

Cambridge University Press

978-0-521-86940-9 - Legal Reform and Administrative Detention Powers in China

Sarah Biddulph

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PART ONE

INTRODUCTION AND
CONCEPTUAL FRAMEWORK

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CHAPTER ONE

THE PROBLEMS OF LEGAL REFORM
OF POLICE ADMINISTRATIVE
DETENTION POWERS

1 INTRODUCTION

This book examines the impact of rebuilding the Chinese legal system since 1978 on the administrative detention powers of the Chinese public security organs (*gong'an jiguan* 公安机关, also referred to in this book as the 'police').¹ The regulation and exercise of police administrative detention powers have arguably been amongst the most problematic areas in the programme of rebuilding China's legal system in the reform era.² Until recently, the process of reconstructing the legal system appeared to have limited impact on the definition and exercise of these powers. This has been so for at least two reasons.

First, administrative detention powers are exercised alongside the state's criminal justice powers to target conduct considered to be socially disruptive, to maintain public order, social stability and, ultimately, political stability.³ Consequently, there has been a high degree of political sensitivity surrounding these powers. Deng Xiaoping repeatedly asserted that success of the economic modernisation programme

¹ The categories of forces falling within the definition of the people's police (*renmin jingcha* 人民警察) are set out in the *PRC People's Police Law* 1995 ('PPL') at art. 2. They include: the public security organs (*gong'an jiguan* 公安机关), the state security organs (*guojia anquan jiguan* 国家安全机关), the police in prisons (*jianyu* 监狱) and RETL management organs (*laodong jiaoyang guanli jiguan* 劳动教养管理机关) and the judicial police (*sifa jingcha* 司法警察) of the people's courts and people's procuratorates. In this book all references to 'the police' are to the public security organs.

² By 'reform era', I refer to the period following the Decision of the Third Plenum of the 11th Central Committee of the Chinese Communist Party ('CCPCC') in December 1978 to embark on a programme of economic reform and modernisation and to reconstruct the legal system.

³ Petracca and Mong, 1990: 1101–2.

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was premised on order and stability,⁴ a demand reiterated by Jiang Zemin.⁵ The maintenance of social control since the introduction of the economic modernisation policy in December 1978 has been so important that it has led sociologist Borge Bakken to comment that the policy of social control itself ‘has been one of the crucial pillars of reform’.⁶

In recent years, problems of social disorder have worsened along with the deepening of inequities arising out of economic reform. The importance to the state of maintaining social order, control and stability has, if anything, heightened. The programme to promote the construction of a ‘Harmonious Society’ launched in February 2005 articulates a broad-ranging plan to address these problems of social inequality and conflict, with the slogan ‘democracy, rule of law, equity, justice, sincerity, amity and vitality’.⁷ A key focus of the Harmonious Society policy is to protect social stability and order.

Secondly, the slow pace of reform of administrative detention powers is partly because these powers are concentrated in the hands of the public security organs.⁸ It is only in the reform era that the Chinese police have become a police force as understood in the Western sense of being a law enforcement agency, that is, a security force responsible for the management of public order and crime control.⁹ Prior to 1979 it was more a revolutionary force than a force for law and order. In a socialist state such as China,¹⁰ the public security organs remain

⁴ Deng Xiaoping, *The Present Situation and the Tasks Before Us*, 16 January 1980; see also Zhang, Qiong, 2002: 38–9. In a speech in 1987, Deng Xiaoping said ‘China is a backward country. If it is to become a developed, modernised country, there must be political stability, strict discipline and good public order, without those we can accomplish nothing’: Deng Xiaoping, *The Two Basic Elements in China’s Policies*, 4 July 1987; von Senger, 2000: 53.

⁵ Jiang Zemin, *Hold High the Great Banner of Deng Xiaoping Theory for an All-round Advancement of the Cause of Building Socialism with Chinese Characteristics into the 21st Century*, 12 September 1997, 26; Lo, 1997: 483–5.

