

# Protection of Human Rights in the Context of Punishment of Minor Crimes in China

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Thank you for inviting me to speak here today.

Over the past decade, I have, in academia and the private sector, studied administrative litigation and judicial reform in China, constitutional development in Hong Kong, human rights in Cambodia, and trade with China.

I was Legal Associate for Asia at the Washington-based International Human Rights Law Group. I was also Assistant Professor of Law at the City University of Hong Kong and a visiting scholar at the People's University in Beijing. I am qualified as a barrister in England, Wales, and Hong Kong, and an attorney-at-law in New York State and District of Columbia. I worked with Freshfields LLP in Beijing and Hong Kong and the U.S. law firm O'Melveny and Myers in Los Angeles.

As an associate of the Carnegie Endowment of International Peace, I implement its Political and Legal Reform Project to study, among other subjects, the impact of China's accession to the WTO on its legal system and the legal reform in Shanghai. I recently trained legislative affairs officials from China's provinces and the State Council, the country's highest executive organ, on "China: WTO and Judicial Review."

I am also a consultant for the United Nations Office of the High Commissioner for Human Rights, advising the office on implementing human rights technical cooperation programs in China. These programs focus on various legal reform and human rights issues including re-education through labor (*laodong jiaoyang or laojiao*) and training of prison staff.

In this testimony, I will examine "minor crimes" under Chinese law and how they are punished. I will then focus on re-education through labor, a mechanism of punishing "minor crimes," by discussing its legal background, the legal and human rights problems it presents, the current debate in China about its future, and my reasons for recommending its abolition. I will, wherever appropriate, draw on discussion in my doctoral thesis titled *Administrative Litigation and Court Reform in China*, which is largely based on empirical research that includes observation of eight administrative trials and interviews with over 140 judges, law professors, lawyers, administrative officials, and litigants in Guangdong province, Chongqing, Wuhan, and Beijing.

## **SUMMARY**

Re-education through labor ("RETL"), one of the most prominent administrative sanctions in China, is imposed on people whose act is not serious enough to warrant criminal punishment but too serious to be subjected to lenient administrative sanctions prescribed by the Security Administration Punishment Regulations ("SAPR"). Yet, neither the Chinese Criminal Law nor judicial interpretations clearly define serious and minor crimes.

RETL presents four legal and human rights problems:

- *Extensive Use.* The expansion of the scope of RETL, as manifested in the principal legislative documents governing the system, has drawn criticisms that these documents are conflicting and that public security organs have turned RETL into a crime control mechanism. The extensive use of the system has also led to widespread human rights concerns.
- *Severe Punishment.* Anyone who is subjected to RETL may be detained in a labor camp for up to four years. This punishment is more severe than some criminal punishments such as fines, surveillance, and criminal detention.
- *Inconsistent with Administrative Punishment Law.* The Administrative Punishment Law requires all administrative punishments that restrict personal freedom to be prescribed by "laws," which, under Chinese law, must be promulgated by the National People's Congress and its Standing Committee. Although RETL is such type of administrative punishment, it is only prescribed by three decisions either made by the State Council or the Ministry of Public Security. The Standing Committee of the National People's Congress's approval of two of these decisions has not transformed them into "laws."
- *Lack of Effective Supervision.* RETL is not a type of criminal punishment and is thus not subject to any human rights safeguards embodied in the Criminal Law and Criminal Procedure Law. Aggrieved parties facing RETL may resort to protections granted under the Administrative Litigation Law. Unfortunately, the courts' role in reviewing the legality of administrative sanctions such as RETL has been limited by aggrieved parties' fear of suing administrative organs and limited access to lawyers as well as administrative organs' interference with the process.

In light of these problems, many Chinese scholars call for abolishing RETL. Even if it is not abolished, they suggest that it should be reformed. The maximum detention period should be reduced from four to one or two years. Courts, as opposed to public security organs, should decide whether the punishment can be imposed and such decisions can be challenged on appeal. Further, RETL should be incorporated into criminal law.

These reform measures would not effectively resolve the human rights problems presented by RETL. Although Chinese courts are undergoing a five-year reform program, extra-judicial interference will not disappear soon. The Criminal Procedure Law only offers limited human rights protections and has not yet been fully implemented since its revision in 1996. RETL should be abolished.

The Chinese government is planning to enact a law on RETL to improve the system. It appears to have ruled out abolition. While the government's intent of not abolishing RETL is disappointing, its determination of improving the system is welcome. The government must understand that any reforms that fall short of addressing the problems discussed here will negate its efforts in establishing a rule-of-law-based criminal system.

## **I. PUNISHMENT OF "MINOR CRIMES"**

### **A. "Minor Crimes"**

In Chinese criminal law, both criminality and punishment of a particular act depend on whether the "circumstances" of the act are "serious" or "minor."<sup>[1]</sup> The Criminal Law, however, does not clearly define

the term "minor crimes" even though the distinction between the "serious" and the "minor" pervades the legislation.

Article 13 of the Criminal Law defines crimes as all acts that "endanger the sovereignty, territorial integrity and security of the state; split the state, subvert the political power of the people's democratic dictatorship and overthrow the socialist system; undermine the social and economic orders; encroach upon property owned by the state or collectively owned by the laboring masses; infringe upon citizens' privately owned property; infringe upon citizens' rights of the person, democratic rights, and other rights; and other acts that endanger society and should, according to law, be criminally punished." The provision, however, states that these acts are not deemed crimes "if the circumstances are clearly minor and the harm is not great."

Even if an act is deemed a crime, Article 37 provides that "[w]here the circumstances of a person's crime are minor and do not require criminal punishment, the person may be exempted from criminal sanctions, but he may, according to the different circumstances of each case, be reprimanded or ordered to make a statement of repentance or formal apology or make compensation for losses, or be subjected to administrative sanctions by the competent department."

