

THE PRODUCTION OF LEGAL NORMS: A CASE STUDY OF ADMINISTRATIVE DETENTION IN CHINA

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1. INTRODUCTION

The Chinese public security organs exercise a wide range of administrative detention powers, either alone or in conjunction with other state agencies. These include the power to order administrative detention (*xingzheng julu*) under the *Security Administrative Punishments Regulations (Zhi'an Guanli Chufa Tiaoli* "SAPR"), re-education through labour (*laodong jiaoyang*), detention for repatriation (*shourong qiansong*) and stop and detain for questioning (*liuzhi panwen*).

The specific subject of this paper is the legal formation and development of two administrative detention powers. The first is detention for education (*shourong jiaoyu*), which is a specialist detention power targeting prostitutes and clients of prostitutes. The second is coercive drug rehabilitation (*qiangzhi jiedu*), which is directed at addicted drug users. Because the use of these powers was revived throughout the late 1970s and 1980s after the decision was made to rebuild China's legal system, the legal contour of these powers provide us with an example of how the Chinese state¹ has managed legal reform in the context of social order.

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1. 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 institutionalised structure of party and government organs." Russell Hiang Khng Heng, *Media Negotiating the State: In the Name of the Law in Anticipation*, 16 J. SOC. ISSUES S.E. ASIA 213, 214 (2001). This definition includes the exercise of power of the Chinese Communist Party 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 Pittman Potter between the "regime" and its "subjects." The "regime" constitutes the elite at the 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

In this paper I seek to identify the ways in which the state's demand to maintain social order and stability may affect the regulatory regime governing these powers, with special focus on the role of law in defining and constraining these powers.

The starting point of this paper is the empirical view of law as an "aspect of society".² This view of law invites us to focus on the political, social and institutional contexts within which legal ideas and rules are produced and the purposes which the law is designed to serve. I examine the law in its social, political, institutional and recent historical contexts to better understand the dynamic process of rebuilding the legal regulatory regime as it relates to social order.

In contextualising the legal regulatory regime in this way, I am mindful of the criticisms made by Professor Donald Clarke of those models of the legal reform process that explicitly or implicitly assume that the Chinese legal system is developing toward some predetermined end point. One such end point is what Clarke labels the "ideal Western legal order".³ An hypothesis of this paper is that legal norms do not inevitably develop toward some end point, but are produced as part of an ongoing process. Rather than ask in what direction the legal system is developing, this paper focuses on the some of the factors that arguably have significantly influenced the form and content of the legal norms that are being produced.

Without purporting to be exhaustive, this paper examines some important factors of this dynamism: the recent history of the powers, the policy contexts within which these powers have developed and been used and the main institutional influences on the development and implementation of these policies.

The main policy contexts examined include: the primary social order policy, the Comprehensive Management of Social Order (*Shehui Zhi'an Zonghe Zhili*), the efforts to build a socialist

opportunity for meaningful input." Pitman B. Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, 138 CHINA Q. 325, 327 (1994).

2. ROGER COTTERRELL, *LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE* 8 (1995). Cotterrell discusses empirical legal theory and contrasts it with normative legal theory. *Id.* at 24-28. Cotterrell also discusses the idea of law as "institutionalized doctrine." *Id.* at 4. Legal doctrine, he argues, is shaped by "pre-existing patterns of power" as well as the practical and institutional contexts in which law is developed and used. *Id.* at 4, 8.

3. Donald C. Clarke, *Puzzling Observations in Chinese Law: When is a Riddle Just a Mistake?*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 93, 95 (Stephen Hsu ed., 2003). A related argument is proposed in an excellent article by Teemu Ruskola. Ruskola examines under the rubric of "legal orientalism" the persistence of analyses that emphasize the "lack" of Chinese law in contrast to an idealised western legal norm, be it rule of law, or the Weberian ideal of a formal legal rationality. Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002).

ethic under the rubric of “socialist spiritual civilisation” (*shehui zhuyi jingshen wenming*),⁴ and the program of building a country ruled according to law (*yifa zhiguo*).

The process-oriented analysis permits the study of non-uniform developments in the legal system across different sectors. To explore these possibilities, this paper evaluates the contribution of different influences in the production of legal norms for social control.

The two powers selected have been used prior to 1949.⁵ The focus of this paper is confined to the use of these powers by the Chinese Communists starting shortly after the Communist victory in 1949. The powers were used as one component of a broad strategy to deal with conduct that was considered seriously to undermine social order and inhibit the construction of a socialist ethic. Official propaganda would have us believe that prostitution and drug abuse had been eliminated by the end of the 1950s.⁶ Consequently, the detention powers used as part of the strategy of elimination were officially no longer needed.

Both of these powers were revived in the late 1970s and early 1980s in response to the worsening problems of prostitution and drug use. However, the revival of these powers has taken place in a radically changed political and social environment. In the era of economic reform, the state is no longer able effectively to exercise the same levels of control over the Chinese people as it did in the 1950s.

4. The first public call in the reform era for an emphasis on the creation of a high level socialist spiritual civilisation was made by Ye Jianying in a speech to mark the 30th anniversary of establishment of the People's Republic of China (“PRC”) on October 1, 1979. Ye said that modernisation was not limited to reform and perfection of the socialist economic system but that at the same time emphasis should be placed on creation and perfection of the socialist political system, socialist democracy, socialist legal system, and creation of a high level of socialist spiritual civilisation. Ye called for improvement of the educational, technological, cultural levels and standards of health of the people, establishment of a “lofty revolutionary ideal” (*geming lixiang*) and “revolutionary moral practice” and development of a rich and varied cultural life. This portion of the speech is reproduced in *Ye Jianying Zhuan [Biography of Ye Jianying]*, in *DANGDAI ZHONGGUO CHUBANSHE [CONTEMPORARY CHINA PRESS]* 679 (Gu Fan ed., 1995); see also RICHARD BAUM, *BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPENG* 87-88 (1994); ANN ANAGOST, *NATIONAL PAST TIMES: NARRATIVE, REPRESENTATION AND POWER IN MODERN CHINA* 80-84 (1997) (discussing the various historical and foreign roots of the concept of spiritual civilisation).

5. FRANK DIKOTTER ET AL., *NARCOTIC CULTURE: A SOCIAL HISTORY OF DRUG CONSUMPTION IN CHINA* 331-33 (2002).

6. ZHILI MAIYIN PIAOCHANG DUICE [COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION AND USE OF PROSTITUTES] 192-93 (Xinsheng Mou ed., 1996) [hereinafter *COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION*] (regarding prostitution); LIUHA ANJIAN FALU SHI WU [LEGAL WORKBOOK ON SIX EVILS CASES] 11 (Qiuhan Zhang ed., 1993) (discussing the subject of drug addiction).

These detention powers have been developed in the context of the current social order policy, the Comprehensive Management of Public Order.⁷ The public security organs (*gong'an jiguan*)⁸ play a major role in enforcing this policy. This policy is directed in part at those people who are referred to by CCP officials as the "social dregs" (*shehui zhazi*),⁹ whose acts, whilst not criminal, seriously offend public morality and undermine attempts of the Chinese Communist Party ("CCP" or "Party") to achieve a socialist spiritual civilisation. The public security organs also portray the actions of these groups as disrupting social order and creating an environment conducive to criminal activity.¹⁰ The state's acknowledgement notwithstanding, its effort to eliminate prostitution and drug abuse have been unsuccessful. The new detention powers have been recreated during what has been called "a crisis in policing",¹¹ where traditional methods of social control are breaking down and are ineffective in constraining crime and other socially harmful acts. The increased reliance on these forms of detention could be seen as a response to the failure of less punitive alternatives.

Given the ostensible magnitude of the problem the public security organs have been permitted to exercise extensive powers to address prostitution and drug abuse. It is the way in which these detention powers have developed and their resulting legal form that helps to bring into focus the issues addressed in this paper. The first is the degree to which policy and strategies for dealing with prostitution and drug abuse have influenced the legal structure of these police powers. The second is the compara-

7. The program was formally adopted in Zhonggong Zhongyang Pizhuan Zhongyang Zhengfa Weiyuanhui Zhaokai de Jing, Jin, Hu, Sui, Han, Wu Da Chengshi Zhi'an Zuotanhui de Jiyao [Summary of the Public Order Meeting of Five Big Cities of Beijing, Tianjin, Shanghai, Guangzhou and Wuhan Convened by the Central Political Legal Committee] (1981), reprinted in SHIHUI ZHIAN ZONGHE ZHILI ZHENGJI FAGUI: HUIBIAN [COLLECTION OF LAWS AND REGULATIONS OF THE POLICY OF COMPREHENSIVE MANAGEMENT OF PUBLIC ORDER] 1-4 (Yourong Chen ed., 1992).

8. I also refer to "public security organs" as "the police" in this paper. Although the definition of "police" in article 2 of Zhonghua Renmin Gongheguo Renmin Jingcha Fa [PRC People's Police Law], which was passed by the Standing Committee of the NPC on February 28, 1995 and came into effect on the same day, is broader than the collective term "public security organs," in this paper, the term police is also used for convenience to represent the public security organs, as they have the primary responsibility for the policing of social order.

9. This term, taken from usage in the CCP, is referred to in Michael R. Dutton & Tianfu Lee, *Missing the Target? Policing Strategies in the Period of Economic Reform*, 39 CRIME & DELINQ. 316, 333 (1993).

10. ZHONGGUO XIAN JIE DUAN FANZUI WENTI YANJIU - ZHONGJUAN [STUDY OF THE PROBLEM OF CRIME IN CHINA'S NEW ERA - CENTRAL VOLUME] 9 (Yu Le ed., 1993) [hereinafter STUDY OF THE PROBLEM OF CRIME].

11. Dutton & Lee, *supra* note 9, at 330-34.

tive success of the public security organs (*gong'an jiguan*) to use law to their own ends, despite theoretically enhanced legal constraints on the exercise of state power. In other words, this case study enables an investigation of the tensions between the general reforms to the legal system and the legal regulation of social order powers.

Since the Third Plenum of the 11th Central Committee of the CCP ("Central Committee") determined to rebuild the legal system in December 1978,¹² there has been substantial development toward the creation of a comprehensive legal system. The organisation and the exercise of state power are being defined and regulated in legal terms. As part of this process, increasingly clear distinctions are being drawn between legislative and administrative powers. In the early 1980s, central and local governments and government departments were authorised to pass rules (*guizhang*) and local rules and regulations (*difangxing guizhang*), thereby incorporating certain administrative directives into the formal legal system.¹³ Other forms of administrative directive, called "normative documents" (*guifanxing wenjian*), are gradually being excluded from legislative forms of governance. They remain in the sphere of administrative power.¹⁴

Despite these efforts, legislation has not entirely displaced pre-reform modes of administrative regulation, either in defining the powers of the public security organs, or in the manner of their exercise. An examination of these detention powers reveals that instructions issued through both Party and administrative channels remain the dominant source of regulatory norms. Because these detention powers are defined the highest levels of generality, public security personnel possess almost unfettered discretion in their enforcement. Due to their legal form, these instruments also escape the legislatively imposed procedural lim-

12. Communique of the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party.

13. See Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 725-28 (1994).

14. Keller argues that the "positive norms in Communist administration emerged out of early Party and state systems of bureaucratic communication." *Id.* at 722. Keller describes normative documents as "all administrative directions purporting to establish or modify norms of public or official behaviour." These took the form of verbal and written directives which came to be called "normative documents." *Id.* The distinction between law and normative documents has been further clarified after passage by the State Council of the Procedural Regulations for Formulating Rules on 1 January 2002. These regulations specify procedures for initiation, drafting, examination, promulgation and interpretation of administrative rules passed by agencies including central government departments. The State Council also sought to standardise the use of official documents in the Measures on the Handling of Official Documents by State Administrative Agencies, 1 January 2001.

itations on the exercise of power and legal mechanisms for accountability.

The complexity of the relationship between law and enforcement powers exercised by the police is not confined to China. Others have highlighted the complex relationship between policing and law in countries such as the United Kingdom, Australia, and the United States of America.¹⁵ When the police exercise broad discretion in their enforcement functions, studies have shown that one cannot expect the police merely to enforce the law or assert that the law is irrelevant to policing.¹⁶ Rather, law is one of the factors that structure the environment within which police powers are defined and exercised.¹⁷ Law acts as both a resource to empower the police as well as a fetter on those powers. As a result, we might expect that the public security organs have been actively seeking to shape the law as it relates to social order.

This paper first traces briefly the legal and social order contexts within which the development of these detention powers has taken place. It then examines the development of these powers and their legal characteristics. It concludes with some comments on what the legal form of these detention powers might suggest to us about the uneven nature of the path of construction of the legal system in China.

2. DEVELOPING A FORMAL LEGISLATIVE INFRASTRUCTURE

Since 1978, the Chinese government has been consciously moving away from informal modes of justice toward the implementation of more formal, institutionalised modes of justice, characterised by codified laws enforced by a "regular judicial hierarchy".¹⁸ This process involved the establishment of a legisla-

15. For a comprehensive discussion of debates see DAVID DIXON, *LAW IN POLICING: LEGAL REGULATION AND POLICE PRACTICES*, 1-48 (1997).

16. *Id.* at 1-8.

17. For a discussion of the range of views of the relationship between law and policing that are grouped under the heading of structural approaches see *id.* at 20-48.

18. See SHAOCHUAN LENG & HUNGDAH CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA*, 35 (1985); see also Richard Baum, *Modernization and Legal Reform in Post-Mao China: The Rebirth of Socialist Legality*, 19 *STUD. COMP. COMMUNISM* 69 (1986); James P. Brady, *The Transformation of Justice Under Socialism: The Contrasting Experiences of Cuba and China*, 10 *INSURGENT SOCIALIST* 5 (1981); BILL BRUGGER & STEPHEN REGLAR, *Introduction to POLITICS, ECONOMY AND SOCIETY & SOCIETY IN CONTEMPORARY CHINA* 1 (1994); see generally JUNE T. DREYER, *CHINA'S POLITICAL SYSTEM: MODERNIZATION AND TRADITION* 163-87 (1993). For a comprehensive description of the process of formalization and informalization of the legal process in the area of criminal law between 1949 and 1978, see STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 71, 71-87 (1999).

tive infrastructure to govern and to stabilise state administration within a comprehensive set of generalised legal norms.

According to Professor Richard Baum, the model of socialist legality adopted is instrumental in nature—it downgrades class struggle and moves toward a more formalised, institutionalised, and regularised system of justice without contemplating autonomy of the legal system from political leadership.¹⁹

Since introduction of the policies of economic modernisation and legal system construction (*fazhi jianshe*), law has been used to serve the increasingly complex ends of economic reform.²⁰ As a result, the dictatorship function of law has been seriously eroded, with an increasing depoliticisation of the legal system, to the point where some argue that law has taken on a social management role.²¹

Corresponding to changing perceptions of the instrumental objectives of the legal system, views about the proper form of law have changed. Consistent with Leninist interpretations of law as an instrument of politics and lacking institutional autonomy, law was seen as a “flexible tool of social engineering.”²² However, Shih argues that many Chinese legal scholars now prefer legal clarity and stability over legal elasticity as a way of regularising developments in the economy and preventing abuse of power and corruption.²³ Increased formalisation of the legal system has been traced to the gradual substitution of laws passed by the legislative organs of the state according to specified procedures for rules issued by executive order.²⁴

Legislation has also been used as a way of consolidating state power. For Peng Zhen, the use of formal rules was necessary “to assert and maintain the state’s monopoly on coercive power.”²⁵ Law is seen as a method to entrench the state’s coer-

19. Baum, *supra* note 18, at 94-95; see also RL Caldwell, *Chinese Administration of Criminal Justice: Return to a Jural Model*, 1987 LAWASIA 57; Ronald Keith, *Socialist Legality and Proletarian Democracy in the People’s Republic of China*, 13 CAN. J. POL. SCI. 565 (1980).

20. See Chih-yo Shih, *China’s Socialist Law Under Reform: The Class Nature Reconsidered*, 44 AM. J. COMP. L. 627, 642-43 (1996); see also Carlos Wing-Hung Lo, *Socialist Legal Theory in Deng Xiaoping’s China*, 11 COLUM. J. ASIAN L. 469, 480, 483-84 (1997); Yuan Yuan Shen, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, in THE LIMITS OF THE RULE OF LAW IN CHINA 20, 25 (Karen G. Turner et al. eds., 2000).

21. See LO, *supra* note 20, at 480, 483-84; see also Shih, *supra* note 20, at 642-43.

22. See, e.g., JOHN N. HAZARD, COMMUNISTS AND THEIR LAW 6, 69 (1969).

23. Shih, *supra* note 20.

24. See Gang Fan & Chunying Xin, *The Role of Law and Legal Institutions in Asian Economic Development: The Case of China; Patterns of Change in the Legal System and Socio-Economy*, 644 HARV. INST. INT’L DEV. PAPERS 1, 10 (1998).

25. See Pitman B. Potter, *Curbing the Party: Peng Zhen and Chinese Legal Culture*, 45 PROBS. POST COMMUNISM 17 (1998).

cive power and bolster the power of the public security forces, and to improve the consistency and efficiency of state administration.²⁶ The public security forces have also seen law as one of the social control mechanisms used by them to maintain public order. Law is both a "weapon" for empowering the public security, as well as a "correct measure" (*zhunxian*) against which justice is meted out, to ensure that local level police do not punish either too leniently or too severely.²⁷

The process of legal system formalisation has taken place at different rates across different sectors, and does not inevitably mean increasing autonomy from the dictates of party policy. The continued centrality of the criminal justice system as an instrument of social and political control has meant that the criminal justice system remains highly instrumental and still demonstrates elements of legal elasticity, in that it "continues to operate as a tool of changing Party policies."²⁸ Professor Lubman asserts that the criminal justice system has retained many of its pre-reform bureaucratic features.²⁹

However, even in the area of criminal justice, recent substantial amendments to the *Criminal Law* and the *Criminal Procedure Law* suggest an intention to regularise the operation of the criminal justice system by providing a more detailed and comprehensive regulatory framework for the administration of criminal justice.³⁰ These amendments seek to rationalise, if not limit, the exercise of power by the state agencies responsible for the operation of the criminal justice system. Some even express a degree of optimism that the reforms, although incomplete, may tend to promote procedural justice.³¹

26. See generally Edward J. Epstein, *A Matter of Justice*, 1992 CHINA REV. 1; Pittman B. Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, 159 CHINA Q. 673, 681-82 (1999); Potter, *supra* note 25.

27. *Zhongguo Xingshi Zhengce He Celue Wenti* [*Problems of China's Criminal Policy and Tactics*], in DANGDAI ZHONGGUO FAXUE WENKU 168 (Yang Xiao ed., 1996); see also STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 237-38 (discussing problems of enforcement that arise as a result of the inadequacies in the law, including giving excessively broad discretion to public security personnel).

28. See LUBMAN, *supra* note 18, at 84-87. In relation to the perseverance of legal instrumentalism see Potter, *supra* note 26; Donald C. Clarke & James V. Feinerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China*, 141 CHINA Q. 135; HAROLD M. TANNER, STRIKE HARD! ANTI-CRIME CAMPAIGNS AND CHINESE CRIMINAL JUSTICE, 1979-1985, at 193-94 (1999).

29. LUBMAN, *supra* note 18, at 84-87, 171-72; see also Clarke & Feinerman, *supra* note 28; Donald C. Clarke, *Concepts of Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890 (1985).

30. See Potter, *supra* note 26; JONATHAN HECHT, LAWYERS COMMITTEE FOR HUMAN RIGHTS 8-9 (1996).

31. See e.g., Mike P.H. Chu, *Criminal Procedure Reform in the People's Republic of China: The Dilemma of Crime Control and Regime Legitimacy*, 18 UCLA PAC.