⁶ Bakken, 2000: 6. As a consequence, committees of the Chinese Communist Party (the ‘Party’ or the ‘CCP’), in particular the Political-Legal Committee (*Zhengfa Weiyuanhui* 政法委员会), have continued to be directly involved in the formation and implementation of social order policies and in aspects of law and order enforcement: discussed in chapters 4 and 7.

⁷ The programme to construct a Harmonious Society was first set out by Hu Jintao at a meeting at the Party School of senior Party and government leaders at provincial and ministerial level on 19 February 2005. Hu is Party Secretary, President and Head of the Central Military Commission. The elements of an harmonious society are ‘*minzhu fazhi, gongping zhengyi, chengxin youai, chongman huoli, anding youxu, renyu ziran hexie xiangchu de shehui*’ (民主法治, 公平正义, 诚信友爱, 充满活力, 安定有序, 人与自然和谐相处的社会): Hu, 20 February 2005.

⁸ Discussed in chapters 3 to 6. ⁹ Dutton, 2000: 61; Fu, 1994: 280–2.

¹⁰ In this book I have adopted the definition of the state used by Heng in a discussion of the Vietnamese state, in which the state ‘is defined broadly as the political authority that runs the country in an institutionalized structure of party and government organs’: Heng, 2001:

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one of the main forces to buttress the power of the Chinese Communist Party ('CCP' or 'Party') and to enforce its policies.¹¹ The public security continues to be a particularly powerful organ and central to the state's monopoly on coercion.¹²

Despite this mixture of political sensitivity and concentration of power in the hands of the police, factors that appear to militate against the legal reform of these powers, I demonstrate in this book that there has been both systematic and occasionally dramatic reform of these powers. I consider the processes which have made legal change possible.

2 THE ADMINISTRATIVE DETENTION POWERS

2.1 Introduction

In this book, I focus on three administrative detention powers: detention for education (*shourong jiaoyu* 收容教育); coercive drug rehabilitation (*qiangzhi jiedu* 强制戒毒); and re-education through labour (*laodong jiaoyang* 劳动教养, 'RETL').¹³ These powers are imposed primarily by the

214. This definition includes the exercise of power of the CCP as well as the organs of state exercising legislative, executive and adjudicative power. This definition is further refined with reference to the division drawn by Pitman Potter between the 'regime' and its 'subjects'. The 'regime' constitutes the elite at central and provincial level and is defined in contrast to those 'who either have no participation in the exercise of political rule, or whose participation is wholly passive without opportunity for meaningful input': Potter, 1994b: 327.

¹¹ McCormick, 1990: 1–26, arguing China should be characterised as a Leninist state and describing the basic aspects of Leninist political organisation as being 'the central institution is a political party with a broad and formalized ideological agenda that penetrates most aspects of society' (at 87). As a result, the state is dominated by a central party which is 'not just a ruling class but a ruling institution', and 'pre-empt[s] autonomous social or political organisation' (at 87). The Party maintains an extensive organisation whose tasks include supervision of economic, political and social organisation which is buttressed by an extensive police network. The bureaucratic elite is also the political elite and the Party, through the government, has a preponderant role in economic affairs. Hamrin and Zhao, 1995: Introduction, xxv–xxviii, discussing the different models used to describe the transformation of Leninist states including: bureaucratic authoritarianism; communist neo-traditionalism; fragmented authoritarianism; and state corporatism. They conclude that the system in the Deng Xiaoping era (to the late 1980s) more closely resembled a bureaucratic authoritarian system. It is 'bureaucratic' in that the Party 'attempts to incorporate all social organisations within the party-state structure'. It is authoritarian in that the central party state retains 'ultimate, unlimited authority': at xxv–xxvi. They acknowledge that concepts from other theories also have explanatory value in respect of different aspects of the party state structure and operation.

¹² Professor Lubman argues that 'police-administered sanctions express the dominance of the criminal process by the police at all times before legal reform began in 1978, except when it became a target of the Cultural Revolution': Lubman, 1999: 80. He argues that police dominance of the criminal justice process has continued into the reform era and is facilitated by the use of administrative forms of detention outside the formal criminal justice system: at 163–4, 168–70. See also McCormick, 1990: 104–14.