The word "circumstances" is not defined in the law but scholars have generally agreed that it has a very broad meaning. It includes "all the aspects of a specified act that are thought relevant but are not expressly provided for in the written law governing that act."<sup>[2]</sup> In particular, it can refer to "the subjective blameworthiness of a particular actor" or "external social and political effects of a crime."<sup>[3]</sup>

A scholar points out that "the `circumstances' need common knowledge to be understood"<sup>[4]</sup> but acknowledges that "it does not usually work well" and, therefore, it is necessary for the Supreme People's Court and the Supreme People's Procuratorate to issue judicial interpretations to provide clarifications.<sup>[5]</sup> The Supreme People's Court is authorized to interpret "any problems of the concrete application of laws or regulations in the course of litigation" whereas the Supreme People's Procuratorate has the power to interpret only "questions involving the specific application of laws and decrees in the procuratorial work of the procuratorates."<sup>[6]</sup>

Numerous judicial interpretations have been issued to provide guidance as to whether or not the circumstances of a particular crime are minor. Two examples are illustrative. Article 294 of the Criminal Law states, *inter alia*, that

Whoever organizes, leads, or actively participates in an organization with characteristics of a criminal syndicate, which carries out lawless and criminal activities in an organized manner through violence, threat, or other means, with the aim of playing the tyrant in a locality, committing all evil things, bullying and harming the masses, and seriously undermining economic and social orders shall be sentenced to fixed-term imprisonment of not less than three years nor more than ten years. Other participants shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, surveillance, or deprivation of political rights.

The *Supreme People's Court's Interpretation on Several Questions Concerning the Concrete Application of Laws in Adjudicating Criminal Syndicate Cases*<sup>[7]</sup> clarifies that participating in a criminal syndicate is not deemed a crime if the circumstances are minor, such as the participant did not carry out any criminal activity or was deceived or coerced to join the syndicate.<sup>[8]</sup>

Article 264 of the Criminal Law provides, *inter alia*, that "[t]hose who steal relatively large amounts of public or private money and property ... shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, or surveillance, and may in addition or exclusively be subject to fines." The *Supreme People's Court's Interpretation on Several Questions Concerning the Concrete Application of Laws*

in *Adjudicating Theft Cases*<sup>[9]</sup> defines "relatively large amounts" as amounts of 500-2,000 yuan (US\$60-250) and above. The Higher Level People's Court of each province, autonomous region, or municipality directly under the Central Government adopts, after considering the economic development and social order of its locality, an appropriate figure within this range as the standard to be applied in the locality.<sup>[10]</sup> Stealing of this amount of money and property is, however, not deemed a crime if the circumstances are minor.<sup>[11]</sup> The Interpretation does not provide an exhaustive list of minor circumstances but refers to several situations as examples: the stealing was committed by a person who has reached the age of 16 but not the age of 18, the stolen property and money have been completely returned, the person surrendered himself or herself to the police, or the person was coerced to steal and shared none or a relatively small amount of the stolen property.<sup>[12]</sup>

Although judicial interpretations help clarify the Criminal Law and are thus hailed as an "indispensable" source for understanding Chinese law,<sup>[13]</sup> the broad and indeterminate language found in these interpretations, as illustrated in the above two examples, create wide scope of discretion in interpretation.<sup>[14]</sup> Each of the cited interpretations defines "minor" as "minor," and the resulting tautology fails to provide genuine clarification and guidance to the courts and administrative agencies.

## B. Punishment

When the circumstances of a person's act are so minor that the act is not deemed a crime, or when the circumstances of a person's crime are so minor that the crime does not require criminal punishment, the person may still be subjected to administrative sanctions. The re-education through labor, which is to be discussed in Part II, and those prescribed by the Security Administration Punishment Regulations ("SAPR")<sup>[15]</sup> are the most prominent administrative sanctions.

Article 2 of the SAPR provides that "[w]hoever disturbs social order, endangers public safety, infringes upon a citizen's rights of the person or encroaches upon public or private property" shall be punished in accordance with the SAPR "if such an act is not serious enough for criminal punishment" and "security administration punishment should be imposed."<sup>[16]</sup> Penalties under the regulations include a warning, a maximum fine of 5,000 yuan (US\$625), and administrative detention of not more than 15 days.<sup>[17]</sup> The public security organs have exclusive responsibility for imposing these penalties.

# II. RE-EDUCATION THROUGH LABOR

## A. Legal Background

Re-education through labor ("RETL") is imposed on people whose act is not serious enough to warrant criminal punishment but too serious to be dealt with under the SAPR. RETL is mainly governed by three legislative documents. According to the *1957 Decision of the State Council Regarding the Question of Re-education Through Labor* ("1957 Decision"),<sup>[18]</sup> the purposes of establishing RETL are "to reform into self-supporting new persons those persons who are able to work but insist on leading an idle life, violate law and discipline, or do not engage in honest pursuits" and "to further maintain public order, thus facilitating socialist construction."<sup>[19]</sup> The sanctions should be imposed on the following four categories of people:

(1) "those who do not engage in honest pursuits, involve themselves in hooliganism, commit larceny, fraud or other acts for which they are not criminally liable, or violate public security rules and refuse to mend their ways despite repeated admonition;"<sup>[20]</sup>

(2) "counterrevolutionaries and anti-socialist reactionaries who commit minor crimes and are not criminally liable and who have been given sanctions of expulsion by government organs, organizations, enterprises or schools, and as a result have difficulty in making a living;"[21]

(3) "employees of government organs, organizations, enterprises and schools who are able-bodied, but have refused to work for a long period, violated discipline or jeopardized public order, and have been given sanctions of expulsion, and as a result have difficulty in making a living;"[22] or

(4) "those who refuse to accept the work assigned to them or the arrangement made for their employment or who decline to take part in manual labor and production despite persuasion, keep behaving disruptively on purpose, obstruct public officials from performing their duties and refuse to mend their ways despite repeated admonition." [23]

Various bodies may apply for imposition of RETL on anyone who falls into one of the above four categories. These include "civil affairs and public security departments or the government organ, organization, enterprise, school or other units to which the person belongs; or his or her parents or guardians." [24] The applications have to be approved by the "people's committees of provinces, autonomous regions, and municipalities directly under the Central Government or by organs authorized by these people's committees." [25] The 1957 Decision stipulates that agencies in charge of RETL will be established "at the level of provinces, autonomous regions, municipalities directly under the Central Government" or established "with the approval of the people's committees of provinces, autonomous regions, and municipalities directly under the Central Government." [26] It also states that the work of these agencies will be jointly directed and managed by the departments of civil affairs and public security. [27]