3. LAWS FOR THE PURPOSE OF REGULATING AND CONTROLLING THE EXERCISE OF THE STATE'S COERCIVE POWERS³²

One Chinese scholar has asserted that the primary function of law has now become one to validate acts of state agencies and officials within legally specified constitutional, substantive, and procedural norms.³³ Studies of recent developments, especially in the area of administrative law, reveal the beginnings of mechanisms for making state officials legally accountable for their actions.³⁴ Such a mechanism is one of the fundamental

BASIN L.J. 157 (2001); Daphne Huang, *The Right to a Fair Trial in China*, 7 PAC. RIM. L. & POL'Y J. 171 (1998).

32. There are a number of ways in which the term "coercive" can be used. The most commonly used is to indicate the state's power to coerce. In this paper the term "coercive measures" has a specific meaning in the context of Chinese law. Coercive measures (*qiangzhi cuoshi*) is a term used to describe a legal category of criminal and administrative powers. In the *Criminal Procedure Law* coercive measures are set out in Chapter 6 of the General Provisions. They describe powers exercised by the police in the criminal process. In the area of administrative law, the term "coercive measures" describes a number of powers, including detention for education and coercive drug rehabilitation. They are to be distinguished from other categories of administrative power including administrative punishments (*xingzheng chufa*) and administrative penalties (*xingzheng chufen*). For a detailed explanation of the categories of administrative power see XINGZENG FA YU XINGZHENG SUSONG FA CIDIAN [DICTIONARY OF ADMINISTRATIVE LAW AND ADMINISTRATIVE LITIGATION LAW] 460-501, 502-19, 520-31 (Songnian Ying ed., 1993) (regarding administrative punishments, administrative penalties, coercive enforcement, and coercive measures, respectively).

33. MINGAN JIANG, ZHONGGUO XINGZHENG FAZHI FUZHAN JINCHENG DIAOCHA BAOGAO [REPORT ON AN INVESTIGATION ON THE COURSE OF DEVELOPMENT OF CHINESE ADMINISTRATION BY LAW] 13-15 (1998).

34. See Susan Finder, *Like Throwing an Egg Against a Stone? Administrative Litigation in the People's Republic of China*, 3 J. CHINESE L. 1 (1989); see also Dingjian Cai, *Introduction to the Administrative Penalty Law of China*, 10 COLUM. J. ASIAN L. 259, 259-62 (1996); Edward J. Epstein, *Administrative Litigation Law: Citizens Can Sue the State but not the Party*, 1386 CHINA NEWS ANALYSIS 3 (1989); Epstein, *supra* note 26; Jie Huang, *On the Administrative Litigation Law*, CHINESE L. & GOV'T, Fall 1991, at 43; Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and the Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161 (2001); Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, 152 CHINA Q. 832 (1997); Pittman B. Potter, *Administrative Litigation and Political Rights in China*, in HUMAN RIGHTS TRIBUNE 4, 4-7 (1992); Pittman B. Potter, *The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 274 (Pittman B. Potter ed., 1994); Xixin Wang, *Administrative Procedure Reforms in China's Rule of Law Context*, 12 COLUM. J. ASIAN L. 251 (1998); LIN FENG, ADMINISTRATIVE LAW PROCEDURES AND REMEDIES IN CHINA (1996); cf. Ann Anagnost, *Constructing the Civilized Community, in CULTURE AND STATE IN CHINESE HISTORY: CONVENTIONS, ACCOMMODATIONS, AND CRITIQUES* 346, 346-47 (Theodore Hutters et al. eds., 1997) (discussing popular ambivalence towards using legal tools against officials).

prerequisites for establishing a system of rule of law.³⁵ Increasingly, law imposes requirements that all state powers have a legal basis and that the exercise of these powers complies with procedural rules. Legal systems under which government agencies may be made accountable for their actions have also been introduced.

Increasingly comprehensive legal principles define and confine the coercive powers of the State. For example, the *PRC Legislation Law*, (*Zhonghua Renmin Gongheguo Lifa Fa*) removes from administrative agencies the power to make rules under which a person may be deprived of her or his personal liberty.³⁶ This power may only be exercised by the National People's Congress ("NPC") and its Standing Committee and can not be delegated.³⁷

With respect of administrative punishments, the *Administrative Punishments Law*³⁸ provides that an administrative punishment will be void unless based on a publicly promulgated law or regulation.³⁹ Administrative punishments must be just, open, and based on facts, and the punishment must be proportionate to the degree of social harm caused by the act. It also sets out mandatory procedures for meting out a punishment.⁴⁰ Some argue that legislating mandatory procedural requirements may be one method to achieve fairness and stability in the law at a time

35. See Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflection on the Rule and Role of Law in Contemporary China*, 11 *CULTURAL DYNAMICS* 315, 320-321 (1999) (arguing that one of the primary determinants of a system of rule of law as opposed to rule by law is whether the law places meaningful limitations on arbitrary acts of the State and Party).

36. The PRC Legislation Law was passed by the National People's Congress ("NPC") on March 15, 2000 and became effective on July 1, 2000.

37. PRC Legislation Law, arts. 8(4), 8(5), art. 9 (2000). This replicates similar limitations contained in the 1996 Administrative Punishments Law on the legislative competence of administrative agencies in relation to administrative detention powers. PRC Administrative Punishments Law, art. 9 (1996) (providing that only laws (*falü*) may create administrative punishments for restriction of personal freedom).

38. The *Zhonghua Renmin Gongheguo Xingzheng Chufa Fa* [PRC Administrative Punishments Law] was passed by the NPC on March 17, 1996 and became effective on October 1, 1996.

39. PRC Administrative Punishments Law, arts. 3, 4 (1996).

40. *Id.* art. 4. The Criminal Law, article 5 and 61 make an equivalent provision under which a punishment must be proportional to the degree of harm caused by the offense. PRC Administrative Punishments Law, ch. 5. Simple Procedures which are set forth in articles 33 through 35, permit on the spot fines to an individual of less than RMB 50 and for an enterprise, of less than RMB 1,000. Meanwhile, Ordinary Procedures appear in articles 36 through 41. A party that is subject to a serious administrative punishment such as revocation of a business license, an order suspending production or a business licence, or imposition of a relatively large fine may require a hearing procedure before a penalty may be imposed. See PRC Administrative Punishments Law, arts. 42, 43 (1996).

when rapid social and economic change makes achievement of stability in substantive legal norms difficult.⁴¹

Laws such as the *PRC Administrative Litigation Law*⁴² and the *PRC Administrative Review Law*⁴³ have created mechanisms for externally generated review and supervision of administrative actions. A person suffering loss as a result of an unlawful administrative act, or the exercise of detention power under the criminal or administrative law, may seek compensation from the state in accordance with the principles set out in the *PRC State Compensation Law*.⁴⁴

4. SOCIAL ORDER PROBLEMS AND POLICIES

Social order strategies adopted by the Party since 1949 seek to promote order, prevent deviance and crime, and to punish and rehabilitate those who deviate. These strategies have been marked by a coexistence of localised and informal techniques, as well as by the use of centralised and professional mechanisms of control and sanctioning.⁴⁵ The methods used to combat crime and maintain social order fall broadly under the headings of prevention and punishment.⁴⁶ In this section I set out the strategies used to eliminate prostitution and drug addiction in the 1950s and the elements of the current social order strategy that have been employed to deal with these problems as they re-emerged in the 1970s.

41. See Wang, *supra* note 34, at 260-61 (arguing in support of the early passage of an Administrative Punishments Law [Xingzheng Chufa Fa]).

42. Zhonghua Renmin Gongheguo Xingzheng Susong Fa [PRC Administrative Litigation Law] was passed by the NPC on April 4, 1989 and became effective on October 1, 1990.

43. Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa [PRC Administrative Review Law] was passed by the Standing Committee of the NPC on April 29, 1999 and became effective on October 1, 1999. This law is also translated as the PRC Administrative Reconsideration Law. I prefer to use "review" as the translation for "fuyi" in order to distinguish the process of review from the process of re-examination, "fucha," of a decision to send a person to re-education through labour, which is carried out by the original decisionmaker. Temporary Measures on Re-education through Labour, art. 12(2) (1982).

44. Zhonghua Renmin Gongheguo Guojia Peichang Fa [PRC State Compensation Law] was passed by the Standing Committee of the NPC on May 12, 1994 and became effective on January 1, 1995.

45. See Austin T. Turk, *Political Deviance and Popular Justice in China: Lessons for the West*, in SOCIAL CONTROL IN THE PEOPLE'S REPUBLIC OF CHINA 34, 39-40 (Ronald J. Troyer et al. eds., 1989).

46. See Borge Bakken, *Crime, Juvenile Delinquency and Deterrence Policy in China*, 30 AUSTRALIAN J. CHINESE AFF. 29 (1993) (labeling the strategies "prevention" and "deterrence"); Harold M. Tanner, *Policing, Punishment and the Individual: Criminal Justice in China*, 20 L. & SOC. INQUIRY 277, 296-97 (1995).

4.1 HISTORY OF THE ELIMINATION OF PROSTITUTION AND DRUG USE

As the Party took control over China's cities, it was confronted with a number of social order problems, including a large transient population of vagrants, drug addicts, and abandoned children.⁴⁷ The period immediately following the establishment of the PRC is recognized as the first high tide of crime.⁴⁸ Between October 1949 and 1956, a campaign in response to the high crime rate targeted two major groups. The first group comprised counter-revolutionaries, which included remnant Guomintang troops and supporters, secret societies, criminal gangs, and bandits. The second comprised those who engaged in the "remnant crimes that were prevalent from the old society", such as growing, using and selling drugs, gambling, prostitution, kidnapping and selling women and children.⁴⁹ In parts of China, pervasive drug cultivation and addiction required redress.⁵⁰

With respect to prostitution, two differing approaches were employed. The first was the restriction and gradual closure of brothels over a comparatively long period of time, as exemplified in Tianjin and Shanghai. The second less common strategy was to carry out a sudden and coordinated strike to raid and close brothels overnight, as was used in Beijing on 21 November 1949. In Shanghai, it was only in 1951 that prostitution was banned and the first sweep made to close brothels forcibly.⁵¹ In other regions, a number of sweeps to close brothels were taken by local governments between 1950 and 1954.⁵²

At that time in Shanghai, centres called Women's Labour Training Centres were established to detain prostitutes for their

47. Christian Henriot, "*La Fermeture*": *The Abolition of Prostitution in Shanghai, 1949-1958*, 142 CHINA Q. 467, 473 (1995) (citing estimates of 120,000 such people before 1949); see also ZHONGGUO RENMIN SHIGAO [DRAFT HISTORY OF THE CHINESE PEOPLE'S PUBLIC SECURITY] 253 (Guoguang Xi & Lei Yu eds., 1996) (explaining that the number of these transients was a cause of serious instability and crime).

48. STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 10-11.

49. *Id.* at 38-39.

50. JIAN'AN GUO & RONGWEN LI, XIDU WEIFA XINGWEI DE YUFANG YU JIAOZHI [PREVENTION AND TREATMENT OF DRUG ABUSE] 72 (2000).

51. See Henriot, *supra* note 47, at 469-75.

52. STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 39; see also DRAFT HISTORY OF THE CHINESE PEOPLE'S PUBLIC SECURITY, *supra* note 47, at 254 (asserting that the first action was taken in Beijing on November 12, 1949); cf. Xin Ren, *China, in PROSTITUTION: AN INTERNATIONAL HANDBOOK ON TRENDS, PROBLEMS, AND POLICIES* 87, 92 (Nanette J. Davis ed., 1993) (reporting that the first sweep to close brothels and detain prostitutes was documented as taking place in Beijing on November 23, 1949).

education and reform.⁵³ The detention centres were intended to test for and treat illness (especially sexually transmitted diseases), to give the detainees new skills including literacy, to offer job training, and to transform their consciousness so that they would break with their past.⁵⁴ Despite propaganda to the contrary, the task of reform in these centres met with resistance from the inmates who were not universally overjoyed at being liberated from their "oppression."⁵⁵

After their release from these centres in Shanghai, many former prostitutes were placed into the custody of their families, or marriages were arranged. Some were returned to their hometowns in the countryside, some were assigned to work in factories in the city, and others, especially those who were unmarried, were sent to work on state farms in Xinjiang, Gansu, or Ningxia.⁵⁶ Henriot reports that prostitution in Shanghai was only finally eradicated in 1958 because the existence of local resident committees made it impossible for a woman to prostitute without being discovered and reported.⁵⁷

To eradicate drug use and drug related activities,⁵⁸ a number of campaigns were waged between February 1950 and the end of 1952.⁵⁹ The first campaign against drugs involved concerted action by the public security organs to arrest drug offenders, seize drugs, and register drug users. The Central People's Government issued the *Circular on Strict Prohibition of Opium and*

53. Henriot, *supra* note 47, at 476 (referring to the centre established in Shanghai as the Women's Labour Training Centres (*funu laodong jiaoyangsuo*). Michael Dutton has referred to these centres as Women's Production Education and Fostering Institutes (*funu shengchan jiaoyangyuan*). Michael Dutton (unpublished manuscript, on file with author).

54. Henriot, *supra* note 47, at 477-80; see also GAIL HERSHATTER, DANGEROUS PLEASURES: PROSTITUTION AND MODERNITY IN TWENTIETH-CENTURY SHANGHAI 314-17 (1997); Xin Ren, *supra* note 52, at 92-93.

55. HERSHATTER, *supra* note 54, at 312-13; Henriot, *supra* note 47, at 478-79.

56. HERSHATTER, *supra* note 54, at 318-19; see also Henriot, *supra* note 47, at 482-84 (calling the latter option exile).

57. Henriot, *supra* note 47, at 475-76; HERSHATTER, *supra* note 54, at 304-24 (supporting the assertion that prostitution in Shanghai was eradicated by 1958); Dutton, *supra* note 54, ch. 4 (citing *Questions and Answers*, which asserts that prostitution was eradicated in 1956); Xin Ren, *supra* note 52, at 94 (arguing that prostitution was eradicated in 1953).

58. STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 39 (concentrating on opium use).

59. Dai Wendian, *Dui Wuo Guo Xian Jieduan Fanzui Wenti Yanjiu De Yi Xie Si Kuo* [Reflections on the Study of the Problem of Crime in China's New Era], in ZHONGGUO XIAN JIEDUAN FANZUI YANJIU - LUNWENJI [STUDY OF THE PROBLEM OF CRIME IN CHINA'S NEW ERA - ESSAY COLLECTION] 1 (Yu Lei ed., 1989); see also DRAFT HISTORY OF THE CHINESE PEOPLE'S PUBLIC SECURITY, *supra* note 47, at 255.

Drug Taking in February 1950⁶⁰ and the Internal Affairs Ministry issued the *Instructions on Implementing the Work of Strict Prohibition of Drug Taking* on 12 September 1950. Both regulations called for concerted action to eliminate drug use.⁶¹ The February 1950 Circular required the registration of drug addicts and punished those who either did not register or give up drugs within the designated time limits.⁶² It called for the establishment of anti-smoking-anti-drug committees (*Jinyan Jindu Weiyuanhui*) under the local government, comprised of representatives from government, police, and local organisations.⁶³ The Circular also provided for the establishment of anti-smoking centres (*jieryansuo*) in cities where there was "marked drug use."⁶⁴

The second campaign of suppression was waged together with the Three-Anti and Five-Anti campaigns,⁶⁵ which involved a much more extensive mobilisation of the population. This campaign to eliminate drugs was executed with particular force between the end of July and the end of November 1952.⁶⁶ Local anti-smoking-anti-drug committees carried out education as well as actions for suppression of drug manufacture, transport and use.⁶⁷ Nationwide, in the second half of 1952 one report asserts that 360,000 drug users were registered.⁶⁸ By several accounts, under this campaign over 80,000 people were arrested, 800 executed and large numbers of drug users coercively rehabilitated.⁶⁹

60. Circular on Strict Prohibition of Opium and Drug Taking (1950), *reprinted in* DAI LIUHAI WEIFA FANZUI SHIYONG FALU SHOUCHE [STRIKE AGAINST THE SIX EVILS' UNLAWFULNESS AND CRIME HANDBOOK] 366-67 (Editorial Group ed., 1992).

61. Neiwu Bu Guanyu Guanche Yanjing Yandu Gongzuo de Zhishi [Instructions on Implementing the Work of Strict Prohibition of Drug Taking], *reprinted in* GUO & LI, *supra* note 50.

62. Circular on Strict Prohibition of Opium and Drug Taking, art. 6.

63. *Id.* art. 2.

64. *Id.* art. 7.

65. The Three-Anti campaign was against waste, corruption and bureaucratism. The Five-Anti campaign was against corruption, tax evasion, stealing state property, cheating on state contracts and stealing state economic secrets. KENNETH LIEBERTHAL, *GOVERNING CHINA FROM REVOLUTION THROUGH REFORM* 92 (1995).

66. DRAFT HISTORY OF THE CHINESE PEOPLE'S PUBLIC SECURITY, *supra* note 47, at 255; *see also* Xuanlue Liu & Cheng Yuan, *Dui You Zhongguo Tese de Jingdu Gongzuo de Tansuo yu Sikao* [Exploration and Reflection on the Work of Drug Prohibition with Chinese Characteristics], in LUN ZHONGGUO TESE DE GONG'AN [DISCUSSION OF PUBLIC SECURITY WITH CHINESE CHARACTERISTICS] 30, 30-46 (Damin Kang ed., 1997).

67. GUO & LI, *supra* note 50, at 72-73.

68. STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 38-39.

69. LEGAL WORKBOOK ON SIX EVILS CASES, *supra* note 6, at 11; *see also* GUO & LI, *supra* note 50; STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 38-39 (asserting that 36,000 serious drug users were arrested); *cf.* DRAFT HISTORY OF THE CHINESE PEOPLE'S PUBLIC SECURITY, *supra* note 47, at 255 (citing slightly different figures which show that during the July to November 1952 campaign, 35,000 people

Despite propaganda to the contrary, it appears that the problems of drug use and addiction were never completely eliminated.⁷⁰ With respect to both prostitution and drug addiction, the successes achieved by these suppression strategies may be attributed to the efficacy of the combined use of different powers. The public security organs first identified targets through a process of registration, and the resulting registers, even though incomplete, formed the basis for further actions including detention. A range of localised control measures backed up techniques of education and reform used in detention centres after the detainee was released. These techniques ensured that the detainee was not released into her or his original environment without having family or some community organisation responsible for her or his continued education, surveillance and control. The arrangements by the state to send former prostitutes to work in remote provinces depended on the state's capacity to arrange placements throughout the country and its comparatively strong ability to restrict population movements. Finally, the CCP was able to mobilise the population to attack the drug problem as part of the Three-Anti and Five-Anti campaigns.

4.2 SOCIAL ORDER PROBLEMS

In 1978, the public security organs identified what they labelled the fourth high tide of crime since the founding of the PRC.⁷¹ This high tide saw the re-emergence of criminal activity such as violent crime; transient crime; organised crime; drug manufacture and sale. It also saw the revival of drug use and prostitution.⁷²

However, the crime situation that existed at the end of the 1970s was unlike that existing for most of the pre-reform period, as it was juveniles from predominantly worker and peasant backgrounds⁷³ who were identified as the group committing an ever

were arrested, 880 people were handled for serious drug crimes, and 3,996,056 liang of opium was seized).

70. DUPIN FANZUI [DRUG CRIMES] 17-18 (Bingzhi Zhao & Zhigang Yu eds., 2000) (citing the continuation of measures for the elimination of drug use that were employed throughout the 1960s and 1970s).

71. STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 12.

72. *Id.* at 12. At its peak in 1981, 890,000 cases were put on file as compared to at the end of the high tide in 1984, when only 510,000 cases were put on file. The fifth high tide began in 1986 with 540,000 cases put on file and continued to increase until 1991 when 2,360,000 cases were put on file. *Id.* at 45. The crime rate before 1978 had generally floated between 200,000 and 400,000 cases put on file. *Id.* at 38-39.

