong raoluan shehui zhixu zui*) (Article 290). Human rights NGOs have noted the dramatic upswing in conviction of rights lawyers, civil society activists and other people engaged in conduct construed as opposing the state under these offences (Dui Hua 22 January 2014). Lowering the threshold for these crimes does not completely cover the scope of minor crimes previously punished under RETL, but does go some way in that respect. Of course, pursuing a criminal prosecution is not as institutionally convenient as imposing RETL was because of the involvement of a number of agencies; police, procuratorate and courts each have their own powers and institutional interests. For a criminal prosecution the police must obtain sufficient evidence for the procuratorate to decide to accept the file, approve an arrest and initiate a

prosecution. For political cases where there is insufficient evidence or the conduct does not readily fall within one of the categories of crime set out in the law there must be coordination between the courts, procuratorate and police to secure a conviction which requires political will and coordination work to be carried out amongst the different agencies.

Expanding non-custodial punishments

Much attention has been given to the criminal punishment of community correction which provides a mechanism for non-custodial punishment of minor criminal offenders. Whilst community corrections cannot act as a complete substitute for RETL because it is applied when a person has been convicted of a criminal offence, its inclusion in the 2011 revisions to the *Criminal Law* expands the array of punishments that may be imposed in respect of minor crimes. Community corrections was linked to the post-RETL punishments regime in the *Decision on Major Issues on Comprehensively Deepening Reform (Zhonggong Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Zhongda Wenti De Jueding)* approved by the 3rd Plenary session of the 18th CCP Central Committee on 12 November 2013 in the following terms: ‘repeal the system of re-education through labour, perfect the laws for punishment and correction of unlawful conduct and criminal offences, perfect the system of community corrections’ (Section IX point 34).

The number of people given this form of punishment has increased dramatically. In November 2014, the Deputy Minister of Justice, Zhang Sujun was reported to state that since the beginning of trials in selected locations from 2003, there had been a total of 2,113,000 people punished under the system of community corrections (Chinanews 5 November 2014).

Community correction may be imposed in a range of different circumstances. Under the *Criminal Law 1979* (as amended) a person may be sentenced to community corrections and ordered to serve their sentence out of custody when an offender has been sentenced to the criminal punishment of control (Article 38), given a suspended sentence (Article 76) or granted parole (Article 85). An order to serve a sentence out of prison under community correction must be issued by a court with inputs from the procuratorial office in each of China's more than 680 prisons and according to the procedures specified in the 2014 revisions to the *Provisions on Working Procedures in Prisons for Proposing Commutation and Parole (Jianyu Tiqing Jianxing Jiashi Gongzuo Chengxu Guiding)* (Chinanews 5 November 2014).

Criminal procedure reforms

The 2012 reforms to the *Criminal Procedure Law* have expanded the jurisdiction to try matters with a single judge using summary procedure to basic level courts (Article 208). Summary procedure may be used in cases where the facts are clear and the evidence sufficient, the defendant confesses to the crime and raises no objection to the charges, and the defendant does not object to summary procedure (Article 208). Such reforms enable expeditious processing of criminal trials where the main facts are not in contention, or at least where the defendant does not raise any objections to the evidence and the charges. Summary procedure is not confined to and does not perfectly correspond to the prosecution and trial of minor crime. However, expansion to basic level courts makes its use attractive in trials of minor offences where evidence is clear and uncontested. Initial research suggests that the number of offences tried using summary procedure has expanded dramatically (Fang 2014). It is beyond the scope of this chapter to address any questions that might arise about the impact this dramatic expansion of summary procedure might have on the administration of justice and

protection of the procedural rights of defendants. It is enough to note here that this reform enables courts to deal with straightforward matters quickly and would go some way to addressing concerns that diversion of people originally dealt with by RETL into the criminal justice system would increase caseloads to the extent that it would overwhelm the capacity of courts to deal with minor crime.

Areas of flexibility in the criminal justice system

The criminal law and procedure also contain a number of areas of flexibility that enable creative use of existing powers to punish certain categories of conduct not obviously amenable to criminal conviction. The first is the criminal coercive power of detention which enables the police to detain for interrogation a major criminal suspect in the circumstances (*Criminal Procedure Law 1979* (as amended) Article 80). The police may detain the person for three days before applying for an arrest or releasing the person. Police may apply for an extension of between one to four days in 'special circumstances'. If the person is suspected of committing crimes in different places or of involvement in a gang, detention for 30 days can be authorised. The procuratorate must determine whether to approve an arrest within seven days (*Criminal Procedure Law 1979* (as amended) Article 89). The police thus have a number of days before their decision to detain is subject to scrutiny by the procuratorate. Such a device, however, is not as flexible as the administrative powers that have been abolished. If an application for arrest is made, it may not be in the institutional interests of the procuratorate to cooperate by approving an application for arrest where the circumstances and evidence are manifestly inadequate to support an arrest.

Conduct no longer punished and unintended consequences

In the year leading up to the abolition of RETL, some local changes suggested that

certain categories of conduct previously labelled trouble-making behaviour would no longer be punished. In both Yunnan and Guangdong, for example, three categories of people were publicly excluded from the scope of RETL. They were: people suspected of minor conduct threatening national security, repeat and nuisance petitioners and people criticising government and Party leaders (Nandu.com 25 January 2013; Southern Metropolis Daily 25 January 2013; Yunnan Information Daily 7 February 2013; Zhou, Zhang, and Song 16 July 2013). However, the uproar over the discovery and subsequent closure of an illegal ‘Education and Reprimand Centre’ (*xunjie zhongxin*) in Luoyang city (Henan) in 2014 raises the prospect that incentives still exist for local governments to deal coercively with nuisance and repeat petitioners. The existence at local levels of this and other forms of illegal compulsory and punitive detention including ‘legal education bases’ (*fazhi jiaoyu jidi*) (Liu 12 May 2014), may be an unintended and unwelcome consequence of abolishing RETL without also removing the perceived need to punish certain groups.