¹³ An alternate translation is rehabilitation through labour: Cohen, 1968: 21; Clarke, 1985: 1899.

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Chinese public security organs in the execution of their public order (*zhi'an* 治安) responsibilities.¹⁴ They are framed broadly to target people seen as posing a threat to social order, undermining the ethical life of society and harming the overall modernisation programme. This group includes prostitutes, drug addicts and people who dissent or commit misdemeanours, but whose acts are considered not to be sufficiently serious to warrant a criminal sanction.¹⁵

Administrative detention powers have been the subject of sustained criticism, both domestically and by international human rights groups. There is good justification for these criticisms. Lawyers and human rights groups have documented severe and chronic abuses of police powers and of administrative detention powers in particular.¹⁶ Despite some legal reform, these powers remain discretionary and largely legally unconstrained.

By focussing on these three controversial powers – detention for education of prostitutes and clients of prostitutes, coercive drug rehabilitation and RETL – I have necessarily omitted other important administrative detention powers exercised by the police. For example, I do not look in any detail at powers such as administrative detention (*xingzheng juliu* 行政拘留) under the *Security Administrative Punishments Law*, detention for questioning (*liuzhi panwen* 留置盘问), detention for training of juvenile offenders (*shourong jiaoyang* 收容教养) in work-study schools¹⁷ or confinement in asylums. The latter topic has been dealt with elsewhere in an excellent and detailed report.¹⁸ The powers of detention for investigation (*shourong shencha* 收容审查)¹⁹ and detention for repatriation (*shourong qiansong* 收容遣送), having been abolished, are considered only in passing. This book does not examine in detail criminal coercive powers exercised under the *Criminal Procedure Law*.

¹⁴ Hui, 1991: 100–2. ¹⁵ I discuss these powers in detail in chapters 5 and 6.

¹⁶ Cohen, 1993; Thornton, 1995; Fenwick, 2001, examining the use of forced labour; Human Rights in China, 2001b; Amnesty International, 1991, containing a detailed analysis of the legal basis for detention for investigation as well as documenting abuses; Amnesty International, 1997: 21–3; Wu, 1992: 81–107; Hung, 2003a; Human Rights in China, 2001b: 1–4, providing a short history of development of RETL and the documents forming its primary legal basis. A more general discussion can be found in Amnesty International, 1992; Amnesty International, 1996; Amnesty International, 1997; Human Rights Delegation to China, 1991; Human Rights in China, 1999; Human Rights in China, 2001b. Epstein, 1992: 13 discusses detention for repatriation briefly, as well as other detention powers such as detention for investigation and RETL in his general discussion of justice in China.

¹⁷ Discussed in Curran and Cook, 1993. ¹⁸ Munro, 2000.

¹⁹ Also translated as ‘sheltering for examination’ (Hsia and Zeldin, 1992); ‘shelter and investigation’ (Hecht, 1996: 21–2; Epstein and Wong, 1996: 480; Chen, Jianfu, 1999a: 201–6); and ‘sheltering for examination’ (Wong, 1996: 367).

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2.2 Recent history

Although a range of detention powers was used for minor offenders prior to 1949,²⁰ the immediate origins of these police detention powers can be traced back to the early days of the establishment of the People's Republic of China ('PRC').²¹ Professor Cohen refers to the use of these powers in the period 1949–53 as the “administrative” roundups of petty thieves, gamblers, opium addicts, whores, pimps, vagrants and other dregs of the old society’ where the police ‘subjected them to “non-criminal” reform measures during the course of long confinement’.²²

At this time, a range of powers was included within a category Cohen labelled ‘formal administrative sanctions’ exercised by the police.²³ Within this category, he lists sanctions imposed under the 1957 *Security Administrative Punishments Regulations* ('SAPR'),²⁴ supervised production²⁵ and RETL.²⁶ In addition to the group of powers discussed by Cohen, other police-imposed administrative detention powers extant in the 1950s and 1960s included detention of prostitutes in Women's Labour Training Centres,²⁷ Anti-Smoking Rehabilitation Centres for opium addicts²⁸ and detention for investigation for the detention and repatriation of transients.²⁹

Since the 1970s, the social order problems that had, according to official accounts, been brought under control or eradicated³⁰ have

²⁰ Dikotter *et al.*, 2002: 331–3, discussing detention of opium addicts in the Republican period; Dikotter, 2002: 78–80, discussing detention in police custody for a broad range of minor offences, in poorhouses for vagrants and in madhouses for those considered insane; Sommer, 2000: chapter 7, discussing criminalisation of prostitution in the late Qing under Yongzhen Emperor.