73. Hualing Fu, *Formalizing Popular Justice: Police and Community in Post-Mao China*, 31 OSGOOD HALL L.J. 108 (1993) (citing a survey revealing that 95 percent of the prison population were from the working classes).

increasing majority of criminal offences.⁷⁴ The public security forces continue to identify primarily juvenile involvement in prostitution and drug use.⁷⁵

The national social order policy, the Comprehensive Management of Public Order, was instituted in 1981⁷⁶ to implement a comprehensive range of mechanisms to manage these social problems. Prostitution and drug use were targeted from the outset. In a document issued in January 1982, the Central Committee indicated that there should be a balance between “punishment and leniency,” with a need to emphasize education and lenience because the “vast majority of crime is now committed by juveniles from the households of the working people, the sons and daughters of workers.”⁷⁷ The state should exercise its dictatorship function and punish “severely and quickly” only against the “extremely small number” of serious criminal elements.⁷⁸

Emphasis was initially placed on the traditional localised mechanisms of social control that had been seen as working so effectively in controlling prostitution in the past. These strategies were based around the household registration system and the close relationships between local police, the work unit, and the

74. ZHONGFAN WANG, *ZHONGGUO SHEHUI ZHI'AN ZONGHE ZHILI DE LILUN YU SHIJIAN* [THEORY AND PRACTICE OF COMPREHENSIVE MANAGEMENT OF PUBLIC ORDER IN CHINA] 6-7 (1992); see also TANNER, *supra* note 28, at 128.

75. JIANGUO XIAO, XIANDAI SHEHUI ZHI'AN FANGFAN [CONTEMPORARY SOCIAL ORDER PRECAUTIONS] 174 (2000) (asserting that drug addicts are predominantly young with over 80 percent of registered drug addicts being under 35 years old); see also GUO & LI, *supra* note 50, at 92-93 (citing that 82.3 percent of first time drug users are under 25 years old). Authors Guo and Li also assert that the predominant age group of first time drug users is 18 to 22 years old. GUO & LI, *supra* note 50, at 133. They are predominantly not educated beyond lower middle school level (*chuzong yixia*) –with 22.83 percent completing only a primary school education and 60.48 percent completing only lower middle school, – and are unmarried (on average over 50 percent are unmarried, but in many provinces over 70 percent hold this status). *Id.* at 136-38. Nearly 85 percent of drug users in re-education through labour fall in the age group of 18 to 35 year olds. *Id.*

76. The program was formally adopted in the Summary of the Public Order Meeting of Five Big Cities of Beijing, Tianjin, Shanghai, Guangzhou and Wuhan Convened by the Central Political Legal Committee, which was approved and issued by the Central Committee on June 14, 1981. Zhonggong Zhongyang Pizhuan Zhongyang Zhengfa Weiyuanhui Zhaokai de Jing, Jin, Hu, Sui, Han, Wu Da Chengshi Zhian Zuotanhui de Jiyao [Summary of the Public Order Meeting of Five Big Cities of Beijing, Tianjin, Shanghai, Guangzhou and Wuhan Convened by the Central Political Legal Committee], reprinted in *COLLECTION OF LAWS AND REGULATIONS OF THE POLICY OF COMPREHENSIVE MANAGEMENT OF PUBLIC ORDER*, *supra* note 7, at 1-4.

77. *Id.* at 7.

78. This point is made in the Zhonggong Zhongyang Guanyu Jiaqiang Zhengfa Gongzuo de Zhishi [Central Committee Instruction on Strengthening Political Legal Work] (1982), reprinted in *id.* at 5-8.

local community organizations.⁷⁹ These organizations include the street committee, the resident committee, security defence committee, and neighbourhood mediation committee. Through these mechanisms and organisations, the local community had been transparent.⁸⁰ Local committees and police were responsible for identifying those who deviated, and for educating, persuading, and helping them to reform.⁸¹

4.3 BREAKDOWN OF LOCALISED PREVENTION STRATEGIES

As a result of the Cultural Revolution⁸² and the increased population mobility that followed economic reform, the localised social control model based on household registration and police cooperation with local community organisations began to break down.⁸³ Despite some efforts to strengthen localised control methods,⁸⁴ these reforms failed to comprehensively reinstate the transparent community where minor deviations could be identified and prevented from worsening.⁸⁵

The crisis in policing⁸⁶ that ensued saw the police struggling to find effective strategies to deal with social order problems. In respect of the ever worsening problems of prostitution and drug use, the police have reached back to the “golden age” of the 1950s,⁸⁷ and reinvigorated parts of the strategy that has been referred to nostalgically as a “glorious page” written in the “world history of prohibiting prostitution”⁸⁸ and as a “glorious page” of

79. See Raymond Y.K. Lau, *Socio-Political Control in Urban China: Changes and Crisis*, 52 BRIT. J. SOC. 605 (2001).

80. See MICHAEL R. DUTTON, POLICING AND PUNISHMENT IN CHINA: FROM PATRIARCHY TO “THE PEOPLE” 214-39 (1992); see also Yue Ma, *The Police Law 1995: Organization, Functions, Powers and Accountability of the Chinese Police*, 20 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 113, 130-31 (1997).

81. See Fu, *supra* note 73, at 85-87; Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 20 CAL. L. REV. 1254 (1967).

82. STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 248.

83. See Fu, *supra* note 73, at 118; Bakken, *supra* note 46, at 31.

84. An example is the implementation of more mobile systems such as police patrol. See generally Hualing Fu, *Patrol Police: A Recent Development in the People’s Republic of China*, 13 POLICE STUD. 111, 111-17 (1990); Ma, *supra* note 81, at 132.

85. Fu, *supra* note 74, at 118-23.

86. See Dutton & Lee, *supra* note 9, at 330-33; see also Olivia Yu & Lening Zhang, *The Under-Recording of Crime by Police in China: A Case Study*, 22 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 252 (1999) (discussing the crisis in policing); see generally Ma, *supra* note 81, at 131-32.

87. See BORGE BAKKEN, THE EXEMPLARY SOCIETY, HUMAN IMPROVEMENT, SOCIAL CONTROL AND THE DANGERS OF MODERNITY IN CHINA 377 (2000) (citing comments claiming that the 1950s were seen as a golden age of social stability and order).

88. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 192-93.

“our country’s struggle to prohibit drugs”.⁸⁹ What was revived was administrative detention and the launching of campaigns of suppression against those targeted.

However, this strategy is no longer as effective as it was in the 1950s. The police have blamed the failure of local deterrence and re-education for undermining the long-term effectiveness of campaigns of suppression⁹⁰ and for the high recidivism rates of those released from detention for prostitution or drug use. The strong localised infrastructure that uncovered deviant acts and prevented their re-occurrence after the detainee was released have weakened. In part this is because of the inability and unwillingness of local community organisations either to detect the activities before drug addicts and prostitutes are caught by the police, or to participate in re-education and integration into the community after they have been released from detention.⁹¹

4.4 TARGETING

Dutton and Lee have argued that as a result of the inability of the police to carry out more comprehensive policing of the population, the police have increasingly resorted to strategies of targeting certain classes of individuals, certain professions, and certain locations for increased levels of surveillance and enforcement.⁹²

The registration and surveillance⁹³ of certain categories of people, the focal population (*zhongdian renkou*), has been identified as one of the most important functions of the local police

89. LEGAL WORKBOOK ON SIX EVILS CASES, *supra* note 6, at 11.

90. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 128-29.

91. *See id.* at 198 (asserting that the best results from detention for education is to limit the recidivism rate to 30 percent); *see also* GUO & LI, *supra* note 50, at 232-33 (citing a survey of people released from coercive drug rehabilitation in Kunming between 1990 and 1993, showing that over 85 percent took up drugs again within three years and 15 percent died from it). The authors cite other studies indicating the recidivism rate at well over 90 percent for coercive drug rehabilitation and the recidivism rate of people released from re-education through labour as being somewhat lower between 75 percent and 85 percent. Of those in re-education through labour because of drug addiction, over 88 percent had been through coercive drug rehabilitation and more than 50 percent had been through coercive drug rehabilitation more than twice. Some had even gone through it up 10 times or more. *Id.* at 144-45.

92. *See* Dutton & Lee, *supra* note 9, at 316; *see also* STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 257-60; GONGAN XINGZHENG GUANLI YU XINGZHENG FUYI SUSONG [PUBLIC SECURITY ADMINISTRATIVE REGULATION AND ADMINISTRATIVE REVIEW AND LITIGATION] 86-87 (Shihuai Mou ed., 1992).

93. Surveillance may be both overt and covert. *See* Regulations on Management Work of the Focal Population, *noted in* Michael Dutton, *Dreaming of Better Times: “Repetition with a Difference” and Community Policing in China*, 3 POSITIONS: E. ASIA CULTURES CRITIQUE 415, 435 (1995).

station.⁹⁴ Targeted groups are broadly defined, and include those persons suspected of committing common criminal activities, activities endangering public order, such as gambling or being transient without work or a fixed home,⁹⁵ and those released from correctional institutions. Habitual drug users are registered so that they can be targeted for close monitoring or coercive rehabilitation.⁹⁶ Prostitutes have also been identified as part of the focal population.⁹⁷ The renewed use of administrative detention and waging of campaigns arguably is an extension of this targeting process.

4.5 THE "SECOND LINE OF DEFENCE"

Administrative detention still falls within the broad category of prevention. For those identified as having a bad attitude or "bad tendencies", prevention strategies theoretically begin with moral and ideological education and persuasion, which may be carried out by the family, school, work unit, or street committee.⁹⁸

More severe measures are considered appropriate for those who have been "educated repeatedly and won't reform."⁹⁹ The powers to detain prostitutes and drug addicts are considered to form the "second line of defence" in the strategy of crime prevention.¹⁰⁰ They are intended to constitute a more coercive form of education, and therefore are still considered to be measures

94. MINGXIN WANG, GONGAN ZHANDOULI LUN [DISCUSSION OF THE STRIKE FORCE OF THE PUBLIC SECURITY] 251 (1993).

95. GONG'AN GUANLIXUE GAILUN [OUTLINE OF ADMINISTRATIVE MANAGEMENT] 89-91 (Lei Yu ed., 1986).

96. Registration of drug users was initially required under the Urgent Instruction on the Problems of Completely Prohibition of Opium. Issued jointly by the Central Committee of the CCP and the State Council on July 16, 1982, it required registration of drug users with the local government. Zhonggong Zhongyang Guowuyuan Guanyu Jingjue Yapiian Yandu Wenti de Jingji Zhishi [Urgent Instruction on the Problems of Completely Prohibition of Opium] (1982), *reprinted in* COLLECTION OF LAWS AND REGULATIONS OF THE POLICY OF COMPREHENSIVE MANAGEMENT OF PUBLIC ORDER, *supra* note 7, at 102-04; *see also* Liu & Yuan, *supra* note 66, at 40.

97. Gong An Bu Guanyu Jianjue Zhizhi Maiyin Huodong de Tongzhi [Ministry of Public Security Notice on Resolutely Prohibiting Prostitution Activities] (1981), *reprinted in* ZHONGHUA RENMIN GONGHEGUO GONG AN GUIZHANG HUIBIAN [COLLECTION OF PRC PUBLIC SECURITY RULES] 1148-50 (Zhonghua Renmin Gong An Bu [PRC Ministry of Public Security] ed., 1994). Article 1 required the focal population to register and targeted areas were to be used to identify prostitutes. *Id.*

98. STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 438.

99. ZHI'AN GUANLI CHUFA TIAOLI JIAOCHENG [TEACHING MATERIALS ON THE SECURITY ADMINISTRATIVE PUNISHMENT REGULATIONS] 3 (Pingshan Zhu ed., 1991).

100. Yuansheng Xu & Shiqiao Fang, *Lun Woguo gong'an Gongzuo de Yi Da Tese - Laodong Jiaoyang Zhidu* [Discussing a Major Characteristic of Our Country's Public Security Work - Re-education Through Labour System], in DISCUSSION OF

for handling "non-antagonistic contradictions."¹⁰¹ Their purpose is to prevent what is considered to be "the reserve force for crime"¹⁰² from becoming criminal. The emphasis in the use of these powers to detain prostitutes and drug addicts has, in principle, been to "educate, rescue and reform," not to punish.¹⁰³

Prostitution and drug use are not considered to be criminal offences. They are seen as being particularly pernicious and as poisoning the social atmosphere, undermining efforts to create a socialist ethic and socialist spiritual civilisation.¹⁰⁴ They are also considered to be factors that directly and indirectly contribute to an increase in other crimes. Police link drug use with crime. They point to a high correlation between drug addiction and crimes committed to finance the addiction.¹⁰⁵ They also link drug use to other violent drug related crimes.¹⁰⁶ The threat has been characterised by the police in the following terms:

PUBLIC SECURITY WITH CHINESE CHARACTERISTICS, *supra* note 66, at 97; *see also* Fu, *supra* note 73, at 67.

101. STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 439 (dealing with these powers under the heading of "prevention"); *see also* TEACHING MATERIALS ON THE SECURITY ADMINISTRATIVE PUNISHMENT REGULATIONS, *supra* note 101, at 2-4. Mao Zedong's Theory of Contradictions has constituted the basic principle for determining the method to be used in handling problems of social order and crime. It requires a distinction to be drawn between antagonistic contradictions, as in those between the people and the enemy, and non-antagonistic contradictions, which are those amongst the people. Contradictions should be handled completely differently depending on the nature of the contradiction. Non antagonistic contradictions between the people are classified as non fundamental and may be handled through correcting mistaken views by carrying out criticism and struggle with a view to re-establishing unity (*tuanjie*). Antagonistic contradictions involve fundamental contradictions of interest and are those where one class suppresses another. They involve violence and suppression. The importance of the Theory of Contradictions in handling problems of social order and crime has weakened alongside the decision of the Central Committee of the CCP to downgrade class struggle as a policy priority. For a discussion of the application of the *Theory of Contradictions* in the criminal justice system see XIAO, *supra* note 75, at 90-113.

102. STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 438; *see also* BAKKEN, *supra* note 88, at 319-25 (discussing the significance of these forms of deviant behaviour in terms of "chain narratives" where the first act will lead to the second and the second to the third). In terms of identifying the danger of deviance developing into crime, it places great emphasis on the first deviant act. It is considered a risk that this act may constitute the first step along the path to crime and so warrants early attention. *Id.* at 319-20.

103. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 117.

104. *See* STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 8-9.

105. Liu & Yuan, *supra* note 66, at 31 (asserting that over 70 percent of drug users commit crime to support their habit); STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 389 (reporting that in 1989 in Lanzhou 25,377 drug users were investigated, and of them, 53.1 percent had committed unlawful or criminal actions); Guo & Li, *supra* note 50, at 95 (citing results of a survey in which between 70 and 75 percent of drug addicts have committed unlawful or criminal acts).

106. *See* STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 387-88. The use of drugs has been linked to theft and murder. *Id.* The growth, sale, and transport of

...the re-emergence of the social evils that were eradicated in the early years of the establishment of the PRC, the manufacture, sale and use of drugs, kidnapping and selling people, prostitution etc these evil social phenomena, not only have they rekindled but have already developed to a particularly serious stage. These evil phenomena are a hotbed to propagate crime and induce a large volume of crime like a bacteria that will infect society, poison the people and if they are not eliminated early will necessarily become a great disaster.¹⁰⁷

Different forms of administrative detention are applied to those who do not commit a major criminal offence, but constantly commit misdemeanours (*da fa bufan, xiao fa changfan*) such as prostitution and drug use.¹⁰⁸ The primary set of sanctions in this category originates under the *Security Administrative Punishment Regulations* (SAPR) that were originally passed in 1957.¹⁰⁹ The regulations provide for administrative punishments to be given to people who harm public order, infringe upon the personal rights of citizens, damage public or private property, including prostitution and drug use but whose offences are not sufficiently serious to warrant criminal prosecution.¹¹⁰ Other administrative sanctions in this second line of defence include detention for education and coercive drug rehabilitation and re-education through labour imposed on prostitutes who reoffend and drug addicts who become addicted again after release from coercive drug rehabilitation. These forms of detention comprise a convenient middle ground for dealing with conduct considered to be potentially dangerous and morally harmful behaviours.

4.6 CAMPAIGNS, ENFORCEMENT POLICY AND LAW

Despite the initial view that that most offending was non-antagonistic in nature and that social order strategies should em-

drugs no longer is a small scale operation but involves organised crime and the increasing influence of international drug gangs, especially from the golden triangle. *Id.*

107. *Id.* at 9.

108. Xu & Fang, *supra* note 102, at 95 (discussing re-education through labour).

109. Zhonghua Renmin Gongheguo Zhian Guanli Chufa Tiaoli [PRC Security Administration Punishment Regulations] (1994), *reprinted in* ZHONGGUO RENMIN GONGHEGUO FALU QUANSHU [COLLECTION OF LAWS OF THE PRC] 1529-34 (Huaian Wang ed., 1989). The Security Administration Punishment Regulations ("SAPR") is the primary piece of legislation that gives the police powers to impose public order administrative sanctions. *Id.* It was first passed in 1957 by the Standing Committee of the NPC and was replaced on September 5, 1986 by the same entity. *Id.* Then on May 12, 1994, the SAPR was amended at the seventh meeting of the Eighth Standing Committee. Although this last amendment has increased the scope of the legislation, it has not increased the severity of its punishments.

110. Security Administration Punishment Regulations, art. 2; *see also* XINGZHENG CHUFA TONGLUN [GENERAL SURVEY OF ADMINISTRATIVE PUNISHMENT] 86-87 (Jiangui He ed., 1991).

phasise prevention and education, this view changed near the end of 1982. In August of 1982, the Central Political-Legal Committee of the Party emphasised the centrality of the strategy of striking hard and fast against crime (the "Hard Strike" or "Yanda") to the policy of Comprehensive Management of Public Order, saying that severely cracking down on serious crime was the "key link" of the policy.¹¹¹ Hard Strikes of suppression have targeted both prostitution and drug use since the first Hard Strike Launched in 1983. The Hard Strike campaign¹¹² conducted between 1983 and 1987 derived its form, though not its political content, from the mass mobilisational campaigns of the pre-reform era. The form required launching a "tidal wave" against the "high tide of crime"¹¹³ and "gathering superior troops to wage a war of annihilation" against the enemies.¹¹⁴

In July 1983 a determination was made to launch a campaign to "mobilise all forces of society in conducting a war against crime".¹¹⁵ In a speech shortly before the 1983 Hard Strike was launched, Deng Xiaoping said:

Why not organise a relentless campaign against crime- or two or three campaigns? Every large- or medium-sized city should organise several such campaigns over the next three years . . . Just as comrade Peng Zhen said not long ago, we should conduct some investigations with the advice of veteran policemen, then we shall be able to organise campaigns. In every campaign we should crack down on a large number of criminals. We have decided not to launch any more political movements, but if we are going to combat serious crime on a large scale, we must mobilise the masses.¹¹⁶

111. WANG, *supra* note 74, at 9.

112. See discussion of this Hard Strike in TANNER, *supra* note 28, at 83-93 and Murray Scot Tanner, *State Coercion and the Balance of Awe: The 1983-1986 "Stern Blows" Anti Crime Campaign*, 44 CHINA J. 93 (2000). The documents passed at the time of launching the hard strike include the Decision Regarding Striking Hard Blows Against Crimiminal Activities by the Central Committee of the CCP on August 25, 1983. Subsequently the Decision of the Standing Committee of the NPC Regarding the Severe Punishment of Criminal Elements who Seriously Endanger Public Security was passed on September 2, 1983. This Hard strike is referred to variously as the "Hard Strike Campaign," as in TANNER, *supra*, or the "Stern Blows" Campaign, as in Tanner, *supra*, which are different translations of the Chinese abbreviated as "Yanda." As there have been a number of Hard Strikes waged subsequently to that waged between 1983 and 1987, I use the generic term Hard Strike and then identify which one by the dates or its particular targets.