Implications

What then are the implications of this reform? In addition to hoped-for improvements in rights protection under China’s version of the rule of law, there are a number of institutional consequences.

Abolition of RETL has removed a power that the police have found to be a flexible and useful tool to address an array of emerging problems of disruptive conduct and dissent in the reform era. An arbitrary and abusive power has been abolished. Whilst alternative powers exist to punish much conduct targeted for RETL, institutional discretion has been restricted. In the area of minor crime, for example, police must still provide a brief of

evidence to the procuratorate that is sufficient to meet standards for arrest and prosecution. Under RETL, the police did not have to convince another agency that punishment was required. In some areas, such as repeat petitioning and other forms of conduct perceived to oppose the Party–state, categories of crime must be strained to cover such conduct. If that cannot be done, the consequence is that the person should not be punished. In this area, where local governments retain incentives to suppress or punish such conduct, the temptation to lish *ad hoc* and illegal forms of detention and punishment has already proven to be strong. The problem with illegal forms of detention is that they are precisely that, illegal, and so not subject to any legal or practical constraints.

With the expansion of community corrections as a form of non–custodial punishment for minor crime, there has been a transfer of responsibilities and burden of resources and costs onto the local government and local justice agencies. Not only does the local government shoulder the responsibility of community corrections, but the creation of compulsory community based drug treatment orders in the *Drug Prohibition Law 2007* also imposes a substantial burden on local authorities. The shortfall in local government budgets to perform their ever–increasing scope of responsibilities casts a shadow of doubt over the extent to which they are willing or able to allocate needed resources into administering these community–based orders.

Debates about RETL before its abolition raised broader issues about the values that should be reflected in China’s punishments regimes and in governance more generally. Questions of how ideals of justice and the protection of human rights should be instantiated were extensively debated in the lead up to abolition of re–education through labour. Some academics argued that reforms should be guided by a rights–centred interpretation of China’s international obligations under the *International Covenant on*

Civil and Political Rights 1976. Such a reading would place the protection of personal liberty at the heart of these human rights protections. Thus, it was argued that a broad interpretation should be taken of principles such as proportionality and procedural justice (Wu 2008, 61–2)

In the end, RETL was abolished without any definitive engagement with these broader arguments about justice and human rights or with the conceptual structure of the punishments system. The broader impact on the conceptual structure and values of the system of punishments remains to be worked through. In just the same way, detention for repatriation was abolished without explicitly addressing the issues of the power of the NPC Standing Committee to review the constitutionality of powers that had been raised by the academic petition letters (Hand 2006, 149). Detention for investigation was not so much abolished as it was incorporated into the criminal justice system by inclusion into the *Criminal Procedure Law* 1996 of the elements of flexibility demanded by the police when interrogating those categories of criminal suspects formerly targeted by detention for investigation. The pattern that emerges is one of incremental reforms to abolish or reform those areas of worst abuse. It is not surprising that the Party–state has chosen not taken these opportunities to articulate broad principles of rights and justice against which the whole sanctioning system can be judged. Rather it has retained the flexibility of dealing with problems in the composition of coercive powers on a case by case basis.

Finally, the question arises about the fate of the other administrative powers that fall into the category of ‘Big RETL’. In particular, questions have been raised about the fate of detention for education of sex workers. I would suggest that the same three factors, discussed above in relation to RETL, could usefully be applied to this question. That is, is there popular and international criticism of the power such that it can be abolished in a way that is politically advantageous, or at least not disadvantageous? Can the power be

abolished in a way that does not have a significant impact on public order? And finally, is there an alternative available form of punishment, or has there been a decision that this form of punishment no longer needs to be applied to that conduct?

The prominent media coverage of the detention of the actor Huang Haibo in 2014, discussed above, suggests that there is increasing attention being paid to this form of detention, but this public awareness and concern starts from a very low base. However, similar to RETL, despite the minimal legislative reference to this power in the NPC Standing Committee's *Decision on Strictly Prohibiting Prostitution and Using Prostitutes* 1991, I would argue that substantively this power suffers from the same problems of unconstitutionality and illegality as RETL. The political implications of abolition and the question of whether there has been a change of official views about the need to punish such conduct suffer from the persistently heavy moral overtones of sex work as a form of vice that is destructive of the social fabric. In the *Decision on Some Major Questions in Comprehensively Moving Forward Governing the Country According to Law* (*Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti De Jueding*), adopted on 23 October 2014, the CCP Central Committee emphasised the need to strengthen citizens' morality and the role of the Party and rule of law in this task. It may be that the arguments based on illegality outweigh these moral overtones. In saying this, the Party–state is fettered in its decision–making by the official and popular view, not unique to China, that legalising conduct is a signal that the conduct is socially and politically acceptable. Sex work and soliciting sex are unlawful and also punishable under the SAPL, but abolition of the alternative detention power would signal that this conduct is viewed as a minor infringement. It remains to be seen whether the Party–state is ready to send this signal.

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