In 1979, the State Council issued the *Supplementary Decision Of The State Council For Re-education Through Labor* ("1979 Decision") to provide more details about RETL. [28] Under the 1957 Decision, a person can be subject to RETL for indefinite periods but the 1979 Decision confines these periods to one to three years, with one-year extension "whenever it is necessary." [29] The 1979 Decision clarifies that RETL Administrative Committees shall be established by "the people's governments of the provinces, autonomous regions, and municipalities directly under the Central Government, and of large and medium-sized cities." [30] These committees shall be composed of "persons who are in charge of civil affairs, public security and labor departments" and these persons shall be responsible for directing and managing the work of RETL. [31] Further, the 1979 Decision states that RETL can only be imposed on "those people in large and medium-sized cities who need to be re-educated through labor." [32] The RETL Administrative Committees of provinces, autonomous regions, and municipalities directly under the Central Government, and of large and medium-sized cities, are responsible for examining and approving those who need such re-education. [33] In other words, RETL is not applicable to the rural populace.

In 1982, the Ministry of Public Security passed, with the approval of the State Council, the *Trial Methods for the Implementation of Re-education Through Labor* ("1982 Trial Methods"). [34] Under this document, RETL can be imposed not only on the four categories of persons listed under the 1957 Decision, but also on anyone who "joined others to commit a crime such as murder, robbery, rape, and arson" or who "abetted others to commit a crime" and the circumstances surrounding these crimes are not serious enough for criminal punishments. [35] Moreover, RETL is also applicable to the rural populace if the person committed crimes "in cities, along railways, and in large-scale factories and mines." [36]

## B. Legal and Human Rights Problems of Re-education Through Labor

### 1. Extensive Use

The expansion of the scope of RETL, as shown in the 1957 Decision, the 1979 Decision, and the 1982 Trial Methods, has drawn criticisms from Chinese legal scholars that these documents are conflicting<sup>[37]</sup> and that RETL has been turned by the public security organs into a "crime control mechanism,"<sup>[38]</sup> which is different from the legislative intent stipulated in the 1957 Decision.

Numerous reports about the extensive use of the system have also led to widespread human rights concerns. RETL is imposed by RETL Administrative Committees that are dominated by public security organs,<sup>[39]</sup> and these organs have reportedly abused the system to take actions against suspected offenders so as to avoid the procedural requirements or supervisory mechanisms presented under the Criminal Procedure Law.<sup>[40]</sup> In particular, it has been reported that public security organs have imposed RETL on offenders against whom they lack sufficient evidence to support a charge even though the circumstances of the crime committed are not minor.<sup>[41]</sup>

Official sources reveal that about 3.5 million people have been re-educated since its establishment in the 1950's.<sup>[42]</sup> At present, 300,000 people are being held in the country's nearly 300 RETL camps,<sup>[43]</sup> at least 1000 of whom are there because they are Falun Gong followers.<sup>[44]</sup> Torture<sup>[45]</sup> and maltreatment such as banning family visits and censoring inmates' personal correspondence<sup>[46]</sup> are alleged to be commonly practiced in RETL camps. Of all the current inmates, a third are punished by RETL because they were drug addicts, prostitutes, brothel visitors; another third are offenders of minor crimes such as larceny, fraud, and assault. The rest comprises of other types of inmates.<sup>[47]</sup>

## 2. Severe Punishment

Although couched in terms of leniency, the 1979 Decision and the 1982 Trial Methods allow a person to be detained in a labor camp for up to four years. This punishment is far more severe than some criminal punishments, which include five types of "principal punishments" (*zhuxing*)<sup>[48]</sup> and three types of "supplementary punishments" (*fujia xing*).<sup>[49]</sup> The five types of principal punishments are:

- (1) Surveillance (*guanzhi*) (from three months to two years)<sup>[50]</sup>
- (2) Criminal detention (*juyi*) (from one month to six months)<sup>[51]</sup>
- (3) Fixed-term imprisonment (from six months to 15 years and up to 20 years when the death penalty is commuted to fixed-term imprisonment or in cases of combined punishment for more than one crime)<sup>[52]</sup>
- (4) Life imprisonment
- (5) Death penalty

Supplementary punishments, regardless of the opposite meaning conveyed by its name, may be imposed independently.<sup>[53]</sup> They include:

- (1) Fines (the amount of the fine imposed depends on the circumstances of the crime)<sup>[54]</sup>
- (2) Deprivation of political rights<sup>[55]</sup>
- (3) Confiscation of property

Critics argue that because RETL is more severe than criminal punishments such as fines, surveillance, and criminal detention, application of the sanction violates the rationale behind RETL: the system should be applied to cases whose level of severity does not merit any criminal punishment.[\[56\]](#)

### 3. Inconsistent with Administrative Punishment Law

The RETL system has also been challenged as inconsistent with the Administrative Punishment Law.[\[57\]](#) The statute specifically requires all administrative punishments that restrict personal freedom to be prescribed by "laws."[\[58\]](#) Administrative regulations and rules can only prescribe other punishments such as warning, fines, confiscation of illegally-gained income and property, and provisional suspension or revocation of permits or licenses.[\[59\]](#) According to the hierarchy of Chinese legislative authorities, only the National People's Congress and its Standing Committee can promulgate "laws."[\[60\]](#) RETL, which is a type of administrative punishment that restricts personal freedom,[\[61\]](#) is prescribed not by a "law" but by decisions made by the State Council or the Ministry of Public Security, and the legality of this system is therefore questionable.[\[62\]](#)

Those who disagree with the above view may argue that the Standing Committee of the National People's Congress's approval of the 1957 and 1979 Decisions has effectively transformed them into "laws".[\[63\]](#) This view is debatable. But even if it is correct, the same argument cannot be applied to the 1982 Trial Methods because the Standing Committee of the National People's Congress has never approved the document. Among the three documents, the 1982 Trial Methods has the most extensive and controversial coverage.

### 4. Lack of Effective Supervision

As an administrative, rather than criminal, sanction, RETL is not subject to any human rights safeguards, however limited they are, contained in the Criminal Law and Criminal Procedure Law.

