



Between Reality and Idea: Implementing the Rule of Law in China's Pre-trial Process

Enshen Li¹

La Trobe University, Australia

Abstract

This article explores the regulatory and conceptual frameworks of the Chinese pre-trial process by identifying the administrative justice system as one salient component in this legal scheme. It reviews the major difficulties of administering pre-trial justice in accordance with the rule of law, as well as corresponding legislative recommendations for promoting the rule of law as a normative system in the operation of the pre-trial process. The article proceeds to make a claim that the idea of implementing the rule of law as the reformative basis to regularize the pre-trial process is most likely unsuccessful due to the Party's resistance and the immaturity of the current legal system.

Keywords: China; pre-trial process; normative system; legal system.

Introduction

The Chinese pre-trial process is generally characterized by legal scholars as the preparatory stage of the Chinese criminal justice system (Leng & Chiu, 1985; Turack, 1999; Fan & Zhang, 2005; Chen, 2005). At this stage, arrest, detention, investigation and prosecution are respectively carried out by the Chinese public security organs (the police) and the procurators serve the trial sessions. Professor Chen Ruihua, one of the leading legal professionals in China, further points out that the pre-trial process in China is composed of three separate and independent stages, namely initiation of a case (Li'an), investigation and prosecution (Chen, 2005). Each stage is regulated by self-governing procedural settings, constituting one fragment of the "streamlined work processes" in the Chinese criminal justice system (Chen, 2005). Therefore, the Chinese legal circle is normally inclined to examine the pre-trial process in the context of criminal justice. In terms of its deficiencies, legal practitioners and academics are intended to promote this phase by reforming the current criminal procedure law in order to meet the requirements of the rule of law and proceduralism (See, e.g., Chen, 2007; Chen, 2006). However, as a stage of implementing law prior to trial, the Chinese pre-trial process should not be defined exclusively as a criminal process. Rather, a uniquely designed administrative justice system that has been long employed in the Chinese legal history is supposed to be considered as another important constituent in China's pre-trial justice system.

In parallel with the formal criminal justice system, China's administrative justice system has been in existence for several decades since its establishment in the 1950s. Unlike the

¹ SJD Candidate, School of Law, La Trobe University, Melbourne (Bundoora), Victoria 3086, Australia. Email: anssen_lee@hotmail.com

former that is aimed at punishing criminality, the latter serves as an effective means to deal with minor offences. Those who commit deviant acts, such as prostitution, drug abuse and public order offenses, are handled by the administrative apparatus through administrative procedures, and sanctioned by administrative regulations. Therefore, conceptually, the administrative justice system refers to the regulatory framework in which the Chinese authorities, particularly the police, incarcerate minor offenders under a variety of administrative detentions to maintain public order, social and political stability. Among all administrative custodial measures, Reeducation through Labor (Laodong Jiaoyang), Detention for Education (Shourong Jiaoyu), Coercive Drug Rehabilitation (Qiangzhi Jiuedu) and Public Order Detention (Zhi'an Juliu) are four major measures comprising of incarceration imposed on offenders who commit socially disruptive behaviors.

Clearly, the administrative justice system is largely employed alongside the state's criminal justice powers to target conduct considered to be socially disruptive (Biddulph, 2007). Since the introduction of the economic modernization policy in the late 1970s, the maintenance of social control has been very important to guarantee the success of the economic reforms (Senger, 2000). Many legal scholars have even argued that the policy of social control itself has been one of the crucial pillars of reform (Bakken, 2000; Chen, 2002). Therefore, the administrative justice system has been heavily relied on in practice to serve as a "second line of defense" to preserve social order and public security.² The use of administrative detention powers is viewed as a flexible tool in the hands of the police to address social order problems, constituting the lower level of crime prevention strategies.

Despite the practical effect the Chinese pre-trial process exerts on the maintenance of social order, both the criminal pre-trial process as well as the various forms of administrative detentions are often portrayed as representative of China's failure to establish rule of law (Peerenboom, 2004). Clearly, one of the most heavily criticized aspects of the Chinese criminal justice system has been the miscarriage of justice in the pre-trial process. Arbitrary detention, misuse of the authorities' unfettered powers and exclusion of judiciary and legal counsel contribute greatly to the malpractices of this procedure (Song, 2003). Many legal scholars and practitioners tend to attribute these phenomena to some ideological causes. They, for instance, argue that the authorities' mentality of favoring substantive justice over procedural justice has long dominated the operation of the Chinese criminal pre-trial, and hence resulting in the disregard of due process (Wong, 1998). Further, the investigative organs are inclined to circumvent formal legal procedures in an attempt to conserve valuable and limited police resources (Wong, 1998). More crucially, the hostility of the public toward elements that are destructive of social order and security discourages the effective protection of the legal rights of suspects (Cao & Cullen, 2001). These long-standing attitudes enable the authorities to pay more attention to how to serve crime control rather than abide by the rule of law in their implementation of the law. In respect of the administrative justice system, the unsound legal basis and arbitrary deprivation of minor offenders' liberty generate the two most destructive factors in the process of rationalizing the use of administrative detentions.