²¹ The origin of these powers is discussed in chapter 3.

²² Cohen, 1966: 477; Cohen, 1968: 10; Wong, 2002: 294, citing Cohen, includes administrative powers of the police within the populist (or informal) model of justice.

²³ Cohen, 1968: 20–1, distinguishing ‘formal administrative sanctions’, which were exercised by the police, from ‘informal administrative sanctions’, which were exercised by power elites, work units and the masses during the Anti-Rightist Movement and Cultural Revolution, such as criticism, self-criticism and struggle sessions.

²⁴ Cohen, 1968: 20. Whilst Professor Cohen translates ‘*Tiaoli*’ as ‘Act’, in this book I adopt the more commonly used translation of ‘*Tiaoli*’ as ‘Regulation’.

²⁵ Cohen, 1968: 21, also referred to as controlled production and supervised production.

²⁶ Cohen, 1968: 21.

²⁷ Henriot, 1995: 477, refers to them as *fumù laodong jiaoyang suo*. These centres are also referred to as Women's Production Education and Fostering Institutes: Dutton, 2005: 152; and Huang, 1994: 119.

²⁸ Central People's Government, *Circular on Strict Prohibition of Opium and Drug Taking*, 24 February 1950, art. 7.

²⁹ Detention for investigation was split into two powers in 1975: detention for investigation and detention for repatriation.

³⁰ For example, Mou, 1996: 192–3 in respect of prostitution; Zhang, Qiuhan, 1993: 11 in respect of drug addiction.

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re-emerged. The powers to detain prostitutes and drug addicts that had officially fallen into desuetude because they were no longer needed have quietly been resurrected. As I discuss in chapter 6, those detention powers such as RETL that had remained extant have been adapted and expanded to meet changing social order problems.

2.3 Legal characterisation

The public security organs currently exercise a range of powers whose legal classifications are divided into criminal and administrative jurisdictions.³¹ Powers exercised by the police under the criminal jurisdiction are enumerated in the *PRC Criminal Procedure Law* ('CPL').³² The exercise of these powers is subject to supervision by the People's Procuratorate.³³ The People's Courts have sole jurisdiction to convict a person of a criminal offence.³⁴

Administrative powers by contrast, are exercised, usually independently, by the police to sanction minor breaches of the law.³⁵ Whilst unlawful, the sanctioned conduct is not considered to be sufficiently serious to warrant prosecution under the *Criminal Law*.³⁶ The detention powers that are the focus of this book fall within the scope of the administrative powers of the police³⁷ and are regulated by administrative law and procedure, which is discussed in chapters 7 and 8.

In practice, however, these powers fall at the intersection of the categories of criminal and administrative law.³⁸ For example, detention for investigation, whilst officially categorised as an administrative power,

³¹ He, 1991: 1–3, discussing the distinction between criminal, administrative and civil punishments.

³² The two primary codes concerning criminal justice are the *Criminal Law of the PRC*, which first took effect on 1 January 1980 and was substantially amended in 1997, and the *Criminal Procedure Law of the PRC* ('CPL'), which first took effect on 1 January 1980 was substantially amended in 1996. References to the *Criminal Law* and *CPL*, unless otherwise stated, refer to the amended versions of these laws.

³³ *CPL*, art. 8. ³⁴ *CPL*, art. 12.

³⁵ Police powers in respect of administrative and other infringements are set out in chapter 2 of the *PPL* 1995 as well as in *sui generis* legislation covering particular powers.