The Chinese Criminal Law was promulgated in 1979 and amended four times from 1997 to 2001. The 1997 amendment was particularly remarkable. It abolished the provision on analogy[\[64\]](#) and adopted certain fundamental principles of justice such as equality before the law[\[65\]](#) and proportionality (*zuixing xiang shiying yuanze*).[\[66\]](#) But it did not adopt the principle of double jeopardy as far as crimes committed outside China are concerned.[\[67\]](#)

The revision of the Criminal Procedure Law in 1996 brought the legislation closer to international human rights standards by adopting the presumption of innocence, expanding the right to counsel, and increasing the role of the courts so as to eliminate the prior practice of pre-trial determination of guilt. Despite these improvements, the revised Criminal Procedure Law still has various deficiencies.[\[68\]](#) For example, it allows long period of pre-arrest detention. The public security organs can detain for a period of 30 days those "strongly suspected of wandering around committing crimes, of committing multiple crimes, or of forming gangs to commit crimes."[\[69\]](#) The requirement for the public security organs to inform detainees' families of the reasons for detention and the place of custody within 24 hours after the detention may be waived if this "may hinder the investigation or there is no way of notifying them."[\[70\]](#)

As these limited human rights protections are beyond the reach of those who are punished by RETL, aggrieved parties may only resort to protections granted under the Administrative Litigation Law.[\[71\]](#) The statute stipulates that anyone who believes that his or her legitimate rights and interests have been infringed by administrative acts such as administrative sanctions may bring lawsuits to courts.[\[72\]](#) Should the court find the challenged administrative act illegal, it may revoke (*chexiao*) the act.[\[73\]](#)

Based on documentary sources and empirical research, I have noticed some improvements in administrative litigation such as growing respect for procedural requirements. However, the existing problems as discussed

below appear to have limited the courts' role in reviewing the legality of administrative sanctions such as RETL.<sup>[74]</sup>

a. Fear

According to interviewees, aggrieved parties dare not sue administrative organs, especially public security organs, which have wielded extensive power over the populace for decades in China. They fear reprisals resulted from direct confrontation with these organs. Nevertheless, official statistics show that during the years from 1991 to 2000, a significant portion (ranging from 15 to 30 per cent) of administrative cases accepted by first-instance courts were "public security" (*gongan*) cases, which cover "social order" (*zhian*) cases, RETL (*laojiao*) cases, and "others" (*qita*).<sup>[75]</sup> (See **Table One**). If this fear exists, why do public security cases account for such significant portion?

**Table One – Number of First-Instance Administrative Cases Accepted in China, 1991-2000<sup>[76]</sup>**

	Administrative Cases	Public Security Cases	Percentage (%) <sup>[77]</sup>
1991	25,667	?	-
1992	27,125	7,863	28.99
1993	27,911	7,018	25.14
1994	35,083	8,624	24.58
1995	52,596	11,633	22.12
1996	79,966	15,090	18.87
1997	90,557	14,171	15.65
1998	98,350	14,288	14.53
1999	97,569	14,611	14.98
2000	85,760	13,173	15.36

Interviewees explained that the relatively high percentage of "public security" administrative cases simply reflected public security organs' possession of enormous power affecting a wide range of citizens' daily activities. Regardless of their fear, some aggrieved parties finally resorted to administrative litigation because they considered their grievances too grave to endure.

Some other evidence corroborates this explanation. According to a survey conducted in 1992, 51 of 90 plaintiffs interviewed said that they filed suits under the Administrative Litigation Law because they felt this was their last resort.<sup>[79]</sup> In 1993, an abstract painter reportedly sued Beijing's Haidian District Police after three officers beat him for arguing with a bus conductor. The painter won his case. However, the police arrested him two weeks later and charged him with a trumped-up bicycle theft. He was then sent, without trial, to two years in a labor camp. When interviewed in 1997, the painter recalled, "My vision was too optimistic. From now on, I will express myself through my art."<sup>[80]</sup> In fact, police misconduct was considered a "grave" problem by then--Supreme People's Court president Ren Jianxin in December 1996 and he criticized some law-enforcement officials "[who] have taken advantage of legal loop-holes, intentionally misinterpreted the law, distorted evidence and broken the law they enforce."<sup>[81]</sup>

## b. Limited Access to Lawyers

The fee for retaining a lawyer varies in accordance with individual lawyer's experience and competence. On average, the fee can amount to at least 2,000-3,000 yuan (US\$250-\$375) for a case tried by a basic level court and 5,000 yuan (US\$625) for one by an intermediate level court.<sup>[82]</sup> The average monthly income of an ordinary worker is below 1,000 yuan (US\$125).<sup>[83]</sup>

Free legal service is available but its effectiveness in administrative litigation is doubtful.<sup>[84]</sup> Legal aid rules generally require eligible applicants' monthly income to be less than a fixed amount ranging from 200-400 yuan (US\$25-\$50).<sup>[85]</sup> Few people except those living below the poverty line or those who are unemployed can meet this requirement.<sup>[86]</sup> Besides, priorities of legal aid are given to criminal defendants facing the death penalty as well as the blind, deaf, dumb, aged, and minors to assist their claim for compensation in personal injury cases.<sup>[87]</sup> Administrative cases do not seem to have attracted legal aid providers' attention. From its opening in 1995 to January 1999, the Guangzhou Legal Aid Center has only handled two administrative cases.<sup>[88]</sup> By contrast, within the year of 1998, 700 criminal and economic cases were handled.<sup>[89]</sup> Legal aid centers in the entire Chongqing handled about 2,400 criminal cases and 3,500 civil cases in 1999. Only about ten cases were administrative cases.<sup>[90]</sup>

Even if aggrieved parties can afford to retain lawyers, they may encounter difficulties because lawyers are not enthusiastic about handling administrative cases. Unlike economic and civil cases, the amount in dispute in an administrative case is low and thus lawyers cannot charge high fees. Moreover, most lawyers are reluctant to stand up to the government, which has power to decide whether or not a lawyer's license should be renewed.<sup>[91]</sup>

## c. Interference

The majority of interviewees identified interference by administrative organs and the Chinese Communist Party as the greatest difficulty encountered in administrative litigation. Such interference may occur during the entire course of handling an administrative case, but is especially common before the case is accepted. At subsequent stages, judges may be pressured to uphold the administrative act and aggrieved parties and/or courts pressured to have the case withdrawn.