² Professor Sarah Biddulph in her book views the regulation and education based on the community organization and mass-line policing as the 'first line of defense' serving the prevention of criminality in China. When the 'first line of defence' fails, the coercive police powers that serve as the 'second line of defence' take over and function as the stiffer measures to prevent criminality.

Many professionals thus suggest that all forms of administrative detentions are either abolished or reformed to meet the requirement of rule of law.

This article first explores the formation of the pre-trial justice system in China in the reform era, and then focuses on its major legal and extralegal deficiencies in its actual operation. By viewing some reformative proposals in response to the current dilemmas of this process, the paper argues that the rule of law that has been strongly advocated by legal scholars may theoretically form the ideological basis to substantialize potential reforms. Yet the implementation of the rule of law in reality is most likely compromised by the Party's ambivalent attitude towards the force of law and the undeveloped legal system in contemporary China.

The Formation of China's Pre-trial Process

Historically, the Chinese pre-trial process has experienced an unsmooth journey since the founding of the People's Republic of China in 1949. Prior to the economic reforms initiated in the 1980s, China had suffered from some periods of lawlessness and disorder where the revolutionary struggle overrode everything in the regulation of the state. (Lu, 1995; see also Dittmer, 1974; Lee, 1978; Dittmer & Chen, 1981; Esherick, Pickowicz & Walder, 2006) In order to justify the administration of the "people's justice", China had first built a societal criminal justice system that emphasized the politicization of the entire legal process during the mass campaigns (Leng, 1977). Thus, a primary criminal pre-trial process was shaped by the enactment of a large number of substantive and procedural laws at that time. For example, the Land Reform Law (1950), the Act for the Punishment of Counter-revolutionaries (1951) and the Act for Punishment of Corruption (1952) authorized the police to dispense justice prior to ad hoc trials.³ In the meantime, an Arrest and Detention Act was promulgated in 1954 to formulate the imposition of custodial measures on criminal suspects and "class enemies" (Cohen, 1968). While a criminal procedure was established to target criminality, an administrative justice system was gradually formed for the handling of minor offenders. This legal mechanism was aimed at relatively unimportant misconduct that is not criminal in nature. Professor Alan Cohen refers to this system as the administrative roundups of "petty thieves, gamblers, opium addicts, whores, pimps, vagrants and other dregs of the old society" (Cohen, 1966), who were subjected to non-criminal reform measures executed exclusively by the police during the course of long confinement (Biddulph, 2007). Based on several years of experience with police imposition of administrative punishments, the Security Administration Punishment Act was enacted in 1957 in an attempt to legitimize the use of administrative sanctions (Cohen, 1968), hence indicating the authorities' commitment to constructing a formal administrative justice system to maintain social order alongside the criminal justice system.

The Chinese pre-trial process has been significantly improved in terms of proceduralism and regularity since the economic and legal reforms in the late 1970s. A spate of laws and regulations has been adopted to standardize the criminal and administrative practices by law enforcement agencies prior to trial. As a surge of advocating the importance of the rule of law continues in the Chinese legal complex, the

³ The *Land Reform Law*, the *Act for the Punishment for Counter-Revolutionaries* and the *Act for Punishment of Corruption* were passed in a series of political campaigns during the period of 1949-1953, including the Land Reform Movement, the Suppression of Counter-Revolutionaries Movement, the Three-Anti Movement and Five-Anti Movement.