113. See Dutton & Lee, *supra* note 9, at 321-22.

114. WANG, *supra* note 94, at 180-81. The author points out that the form of the modern day campaign has been attributed both to a passage in the HUAINANZI and to the speech made in December 1947 by Mao Zedong, the President of the PRC at the time, entitled *The Present Situation and Our Tasks*.

115. See STUDY OF THE PROBLEM OF CRIME, *supra* note 10, at 8-9, 31-32.

116. Deng Xiaoping, *Crack Down on Crime*, in DENG XIAOPING, *SELECTED WORKS 1982-1983*, at 44 (1994).

The targets of 1983 Hard Strike campaign were characterised as wreckers and criminal elements. Because nature of the contradiction was considered antagonistic,¹¹⁷ it was appropriate to wield the people's democratic dictatorship against these targets.¹¹⁸

The continuing adherence to the Hard Strikes strategies has required the state enforcement agencies to punish severely and quickly those committing the targeted offences. This strategy has resulted in undermining compliance with legally specified procedures, the legally specified separation of function of state enforcement agencies, and inevitably leads to abuse.¹¹⁹ Hard Strike campaigns reinforce Party control over enforcement policy, undermining the law and the autonomy of enforcement agencies from the policy dictates of the Party elite.¹²⁰

By requiring the consolidated efforts of the political-legal organs (*zhengfa jiguan*) of the state (the police, the procuratorate, and the courts), Hard Strike campaigns directly affect the enforcement practices of these organs. Party leadership over these organs has been institutionalised through the Party's Political-Legal Committees (*zhengfa weiyuanhui*), established at each level of government. In addition, the Party has sought to strengthen its leadership over the implementation of the Comprehensive Management of Public Order policy in response to the poor and uneven implementation in the 1980s.¹²¹ In 1991, the Comprehensive Management of Public Order Committee

117. See *supra* note 102 and accompanying text on antagonistic and non antagonistic contradictions.

118. *Problems of China's Criminal Policy and Tactics*, *supra* note 27, at 155 (citing Liu Fuzhi (the Minister of Public Security at the time) who quotes Deng Xiaoping (the President of PRC at the time)) from Deng Xiaoping, *Yanda Jiushi Zhuanzheng* [*The Hard Strike is Precisely People's Democratic Dictatorship*], in DRAFT HISTORY OF THE CHINESE PEOPLE'S PUBLIC SECURITY, *supra* note 47, at 372.

119. See Tanner, *supra* note 46, at 296-97; see also Bakken, *supra* note 46, at 50; John T. Boxer, *China's Death Penalty: Undermining Legal Reform and Threatening the National Economic Interest*, 22 SUFFOLK TRANSNAT'L L. REV. 593 (1999); LUBMAN, *supra* note 18, at 163-64; Daniel C. Turack, *The New Chinese Criminal Justice System*, 7 CARDOZA J. INT'L & COMP. L. 49, 50-52 (1999).

120. See Keith Forster, *The 1982 Campaign Against Economic Crime in China*, 14 AUSTRALIAN J. CHINESE AFF. 1 (1985), in relation to the hard strike against economic crime and corruption in 1982. *But cf.* Michael W. Dowdle, *Heretical Laments: China and the Fallacies of "Rule of Law,"* 11 CULTURAL DYNAMICS 287, 296 (1996) (arguing that the requirement for hard strikes according to law (*yifa yanda*) are now carried out as a supplement to the law rather than as a surrogate, and that uneven enforcement practices are not unknown in the West).

121. Research Office of the Political-Legal Committee, *National Political-Legal Meetings*, in LAW YEARBOOK OF CHINA (Law Yearbook Editorial Committee ed., 1993). This problem is also discussed in the Decision on Strengthening the Comprehensive Management of Public Order issued jointly by the Central Committee and the State Council on February 19, 1991, reprinted in COLLECTION OF LAWS AND

(*Shehui Zhi'an Zhonghe Zhili Weiyuanhui* [abbreviated as "*Zhongzhiwei*") was established under the dual leadership of the Central Committee and the State Council¹²² to act as an umbrella organisation for improving the implementation of the policy.

At the time of the 1983 Hard Strike, Peng Zhen¹²³ drew a distinction between the matters properly governed by legislation and those properly within the political-legal sphere. Pitman Potter has discussed the way in which Peng Zhen distinguished legislative work, which was designed to establish long-term principles, from political-legal work, which was administrative. Peng Zhen saw the Hard Strike of 1983-87 as being more political than legal in nature, and therefore properly subject to Party, rather than legal, control.¹²⁴

It is unclear whether this distinction was intended merely to provide an explanation for continued Party control over campaigns of Hard Strikes, or reflected his view on the limits of the legislative sphere. In any case, the result was to draw a conceptual distinction between matters regulated by legislation and enforcement policy, and to provide some conceptual justification for designating enforcement and Hard Strike campaigns as an administrative matter properly under direct Party control.

Hard Strike campaigns have now come to dominate enforcement policy. They have moved very far from their original conception as anti-bureaucratic devices for mass mobilisation and revolution, and now are an institutionalised component of the state's enforcement policy. Officially, Hard Strikes of suppression must not only be carried out in accordance with law,¹²⁵ but they also constitute an "important part of the legal system."¹²⁶

REGULATIONS OF THE POLICY OF COMPREHENSIVE MANAGEMENT OF PUBLIC ORDER, *supra* note 7, at 24-33.

122. Decision on Strengthening the Comprehensive Management of Public Order (1991).

123. In 1979, Peng Zhen was appointed chair of the Legal System Committee of the Standing Committee of the NPC. In 1980, he was appointed chair of the Political Legal Committee of the CCP Central Committee. *See* Potter, *supra* note 25, at 17.

124. *See id.* at 23.

125. Xianguo Xiong, *Yifa "Yanda" [Strike Hard] in Accordance with the Law*, RENMIN FAYUAN BAO [PEOPLE'S COURT DAILY], 2001.

126. Xingting Gao, *Yong Deng Xiaoping Lilun Zhidao Zhengfa Gongzuo [Using Deng Xiaoping Theory as a Guide for Political Legal Work]*, in YIFA ZHIGUO JIBEN FANLUE LUNWENJI [COLLECTION OF ESSAYS ON THE BASIC PLAN FOR RULING THE COUNTRY BY LAW] 389, 391 (Judicial Research Office of the Bureau of Beijing ed., 1998) (stating that to protect social stability, it is necessary to rely on the comprehensive management of public order and that the key link of public order is to "strike hard on the basis of the law").

By the time the third battle (*zhanyi*) of the 1983 Hard Strike started in 1986,¹²⁷ the scope of targets had already been expanded to include targets such as prostitutes and drug users, whose acts were not considered to be criminal, and who were subject to different forms of administrative detention. After 1986, the traditional method for carrying out a Hard Strike (*jizhong tongyi xingdong*), which consisted of nationwide concerted action carried out by a wide range of state and Party organisations and mass organisations, mass mobilisation and widespread use of propaganda, had been supplemented by other enforcement methods involving concerted action against specific targets. They include specialist struggles (*zhuanxiang douzheng*), which are more focused in particular areas and against a small number of specified targets, including prostitution and drug use.¹²⁸

As I will demonstrate in the following sections, Hard Strike campaigns have contributed directly to the revival and increasingly widespread use of these administrative detention powers, which have developed to be an integral part of enforcement of law and order. As a component of enforcement of law and order, Hard Strikes have evolved as part of the political and administrative processes that underpin the formation and execution of enforcement policy. In this respect we might find apposite the conceptual distinction drawn by Peng Zhen between the legislative and political-legal spheres, which places enforcement, and therefore the management of these detention powers, in the political-legal sphere. As a result, the Hard Strike policy and the detention powers have been subject to Party and administrative, rather than legislative, control.

5. PROSTITUTION

5.1 RE-EMERGENCE OF THE PROBLEM IN THE 1970s

At the end of the 1970s and in the early 1980s, the re-emergence of prostitution was identified as a social problem that had

127. Shengfu Sun, *Guanyu Jianchi "Yanda" Fanzhen de Yixie Sikao* [Some Reflections on Upholding the "Heavy Strike" Guiding Principle], in *ZHONGGUO RENMIN GONGAN DAXUE XIAOQING SHE ZHOU NIAN LUNWEN XUANJI* [SELECTION OF ESSAYS FOR THE TENTH ANNIVERSARY OF THE CHINA PEOPLE'S PUBLIC SECURITY UNIVERSITY] 248, 249 (1994) (discussing the 1983-1986 Hard Strike).

128. *ZHONGGUO SHEHUI ZHI'AN ZONGHE ZHILI NIANJIAN 1995-1996* [YEAR-BOOK OF THE COMPREHENSIVE MANAGEMENT OF PUBLIC ORDER 1995-1996] 9-11 (Shengjun Wang ed., 1998) (setting out a speech given to a National Political Legal Work Meeting in December 1996 by Li Peng, the Premier of PRC at the time, where Li urged that more emphasis should be placed on the regular hard strike in order to prevent criminals thinking that on the day the hard strike ends they will be safe to continue committing crimes).

to be dealt with.¹²⁹ Whilst prostitution is still not considered criminal in nature, the government sharply distinguished the present day prostitute from the previous official characterization of the 1950s—the idealised victim model. Several government departments, in a 1987 report to the Central Committee of the CCP and the State Council, characterised prostitution in the following terms: “Recently the re-emergence of prostitution activities is completely different from that of old China where prostitution arose from being compelled to find some means of livelihood. The vast majority of prostitutes today desire material enjoyment, avoid disliked work and pursue a degenerate parasitic lifestyle.”¹³⁰

The Ministry of Public Security issued the *Notice on Resolutely Prohibiting Prostitution Activities* in June 1981. The notice mandated a range of actions against prostitution which have continued to this day. For example, it required the identification of prostitutes from the registers of the focal population (*zhongdian renkou*) and called for a consolidated strike against all prostitution-related activities.¹³¹

The Ministry *Notice* reserved criminal sanctions for those who ran brothels, forced women into prostitution, or introduced women into prostitution.¹³² The *PRC Criminal Law*¹³³ continues to criminalise organising, luring, forcing into prostitution, and housing prostitutes,¹³⁴ as well as prostituting knowingly with a sexually transmitted disease.¹³⁵

Different treatment applies to prostitutes in different situations. Those who occasionally prostituted, or “hankered after petty gains” (*tantu xiaoli*), were to be educated and supervised by

129. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 1 (quoting Deng Xiaoping, the President of PRC at the time as saying “Our cities have prostitutes, why are we not dealing with it?”).

130. Guanyu Yanli Daji Jianjue Qudi Maiyin Huodong he Zhizhi Xingbing Manyan de Baogao [Report on Strike Hard Against and Resolutely Suppress Prostitution Activities and Prevent the Spread of Sexually Transmitted Diseases] (1987), reprinted in ZHIFA SHOUCHE 220 (Gonganbu FAGUI JU ed., 1988). This report was submitted to the Central Committee of the CCP and the State Council by the Ministry of Public Security, Ministry of Justice, Ministry of Health, Civil Administration and Women’s Federation on September 21, 1987.

131. Gong’an Bu Guanyu Jianjue Zhizhi Maiyin Huodong de Tongzhi [Notice on Resolutely Prohibiting Prostitution Activities] (1981), reprinted in ZHONGHUA RENMIN GONGHEGUO GONG’AN GUIZHANG HUIBIAN 1957-1993 [COLLECTION OF PRC PUBLIC SECURITY RULES] 1148-50 (Zhonghua Renmin Gong’an Bu [PRC People’s Ministry of Public Security] ed., 1994).

132. Notice on Resolutely Prohibiting Prostitution Activities, art. 2.

133. Zhonghua Renmin Gongheguo Xing Fa [PRC Criminal Law] (1997). The original version that was passed by the NPC on July 1, 1997 was later amended on March 14, 1997.

134. PRC Criminal Law, arts. 358, 359, 361.

135. *Id.* art. 360.

the head of the family.¹³⁶ Those with regular employment would receive administrative detention under the *Security Administrative Punishment Regulations*,¹³⁷ or a disciplinary sanction by their work unit.¹³⁸ The work unit would also ensure that the person be subject to help and education (*bangjiao*) in their local community.¹³⁹ Those who had floated into the city from the countryside were gathered for education¹⁴⁰ and then repatriated to their hometowns, where local security organisations would provide further control and education.¹⁴¹ Those who had no regular employment, or who continued to prostitute after being educated, were to be sent to re-education through labour.¹⁴² Re-education through labour for repeat offenders was included as part of the original formulation of the policy of Comprehensive Management of Public Order,¹⁴³ and was included in the *Temporary Measures on Re-education Through Labour*, passed in 1982.¹⁴⁴

5.2 TARGETING PROSTITUTION IN CAMPAIGNS OF SUPPRESSION AND DEVELOPMENT OF PROSTITUTE DETENTION

The decision to include eradication of prostitution as part of the Hard Strike campaign was made shortly prior to the launch of the 1983 Hard Strike. The severity of the order reflected the seriousness of the campaign: enforcement would target all prostitutes and those caught prostituting repeatedly would receive re-education through labour. Subsequent campaigns continued to require the universal enforcement and to emphasise the use of detention powers rather than lesser forms of punishment in the forms of warnings or fines.

136. Notice on Resolutely Prohibiting Prostitution Activities, art. 3(1).

137. The SAPR was subsequently amended by the Decision on Strict Prohibition of Prostitution, point 4, paragraph 1. Punishments under the SAPR now include a warning or fine of less than RMB 5,000, being instructed to sign an undertaking of repentance, administrative detention of up to 15 days, or re-education through labour. PRC Security Administrative Punishment Regulations, art. 30 (1994).

138. Notice on Resolutely Prohibiting Prostitution Activities, art. 3(2).

139. *Id.* art. 3(2).

140. The term used is *shourong jiaoyu*, though it appears that the term is here being used as a verb and not as the name of a particular form of detention, which is also called *shourong jiaoyu*.

141. Notice on Resolutely Prohibiting Prostitution Activities, art 3(3).

142. Notice on Resolutely Prohibiting Prostitution Activities, arts. 3(1), 3(2), 3(3).

143. Summary of the Minutes of the Public Order Meeting of Five Big Cities of Beijing, Tianjin, Shanghai, Guangzhou and Wuhan, point 5 (1982), reprinted in COLLECTION OF LAWS AND REGULATIONS OF THE POLICY OF COMPREHENSIVE MANAGEMENT OF PUBLIC ORDER, *supra* note 7, at 1-4.

144. Laodong Jiaoyang Shixing Banfa [Temporary Measures on Re-education through Labor] (1982), art. 10, reprinted in COLLECTION OF LAWS OF THE PRC, *supra* note 111, at 1583-89.

In 1983 the General Office of the Central Committee approved the Hard Strike against prostitution and prostitution related activities when it issued and approved a joint report and recommendations prepared by the Ministry of Public Security and the All China Women's Federation.¹⁴⁵ Subsequent Hard Strikes have been launched in similar ways. Reports from the provincial level indicate that campaigns for the elimination of prostitution began around 1982¹⁴⁶ and were conducted throughout the first two battles of the 1983 Hard Strike.¹⁴⁷

5.3 REVIVAL OF SPECIALIST PROSTITUTE DETENTION CENTRES: DETENTION FOR EDUCATION (*SHOURONG JIAOYU*)

One police source asserts that specialist detention for the education and reform of prostitutes in detention for education centres (*shourong jiaoyu suo*), was revived in 1984 when the first female centre for prostitutes were established in Shanghai and Wuhan.¹⁴⁸ The Shanghai centre was established in September 1984 with the approval of the Shanghai Party Committee and the Municipal Government and with the co-operation of the Shanghai public security bureau, women's federation, and the civil affairs bureau. It was operated by the public security organs.¹⁴⁹ The

145. The Office of the Central Committee reaffirmed the use both of administrative punishments under the SAPR for prostitutes and clients of prostitutes, and of re-education through labour for those prostitutes repeatedly caught prostituting. Zhonggong Zhongyang Bangongting Zhuafan Gong'an Bu Quanguo Fulian Liang Dang Zu "Guanyu Jianjue Qudi Maiyin Huodong de Baogao" [Transmitting and Issuing the Ministry of Public Security, All China Women's Federation Two Party Organisations "Report on Resolutely Suppressing Prostitution Activities"] (1983). The report at section four states: "*faxian yige, shourong yige, songchu laodong jiaoyang*," STRIKE AGAINST THE SIX EVILS' UNLAWFULNESS AND CRIME HANDBOOK, *supra* note 60, at 28-32. The enforcement decisions of this Report were issued by joint opinion of the Supreme People's Court, Supreme People's Procuratorate and the Ministry of Public Security on August 7, 1984 in *Guanyu Maiyin, Piaochang Anchang Ying Ruhe Chuli de Yijian* [Opinion on How to Handle Cases involving Prostitutes, Clients of Prostitutes and Elicit Prostitutes], *reprinted in* STRIKE AGAINST THE SIX EVILS' UNLAWFULNESS AND CRIME HANDBOOK, *supra* note 60, at 38.

146. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 278, 310, 344 (citing reports concerning the Provinces of Fujian, Guangdong, and Hubei).

147. *Id.* at 247-48 (asserting that Liaoning Province waged its first campaign to eliminate prostitution between 1983 and 1985 and conducted specialist struggles after that time).

148. *Id.* at 193.

149. *See id.* at 265 (citing a report prepared by officials about Shanghai which indicates that from the time of establishment until the end of 1993, the female detention center had 4,099 people and the prostitute user center had 1,631 people detained).

construction of this detention centre was initially based on local regulation.¹⁵⁰

5.4 SPECIALIST STRUGGLES AGAINST PROSTITUTION FROM 1986

The third battle of the 1983-86 Hard Strike, which ran between March and October 1986, targeted socially harmful acts including prostitution-related offences, drug-related offences, and gambling.¹⁵¹ Whilst targeting prostitution, this battle differed from the first two battles of the Hard Strike in that it was not coordinated at the national level, but was left to the local levels to determine the main focus of their strikes based on local situations. These strikes were localized and targeted in the form of specialist struggles (*zhuanxiang douzheng*).¹⁵²

The State Council issued the *Notice on Resolutely Suppressing Prostitution Activities and Preventing the Spread of Sexually Transmitted Diseases* on 1 September 1986 gave renewed central impetus to waging the campaign of suppression against prostitution.¹⁵³ This notice pointed out the failure to eradicate prostitution and urged concerted action to eliminate it. This notice, and other complementary notices passed at that time,¹⁵⁴ set out a range of measures to be taken for managing sites considered to harbour prostitution, testing persons for sexually transmitted diseases, and punishing persons for engaging in prostitution and prostitution-related activity. The next campaign

150. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 265 (citing both Guanyu Shourong Jiaoyu Maiyin Funu Gongzuo de Ruogan Guiding [Several Regulations on the Work of Detention for Education of Female Prostitutes] (n.d.) and Guanyu Dui Maiyin Piaochang Renyuan de Chuli Yijian [The Opinion on Handling People who Prostitute and Clients of Prostitutes] as the legal basis for constructing the detention center).

151. DRAFT HISTORY OF THE CHINESE PEOPLE'S PUBLIC SECURITY, *supra* note 47, at 379.

152. *Id.* at 378-79 (asserting that the new focus of the campaign coincided with the replacement of Liu Fuzhi with Yuan Chongwu as Minister of Public Security).

153. Guanyu Jianjue Qudi Maiyin Huodong he Zhizhi Xingbing Manyan de Tongzhi [Notice on Resolutely Suppressing Prostitution Activities and Preventing the Spread of Sexually Transmitted Diseases] (1986), *reprinted in* ZHIFA SHOUCE 227-29 (Gonganbu Fagui Ju ed., 1986).