In some administrative cases where public security organs are defendants, the organs have reportedly manipulated the blurred distinction between their dual roles of conducting criminal investigations and imposing administrative sanctions. When these organs intend to bypass the human rights protections provided under the criminal justice system, they often claim that whatever sanctions imposed on suspects are administrative sanctions. When these sanctions are challenged in court through administrative litigation, the public security organs often influence judges to reject the cases on the ground that the court lacks jurisdiction because the sanctions are not administrative acts but acts of criminal investigation.<sup>[92]</sup>

Chinese judges are susceptible to pressure exerted by administrative organs and the Chinese Communist Party because courts' financial arrangements including courts' budgets, judges' salaries and welfare benefits as well as appointment and dismissal of judges are determined by people's governments at corresponding levels, which are ultimately controlled by the local party committees.<sup>[93]</sup>

## III. THE FUTURE OF RETL AND CONCLUDING REMARKS

In light of the legal and human rights problems of RETL, many scholars call for abolition or fundamental reform of RETL.<sup>[94]</sup> Some of those who support abolition of RETL suggest amending the SAPR to increase

the maximum period of administrative detention from 15 days to a month.<sup>[95]</sup> Offenders of "minor crimes" may be detained for up to a month under the SAPR whereas other offenders may be punished under the Criminal Law, which provides that criminal detention should last from one month to six months.<sup>[96]</sup> As there is no gap between these two types of detention, there is no need to have RETL.<sup>[97]</sup>

If the RETL is not abolished, the system should be fundamentally reformed. The maximum detention period should be reduced from four years to one<sup>[98]</sup> or two years.<sup>[99]</sup> Imposition of these punishments should not be decided by public security organs but by courts whose decisions are subject to appeal.<sup>[100]</sup> If possible, the system should be incorporated into the Criminal Law by establishing a new type of punishment called "police orders" or "public safety orders" which are similar to community-based orders in western countries.<sup>[101]</sup>

The reform measures stated in the preceding paragraph, although they would alleviate some of the problems in the current system, would not effectively resolve the human rights problems presented by RETL. Designating courts as the authorities to decide whether or not RETL should be imposed will be an effective reform measure if and only if the courts can make these decisions independently. Although the Chinese courts are undergoing a five-year reform program, the problem of extra-judicial interference will not be resolved in the near future, because the solution is necessarily linked to both political reform and changes in Chinese legal culture.<sup>[102]</sup>

The revisions of the Criminal Law and the Criminal Procedure Law marked the continued maturing of Chinese legality to reflect changed social and economic conditions. Yet the current Criminal Procedure Law only offers limited human rights protections, and it remains unknown when the legislation will be completely brought in line with international norms. The recognition of criminal suspects' right to keep silence, expressed in a regulation issued in Liaoning Province, gives hope of a trend towards greater incorporation of international human rights norms into the Chinese criminal justice system.<sup>[103]</sup> Integration of RETL into the Criminal Law would at least have the advantage of subjecting RETL to human rights protections already provided in the Criminal Procedure Law.

The incorporation of RETL into the Criminal Law ought not obscure the problems that it would continue to present, especially in light of the need to implement even the existing safeguards against official arbitrariness that are contained in the Criminal Procedure Law. After extensive investigations in six selected provinces, autonomous regions and cities, namely, Tianjin, Inner Mongolia, Heilongjiang, Zhejiang, Shaanxi and Hubei, the National People's Congress Standing Committee concluded that the Criminal Procedure Law has not been fully implemented since its revision in 1996. Over-extended detention of criminal suspects and forced confession are still "salient problems" in many parts of the country. Judges, procuratorates, and public security organs restrict defense lawyers' activities by obstructing the lawyers to meet with their clients and to access court files relating to their cases. The National People's Congress Standing Committee attributed this unsatisfactory implementation to law enforcers' "erroneous understanding" of the law. These enforcers regard the law as "too advanced" for China.<sup>[104]</sup> Against this backdrop, incorporating RETL into the Criminal Law would only subject the system to minimal human rights protections that are only available at the discretion of law enforcers. RETL is such a major anomaly in a legal system that is supposed to be ruled by law, that, the mechanism should be abolished.

I expressed the above views at the Seminar on Punishment of Minor Crimes, which was jointly organized by the Chinese government and the United Nations Office of the High Commissioner for Human Rights in February 2001. Since then, the Chinese government has announced its plan of drafting a law on RETL to improve the name, targets, and implementation mechanisms of RETL.<sup>[105]</sup> But it appears to have ruled out abolition. Wang Yunsheng, Director of the Ministry of Justice's Bureau of Re-education Through Labor, explained, "For such a populous nation as China, the [RETL], which aims at stopping those on the verge of committing serious crimes, is an effective one for reducing crime."<sup>[106]</sup>

While the Chinese government's intent of not abolishing the RETL system is disappointing, its determination of improving the system is welcome. But the government must understand that any reforms that fall short of addressing the problems discussed here will negate its efforts in establishing a rule-of-law-based criminal system.

I thank you again for inviting me to speak today and I look forward to answering any questions you may have.

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[1] See Criminal Law of the People's Republic of China, promulgated on July 1, 1979, revised on Mar. 14, 1997, Dec. 25 1999, Aug. 31, 2001, and Dec. 29, 2001[hereinafter *Criminal Law*].

[2] Note: *Concepts of Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890, 1901 n.52 (1985). See also Fang Huicheng, [*Do Not Punish Multiple Crimes as a Single Crime Committed Under "Serious Circumstances"*], FAXUE [JURISPRUDENCE], No. 3, 1984, 24; Wen Jing, [*My Humble Opinion on the Circumstances of a Crime*], FAXUE JIKAN [JURISPRUDENCE QUARTERLY], No. 1, 1984, 44.

[3] *Id.*

[4] Shizhou Wang, *The Judicial Explanation In Chinese Criminal Law*, 43 AM. J. COMP. L. 569, 575 (1995).