1979 Criminal Procedure Law and its amended version in 1996 have set out many provisions to greatly enhance the protection of suspects' legal rights in the criminal pre-trial process.⁴ For example, to ensure that the suspect is able to access legal counsel before trial, the procedure laws have expanded and detailed the legal duties of defense lawyers, and provided that the lawyer's pre-trial practices are legally guaranteed.⁵ Moreover, a large number of regulations and judicial interpretations have been enacted to make the underlying prescriptions more enforceable. The latest effort among the statutory reforms is the passage of the Rules on Questions about Exclusion of Illegal Evidence in Handling Criminal Cases and the Rules on Questions about Examining and Judging Evidence in Death Penalty Cases in 2010.⁶ These two directives were jointly issued by the Supreme Court, the Supreme Procuratorate, the Ministry of Public Security, the Ministry of National Security and the Ministry of Justice in an attempt to restrain the authorities' discretionary powers in collecting evidence, and more importantly, to prohibit the abuse and ill treatment of suspects for incriminating evidence prior to trial (The Supreme Court, the Supreme Procuratorate, the Ministry of Public Security, the Ministry of National Security & the Ministry of Justice. 2010; Li, 2010).

Along with the regulatory advancement in the criminal regime, the exercise of administrative detention powers was reinforced in both theory and practice. Due to the "Open-Door" policy initiated in the late 1970s, the problems of drug abuse and prostitution that were eradicated in the 1950s re-emerged as serious social problems requiring redress (Mou, 1996; Lu, Fang & Wang, 2008). Meanwhile, public order offences that undermine social order and stability have become the major transgression in contemporary China. As a consequence, the Chinese authorities have begun to re-employ coercive administrative measures, namely Reeducation through Labor, Detention for Education, Coercive Drug Rehabilitation and Public Order Detention, as a "second line of defense" to prevent socially disruptive behaviors from deteriorating into crime (Biddulph, 2007). Given that minor offences are not considered as crimes in the Chinese legal context, the imposition of administrative detention on minor offenders is expected to be reformative, educative and rehabilitative because of their aim to handle "non-antagonistic contradiction between the people" (Mao, 1972; Yu, 1993).⁷ While the enforcement of administrative detention has increased, a considerable number of administrative laws and regulations were promulgated by the Chinese government in the reform era to further the justifications of their use. For example, on 29 November 1979 the Standing Committee of the National People's Congress decided to reinvigorate Reeducation through Labor by approving the Supplementary Regulations of the State Council on Reeducation through Labor. Afterwards, two corresponding documents were passed in 1980 and 1982 respectively by the state council, namely the Notice on Consolidation of the Two Measures of Forced Labor and Detention for Investigation into

⁴ The Criminal Procedure Law of the People's Republic of China, adopted by the Plenary Meeting of the Fifth National People's Congress on July 1 1979 and entered into force on January 1, 1980. This law was revised on 17 March 1997 by the Forth Meeting of the Eighth National People's Committee, and came into effect on 1 January 1997.

⁵ Art 36, 37, 75, the *Criminal Procedure Law 1996*.

⁶ *The Rules on Questions about Exclusion of Illegal Evidence in Handling Criminal Cases and the Rules on Questions about Examining and Judging Evidence in Death Penalty Cases* both took effect on July 1 2010.

⁷ In Mao's speech, dealing with minor offenders falls within the scope of non-antagonistic contradiction, which may be handled through education and correction.

Reeducation through Labor and the Temporary Measures on Reeducation through Labor, to expand the targets of reeducation through labor and formulate its operation. At the same time, the Measures for Detention for Education of Prostitutes and Clients of Prostitutes and the Measures on Coercive Drug Rehabilitation were adopted by the State Council in 1993 and 1995 to deal with increasing prostitutes and drug users, serving as the primary legal basis of the use of detention for education and coercive drug rehabilitation.

Clearly, the distinctive features of exercising administrative detention powers make the administrative justice system a true pre-trial process. In the administration of administrative justice, the public security organ is the sole law enforcement agency performing the legal duties of maintaining social order and preserving social security. Unlike the criminal pre-trial stage where the police are only responsible for investigation and detention, the police in the administrative justice regime enjoy a broader scope of legal powers, ranging from the determination of minor offenses to the imposition of administrative detention without the intervention of other legal apparatus. Specifically, the people's procuratorates and courts are not engaged in the process of imposing administrative custodial measures. Nor is there a systematic checks and balances procedure to regulate the police's practices and supervise their exercise of administrative detention powers. Although the Chinese government enacted the Administrative Punishment Law in 1996 in order to strengthen the administrative offenders' legal rights in dealing with the authorities' superior powers, its applicability is more on paper than in practice. In theory, the Administrative Punishment Law provides that offenders are entitled to initiate a public hearing if they think proposed administrative punishments are unlawful or inappropriate.⁸ Such a legal privilege, however, does not apply to those who are administratively detained.⁹ In essence, the administrative detainees are only afforded two post-incarceration remedies in practice. First, pursuant to the Chinese Administrative Reconsideration, a detainee may apply to the public security organs at a higher level for an administrative reconsideration.¹⁰ Secondly, if the applicant is not satisfied with the reconsideration decision, he/she may bring an administrative action in accordance with the Administrative Litigation Law against the concerned public security organs for their detention decisions.¹¹ The litigation is usually organized in the form of a court hearing by the judiciary to examine the legality and reasonableness of detention decision, but the execution of detention is not suspended during the court sessions.¹²