154. Gong'an Bu Guanyu Jiaqiang Luguan Hangye Zhi'an Guanli Gongzuo de Tongzhi [Notice on Strengthening the Public Order Management of the Hotel Industry] (1986), *reprinted in* STRIKE AGAINST THE SIX EVILS' UNLAWFULNESS AND CRIME HANDBOOK, *supra* note 60, at 49-50. Regulations for management of the hotel industry are set out by the Ministry of Public Security in Gong'an Bu Luguan Ye Zhi'an Guanli Banfa [Measures on Managing Public Order in the Hotel Industry] (1987), *reprinted in* ZHIFA SHOUCE, *supra* note 130, at 187-90.

to eliminate prostitution was commenced on the basis of this document, although its contents were required to be kept secret.¹⁵⁵

The number of localities establishing detention centres for prostitutes and clients of prostitutes increased from 1986 onwards.¹⁵⁶ In Liaoning province, for example, construction of these centers reportedly commenced in 1986.¹⁵⁷ In 1986, the Fujian provincial government approved the *Report on Resolutely Striking Against and Suppressing Prostitution and Using Prostitutes* prepared by the public security bureau and the construction of detention centers.¹⁵⁸ It was not until 1990 that the provincial government set out targets and procedures for detention when it approved and issued the Bureau of Public Security's *Fujian Province Temporary Regulations on Detention for Education of Female Prostitutes*.¹⁵⁹ In Shanghai, a detention centre for clients of prostitutes was established in 1987.¹⁶⁰ In Guangdong in June 1987 the Standing Committee of the Guangdong People's Congress passed the *Guangdong Province Regulations on Suppressing Prostitution and Using Prostitutes*, which provided for a range of penalties, including the detention of prostitutes in detention for education centres and the imposition of re-education through labour.¹⁶¹

155. Guanyu Jianjue Qudi Maiyin Huodong he Zhizhi Xingbing Manyan de Tongzhi [Notice on Resolutely Suppressing Prostitution Activities and Preventing the Spread of Sexually Transmitted Diseases] (1986), *reprinted in* ZHIFA SHOUCE, *supra* note 130, at 227-29.

156. *See* COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 345 (asserting that in 1987 in the province of Hubei, for example, a notice was issued jointly by the Provincial Party Committee and the Provincial government that required detention for the education of prostitutes).

157. *See id.* at 248, 252 (noting that in the Liaoning province a campaign was conducted between 1986 and 1988 based on the spirit of the State Council's 1986 document).

158. Guanyu Daji Qudi Maiyin Piaochang Huodong de Baogao [Report on Resolutely Striking Against and Suppressing Prostitution and Using Prostitutes] (n.d.), *cited in id.* at 284-85. According to its report, Fujian province in 1993 had nine detention centers with one in Xiamen for clients of prostitutes with a capacity of 2,000 people.

159. Fujian Sheng Shourong Jiaoyu Maiyin Funu Zanzing Guiding [Fujian Province Temporary Regulations on Detention for Education of Female Prostitutes] (1990), *cited in id.* at 285 (setting out matters including the targets and procedures for approval).

160. *See id.* at 265 (citing a Shanghai report which indicates that from the time of establishment until the end of 1993, the female detention center had 4,099 people and the prostitute client center had 1,631 people).

161. *See generally id.* at 311 (explaining that these regulations were an amended version of the 1981 public security regulations and that there is an indication that detention for education centers was established in Guangdong before the 1987 regulations were passed). Article 5 of those regulations states the following: In respect of prostitutes, handle by (giving) up to fifteen days administrative detention, be directed to make a statement of repentance and be returned to her family or work unit for control and education (*guanjiao*). Where the situation is serious, give between

The Office of the Central Committee and the State Council issued instructions to intensify efforts against prostitution on 26 October 1987 when they approved and transmitted a report containing recommendations that had been prepared by several agencies. Because the State Council and Central Committee were concerned that efforts to eliminate prostitution had not been particularly successful, they instructed all Party and state agencies to strike hard against prostitution and related activities and to step up administrative management¹⁶² including strengthened management of dance halls and hotels.¹⁶³

In addition, the report proposed expansion of the number of specialist prostitute detention centres to enable detention of every prostitute caught. The document requested that the local governments in places where prostitution was prevalent establish specialist prostitute detention centres if none existed. The document also indicated that some central funding would pay for the construction of these detention facilities.¹⁶⁴

5.5 SIX EVILS CAMPAIGN

The best-known national campaign against prostitution of the 1980s was the Six Evils campaign conducted between November 1989 and January 1990. Following the Tiananmen Square Incident on June 4th, 1990, Public Security Bureau heads met and discussed the inability of the public security organs to contain socially disruptive acts including pornography, prostitution, drug use and gambling, even though they considered these activities to

six months and one year of detention for education (*shourong jiaoyang*) or re-education through labour. In general it is permitted to give a fine of less than RMB 5,000. *See id.* at 311.

162. Zhonggong Zhongyang Bangongting Guowuyuan Bangongting zhuanfa "Guanyu Yanli Daji Jianjue Qudi Maiyin Huodong he Zhizhi Xingbing Manyan [Strike Hard Against and Resolutely Suppress Prostitution Activities and Prevent the Spread of Sexually Transmitted Diseases] (1987), *reprinted in* ZHIFA SHOUCHE, *supra* note 130, at 218-19.

163. ZHIFA SHOUCHE, *supra* note 130, at 224-26.

164. Guanyu Yanli Daji Jianjue Qudi Maiyin Huodong he Zhizhi Xingbing Manyan de Baogao [Report on Strike Hard Against and Resolutely Suppress Prostitution Activities and Prevent the Spread of Sexually Transmitted Diseases], para. 5 (1987), *reprinted in* ZHIFA SHOUCHE, *supra* note 130, at 222. It proposed that they were all to be compulsorily tested for STDs and compulsorily treated at their own expense. Foreigners are to be expelled. Expansion of the STD testing facilities was to be set up by the Ministry of Health. The report also proposed mobilisation at the local level and the initiation of an education campaign amongst women in areas where prostitution is prevalent in the Four Haves (ideals, morality, culture, and discipline) and the Four Selfs (self-respect, self-love, self-protection and self-strengthening).

be seriously disrupting the success of the economic reforms.¹⁶⁵ When the Central Committee and the State Council determined in 1989 to conduct a Hard Strike against pornography (the "*Saohuang*" *Hard Strike*), the Ministry of Public Security sought to expand the scope of the campaign to include prostitution and prostitution related offences, drug offences, gambling, and deceit using feudal superstition. Later, attacking, kidnapping, and selling women and children were added to the list of targets, which was then labelled the "Six Evils" Hard Strike (the "*Six Evils*" *Hard Strike*).¹⁶⁶ Luo Gan subsequently held a telephone conference on November 13, 1989 to launch the nationwide Hard Strike to eradicate these evils under the rubric of *Saohuang* and *Liuhai*.¹⁶⁷ The campaign lasted two months and concluded on 15 January 1990.¹⁶⁸

Under this campaign, the prostitution-related law enforcement rate increased dramatically. For example, the Liaoning police reported that their concerted action with other organs to carry out the Six Evils Hard Strike resulted in the seizure of 3,333 people during the six-month period between October 1989 and March 1990. This is in contrast with an average of 200 annual seizures between 1983 and 1985, and 400 annual seizures between 1986 and 1988. In Shanghai the effect of the Six Evils Hard Strike can be seen from the enforcement figures for the years from 1983 to 1993, set out below.¹⁶⁹

Year	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993
Prostitutes	482	244	329	600	625	678	10,869	42	1,042	1,744	1,556
Clients	248	124	165	329	577	700	12,808	56	1,364	1,875	1,863

In a Notice dated 7 May 1990, the Ministry of Public Security noted that although the official activities of the *Liuhai* Hard Strike were mostly finished, the public security organs would

165. DRAFT HISTORY OF THE CHINESE PEOPLE'S PUBLIC SECURITY, *supra* note 47, at 394-95 (reporting that two nationwide meetings of public security bureau heads were held in July 1989 and again in July 1990 to discuss these issues).

166. *Id.*

167. In Guangdong and Shen Zhen the campaign commenced earlier and was against Seven Evils (*Qihai*) and included organised crime and "black societies." See COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 304.

168. DRAFT HISTORY OF THE CHINESE PEOPLE'S PUBLIC SECURITY, *supra* note 47, at 395.

169. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 277. These figures, admittedly, give no indication of how the cases were handled. Also, unfortunately, national statistics on detention of prostitutes remain unavailable.

continue the attack on the Six Evils particularly in Beijing, Tianjin, and Shanghai, in preparation for the Asian Games.¹⁷⁰

From 1990 on, additional specialist struggles have been waged at regular intervals at the national level and in areas where prostitution was considered particularly acute. These struggles have taken various forms: the mass coordinated action (*jizhong tongyi xingdong*) used during the early stages of the 1983 Hard Strike, the specialist struggles (*zhuanxiang douzheng*) that were targeted against a small number of specified targets in particular areas.¹⁷¹

The targets of Hard Strikes that include prostitution also varies. Hard Strikes conducted between 1991 and 1993 against prostitution, for example, were included in the Hard Strike campaigns against kidnapping and selling women and forcing women into prostitution.¹⁷²

5.6 LEGAL BASIS FOR DETENTION FOR EDUCATION

The above descriptions show that the development of the power of detention for education has been intertwined with the periodic Hard Strikes and other campaigns targeting prostitution throughout the 1980s. At first, the decision to construct detention centres took place at the local level under local regulations. In the case of Fujian and Guangzhou at least, written accounts indicate that the provincial public security bureau first passed the

170. Gong'an Bu Guanyu Yange Yifa Banshi, Zhexing Zhengci, Shenru Kaizhan Chu "Liu Hai" Douzheng de Tongzhi [Ministry of Public Security Notice on Deepening the Struggle to Eliminate the "Six Evils" Strictly on the Basis of Law and Implementing Policy] (1990), reprinted in *ZHIFA SHOUCE* 231-38 (Gonganbu Fazhi Si ed., 1990).

171. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 248-49 (stating that in Liaoning between May 1991 and February 1992 the Central Committee directed that a specialist struggle under the title of the LiuBu Ju (Six Ministries and Commissions: public security, administration of industry and commerce, culture, tourism, industry, and procuratorate) be conducted under the leadership of the provincial government against targeted sites, such as hotels, dance halls and taxi stands). As a result of this specialist struggle, it was reported that 4,788 prostitutes were seized. *Id.* YEARBOOK OF THE COMPREHENSIVE MANAGEMENT OF PUBLIC ORDER 1995-1996, *supra* note 128, at 9-11.

172. Zuigao Renmin Jianchayuan Guanyu Chongfen Fahui Jiancha Zhinene Jianjue Daji Guaimai Funu, Ertong he Qiangpo, Yinyou Rongliu Funu Maiyin de Fanzui Zhiji Peihe Chajin Qudi Maiyin Piaochang Huodong de Tongzhi [Notice on Fully Developing Procuratorial Capacity Resolutely to Strike against Kidnapping and Selling Women and Children and the Crime of Coercing, Luring and Keeping Female Prostitutes, Actively to Coordinate to Investigate and Prohibit and Eliminate Prostitution Activities] (1991), reprinted in *ZHIFA SHOUCE* 194-96 (Gonganbu Fazhi Si ed., 1991). For excerpts of speeches made at meetings throughout the country in 1993 discussing striking against kidnapping prohibiting prostitution work, see *ZHONGGUO SHEHUI ZHI'AN ZONGHE ZHILI NIANJIAN*, 1993-1994 [YEARBOOK OF THE COMPREHENSIVE MANAGEMENT OF PUBLIC ORDER, 1993-1994] 42-47 (Huaide Shu ed., 1996).

relevant provisions and the provincial level government and the congress standing committee later amended and adopted these provisions.¹⁷³

The police have acknowledged that there was a need to "legalize" and "systematize" the detention power as quickly as possible.¹⁷⁴ In light of the spreading prostitution the Ministry of Public Security drafted the *Decision on Strictly Prohibiting Prostitution and Using Prostitutes* and submitted it to the State Council, requesting the draft be sent to the NPC Standing Committee for passage as legislation.¹⁷⁵ The *Decision on Strictly Prohibiting Prostitution and Using Prostitutes*,¹⁷⁶ has been relied upon as the "legal basis" for the detention power.¹⁷⁷ Ironically, the NPC Standing Committee did not ratify the Decision until September 4, 1991, well after the end of the Hard Strike against the Six Evils campaign.

The *Decision on Strictly Prohibiting Prostitution and Using Prostitutes* prescribes a range of criminal and administrative actions against different types of prostitution-related activities. The Decision modified the provisions of the *Criminal Law* relating to prostitution and prostitution related offences. This portion of the Decision was later incorporated into the amended *Criminal Law*.¹⁷⁸ The Decision expressly consolidated and super-

173. See discussion *supra* Section 5.4 and accompanying notes.

174. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 127.

175. Feng Luo, *Laodong Jiaoyang Shenpi Gongzuo de Huigu yu Sikao* [Retrospect and Thoughts on Investigation and Approval of Re-education Through Labour], 25 POLICE RES. 33, 35 (1992). This author was the deputy head of the Legal Affairs Division of the Ministry of Public Security at the time of publication of this article. A decision was made that legislation was needed for detention for education and the Ministry of Public Security was given responsibility for drafting this legislation as the outcome of a meeting held in January 1989 to discuss problems of prostitution, referred to in the Summary of the Minutes of Meeting on Research on Striking against and Eliminating Prostitution and Using Prostitutes reproduced in [COLLECTION OF LAWS AND REGULATIONS OF THE POLICY OF COMPREHENSIVE MANAGEMENT OF PUBLIC ORDER] at 143.

176. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Yanjin Maiyin Piaochang de Jueding [Decision on Strictly Prohibiting Prostitution and Using Prostitutes] (1991), reprinted in WANG, *supra* note 94, at 51-53 (explaining that the Decision was passed on September 4, 1991 and became effective on the same day).

177. See COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 120 (citing the legitimate function of the Decision as "providing us with an important legal weapon of struggle . . . to eliminate prostitution both now and in the future").

178. Zuigao Jianchayuan Guanyu Yange Zhixing Quanguo Renta Changweihui "Guanyu Yanjing Maiyin Piaochang de Jueding" he "Guanyu Yancheng Guaimai Bangjia Funu, Ertong de Fanzui Fenzi de Jueding" de Tongzhi [Notice on Strictly Implementing the Standing Committee of the NPC "Decision on Strictly Prohibiting Prostitution and Using Prostitutes" and "Decision on Strictly Punishing those Criminal Elements who kidnap and sell Women and Children"] (1991), reprinted in ЗИФА

seded other post-1980 rules and regulations relating to the suppression and control of prostitution.

The Decision sets out the formal legal basis for the detention-for-education power as follows:

Those who prostitute or use prostitutes may be coercively gathered up (*qiangzhi jizhong*) 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).¹⁷⁹

The Decision mandates tests of sexually transmitted diseases for all prostitutes and subsequent coercive treatment.¹⁸⁰ It also permits a person sent to detention for education to receive an additional administrative punishment under the *Security Administrative Punishments Regulations* of a fine of RMB5,000 and/or up to 15 days administrative detention.¹⁸¹

The police describe the legitimating function of this *Decision on Strictly Prohibiting Prostitution and Using Prostitutes* as “providing us with an important legal basis and weapon of struggle in our work to eliminate prostitution both now and in the future.”¹⁸²

Shortly after the *Decision on Strictly Prohibiting Prostitution and Using Prostitutes*, the Ministry of Public Security issued the *Notice on Conscientiously Implementing the Standing Committee of the NPC Decision on Strictly Prohibiting Prostitution and Using Prostitutes* on 23 November 1991.¹⁸³ It was intended to “fill the legislative gap” until the State Council issue further measure.¹⁸⁴ The State Council did issue a subsequent measure in 1993—the *Measures for Detention for Education of Prosti-*

SHOUCE, *supra* note 172, at 274-76. The Supreme People's Procuratorate indicated that these two Decisions were to supersede any prior inconsistent law or interpretation document.

179. *Decision on Strictly Prohibiting Prostitution and Using Prostitutes*, art. 4, para. 2 (1991).

180. *Id.* art. 4.

181. *Id.* point 4, para. 3. This Decision provides that if the administrative detention was determined to be a separate punishment, then the time spent in detention for education could not be deducted. This interpretation was given on the basis of article 7 of the 1993 Gonganbu Guanyu Dui Xingshi Juliu, Zhi'an Juliu Qixian shifou Zhedi Shourong Jiaoyu Qixian Wenti de Pifu [State Council Measures for Detention for Education of Prostitutes] (1993), *reprinted in* ZHIFA XUZHU 391 (Gonganbu Fazhi Si ed., 1997).

182. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 120.

183. *Notice on Conscientiously Implementing the Standing Committee of the NPC Decision on Strictly Prohibiting Prostitution and Using Prostitutes* (1991), *reprinted in* ZHIFA SHOUCE, *supra* note 172, at 318-22.

184. *Id.* art. 4.

tutes.¹⁸⁵ These measures largely adopted the contents of the 1991 Ministry of Public Security *Notice*.¹⁸⁶

The *Measures for Detention for Education of Prostitutes* made the public security organs solely responsible for determining when to send a person to detention for education and for managing the detention centres.¹⁸⁷ The *Measures* also gave the Ministry of Public Security the responsibility for interpreting and implementing the *Measures*.¹⁸⁸ Although it is possible locate the "legal basis" of detention power in legislative documents passed by the Standing Committee of the NPC and the State Council, it is the Ministry of Public Security which has passed the substantive rules governing all aspects of the use of the power. The same agency is thus solely responsible for imposing the coercive measure¹⁸⁹ and managing the detention centres. The powers of legislation, interpretation, enforcement, and management have in effect been concentrated in the hands of a single agency. The public security organs even conduct the first level of review of a decision.¹⁹⁰

5.7 LEGAL DEFINITION OF THE POWER

The 1991 Ministry of Public Security *Notice* has defined the power of detention for education as a "coercive administrative education power administered by the public security,"¹⁹¹ an interpretation affirmed by the State Council in its 1993 *Measures*.¹⁹²

This definition is significant in light of the *Administrative Punishments Law*.¹⁹³ The *Administrative Punishments Law* mandates procedures state officials must follow when meting out administrative punishment and requires that the punishment given be proportional to the degree of harm caused. Because detention for education is defined as an administrative coercive mea-

185. The *Measures for Detention for Education of Prostitutes* was passed to take effect on September 4, 1993.

186. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 132.

187. *Measures for Detention for Education of Prostitutes*, arts. 3, 7, 8 (1993).

188. *Id.* art. 22.

189. The power of detention for education is classified as an "administrative coercive measure" (*zingzheng qiangzhi cuoshi*). See discussion *infra* Section 5.7 regarding the legal characterization of the power.

190. See discussion *infra* Section 5.10.

191. Notice on Conscientiously Implementing the Standing Committee of the NPC Decision on Strictly Prohibiting Prostitution and Using Prostitutes, art. 4 (1991).

192. *Id.* art. 2.