[5] *Id.*

[6] *Resolution of the National People's Congress Standing Committee on Strengthening Legal Interpretation Work*, adopted on June 10, 1981.

[7] *Supreme People's Court's Interpretation on Several Questions Concerning the Concrete Application of Laws in Adjudicating Criminal Syndicate Cases*, adopted on Dec. 4, 2000 and effective on Dec. 10, 2000.

[8] *Id.* art. 3(2).

[9] *Supreme People's Court's Interpretation on Several Questions Concerning the Concrete Application of Laws in Adjudicating Theft Cases*, adopted on Nov. 4, 1997 and effective on Mar. 17, 1998.

[10] *Id.* art. 3.

[11] *Id.* art. 6(2).

[12] *Id.*

[13] See Wang, *supra* note 4, at 569. Wang writes that judicial interpretations play an important role in the Chinese criminal justice system because they have six functions: (1) "indicating how to correctly understand the meaning of the law"; (2) "explaining the issues of the law"; (3) "indicating the concrete standard of sentencing within the statutory punishments"; (4) "clarifying the guilty line and line for giving a heavier punishment when the law requires 'serious circumstances' or 'especially serious circumstances'"; (5) "clarifying the limitation of time for a particular law"; and (6) "explaining how to implement laws." *Id.* at 572-77.

[14] For detailed discussion of Chinese legislative drafting, see Perry Keller, *Legislation in the People's Republic of China*, 23 U. BRIT. COLUM. L. REV. 653 (1989); PETER HOWARD CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM, 95-104 (1997); Claudia Ross & Lester Ross, *Language and Law: Sources of Systemic Vagueness and Ambiguous Authority in Chinese Statutory Language*, in THE LIMITS OF THE RULE OF LAW 221 (KAREN G. TURNER, JAMES V. FEINERMAN, AND R. KENT GUY, eds. 2000).

[15] *Security Administration Punishment Regulations*, adopted on Sept. 5, 1986, effective on Jan. 1, 1987, revised on May 12, 1994 [hereinafter *SAPR*].

[16] Articles 19-32 of the *SAPR* specify the circumstances under which the *SAPR* is violated and the corresponding punishments.

[17] *SAPR*, *supra* note 15, art. 6.

[18] *Decision of the State Council Regarding the Question of Re-education Through Labor*, approved by the Standing Committee of the National People's Congress on Aug. 1, 1957, promulgated and effective on Aug. 3, 1957 [hereinafter *1957 Decision*].

[19] *Id.* preamble.

[20] *Id.* para. 1(1).

[21] *Id.* para. 1(2). When the Criminal Law was revised in 1997, the term "counterrevolutionary" was replaced with the term "crimes against state security." The term "counterrevolutionary" found in *the 1957 Decision* has not been amended accordingly.

[22] *Id.* para. 1(3).

[23] *Id.* para. 1(4).

[24] *Id.* para. 3.

[25] *Id.* para. 3.

[26] *Id.* para. 5.

[27] *Id.*

[28] *Supplementary Decision of the State Council for Re-education Through Labor*, approved by the Standing Committee of the National People's Congress on Nov. 29, 1979, promulgated and effective on Nov. 29, 1979.

[29] *Id.* para. 3.

[30] *Id.* para 1.

[31] *Id.*

[32] *Id.* para 2.

[33] *Id.*

[34] *Notice of the State Council on Re-Issuing the Ministry of Public Security's Trial Methods for the Implementation of Re-Education Through Labor*, promulgated and effective on Jan. 21, 1982.

[35] *Id.* art. 10(2) and (6).

[36] *Id.* art. 9.

[37] See Shen Fujun, [*Some Thoughts about the Abolition of Re-education Through Labor System*], FAXUE [JURISPRUDENCE], No.7, 1999, 18, at 18; Chen Ruihua, [*Historical Examination of Re-education Through Labor and Reflections*], ZHONGWAI FAXUE [PEKING UNIVERSITY LAW JOURNAL] Vol. 13. No. 6(2001), 657; Chen Xingliang, *Research on China's Re-education Through Labor System: From the Perspective of Criminal Rule of Law*, ZHONGWAI FAXUE [PEKING UNIVERSITY LAW JOURNAL] Vol. 13. No. 6(2001), 689, 693-94.

[38] Hualing Fu, *Criminal Procedure Law*, in INTRODUCTION TO CHINESE LAW 129, 134 (Chenguang Wang and Xianchu Zhang eds., 1997). See also Chen Xingliang, *supra* note 37, at 694.

[39] See Tao Jigang, [*Some Thoughts on Laws Relating to Re-education Through Labor*], ZHONGGUO RENMIN JINGCHA DAXUE XUEBAO [JOURNAL OF THE CHINA UNIVERSITY OF PEOPLE'S POLICE], No. 3, 1995, 12, at 12; Ma Kechang, [*Strengthen the Reform Efforts, Revise and Perfect the Criminal Law*], FAXUE PINGLUN [LAW REVIEW], No. 5, 1996, 1, at 7-8; Chen Xingliang, *Re-education Through Labor: Analysis Based on International Bill of Human Rights*, FAXUE [JURISPRUDENCE], No. 10 (2001), 49, 51-52; Chen Ruihua, *supra* note 37, at 668.

[40] Criminal Procedure Law of the People's Republic of China, promulgated on July 1, 1979, revised on Mar. 17, 1996 [hereinafter *Criminal Procedure Law*]. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS: CHINA'S CRIMINAL PROCESS AND VIOLATIONS OF HUMAN RIGHTS, 69-79 (1993); Amnesty International, *Open Letter To The President Of The People's Republic Of China*, M2 PRESSWIRE, Sept. 28, 1999, available in LEXIS, News Library, News Group File.

[41] See Fu, *supra* note 38, at 134; Chen Xingliang, *supra* note 39, at 52.

[42] See *China -- Government Re-education System on Legal Basis*, CHINA DAILY, Nov. 2, 1998; *Beijing to Introduce Re-education Through Labor Law This Year*, ZHONGGUO TONGXUN SHE NEWS AGENCY, BBC SUMMARY OF WORLD BROADCASTS, Feb. 19, 2001, available in LEXIS, News Library, News Group File.