³⁶ The *Criminal Law* sets out at art. 13 the categories of acts enumerated in the criminal law that 'are crimes if according to the law they should be criminally punished'. It then makes the proviso, 'however, if the circumstances are clearly minor and the harm is not great, they are not deemed to be crimes'.

³⁷ Although this distinction between criminal and administrative powers is less familiar in common law jurisdictions, the coexistence in the police force of criminal investigation powers with a broad range of administrative powers related to social welfare and public order is more common in continental systems, especially those of Germany and France: Funk, 1995: 70; Monjardet, 1995: 49–50; Gramckow, 1995; Thomaneck, 1985.

³⁸ Liu, 2003.

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was in fact used by the police as a substitute for more restrictive criminal coercive powers including criminal detention.³⁹ One use of RETL has been to detain for further investigation those for whom the police have insufficient evidence to obtain approval to arrest.

The legal form of administrative detention powers raises questions about the ways in which pursuit of social control has influenced the form of legal regulation in this area. The legal forms of detention for education and coercive drug rehabilitation are particularly interesting as their use was revived throughout the late 1970s and early 1980s after the decision was made to rebuild China's legal system. Although RETL was not officially abolished, during the Cultural Revolution its use diminished to the point where a conscious decision needed to be made in the late 1970s to revive it. We cannot just conclude that they are remnants from the pre-reform era, as these powers have been re-established at the same time as the rebuilding of the legal system was underway.

As the Chinese state intensifies its efforts to establish a system of law-based governance, the continuing existence of a wide range of administrative detention powers which are poorly defined by law and almost completely unconstrained by legal supervision mechanisms presents us with a number of uncomfortable questions. Does legal reform extend to administrative detention powers? If it does, how do we explain or justify the existence and legal form of these powers? If it does not, then why not? What are the possibilities for reform of these powers?

Before turning to the three detention powers that are the focus of this book, it is useful briefly to anticipate an example of legal reform I refer to in chapter 9. It is the story of abolition of one of the most controversial police detention powers, detention for investigation. This example illustrates both the possibilities and limits of legal reform. It also suggests the growing importance of law as a forum for debates about the structure and limits of police powers: issues central to this book.

³⁹ To avoid the inconvenience of the legal procedures required for other powers, detention for investigation was used instead of administrative detention, criminal detention or arrest and became a substitute for criminal arrest and investigation procedures: Li and Liu, 1992: 181. Detention for investigation was also used to avoid the time limits for criminal detention, to extend the investigation period or to punish those who had committed unlawful acts: Zhang and Zhang, 1991: 268.

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3 LEGAL REFORM OF ADMINISTRATIVE DETENTION POWERS: THE DEMISE OF DETENTION FOR INVESTIGATION AND THE ISSUES IN THIS BOOK

Like the other detention powers considered in this book, detention for investigation developed out of efforts of the CCP to restore social order after it took power in 1949. In December 1957, the Central Committee of the CCP (the 'CCPCC') and the State Council instructed that unauthorised rural migrants and beggars be taken into detention in order to repatriate them. Troublemakers were to be subject to criminal sanction or RETL.⁴⁰ In response to the social upheaval caused by the Great Leap Forward and the resulting famine,⁴¹ in 1961 the CCPCC approved formal creation of stations for the detention and repatriation of rural migrants who had 'blindly floated' (*mangmu liudong* 盲目流动) to the cities and for the investigation of suspected criminal or counter-revolutionary offences.⁴² At this time, the power was officially described as one 'primarily to rescue, educate and help settle down people who had floated to the city as beggars and to protect social order'.⁴³

Towards the end of the Cultural Revolution in 1975, the use of detention for the investigation of suspected criminal conduct by transients was administratively separated from the detention for repatriation of unauthorised rural migrants.⁴⁴ Detention for investigation centres were operated by the police and detention for repatriation by the civil administration organs.⁴⁵ The use of detention for investigation expanded dramatically in 1983 when the Party launched the first campaign of the Hard Strike against serious crime.⁴⁶

⁴⁰ CCPCC, State Council jointly issuing the *Directive on Preventing the Blind Outflow of the Rural Population*, 18 December 1957; Zhang, Qingwu, 1990: 35.