193. *Zhonghua Renmin Gongheguo Xingzheng Chufa Fa* [PRC Administrative Punishments Law] was passed and promulgated by the NPC on March 17, 1996 and became effective on October 1, 1996.

sure, arguably it is legally distinguishable the power from “administrative punishment”¹⁹⁴ and therefore free from the procedural safeguards under the *Administrative Punishments Law*.¹⁹⁵

5.8 TARGETS

The lack of definition for “prostitution” and “clients of prostitutes” leads to over-enforcement and under-enforcement enabling different views to be taken about what constitutes prostitution. Although the law does not require it, some police consider have confined the scope of targets for detention prostitutes and clients with STDs, persons who have prostituted or used prostitutes repeatedly but for whom it is difficult to get evidence to verify the behaviour, or where the conduct is considered particularly bad, but not sufficiently severe to warrant re-education through labour.¹⁹⁶ Others have expanded it to include morally undesirable behaviour such as extra-marital affairs and a kept mistress within the definition of prostitution.¹⁹⁷

Traditionally the view was that prostitution was a female activity.¹⁹⁸ The passage of *Decision on Strictly Prohibiting Prostitution and Using Prostitutes* broadened the definition of prostitution to include males.¹⁹⁹ Given the range of possible punishments, police recognise that in different areas different in-

194. See, e.g., Gonggan Bu Guanyu Renzhen Guanचे Zhixing Quanguo Renda Changweihui “Guanyu Yanjin Maiyin Piaochang de Jueding” de Tongzhi [Ministry of Public Security Notice on Diligently Implementing the Standing Committee “Decision on Prohibiting Prostitution”] (1991), *reprinted in* ZHIFA SHOUCHE, *supra* note 172, at 320. (describing detention for education as “an administrative education measure of a coercive nature” in point four).

195. The lack of procedural regulation governing imposition of administrative detention by public security organs has been partially redressed by the Regulations on the Procedures for Handling Administrative Cases by Public Security Organs passed by the Ministry of Public Security with effect on 1 January 2004. As these rules were passed after the final revisions had been made to this paper, the paper does not contain a detailed analysis of these rules.

196. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 197.

197. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 138, 140-41 (stating that some police believe that if the sexual relationship is outside marriage and goods are transferred then that will be sufficient to constitute prostitution). An example was given where a couple were having an extra marital affair. On a particular evening the man had bought clothing as a present for the woman and had taken the woman out for dinner and dancing. Later they were caught having sex and the woman was sent to detention for investigation as a prostitute as she was considered to have had extramarital sex for material profit. *Id.*

198. *Id.* at 139.

199. The wording of the criminal offense of organising, permitting, or encouraging “women” to prostitute was changed to “other people” (taren).

terpretations have been made of the acts that warrant detention for education as opposed to other measures.²⁰⁰

5.9 TIME LIMITS

The 1991 *Decision* provides that the time limit for detention is between six months and two years.²⁰¹ Neither the 1991 *Decision* nor the State Council *Measures* set out principles for determining the length of detention in particular cases. One commentator suggests that the time should correspond to the time necessary for education and reform, rather than the severity of the offence.²⁰² The Ministry of Public Security *Measures for the Management of Detention for Education Camps* permits extension of the period of detention when detainees refuse education; refuse to conform to camp administration; or undermine security.²⁰³ The extension may not exceed two years.²⁰⁴

This form of detention and other detention powers controlled by the police are interchangeable. For example, the Ministry of Public Security permits deduction from the total amount of time spent in detention for education the time spent in other forms of detention. These other forms of detention include administrative detention, detention for investigation (*shourong shencha*),²⁰⁵ and criminal detention (*xingshi juliu*), if it arose out of the same facts that justified the detention for education.²⁰⁶

5.10 PROCEDURES

The Ministry of Public Security 1991 *Notice*²⁰⁷ specifies in article 5(2) that procedures for detention are to be carried out by analogy to article 34(2) of the *Security Administrative Punish-*

200. CHUANYU XIE, ZHI'AN XINGZHENG CUOSHI TONGLUN [GENERAL DISCUSSION OF PUBLIC SECURITY ADMINISTRATIVE MEASURES] 108 (2000).

201. Decision on Strictly Prohibiting Prostitution and Using Prostitutes, art. 9, para. 4 (1991).

202. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 197.

203. Gongan Bu Shourong Jiaoyusuo Guanli Banfa [Ministry of Public Security Measures for the Management of Detention for Education Camps], art. 23 (2000), reprinted in ZHIFA XUZHUI 814-24 (Gonganbu Fazhi Ju ed., 2000).

204. *Id.*

205. Gongan Bu Guanyu Renzhen Guanche Zhixing Quanguo Renda Changweihui "Guanyu Yanjin Maiyin Piaochang de Jueding" de Tongzhi [Ministry of Public Security Notice on Diligently Implementing the Standing Committee "Decision on Prohibiting Prostitution"], para. 5(3) (1991).

206. Gongan Bu Guanyu Dui Xingshi Juliu, Zhi'an Juliu Qixian Shifou Zhedi Shourong Jiaoyu Qixian Wenti de Pifu [State Council Measures for Detention for Education of Prostitutes] (1993), reprinted in ZHIFA XUZHUI, *supra* note 182, at 391.

207. Notice on Conscientiously Implementing the Standing Committee of the NPC Decision on Strictly Prohibiting Prostitution and Using Prostitutes, art. 5 (1991).

ment Regulations ("SAPR").²⁰⁸ The SAPR art 34(2) requires that the person being interrogated by the police answer questions truthfully. It requires a record of interview, which must be signed as correct by the interviewee and the interrogating officer.²⁰⁹ Under Article 5 a person may be administratively detained (*xingzheng jülü*) while waiting for the final disposition regarding detention for education. The Ministry of Public Security Notice also analogized the procedures for challenging a decision to article 39 of the SAPR.²¹⁰ SAPR article 39 requires a person to seek the initial administrative review from a higher-level public security department. A person dissatisfied with that review may commence an action in the people's court under the *Administrative Litigation Law*.

5.11 LEGAL ELASTICITY AND THE EFFECT OF CAMPAIGNS ON ENFORCEMENT

The ongoing series of campaigns against prostitution has been ineffective. A major problem is that local police have not been enthusiastic about these campaigns, have become fed up²¹¹ with an apparently never-ending stream of campaigns,²¹² and are exhausted.²¹³ Police have had a particularly ambivalent attitude

208. Zhonghua Renmin Gongheguo Zhi'an Guanli Chuffa Tiaoli [PRC Security Administrative Punishment Regulation] was passed by the Standing Committee of the NPC on August 5, 1986 and amended in accordance with the Decision of Standing Committee of the NPC "Decision on Amending the PRC Security Administrative Punishment Regulations" on May 12, 1994. reference should now also be made to the 2004 Ministry of Public Security Regulations on the Procedures for Handling Administrative Cases by Public Security Organs in respect of procedures for imposing detention for education.

209. Security Administrative Punishment Regulation, art. 34(2) (1994). Article 34(4) further provides that following interrogation, where the facts are clear and the evidence conclusive (*quezao*) a determination to impose a punishment shall be made. The determination shall be in writing in triplicate with one copy given to the person to be punished. Moreover, article 34(5) requires that a person be interrogated within 24 hours after being taken in for interrogation.

210. Gong'an Bu Guanyu Renzhen Guanche Zhixing Quanguo Renda Changweihui "Guanyu Yanjin Maiyin Piaochang de Jueding" de Tongzhi [Ministry of Public Security Notice on Diligently Implementing the Standing Committee "Decision on Prohibiting Prostitution"], para.5(2) (1991).

211. Sun, *supra* note 127, at 252. (employing the use of the homophone of Yanda (厌打) to express the degree to which police officers are fed up with carrying on campaigns (taoyan yanda) (讨厌严厉打击) abbreviated to yanda) (厌打).

212. Sun, *supra* note 127, at 252. Campaign style enforcement is coordinated with the people's procuratorates and the people's courts. *Id.* For example, the Supreme People's Court stated that in the first eight months of 1989, the court had handled 18.11 percent more cases involving the private use of drugs than the previous year. *Id.* The courts had also handled 34.3 percent more cases of distributing and disseminating pornographic material in that period than in the past year under the "six evils" campaign. *Id.*

213. Baocai Tong & Qingbin Wang, *Lun Zhuanxiang Douzheng Zai Jiejue Tuchu de Zhi'an Wenti Zhong de Zhanlue Zuoyong* [Discussing the Strategy of Specialist

toward Hard Strikes against prostitution and many only pretended to crack down on prostitution.²¹⁴

A Notice issued by the Ministry of Public Security on 7 March 1992 recognised this problem and urged greater efforts to be made:

We must, moreover we certainly are able to eradicate these socially repugnant phenomena at the same time as reform and opening up. All negative thoughts and attitudes, poor resolve and lack of confidence about cleaning up these repugnant social phenomena must be rapidly transformed and replaced by a resolute positive attitude and measures taken to harden up and persist and not to slacken off (efforts). . .²¹⁵

Local corruption and police involvement in prostitution has also undermined the Hard Strike campaigns against prostitution.²¹⁶

The wide range of punishments available to the police to impose on prostitutes and their clients has enabled police to impose their preferred penalty, the fine. The Ministry of Public Security has repeatedly warned police against substituting fines for either administrative detention, or for pursuing a criminal sanction.²¹⁷ However, despite repeated exhortations, police continue to issue fines rather than detain prostitutes and their clients.²¹⁸

The revenue raised from fining prostitutes has become institutionalised to the point where quotas have been allocated.²¹⁹

Struggles in Resolving Acute Public Order Problems], in DISCUSSION OF PUBLIC SECURITY WITH CHINESE CHARACTERISTICS, *supra* note 66, at 256, 265.

214. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 135.

215. Gongan Bu Guanyu Jinyibu Saochu Fandu Maiyin Deng Shehui Chou'e Xi-anxiang de Tongzhi [Ministry of Public Security Notice on Further Cleaning up the Traffic in Narcotics, Prostitution etc. Repulsive Social Phenomenon] (1992), *reprinted in* ZHIFA SHOUCHE 77, 78 (Gonganbu Fazhi Si ed., 1992).

216. Official involvement in and profiting from prostitution was acknowledged and prohibited in Dui Canyu Piaochang, Maiyin Huodong de Gongchan Dangyuan ji Youguan Zerenzhe Dang Ji Chufen de Zanxing Guiding [Central Discipline Inspection Committee, Temporary Regulations on Party Disciplinary Sanctions in Respect of those Party Officials and Other Responsible People who Participate in Prostitution and Prostitution Related Activities] (1988), *reprinted in* STRIKE AGAINST THE SIX EVILS' UNLAWFULNESS AND CRIME HANDBOOK, *supra* note 60, at 36-37.

217. Gongan Bu Guanyu Yang'e Yifa Banshi, Zhexing Zhengci, Shenru Kaizhan Chu "Liu Hai" Douzheng de Tongzhi [Ministry of Public Security Notice on Deepening the Struggle to Eliminate the "Six Evils" Strictly on the Basis of Law and Implementing Policy] (1990), *reprinted in* ZHIFA SHOUCHE, *supra* note 173, at 231-38; Ministry of Public Security Notice on Conscientiously Implementing the Standing Committee of the NPC Decision on Strictly Prohibiting Prostitution and Using Prostitutes, art. 3 (1991).

218. Gongan Bu Guanyu Jiaqiang Zhi'an Anjian Chachu Gongzuo de Tongzhi [Notice on Strengthening the Investigation and Prosecution of Public Security (Zhi'an) Cases] (1997), *reprinted in* ZHIFA XUZHUI, *supra* note 182, at 422-24.

219. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 128; TANNER, *supra* note 28, at 116-17.

Although all fines must be paid to the state treasury by law,²²⁰ revenue from fines supplements the budget allocation for the local police.²²¹ The Ministry continues to issue notices prohibiting this activity, and recently has imposed individual responsibility on those in leadership positions in the areas with the worst abuse.²²²

Even during periods of Hard Strikes when the police are exhorted to send all eligible targets to detention, the proportion of prostitutes dealt with who are actually sent to detention for education and re-education through labour remains low. Several sets of figures set out below indicate a similar pattern of enforcement. These statistics must be treated with caution: they are not national figures and are collected and produced by the public security organs for their own purposes.

Of the 12,764 people seized during a 1993 Hard Strike against prostitution in Liaoning province, the police reported that 28 were arrested and sent into the criminal justice system, 260 were sent to re-education through labour, and 1,095 were sent to detention for education.²²³ Of the 12,764 seized, 11,117 were given an administrative punishment, and, of those, 9,117 were fined.²²⁴

Figures from Shanghai indicate a similar pattern. In the 11-year period from 1983 to 1993, the police reportedly handled 42,966 prostitutes. 650 were given criminal sentences (including five death sentences), 1,210 were sent to re-education through

220. The requirement for separation of income and fines was recently reiterated in respect of public security organs in Ministry of Public Security Xingzheng Shiyexing Shoufei he Fashe Shouru Shixing "Shouzhilang Tiao Xian" Guanli de Ruogan Guiding ["Administrative Operating Income and Income from Fines Several Regulations Implementing "Income and Expenditure Two Paths" Management] (n.d.), reprinted in ZHIFA SHOUCE, *supra* note 215, at 133-36.

221. Gong'an Bu Guanyu Qieshi Jiaqiang Gong'an Jiguan Shoufei he Fashe Shouru Guanli de Tongzhi [Ministry of Public Security Notice on Conscientiously Strengthening the Management of Income of Public Security Organs from Collection of Fees and Fines] (1999) (requiring that any budget item specifying that a proportion of fines collected be paid to the police be removed from the budget), reprinted in ZHIFA XUZHIZHI 131-32 (Gonganbu Fazhi Ju, 1999).

222. Gong'an Bu Guanyu Jiaqiang Zhi'an Anjian Chachu Gongzuo de Tongzhi [Ministry of Public Security Notice on Strengthening the Investigation and Prosecution of Public Security (Zhi'an) Cases] (1997), reprinted in ZHIFA XUZHIZHI, *supra* note 182, at 422-24. Article 2 provides: "Earnestly correct the incorrect work practice of substitution of fines for detention, and substitution for fines for detention for education. Each level of public security organ is not permitted to allocate a quota for collecting fines to the local level police in any form or in any name, for those quotas that have already been issued, their implementation must be stopped immediately." See also COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 258.

223. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 258.

224. *Id.*

labour, 5,730 were sent to detention for education, 1,230 were given detention for investigation (*shourong shencha*), and 11,600 were given an administrative punishment.²²⁵

Prostitutes have been caught and punished at a rate 10 times higher than clients who generally receive fines.²²⁶ Of the 56,351 prostitutes detained in 1993, 13,657, or 24%, were placed in detention for education. Of the 131,345 clients of prostitutes seized in 1993, 13,454, or 10%, were placed in detention for education.²²⁷ Incidentally, both Shanghai and Liaoning acknowledge that cases involving people in positions of power are not properly handled.²²⁸

Another factor limiting the number of prostitutes detained for education is the capacity of detention facilities. In 1992 the Ministry of Public Security called for the county-level public security organs to recommend plans to local governments for construction of detention for education centres²²⁹ and to increase the number of detention centres. In this Notice the Ministry of Public Security instructed that additional detention for education centres be constructed so that their capacity would be to hold at least 25% of the prostitutes caught annually.²³⁰

Reports from Shanghai indicate a serious lack of capacity,²³¹ and reports from Liaoning indicate that the capacity of detention facilities was equal to about 10% of the number of people who could be sent to detention.²³² The issue of the under-capacity of detention facilities did not appear to have been resolved by 1996.²³³

From this discussion, we may conclude that the revival and expansion of detention for education centres has been intimately connected with the different campaigns of suppression of prosti-

225. *Id.* at 264.

226. *Id.* at 258.

227. *Id.* at 196-97.

228. *Id.* at 258, 276.

229. Gongan Bu Guanyu Jinyibu Saochu Fandu Maiyin Deng Shehui Chou'e Xi-anxiang de Tongzhi [Ministry of Public Security Notice on Further Cleaning up the Traffic in Narcotics, Prostitution etc Repulsive Social Phenomenon] (1992), reprinted in ZHIFA SHOUCHE, *supra* note 215, at 79.

230. *Id.* at 79.

231. COUNTERMEASURES FOR THE CONTROL OF PROSTITUTION, *supra* note 6, at 273-74.

232. *Id.*

233. Gongan Bu Guanyu Guanche Zhexing "Qiangzhi Jiedu Banfa" Youguan Wenti de Tongzhi [Ministry of Public Security Notice on Several Questions of Implementing "Measures on Coercive Drug Rehabilitation"] (1996) (calling for speeding up of the construction of coercive drug rehabilitation facilities), reprinted in ZHIFA SHOUCHE 645-49 (Gonganbu Fazhi Si ed., 1996). More comprehensive statistics as well as statistics after 1996 are held by the Ministry of Public Security, but are not generally available.

tution since 1983. Although the available figures indicate that the overall rates of enforcement increase during a campaign, financial factors limit the number of prostitutes detained under detention for education. First, the local police prefer to impose fines instead of detention. Secondly, the capacity of detention facilities is limited.

6. DRUG ABUSE

6.1 REVIVAL OF DRUG REHABILITATION CENTRES

The the development of drug rehabilitation measures has been very similar to that of detention for education for prostitutes. Both involves local implementation and a close interrelationship with campaigns for suppression.

With the worsening drug addiction problems in the late 1970s, the strategies of registering drug users and detaining drug addicts in specialist drug addition treatment centres were reinvigorated. By the 1980s, drug rehabilitation centres of various forms were constructed and run by public security organs, the civil administration and health departments, as well as some street committees.²³⁴

The revival of coercive drug rehabilitation centres is documented in the *Notice Restating the Strict Prohibition of Opium and Drug Taking* issued by the State Council in August 1981. The *Notice* required the public security, civil administration, and health departments to co-ordinate efforts to commence a campaign against drug use, including establishing centres for coercive drug rehabilitation in the following terms: "In respect of those users of opium and other drugs, public security, civil administration and health, etc., departments should organise coercive drug rehabilitation."²³⁵

On 16 July 1982, the Central Committee and the State Council jointly issued the *Urgent Instruction on the Problems of Complete Prohibition of Opium*.²³⁶ This document required drug users to register with the local government and give up drug use within a "limited time." Those who failed to comply were to be "coercively taken in to give up (drug abuse) and given necessary punishment."²³⁷ Provincial level provisions were also passed in the early 1980s. The Guangdong Provincial Government, for ex-

234. XIE, *supra* note 200, at 116.

235. Notice Restating the Strict Prohibition of Opium and Drug Taking (1981), reprinted in STRIKE AGAINST THE SIX EVILS' UNLAWFULNESS AND CRIME HANDBOOK, *supra* note 60, at 368-39; see also GUO & LI, *supra* note 50, at 316.

236. GUO & LI, *supra* note 50, at 317.

237. Urgent Instruction on the Problems of Complete Prohibition of Opium, art. 3 (1982).

ample, passed temporary regulations in 1981 under which drug users could be given administrative detention, or be sent to re-education through labour in more serious cases.²³⁸ Beyond curing addiction and illness and giving "necessary punishment", drug rehabilitation centres were also instructed to carry out legal and moral education to transform addicts.²³⁹

In Yunnan, where the problem is particularly acute, a special program to combat drugs was established in 1982 under the leadership of a Drug Prohibition Committee (*Jindu Weiyuanhui*) comprised of representatives of a number of government departments including the public security.²⁴⁰ The committee introduced various local measures to target drug users, including registration and rehabilitation measures. Habitual drug users have been entered into the focal population (*zhongdian renkou*) register held at the local police station to target them for measures to cure addiction.²⁴¹ These measures include giving up drugs under the supervision of the masses, giving up drugs under the supervision of local community organisations, giving up drugs in a state-run detention centre (coercive drug rehabilitation), and giving up drugs in a re-education through labour camp.²⁴²

Since the beginning of the 1980s, drug use and drug related crimes have been targeted under a mixture of Hard Strike measures, including national-level campaigns such as the 1983 Hard Strike campaign, the Saohuang Hard Strike and the Six Evils Hard Strikes in 1989,²⁴³ local- and national-level specialised struggles (*zhuanxiang douzheng*),²⁴⁴ focused management,²⁴⁵ and localised campaigns.²⁴⁶

During the campaign against the Six Evils in 1989-90, the Ministry of Public Security *Notice on Deepening the Struggle to Eliminate the "Six Evils" Strictly on the Basis of Law and Imple-*

238. Temporary Regulations on Prohibition of Traffic in and Use of Drugs (1981), reprinted in STRIKE AGAINST THE SIX EVILS' UNLAWFULNESS AND CRIME HANDBOOK, *supra* note 60, at 480-81.