[43] See *Minister Says 1.7 Million Held In Prisons, Labour Camps*, XINHUA NEWS AGENCY, BBC SUMMARY OF WORLD BROADCASTS, May 22, 2000, available in LEXIS, News Library, News Group File; John Leicester, *China Gives Reporters Glimpse of Labor Camp Dubbed 'Living Hell' by Critics*, THE ASSOCIATED PRESS, May 23, 2001, available in LEXIS, News Library, News Group File.

[44] China has not disclosed the exact number of Falun Gong followers held in re-education through labor camps. But it confirmed in January 2001 that at least 470 followers were held at the Masanjia Education-Through-Labour Education Institution in Liaoning Province and the official media reported in August 2001 that "th[is] camp has also succeeded in 're-educating' more than 90 per cent of the 1,000 female Falun Gong members housed there." See *Forty-Seven Former Female Falun Gong Followers Released After Reform*, XINHUA NEWS AGENCY, BBC SUMMARY OF WORLD BROADCASTS, Jan. 27, 2001, available in LEXIS, News Library, News Group File; *China Rejects Report of Hunger Strike by Jailed Falungong Members*, AGENCE FRANCE PRESSE, Aug. 30, 2001, available in LEXIS, News Library, News Group File. The Hong Kong-based Information Center for Human Rights and Democracy estimated that about 10,000 Falun Gong followers have been sent to these camps since the Falun Gong movement was banned in July 1999. See *Nearly 500 Falungong Were Held At Just One Labour Camp: China*, AGENCE FRANCE PRESSE, Jan. 18, 2001, available in LEXIS, News Library, News Group File.

[45] See *Amnesty International: China -- Torture In China Under The Spotlight At The UN*, M2 PRESSWIRE, May 5, 2000, available in LEXIS, News Library, News Group File; *Released Chinese Dissident Speaks of Horrors of Labor Camp Life*, AGENCE FRANCE PRESSE, Feb. 15, 2002, available in LEXIS, News Library, News Group File.

[46] See Fong Tak-Ho, *Dissident Threatens Legal Action*, HONG KONG STANDARD, July 10, 1997, available in LEXIS, News Library, News Group File.

[47] See Chen Xingliang, *supra* note 37, at 694, 697.

[48] *Criminal Law*, *supra* note 1, art. 33.

[49] *Id.* art. 34.

[50] *Id.* art. 38.

[51] *Id.* art. 42.

[52] *Id.* arts. 45, 50, and 69.

[53] *Id.* art. 34.

[54] *Id.* art. 52.

[55] Deprivation of political rights refers to deprivation of the following rights: (1) the right to elect and the right to be elected; (2) the right to freedom of speech, of the press, of assembly, of association, of procession, and of demonstration; (3) the right to hold a position in state organs; and (4) the right to hold a leading position in a state-owned company, enterprise, or institution or people's organization. *Id.* art. 54.

[56] See Chen Zexian, [*Re-education Through Labor System and Educational Reform of Prisoners in China*], in [HUMAN RIGHTS AND ADMINISTRATION OF JUSTICE] 30, 33-4 (Liu, Li and Kjaerum. eds., 1999); Chen Ruihua, *supra* note 37, at 669; Chen Xingliang, *supra* note 37, at 694.

[57] Administrative Punishment Law of the People's Republic of China, promulgated on Mar. 17, 1996 and effective on Oct. 1, 1996.

[58] *Id.* art. 9

[59] *Id.* arts. 8, 10 and 11.

[60] See XINGZHENG FAXUE JIAOCHENG [TEXT OF ADMINISTRATIVE JURISPRUDENCE] 205 (Ying Songnian, ed., 1988).

[61] This point was in dispute in the past. See Chen Xingliang, *supra* note 39; Chen Ruihua, *supra* note 37, at 669; Jiang Jinfang, [*Legal Developments of Re-education Through Labor System and Practical Problems*], ZHONGWAI FAXUE [PEKING UNIVERSITY LAW JOURNAL] Vol. 13. No. 6(2001) 674, 682.

[62] See Shen Fujun, *supra* note 37, at 19; Chen Zexian, *supra* note 56, at 34-35; JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE, AND DEVELOPMENT 193 (1999).

[63] See *supra* notes 18 and 28. Chen Xingliang argues that they are not "laws;" they are "pre-laws" (*zhun falu*), at the very most, see Chen Xingliang, *supra* note 37, at 689, 692.

[64] Article 79 of the 1979 Criminal Law provided that "[a] person who commits crimes not explicitly defined in the Specific Provisions of this Law may be convicted and sentenced, after obtaining the approval of the Supreme People's Court, according to the most similar article in this Law." After the 1997 amendment, the Criminal Law provides that "[a]ny act deemed by explicit stipulations of law as a crime shall be convicted and given punishment by law and any act that no explicit stipulations of law deem a crime shall not be convicted or given punishment." *Criminal Law*, *supra* note 1, art. 3.

[65] "Anyone committing crimes shall be treated equally in applying the law. No one shall have any privileges outside the law." *Id.* art. 4.

[66] "The punishment shall be proportional to the criminal acts committed by the offenders and the criminal responsibilities that the offenders shall bear." *Id.* art. 5.

[67] For detailed discussion of the amendment to the Criminal Law, see LAWYERS COMMITTEE FOR HUMAN RIGHTS, *WRONGS AND RIGHTS: A HUMAN RIGHTS ANALYSIS OF CHINA'S REVISED CRIMINAL LAW* (1998); JIANFU CHEN, *supra* note 62, at 174-183.

[68] For detailed discussion of the amendment to the Criminal Procedure Law, see Fu, *supra* note 38; LAWYERS COMMITTEE FOR HUMAN RIGHTS, *OPENING TO REFORM?: AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW* (1996); JIANFU CHEN, *supra* note 62, at 200-16; Daphne Huang, *The Right to a Fair Trial in China*, 7 PAC. RIM. L. & POL'Y 171 (1998).

[69] *Criminal Procedure Law*, *supra* note 40, arts. 61(7), 69(2).

[70] *Id.* art. 64.

[71] Administrative Litigation Law of the People's Republic of China, promulgated on Apr. 4, 1989 and effective on Oct. 1, 1990.