⁴¹ Spence, 1990: 583. ⁴² Fan and Xiao, 1991: 142–3; Cui, 1993b: 90–1.

⁴³ Wang, Jiancheng, 1992: 179.

⁴⁴ Fan and Xiao, 1991: 143; State Council approving and issuing MPS, Ministry of Railways, *Report of the National Conference on the Work of Public Order on Railways* in July 1975; MPS *Notice on Doing a Good Job of Ferreting Out Floating Criminals During the New Year and Spring Festival Period*, December 1975.

⁴⁵ Fan and Xiao, 1991: 143.

⁴⁶ Fan and Xiao, 1991: 143; Cui, 1993b: 92. The Hard Strike against Serious Crime (*Yanli Daji Yanzhong Xingshi Fanzui* 严历打击严重刑事犯罪) has been commonly abbreviated as 'Yanda' (严打) or 'Hard Strike': Tanner, Harold, 1999; Tanner, 1994: 12–16. In this book, I adopt Tanner's translation of the term 'Hard Strike'. Tanner, 2000 translates the term as 'Stern Blows' and Bakken, 2000 adopts the translation 'Severe Blows'. The term 'Hard Strike' has been used in two related though distinct contexts. The first is as a proper noun. In chapter 4, I discuss those views, arguing that there have been three 'Hard Strikes' in the reform era: 1983, 1996 and 2001. The second use of the term is descriptive of the style of enforcement, concerted action to strike hard and fast and to punish targeted activities severely and quickly, which is not limited to the three 'Hard Strikes'. The first use is rendered 'Hard Strike'. The second, in lower case, is rendered hard strike.

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After this time, detention for investigation became a tool used by the police to detain for interrogation a wide range of people suspected of committing crime. The time limits for detention for investigation were considerably longer than the criminal detention power in the 1979 CPL.⁴⁷ Not surprisingly, the power was used as a substitute for criminal detention and investigation and for a range of other purposes.⁴⁸

My examination of other administrative detention powers in this book shows that there are many commonalities in the pattern of their development. That is, the use of the powers has changed to address current problems of crime and social order and expanded as an adjunct to the implementation of periodic law and order campaigns. The documentary basis of these powers primarily comprises documents issued by a range of Party and administrative organs, many of them by the CCPCC and the Ministry of Public Security ('MPS'). Another similarity is the serious abuse of these powers which led to a public outcry and to high-level political concern at failures to control these abuses. In chapter 9, I document the debates that started in the 1980s about how detention for investigation could be reformed and, if it could not be reformed, about its abolition.

The most significant point is that the public face of the politically sensitive debate about reforming detention for investigation was conducted in terms of the lawfulness of the power and the developing legal framework governing the state's sanctioning powers. The MPS sought to obtain legal support for detention for investigation by drafting legislation to be passed by the Standing Committee of the National People's Congress ('NPCSC').⁴⁹ The MPS and its supporters argued that retention of detention for investigation as an administrative power was both necessary and not inconsistent with either the criminal law regime

⁴⁷ Under the 1979 CPL, art. 48, the police could only detain a person for three days prior to making an application for arrest to the procuratorate, with a possible extension of up to four days. The procuratorate was required to respond within three days. The total possible time for criminal detention was thus ten days. The initial period of detention for investigation, on the other hand, was one month, with possible extensions approved by higher-level public security organs of up to a total of three months: MPS, *Notice on Strictly Controlling the Use of Detention for Investigation Measures*, 31 July 1985, art. 3.

⁴⁸ Liu and Liu, 1992: 181; Zhang and Zhang, 1991: 268; Zhang, Xu, 1993: 20, suggesting that between 80 and 90 per cent of people convicted of criminal offences were first detained under this power. MPS, *Notice Strictly Prohibiting Public Security Organs from Interfering in Economic Disputes and Illegally Seizing People*, 25 April 1992, criticising and prohibiting detention by the police of one party to a contract dispute and demanding payment of the amount in dispute to secure their release.

⁴⁹ Gao, 1990: 20.