239. GUO & LI, *supra* note 50, at 318.

240. HUAIZHI CHU, "LIUHAI" ZHILI LUN [DISCUSSION OF OF MANAGEMENT OF THE "SIX EVILS"] 63 (1996) (reporting that after 1982 when the document was issued jointly by the Central Committee and the State Council, a specialist anti-drugs force was established in Yunnan that was comprised of 1,300 people).

241. Liu & Yuan, *supra* note 66, at 40; *see also* Ministry of Public Security Notice on Several Questions on Implementing the "Measures on Coercive Drug Rehabilitation" (1996), reprinted in ZHIFA SHOUCHE 645-49 (Gonganbu Fazhi Si ed., 1996).

242. Liu & Yuan, *supra* note 67, at 40.

243. *Id.* at 36.

244. *Id.* at 36-37.

245. *Id.*

246. *Id.* at 36.

*menting Policy*²⁴⁷ reiterated the campaign policy of that all offenders should be dealt with severely. As was done for the prostitute detention, the Ministry of Public Security demanded that fines not be substituted for detention and that the police should properly impose punishments such as administrative detention (*xingzheng juliu*), re-education through labour, and arrest under the criminal justice system. The Ministry directed that drug addicts be subjected to coercive drug rehabilitation and tested for sexually transmitted diseases.²⁴⁸

Around the same time, several provinces passed local regulations setting out some parameters for coercive drug rehabilitation. The Yunnan Congress Standing Committee, for example, passed the *Yunnan Provincial Administrative Punishment Provisions for Prohibiting Drugs* in 1989 which set out a range of punishments for drug related offences. These punishments included detention under the SAPR, re-education through labour when the situation was "serious", and criminal sanction where the act was "sufficient to constitute a crime."²⁴⁹ The Yunnan Provisions permitted drug users to be detained "for a short time" in the police station to give up drugs. Failure to give up drugs within that time would enable detention for between three months and one-year detention in a coercive drug rehabilitation centre. According to these provisions, those who continued to use drugs after coercive rehabilitation could be sent to re-education through labour.²⁵⁰ Similar provisions were passed in other areas.²⁵¹

6.2 LEGAL BASIS OF COERCIVE DRUG REHABILITATION

There are many similarities between the legal form of coercive drug rehabilitation and detention for education, including the range of measures available for use by the police and the manner of definition of the scope and procedures for the imposition of detention.

247. Gonggan Bu Guanyu Yang'e Yifa Banshi, Zhexing Zhengci, Shenru Kaizhan Chu "Liu Hai" Douzheng de Tongzhi [Notice on Deepening the Struggle to Eliminate the "Six Evils" Strictly on the Basis of Law and Implementing Policy] (1990), reprinted in ZHIFA SHOUCE, *supra* note 170, at 231-38.

248. *Id.* at 236.

249. Yunnan Provincial Administrative Punishment Provisions for Prohibiting Drugs, art. 6 (1982).

250. *Id.* art. 11.

251. For instance, the Shaanxi Provincial People's Congress Standing Committee in 1989, the Lanzhou Municipal People's Government in 1989, and the Gansu Provincial People's Congress Standing Committee in 1990, all passed similar provisions to the Yunnan Provincial Administrative Punishment Provisions for Prohibiting Drugs. Their respective provisions are reproduced in STRIKE AGAINST THE SIX EVILS' UNLAWFULNESS AND CRIME HANDBOOK, *supra* note 60, at 480-98.

The current legal basis for coercive drug rehabilitation is the Standing Committee of the NPC *Decision on Strictly Prohibiting Drugs*, issued on 28 December 1990.²⁵² Similar to the *Decision on Strictly Prohibiting Prostitution and Using Prostitutes*, this decision supplemented the *Criminal Law* by prescribing a range of criminal sanctions for certain drug-related activities and authorized a range of administrative measures, including administrative punishment under the SAPR, an increased fine up to RMB 2,000, administrative detention,²⁵³ coercive drug rehabilitation on drug addicts, and re-education through labour for recidivists.²⁵⁴

It authorises the use of coercive drug rehabilitation in the following terms:

Where smoking or injecting drugs has become an addiction, apart from the provision above [that is: for punishment under the *SAPR*], impose coercive drug rehabilitation, carry out treatment and education. After coercive drug rehabilitation, [a person who] smokes or injects drugs, can be sent to re-education through labour and made coercively to give up [drug use] during re-education through labour.²⁵⁵

The State Council *Measures on Coercive Drug Rehabilitation* followed this Standing Committee Decision five years later, in January 1995.²⁵⁶ Together they are the first national-level regulations establishing and managing coercive drug rehabilitation and specifying the length of coercive drug rehabilitation. The Ministry of Public Security has designated the *Decision on Strictly Prohibiting Drugs* and the *Measures on Coercive Drug Rehabilitation* as the legal basis of the power to detain drug users.²⁵⁷

The State Council *Measures on Coercive Drug Rehabilitation* make the police at the county level and above responsible for

252. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jindu de Jueding [NPC Decision on Strictly Prohibiting Drugs] (1990), reprinted in WANG, *supra* note 94, at 47-49 (explaining that the Decision was passed on December 28, 1990 and became effective on the same day).

253. *Id.* art. 8.

254. *Id.* art. 8. These measures have been incorporated as part of the amended *Criminal Law* in articles 347 through 357.

255. *Id.* The relationship between drug rehabilitation and re-education through labour was reiterated in the 1996 Notice of the Ministry of Public Security on Several Questions on the Implementation of the Coercive Drug Rehabilitation Measures. In that notice, the Ministry of Public Security provided that "people released from coercive drug rehabilitation who smoked or injected drugs would be sent lawfully to re-education through labour." Notice of the Ministry of Public Security on Several Questions on the Implementation of the Coercive Drug Rehabilitation Measures (1996).

256. Qiangzhi Jiedu Banfa [Measures on Coercive Drug Rehabilitation] (1995), reprinted in ZHIFA SHOUCHE 157-60 (Gonganbu Fazhi Si ed., 1995).

257. CHIYONG HAO & ZHOU SHAN, JINGWU GONGKAI YU GONGMIN QUANLI [OPENNESS IN POLICE WORK AND CITIZENS' RIGHTS] 310-13 (1999).

planning the construction of drug rehabilitation centres,²⁵⁸ for ordering a person to coercive drug rehabilitation, and for “managing the drug rehabilitation work.”²⁵⁹ As with detention for education, the police possesses the sole the power to pass, interpret, and enforce detailed rules, and to manage coercive drug rehabilitation centres.

6.3 LEGAL CATEGORISATION

The *Measures on Coercive Drug Rehabilitation* formally categorised coercive drug rehabilitation as an exercise of administrative coercive power. The purpose of detention ostensibly is education, treatment, reform, and not punishment. Specifically, it is “an administrative measure coercively to carry out medical and psychological treatment, education of laws and morals in order to give up drug addiction.”²⁶⁰ Therefore it falls outside the legal category of administrative punishment, in a manner analogous to detention for education in the prostitution context.

6.4 TARGETS

Targets for coercive drug rehabilitation are those people who have become addicted to drugs. A user without addiction technically should be subject to sanctions other than coercive drug rehabilitation. However, as with prostitution, the law does not define addiction nor specify tests for determining sanctionable addiction and drug use. It appears that these matters are left to the individual police officer and the detention centre.

Certain categories of person are excluded from the scope of targets, including people with serious or infectious illnesses, and women who are pregnant or nursing their own child less than a year old.²⁶¹

6.5 TIME LIMITS

The *Measures on Coercive Drug Rehabilitation* set out some of the basic principles for detention, such as a maximum length of time for detention of between three and six months, with a maximum extension of up to one year.²⁶² As with detention of prostitutes, the law provides no principles for determining the duration of the detention or for the extension of the initial period.

258. *Measures on Coercive Drug Rehabilitation*, art. 4.

259. *Id.* arts. 3, 5.

260. *Id.* art. 2.

261. *Id.* art. 20.

262. *Id.* art. 6.

6.6 PROCEDURES

The public security organs at the county level and above are responsible for determining whether a person should be sent to coercive drug rehabilitation. They must complete and provide the detainee with a Decision on Coercive Drug Rehabilitation form before the detainee enters the drug rehabilitation centre. The family of the detainee should be notified within three days of the decision to impose coercive rehabilitation.²⁶³ One commentator asserts that detention for education and coercive drug rehabilitation fall within the "security administrative punishments system." Therefore principles in the SAPR are relevant to the implementation of both of these powers.²⁶⁴ No other sources either support or reject this interpretation.

The Ministry of Public Security has designated a number of circumstances where a person may undertake alternative treatment for drug addiction instead of the coercive drug rehabilitation program. But if that person subsequently becomes drug addicted again, the person will be treated as a re-offender and subjected to re-education through labour.²⁶⁵ A person may be kept under the supervision of the local police station to give up drugs when "it is not convenient to send a person to coercive drug rehabilitation."²⁶⁶

Although by law a drug addict must undergo coercive drug rehabilitation before other forms of detention, one police survey²⁶⁷ found that 11.26% of the inmates in re-education through

263. *Id.* art. 5.

264. Youfeng Chen, *Zhi'an Guanli Chufa Tiaoli Xiuding Silu [Thoughts on Revisions to the Security Administrative Punishments Regulations]*, in FALU LUNWEN ZILIAO KU (2002). But see now the 2004 Ministry of Public Security Regulations on the Procedures for Handling Administrative Cases by Public Security Organs passed by the Ministry of Public Security which set out procedures for imposition of coercive drug rehabilitation.

265. In those areas where coercive drug rehabilitation centres have not been established, a person may be sent to re-education through labour if they have either been registered with the local government or the police and have been required to give up drug use within a specified time limit, or have been subject to "concentrated management" (*jizhong banban*) to give up drug use. See Gong'an Bu Guanyu dui Xiduzhe Song Laodong Jiaoyang Renti de Pifu [Ministry of Public Security Response to a Request for Instructions on Sending Drug Users to Re-education through Labour] (1992), reprinted in ZHIFA SHOUCHE, *supra* note 215, at 475.

266. Gong'an Bu Guanyu Guanche Zhixing "Qiangzhi Jiedu Banfa" Youguan Wenti de Tongzhi [Ministry of Public Security Notice on Several Questions on Implementing the "Measures on Coercive Drug Rehabilitation"] (1996), reprinted in ZHIFA SHOUCHE 645, 646 (Gonganbu Fazhi Si ed., 1996).

267. In 1996 and 1998, surveys were conducted of 833 and 1,191 inmates, respectively, who had been sent to re-education through labour as a result of drug addiction. See GUO & LI, *supra* note 50, at 130-31.

labour camps surveyed had not previously received coercive drug rehabilitation.²⁶⁸

6.7 DETENTION CENTRE MANAGEMENT

The *Measures on Coercive Drug Rehabilitation*²⁶⁹ prohibited the operation of privately run drug rehabilitation centres, thereby concentrating the management of coercive drug rehabilitation centres in public security organs to some extent. The 1995 State Council *Measures* permitted medical units to continue operating drug rehabilitation centres, but required them to obtain approval from the provincial or equivalent level health department and be subject to the supervision of the same level public security organ.²⁷⁰ In 2000, the Ministry of Public Security, under the *Measures for Management of Coercive Drug Rehabilitation Centres*, completed the consolidation of power to operate coercive drug rehabilitation centres by permitting them to be run only by the public security organs.²⁷¹

Whilst in detention, the State Council 1995 *Measures* permit detainees to be “organised to carry out an appropriate level of labour” in addition to receiving treatment for drug addiction, psychological training, legal education, and moral education.²⁷² The issue of remuneration for this labour was not clearly addressed until 1996 when the Ministry of Public Security directed that detainees should receive direct payment for their labour and that the payment should not take the form of a discount from the living expenses detainees must pay to the detention centre.²⁷³

The cost of treatment and living expenses are to be borne by the detainee or the family of the detainee.²⁷⁴ In principle, if they have neither the means to pay the cost of treatment nor work,

268. *Id.* at 144. Although the authors noted this statistic, they did not consider the reasons why this was the case.

269. *Measures on Coercive Drug Rehabilitation* (1995), *reprinted in* ZHIFA SHOUCHE 157-60 (Gonganbu Fazhi Si ed., 1995).

270. *Measures on Coercive Drug Rehabilitation*, art. 21; *see also* XIE, *supra* note 200, at 116.

271. Gong'an Bu Qiangzhi Jiedu Guanli Banfa [Ministry of Public Security Measures for Management of Coercive Drug Rehabilitation] (2000), *reprinted in* ZHIFA XUZHI, *supra* note 203, at 804-13.

272. *Measures on Coercive Drug Rehabilitation*, art. 13.

273. Gong'an Bu Guanyu Guanche Zhixing “Qiangzhi Jiedu Banfa” Youguan Wenti de Tongzhi [Ministry of Public Security Notice on Several Questions on Implementing the “Measures on Coercive Drug Rehabilitation”] (1996), *reprinted in* ZHIFA SHOUCHE 645-49 (Gonganbu Fazhi Si ed., 1996).

274. Gong'an Bu Guanyu Yangge Yifa Banshi, Zhexing Zhengci, Shenru Kaizhan Chu “Liu Hai” Douzheng de Tongzhi [Ministry of Public Security Notice on Deepening the Struggle to Eliminate the “Six Evils” Strictly on the Basis of Law and Implementing Policy] (1990), *reprinted in* ZHIFA SHOUCHE 231, 236 (Gonganbu Fazhi Si ed., 1990).

then the local government should make arrangements to meet these costs.²⁷⁵ The Ministry of Public Security required the Bureau of Public Security and the Pricing Authority to promulgate pricing guidelines at the provincial or equivalent level.²⁷⁶

6.8 LEGAL ELASTICITY AND ENFORCEMENT

As with prostitute detention, one limit on enforcement is the limited capacity of drug rehabilitation centres. Yunnan reports the construction of 85 coercive drug rehabilitation centres throughout the province up to the end of 1996²⁷⁷ and the existence of eight re-education through labour centres for drug rehabilitation.²⁷⁸

Figures indicate a rapid increase in the number of detention centres nationwide for dealing with drug addiction after 1995. Figures for the number of detention centres and the number of people treated between 1991 and 1997 are set out as follows:²⁷⁹

Year		1993	1994	1996	1997
Public Security Bureau	Camps	200+	251	500+	695
	People	50,000	50,000	60,000	180,000
Re-education Through Labour	Camps	64	75	65	86
	People	15,000	30,000	18,000	90,000

The White Paper on Narcotics Control issued by the State Council Information Office on 26 June 2000 states that the 746 coercive drug rehabilitation centres established throughout the country handled 224,000 drug addicts in 1999, and 168 specialist re-education through labour teams treated 112,000 people in 1999.²⁸⁰ Re-education through labour for drug addicts is organised in one of two ways. One method is the establishment of specialist re-education through labour camps at provincial and

275. *Id.*

276. Ministry of Public Security Notice on Several Questions on Implementing the "Measures on Coercive Drug Rehabilitation."

277. The author does not provide exact dates for these statistics, but as the book was published in early 1997, the figures cannot include construction after this time. With an overall capacity of between 7,000 and 8,000 people and three intakes per year, in Yunnan it is estimated that 20,000 drug addicts can be detained for coercive drug rehabilitation in one year. Liu & Yuan, *supra* note 66, at 40.

278. These centres have an annual capacity of between 2,000 and 2,500. Between the years of 1991 and 1995 (8th five year plan) the authors Liu and Yuan assert that 118,700 people were detained for coercive drug rehabilitation. *Id.*

279. It appears that this number does not include temporary coercive drug rehabilitation centres, for which no figures are given. In 1994, for example, one set of figures indicates that there were 251 long term coercive drug rehabilitation centres and 153 temporary coercive drug rehabilitation centres. GUO & LI, *supra* note 50, at 318.

280. INFORMATION OFFICE OF THE STATE COUNCIL, WHITE PAPER ON NARCOTICS CONTROL (2000).

equivalent level. The other is the establishment of special drug rehabilitation divisions within ordinary comprehensive re-education through labour camps.²⁸¹ The proportion of people in re-education through labour as a result of drug addiction reportedly has increased dramatically. As of September 1997, one set of figures asserted that the proportion of drug addicts in re-education through labour ranged from 1.6% of the re-education through labour camp population in Tianjin, to 74.1% in Yunnan and 83.58% in Gansu.²⁸²

7. PROBLEMS IN THE MANAGEMENT OF DETENTION CENTRES

In addition imposing fines for fund raising purposes, as was discussed in the context of prostitution, coercive drug rehabilitation itself has been used for fund raising. Problems of joint venture, for-profit coercive drug rehabilitation centres, many of which were not approved by the Health Bureau, charging excessive fees for both living expenses and medicines, eventually led the Ministry of Public Security to issue a *Notice on Putting in Order and Rectifying Coercive Drug Rehabilitation Centres*.²⁸³ The *Notice* ordered the closure of all joint venture coercive drug rehabilitation centres. It also identified and demanded rectification of a range of problems such as keeping people in detention for longer than the permitted period, letting people out early, providing detainees with addictive drugs, releasing people after they had paid a fine, and charging additional fees such as "head fees" and "transport fees."²⁸⁴

More seriously, the Ministry identified problems of operating coercive drug rehabilitation in the local police lock up (*kan-shousuo*), in administrative detention centres, and in detention for education centres, where conditions for detainees may be worse than those in coercive drug rehabilitation centres. The shortage of staff members has meant that some detention centres did not have adequate personnel to have someone on duty all the time.²⁸⁵ The Ministry of Public Security passed the *Measures for the Management of Detention for Education Camps*²⁸⁶ seeking to

281. GUO & LI, *supra* note 50, at 319-20; CHU, *supra* note 240, at 64-65.

282. GUO & LI, *supra* note 50, at 330.

283. Gong'an Bu Guanyu Qingli Zhengdun Qiangzhi Jiedusuo de Tongzhi [Ministry of Public Security Notice on Putting in Order and Rectifying Coercive Drug Rehabilitation Centres] (2000), *reprinted in* ZHIFA XUZH, *supra* note 203, at 412-16.

284. *Id.*

285. *Id.*

286. Gong'an Bu Shourong Jiaoyusuo Guanli Banfa [Ministry of Public Security Measures for the Management of Detention for Education Camps] (2000), *reprinted in* ZHIFA XUZH, *supra* note 203, at 814-24.

address similar problems in respect to the detention of prostitutes.²⁸⁷

The Ministry of Public Security passed remedial measures to evaluate and grade detention for education and coercive drug rehabilitation centres. These measures were indicative of magnitude and spread of the mismanagement of coercive drug rehabilitation centre for drug addicts and detention for education centres for prostitutes. Under the Ministry of Public Security *Measures for Evaluation of the Grade of Detention for Education Camps*²⁸⁸ and the Ministry of Public Security *Measures or Evaluation of the Grade of Coercive Drug Rehabilitation Centres*²⁸⁹, the public security organs and representatives of the local people's congress and government were to evaluate the centres every two years and to conduct ongoing inspection and supervision of centres. Depending on the nature of the facilities, the number and quality of staff, and the number of incidents and programs in place, the centres would be determined to be a first, second, or third grade centre. A detention centre organised jointly with the police lock up could not obtain a grading.

8. DISCUSSION OF ADMINISTRATIVE DETENTION AND THE RULE OF LAW

8.1 LEGAL FORM OF DETENTION FOR EDUCATION AND COERCIVE DRUG REHABILITATION IN THEIR SOCIAL AND POLITICAL CONTEXTS

How has the Chinese state managed legal reform in the context of social order? An examination of the development of detention powers in the detention for education and coercive drug rehabilitation context reveals the continuing dominance of the political-legal organs of state. In particular, the Party's Political-Legal Committee and the Ministry of Public Security lead the formulation of social order policy and the powers deemed necessary to implement that policy.