[72] *Id.* arts. 1-2.

[73] *Id.* art. 54.

[74] See also Chen Ruihua, *supra* note 37, at 671; Chen Xingliang, *supra* note 37, at 695-96.

[75] In China, administrative cases are classified into about 30 categories including public security (*gongan*), industry and commerce (*gongshang*), land use (*tudi*), forestry (*linye*), city construction (*chengjian*), customs (*haiguan*), environmental protection (*huanbao*), patent (*zhuanli*), and tax (*shuiwu*) cases. Public security cases are further categorized as social order (*zhian*), re-education through labor (*laojiao*), or others (*qita*). Interviews with judges in Guangdong, Dec. 1998-Jan. 1999.

[76] CHINA LAW YEARBOOK 1992-2001.

[77] This column lists the percentage of the total number of administrative cases that public security cases account for.

[78] No data could be found to indicate the number of "public security" cases accepted in 1991. However, it was reported in CHINA LAW YEARBOOK 1992 that 7,720 "social order" (*zhian*) cases were accepted, accounting for 30.08 per cent of all first-instance administrative cases accepted in 1991.

[79] FAZHI DE LIXIANG YU XIANSHI [THE IDEAL AND REALITY OF THE RULE OF LAW] 322 (Gong Xiangrui et al. eds., 1993).

[80] George Wehrfritz and Michael Laris, *Rules Are the Law*, NEWSWEEK (ATLANTIC EDITION), Sept. 29, 1997, available in LEXIS, News Library, News Group File.

[81] *Id.*

[82] Interviews in Guangdong, Dec. 1998-Jan. 1999 and Chongqing, Dec. 1999-Jan. 2000.

[83] *Id.*

[84] For discussion of legal aid practices in China, *see generally* David Lee, *Legal Reform in China: A Role for Nongovernmental Organizations*, 25 YALE J. INT'L L. 363 (2000); Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L. J. 211 (1999).

[85] Guangzhou Legal Aid Center adopted "340-380 yuan" as the standard. *See* Pamphlet issued by Guangzhou Legal Aid Center, Jan. 1999 (on file with author).

[86] Interview with Director, Guangzhou Legal Aid Center, Jan. 1999; Interview with Directors, Chongqing Legal Aid Center, Jan. 2000.

[87] *See Backgrounder: Qualifications for Chinese Citizens to Receive Legal Aid*, XINHUA GENERAL NEWS SERVICE, JUNE 16, 2000, available in LEXIS, News Library, News Group File.

[88] Interview with Director, Legal Aid Center in Guangzhou, Jan. 1999.

[89] *Id.*

[90] Interview with Directors, Legal Aid Center in Chongqing, Jan. 2000.

[91] Interviews in Guangdong, Dec. 1998-Jan. 1999 and Chongqing, Dec. 1999-Jan. 2000.

[92] Dong Hao, *[Some Thoughts about Reforming Multiple Responsibilities System of Our Country's Judicial Organs]*, ZHONGGUO FAXUE [CHINA'S LEGAL STUDIES], No. 4, 1997, 24, at 26.

[93] For discussion of constraints on judicial autonomy, *see* Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 J. INT'L. L. BUS. 383, 394-98 (2000); He Weifang, *[The Realization of Social Justice Through Judicature: A Look at the Current Situation of Chinese Judges]*, in [TOWARD A TIME OF RIGHTS: A PERSPECTIVE OF THE CIVIL RIGHTS DEVELOPMENT IN CHINA] 209 (Xia Yong ed., 1995).

[94] *See e.g.* Shen Fujun, *supra* note 37; Tao Jigang, *supra* note 39, at 12; Ma Kechang, *supra* note 39, at 7-8; Chen Zexian, *supra* note 56; Chen Xingliang, *[Dual Tasks for Criminal Revision: Change of Value and Adjustment of Structure]*, ZHONGWAI FAXUE [PEKING UNIVERSITY LAW JOURNAL], No.1, 1997, 55, at 56-60; Chen Guangzhong and Zhang Jianwei, *[The UN's International Covenant on Civil and Political Rights and Our Country's Criminal Litigation]*, ZHONGGUO FAXUE [CHINA'S LEGAL STUDIES], No. 6, 1998, 98, at 108; Chen Ruihua, *supra* note 37, at 669-73.

[95] *See supra* Part I.B.

[96] *Criminal Law*, *supra* note 1, art. 42.

[97] *See* Shen Fujun, *supra* note 37, at 19; Chen Zexian, *supra* note 56, at 36; Chen and Zhang, *supra* note 94, at 108. *See also* Chen Xingliang, *supra* note 37, at 700.

[98] *See* Chen and Zhang, *supra* note 94, at 108.

[99] *See* Chen Zexian, *supra* note 56, at 35.

[100] *See* Chen and Zhang, *supra* note 94, at 108

[101] *See* Ma Kechang, *supra* note 39, at 7-8; JIANFU CHEN, *supra* note 62, at 193; Chen Xingliang, *supra* note 94, at 56-60; and Chen and Zhang, *supra* note 94, at 108.

[102] The Supreme People's Court launched a Five-Year Court Reform Plan in October 1999. *See China's Supreme Court Plans Greater Autonomy For Judges*, CHINAONLINE, Oct. 26, 1999, available in LEXIS, News Library, News Group File.

[103] *See China: New Regulation Sees Introduction of Criminal Suspects' Right to Silence*, XINHUA NEWS AGENCY, BBC WORLDWIDE MONITORING, Nov. 22, 2000, available in LEXIS, News Library, News Group File.

[104] *See Official Admits Detention, Forced Confessions A Major Problem*, XINHUA NEWS AGENCY, BBC SUMMARY OF WORLD BROADCASTS, Dec. 30, 2000, available in LEXIS, News Library, News Group File.

[105] *See Speed Urged for Judicial System Laws*, CHINA DAILY, Dec. 24, 2001; *Beijing to Introduce Re-education Through Labor Law This Year*, *supra* note 42.

[106] *See China Reviews "Re-education Through Labor" System*, DEUTSCHE PRESSE-AGENTUR, Feb. 5, 2001, available in LEXIS, News Library, News Group File.