The revived use of both detention for education and coercive drug rehabilitation is directly linked to the growing alarm in the ranks of the Party and state about the extent of prostitution and drug addiction in the 1970s and early 1980s. Although these

287. *Id.* art. 17 (requiring that guards be on duty 24 hours per day and whilst on duty, not leave their post).

288. Gong'an Bu Shourong Jiaoyu Dengji Pingding Banfa [Ministry of Public Security Measures for Evaluation of the Grade of Detention for Education Camps] (2000), reprinted in ZHIFA XUZHI, *supra* note 203, at 348-62.

289. Gong'an Bu Qiangzhi Jiedu Suo Dengji Pingding Banfa [Ministry of Public Security Measures or Evaluation of the Grade of Coercive Drug Rehabilitation Centres] (2000), reprinted in ZHIFA XUZHI, *supra* note 203, at 333-43.

behaviours were seen not as criminal, they were seen as disrupting social order, imperilling the project of building a socialist ethic, and promoting crime. The increasing use of these detention powers as part of the "second line of defence" against crime occurred in the context of a weakening of localized social control and diminishing local police capacity to detect prostitution and drug addiction and to mobilise the local community to address these problems. Faced with these difficulties, the police reached back to the 1950s to revive a strategy they believed had once been successful.

Since introduction of the social order policy of Comprehensive Management of Public Order, increasing emphasis has been placed on waging an ongoing series of Hard Strikes against targeted activities and groups, as evidenced by the treatment of prostitution and drug use since the 1983 Hard Strike. During these Hard Strikes, police have been encouraged to impose the more severe punishment of detention instead of lesser punishments such as fines or warnings, contributing to the increasing use of these forms of detention.

The vague and broad definition of these detention powers and the lack of strict procedural safeguards give the police almost unfettered discretion to impose detention. On the other hand, documents issued by Party organs and the Ministry of Public Security, as well as accounts by police commentators, indicate that the imposition of these forms of detention is heavily influenced by corrupt practices and resource issues such as the capacity of detention centres.

An examination of the documentary basis of these powers shows that they continue to be described primarily by normative documents (*guifanxing wenjian*) issued by Party and state administrative organs. These documents set out general normative principles such as the scope and procedures for exercise of the detention powers. These normative documents sometimes address particular enforcement problems, strategic issues, and internal discipline in the exercise of these powers.

In the pre-reform period, normative documents served as the main documentary method for governing state administration.²⁹⁰ In the reform era, a portion of these documents has been incorporated within the formal hierarchy of the legal system in the form of administrative rules (*guizhang*). This possibly blurred the boundaries of the legislative infrastructure.²⁹¹ How-

290. See Keller, *supra* note 13, at 722-25.

291. See *id.* at 726-27.

ever, since the late 1980s, laws such as the *Legislation Law*²⁹² have attempted to distinguish legislation from administration. This process includes establishing criteria for determining legislative competence of different state agencies to pass regulations and rules, to limit the power of state administrative agencies to create punishments and coercive measures, and to impose procedural requirements on rule-making.²⁹³

The 1990 and 1991 Decisions issued by the Standing Committee of the NPC mentioned the power to detain prostitutes and drug users.²⁹⁴ However, the normative content of these detention powers is largely provided by a series of Party and police rules. More recent developments in the legal system require the exercise of state's coercive powers be based on legislation and not administrative decisions. However this ideal has not yet affected the legal form of the detention powers. The legal form of these powers is characteristic of the form of regulation that prevailed in pre-reform period. The distinction drawn by Peng Zhen between matters properly the subject of legislation and the politically and legally oriented law enforcement that is properly subject to political and administrative control, retains explanatory force when examining the legal form of detention powers.²⁹⁵ Administrative detention appears still to fall within the latter category.

This discussion about the legal informality of the powers of detention for education and coercive drug rehabilitation demonstrates the centrality of social, political, historical and institutional factors in shaping these powers. Such an analysis might lead us to conclude that the police can exercise their powers without significant legal constraint, or that to a considerable extent the police are able to control both the legal definition of their powers and the constraints placed upon the exercise of those powers. In the next section I consider briefly the extent to which recent developments in the legal system have started to impact upon public security administrative detention powers.

292. PRC Legislation Law (2000). The impetus for a better legal definition of state powers came initially from passage of the Administrative Litigation Law. This law empowered the courts to review the lawfulness of an administrative decision. Zhonghua Renmin Gongheguo Xingzheng Susong Fa [PRC Administrative Litigation Law] (1989). Administrative agencies were thus forced to designate the laws and rules against which the lawfulness of a particular action would be judged.

293. See discussion *infra* Section 8.2.

294. NPC Decision on Strictly Prohibiting Drugs (1990), *reprinted in* WANG, *supra* note 94, at 47-49.

295. Potter, *supra* note 25, at 23.

8.2 MINIMUM REQUIREMENT FOR A LEGISLATIVE FRAMEWORK FOR ADMINISTRATIVE DETENTION POWERS

The developing legislative framework has begun to impose minimum requirements on the legal form of administrative detention powers. The passage of the *Legislation Law*²⁹⁶ and the *Administrative Punishments Law*²⁹⁷ demonstrated an intention to centralise the power to make rules enabling agencies to deprive a person of her or his liberty. The *Legislation Law*, requiring that a power to deprive a person of her or his liberty be based on law, lends weight to the legal and constitutional arguments that administrative detention powers be radically restructured.

One notable example of the use of legally framed arguments occurred during the debate preceding the 1996 abolition of the power of detention for investigation (*shourong shencha*). Some argued that the power was contrary to "socialist legal construction" and was unconstitutional.²⁹⁸ There were several lines of reasoning in this argument. One was that the power of detention for investigation contradicted the spirit and letter of the *Constitution*²⁹⁹ and undermined the integrity of criminal procedures as codified in the *Criminal Procedure Law*.³⁰⁰ Another was that the State Council or by the Ministry of Public Security did not have the power to pass the rules that formed the legal basis of the investigatory detention power.³⁰¹

Similar arguments are now being made in the debate about either restructuring or abolition of re-education through labour.³⁰² It has also been argued that the administrative deten-

296. See *supra* note 35.

297. See *supra* note 37.

298. XINGSHI SUSONG FA YANJIU ZONGSHU YU PINGJIA [SUMMARY AND APPRAISAL OF CRIMINAL PROCEDURE LAW STUDY] 146 (Chongyi Fan & Shengxi Xiao ed., 1991); Jianwei Zhang & Zhongcheng Li, *Lun Feichu Shourong Shencha* [Discussing the Abolition of Detention for Investigation], 3 ZHONGWAI FAXUE 55 (1994); Xinxin Wang, *Administrative Procedure Reforms in China's Rule of Law Context*, 12 COLUM. J. ASIAN L. 251 (1998).

299. ZHONGGUO RENMIN GONGHEGUO XIANFA, art. 37 (providing that freedom of the person is inviolable and that a citizen may only be arrested upon the approval of the people's procuratorate or the people's court).

300. Zhang & Li, *supra* note 298; Ming Cui, *Shourong Shencha de Lishi, Xianzhuang Yu Chulu* [The History, Present Situation and Prospects of Detention for Investigation], in ZHONGGUO DANGDAI XING YU FA [CHINA'S CONTEMPORARY CRIME AND LAW] 95 (Ming Cui ed., 1993).

301. Dingjian Cai, *Guojia Quanli Jiexian Lun* [Discussion of the Limits of State Power], in ZHONGGUO FAXUE 54 (1991) (arguing that a specific delegation of power is required); XINGZHENG FA YU XINGZHENG SUSONG FA CIDIAN [DICTIONARY OF ADMINISTRATIVE LAW AND ADMINISTRATIVE LITIGATION LAW] 1135-36 (Songnian Ying ed., 1992).

302. See, for example, the collection of views in volume five of FAXUE, including Chen, *supra* note 264.

tion power of detention for repatriation (*shourong qiansong*) should be abolished, as it is not based on legislation passed by either the NPC or its Standing Committee, and therefore does not have a proper legislative basis as required by the *Legislation Law*.³⁰³ In addition, the International Covenant on Civil and Political Rights guarantees that a person not be deprived of her of his liberty except on grounds and procedures established by law.³⁰⁴ Scholars argue that this requires that a decision to deprive personal liberty must be made by a court.³⁰⁵ This argument concludes that the decision to impose detention for education and coercive drug rehabilitation, since it is not made by the court, would undermine China's compliance with the ICCPR.

8.3 THE *Legislation Law*: legitimating device?

Article 8 of the *Legislation Law* specifies a list of areas which may only be regulated by way of law (*falü*) passed by the NPC or its Standing Committee. Specifically, Article 8(5) includes in this list powers for: "deprivation of a citizen's political rights, coercive measures and punishments for restriction of personal freedom".³⁰⁶

During negotiations in drafting the *Legislation Law*, the police argued that the limits on administrative rule-making in respect of coercive measures should not apply to administrative coercive measures (*xingzheng qiangzhi cuoshi*), which should be able to be based on administrative regulation and local regulation.³⁰⁷ The final draft of the *Legislation Law* submitted to the NPC for examination endorsed this view as the draft did not place restrictions on the capacity of administrative organs to pass rules in respect of coercive measures (*qiangzhi cuoshi*) resulting in the restriction of personal freedom.³⁰⁸

When the Law Committee of the National People's Congress conducted the final review of the draft legislation, it was

303. Wenren Liu, in *FALU LUNWEN ZILIAO KU* (2002). Since this article was written, this power was in fact abolished.

304. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 9(1), 999 U.N.T.S. 171 (entered into force on Mar. 23, 1976) ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.").

305. Liu, *supra* note 303.

306. ZHONGHUA RENMIN GONGHEGUO LIFA FA SHIYI [EXPLANATION OF THE PRC LEGISLATION LAW] 45 (Chunsheng Zhang ed., 2000). Zhang explains the basis for such a provision as recognising that personal freedom and political rights are fundamental rights of citizens guaranteed by the Constitution and as such should not be lightly impinged upon. *Id.* Freedom of the person, Zhang argues, is the basis for other freedoms and rights. *Id.*

307. *Id.* at 48-49.

308. *Id.*

argued that freedom of the person is a constitutionally protected fundamental right and that any power depriving a person of this freedom must be based on law (*fa*) and not on subordinate legislation.³⁰⁹ The *Results of Review of the PRC Legislation Law* (draft), issued by the Law Committee amended the provision in the draft legislation to include coercive measures to the list of powers that must be based upon law.³¹⁰ The same reasoning was the basis for determining that the power of the NPC and its Standing Committee to pass laws in respect of powers including detention is non-delegable.³¹¹

The police have asserted that the *Decision on Strictly Prohibiting Prostitution and Using Prostitutes* and the *Decision on Strictly Prohibiting Drugs* passed by the NPC Standing Committee satisfies the requirement of the *Legislation Law* that the power to deprive a person of liberty must be based on legislation passed by the NPC or its Standing Committee.

Although the *Legislation Law* requires that punishments and coercive measures that result in deprivation of personal freedom be based on law, a number of related issues remain unresolved. First, it is not clear how detailed the law must be in specifying the substantive and procedural aspects of a power. Secondly, it is not clear what constitutes a delegation within the meaning of article 9, especially with respect to the distinction between delegated power and the power to enforce or implement law.

It is unclear from the text of the *Legislation Law* itself whether blank authorisations given under the *Decision on Strictly Prohibiting Prostitution and Using Prostitutes* and the *Decision on Strictly Prohibiting Drugs* constitute sufficient legislative authorisation to satisfy the requirements of the *Legislation Law*. It is also unclear from the *Legislation Law* whether the authority of the Ministry of Public Security to regulate the definition and enforcement of detention powers constitutes an impermissible delegation of the power. I argue that this form of authorisation contravenes at least the intent and possibly the letter of the *Legislation Law*.

The historical account in the previous sections made apparent that the legislative authorisations provided by two Decisions were legislative legitimating devices for these powers and were irrelevant to their development and manner of use. The *Decision*

309. *Id.*

310. Di Jiuceng Quanguo Renmin Daibiao Dahui Falu Weiyuanhui Guanyu "Zhonghua Renmin Gongheguo Lifa Fa (Cao'an)" Shenyi Jiegou de Baogao (2000), reprinted in *id.* at 294, 295.

311. PRC Legislation Law, art. 9 (2000), reprinted in *id.* at 71-72.

on *Strictly Prohibiting Prostitution and Using Prostitutes* was drafted by the police to legitimate their powers via legislation.³¹² Arguably the *Decision on Strictly Prohibiting Prostitution and Using Prostitutes* and the *Decision on Strictly Prohibiting Drugs* have the important function of giving at least the appearance of legality to the powers. This appearance of legality enables the Ministry of Public Security to argue that the powers of detention for education and coercive drug rehabilitation are legally endorsed.

A legislative basis for these powers is now arguably required to secure their continued existence. Even though lack of a detailed legislative basis for the powers has given the public security unfettered control over the development and implementation of these powers, it also renders the continued existence of these powers vulnerable to a change of political will. The failure of the *Legislation Law* to provide any detailed legal principles for determining what constitutes an adequate legislative basis for a power leaves the determination about legal adequacy of the basis for these powers a political one. Currently the *Legislation Law* can be used as the legal support for either the preservation or the abolition of these detention powers.

8.4 SUPERVISION OF POLICE CONDUCT AND MANAGEMENT OF DETENTION FACILITIES

The people's courts under the *Administrative Litigation Law* and the public security and local governments under the *Administrative Review Law* separately provide external supervision over police conduct and detention management.

The *Administrative Litigation Law* requires a court to determine whether an administrative action³¹³ is lawful on the basis of laws, administrative regulations, and local regulations.³¹⁴ The court should "refer to" ministerial rules, decisions and orders of the State Council, and local rules passed by the local people's governments.³¹⁵ The high degree of generality with which the legal bases of these detention powers have been defined limits the effectiveness of litigation and review as channels for supervision of police conduct. The lack of detail provides the court with

312. Luo, *supra* note 176, at 35. This author was the deputy head of the Legal Affairs Division of the Ministry of Public Security at the time of publication of this article.

313. PRC Administrative Litigation Law, arts. 2, 5 (1989).

314. *Id.* art. 52 (referring to laws passed by the NPC and its Standing Committee, administrative regulations passed by the State Council, and local rules passed by local people's congresses or congresses of autonomous regions).

315. *Id.* art. 53.

little basis to declare an act unlawful except in the most obvious or egregious cases.

The scope of administrative review under the *Administrative Review Law* is broader than that for administrative litigation, in that the review agency is empowered to determine the lawfulness and reasonableness, or appropriateness, of a particular administrative act.³¹⁶ The reviewing agency may scrutinise the lawfulness of the rules upon which the decision was based while examining the decision itself and amending the rule to the extent of its functional power.³¹⁷ In practice willingness of the public security organs to change decisions still needs to be demonstrated.

8.5 LEGAL CHANNELS FOR EXTERNAL REVIEW HELP STRENGTHEN VERTICAL CONTROL BY THE MINISTRY OVER LOWER LEVEL PUBLIC SECURITY ORGANS

Despite the limitations on external sources of review and litigation, the Ministry of Public Security has sought to strengthen internal channels for supervision of local-level conduct.³¹⁸ In 1999, the Ministry of Public Security passed two regulations seeking to increase the accountability of lower-level agencies for unlawful acts and abuses of power.³¹⁹ For example, an officer who committed an intentional or negligent "fault" during enforcement is susceptible to disciplinary sanctions³²⁰ or criminal sanction.³²¹ A fault includes being challenged successfully under administrative litigation or review for a decision where there was a "mistake of the main facts, or a gross abuse of procedure," as well as the lawfulness and reasonableness of imposition of detention for education, coercive drug rehabilitation and re-education through labour.³²² Where compensation is payable under the

316. *Id.* arts. 1, 28.

317. *Id.* art. 27.

318. The Public Security Supervision Committee was established in 1995 based on the PRC People's Police Law article 47 This committee has responsibility for coordinating and implementing internal supervision over all aspects of police work.

319. Gong'an Bu Gong'an Jiguan Neibu Zhefa Jiandu Gongzuo Guiding [Ministry of Public Security Regulations on Public Security Organs Internal Enforcement Supervision Work] (1999), *reprinted in* ZHIFA SHOUCE, *supra* note 215, at 171-76.

320. Disciplinary sanctions for police officers include demotion, leaving the post for training, suspension from duty, revocation of qualification, a written investigation, circulating a notice of criticism, and expulsion, which are to be carried out in accordance with the People's Police Law and Public Servants Regulations.

321. Gong'an Bu Guanyu Renmin Jingcha Zhefa Guocuo Zeren Cuiqiu Guiding [Ministry of Public Security Regulations on Pursuing Responsibility of Public Security Organs and People's Police for Faults in Enforcement] (1999), *reprinted in* ZHIFA XUZHU, *supra* note 221, at 177-82.

322. *Id.* arts. 3 and 6(4).

State Compensation Law, the responsible individual will be required to pay part or all of the compensation awarded.³²³

The ways in which the state has managed legal reform in the context of social order is far from simple. The Ministry of Public Security has sought to use law in a number of ways. It has actively sought to influence the drafting of laws that impact on their rule making and enforcement powers. It has sought to limit restrictions on its rule making powers³²⁴ as well as to entrench the powers exercised by the public security organs by way of legislation,³²⁵ though it has not been completely successful in these efforts. Law is also a way for the Ministry of Public Security to strengthen internal channels for supervision and control over the conduct of local police officers.

9. CONCLUSION

This paper has examined the development of the legal regulatory framework in relation to the specific examples of detention for education and coercive drug rehabilitation since the 1970s. It has considered the interplay between formal legislation and administrative law. It has also identified the centrality of social order policy and the strategies adopted for enforcement of that policy in both the way in which these powers have been revived and in the consequent informality of their legal form. Yet, concurrently, I have noted the importance of ensuring that the powers at least appear to be legally constituted.

To what extent do these contextual factors determine social order regulation? There are several important factors that are particular to the area of social order. First, contemporary strategies for dealing with prostitution and drug addiction were drawn from the past. The techniques used in the early days of the PRC have been revitalised and incorporated as part of the measures currently used for dealing with social order problems. Secondly, the political-legal organisational structures continue to dominate the enforcement of social order and in this respect at least the Party and state enforcement institutions continue to have an almost seamless relationship. As a result, the distinction between processes of policymaking, development of enforcement strategies, the powers required to give effect to these enforcement strategies, and the formal legal entrenchment of these powers be-

323. *Id.* art. 19.

324. For example, the Ministry of Public Security sought to influence the drafting of the PRC Legislation Law. See discussion *supra* Section 8.3.

325. The Ministry has done this by drafting the legislation that was later passed by the Standing Committee of the NPC in respect of detention for education. See discussion *supra* Section 8.3.

comes blurred. Reliance on campaign-style law enforcement in the form of Hard Strikes requires elasticity in the legal form of powers. The Ministry of Public Security has sought to legalise its powers in a manner that preserves its broad discretionary powers. To date, the NPC and its Standing Committee have largely acquiesced in the creation of these detention powers and in the almost unconstrained scope of discretion they confer on the public security organs.

Wide-ranging administrative law reforms that seek to constrain the law-making powers of administrative organs of state, to impose mandatory procedural requirements and to strengthen supervision over the exercise of administrative powers have not yet had a significant impact on these two administrative detention powers. However, there are indications that the failure of these administrative detention powers to meet these standards of legality are viewed with increasing unease, as the debates about re-education through labour demonstrate. Given the continuing centrality of political-legal forms of control in the area of social order and the political sensitivity of social order, fundamental changes to the current regulation of these detention powers will be difficult, though increasingly, not impossible.