The Characteristics of China's Pre-trial Process

Indeed, the Chinese authorities have intended to build a normative administrative justice system to handle transgression based on Chinese characteristics. Yet the ruling out of due process and judicial supervision in the exercise of administrative detention powers in effect bears great similarities with the criminal pre-trial process. Specifically, there are three distinctive features shared by these two legal schemes, which classifies them into the same category.

⁸ Art 42, the *Administrative Punishment Law*.

⁹ Art 42 states that public hearing can only be held for non-custodial administrative punishments such as suspension of production and business operations, revocation of business licenses and administrative fines.

¹⁰ Art 5, the *Administrative Reconsideration Law*.

¹¹ Art 6(1), the *Administrative Reconsideration Law*.

¹² Art 11(1), (2), the *Administrative Litigation Law*.

First, in both criminal and administrative justice system, while the law enforcement agencies are granted discretionary powers to carry out their legal duties, offenders are often given limited legal rights to prevent themselves from being wrongly or illegally treated. The unequal power between the authorities and offenders results in the offenders' vulnerability in legally defending themselves in the pre-trial process and in turn exacerbates the abuse of powers by law enforcement agencies due to the lack of effective counteraction. For example, as an effective instrument to serve the goals of completing investigations and preventing social instability (Shi & Ruan, 2005), pre-trial detention has become the preferred vehicle in handling criminal cases, including the use of unlawful detention and extended detention.¹³ Procedurally, the laws subject the imposition of pre-trial detention to the approval by either the chief of public security organs or procuratorates.¹⁴ Such an internal approval system, however, is merely a bureaucratic formality, which barely assures the lawfulness of detention due to its non-transparent procedure (Huang, 2007). It is because as the important accusatory organs, it is unrealistic to expect the police and procuratorates to neutrally examine the legality and necessity of detention prior to trial (Huang, 2005). On the other hand, the suspect is afforded very few legal rights to challenge the detention decision. The rights that suspects may expect are either insufficient to counteract the authorities' paramount power, or, even though those minimal legal rights are in theory workable, largely unreliable in practice.

Second, the court that is supposed to function as the last arbitrator to oversee the administration of justice at the pre-trial phase is entirely excluded. In the criminal procedure, for example, the police and the procuratorates carry out the investigatory and procuratorial activities, respectively, without the intervention of the judiciary. At the investigatory phase, the investigatory agencies enjoy the full power to carry out the investigation, ranging from the approval of custodial measures to the restriction on the lawyer's early involvement. At the procuratorial stage, the people's procuratorates continue to possess enormous power in preparing public prosecution. The procuratorates may keep the suspect in custody after the case is transferred from the police, reject the lawyer's demand for collected evidence, and even return the case to the police for supplementary investigation if the evidence is inadequate to support a successful prosecution. It is noteworthy that none of these aforementioned practices are subject to judicial examination. It in reality turns the Chinese pre-trial process into a purely administrative procedure at the expense of an adversarial system of criminal procedure. Moreover, China's pre-trial process fails to position a judicial review system to limit and correct the authorities' deprivation of citizen's liberty. In the administrative justice regime, for example, the imposition of administrative detention is subject to the police's individual understanding of the law. The public security organs are able to willfully send the defaulters to administrative detention centers without due process. Minor offenders in practice are offered no means to challenge the detention decision and seek redress from the courts during incarceration.

Third, the lawyer's role is minimized in both justice mechanisms. Although the Chinese government has sought to promote the lawyer's stature through legislation and

¹³ Chen Ruihua, 'The Legal Analysis of Extended Detention (Chaoqi Jiya Wenti de Falv Fenxi)' (2000) 9 *People's Procuratorate (Renmin Jiancha)* 7.

¹⁴ Art. 106, the *Procedural Rules of Public Security Organs in Handling Criminal Cases*; Art 124-127, the *Criminal Procedure Law 1996*.

advocacy of the rule of law, the lawyers' defense work is in reality hampered by a number of legal and extralegal factors. In the criminal justice system, although the law has increased the lawyers' legal rights in the performance of their defense work, "Three Difficulties", namely meeting criminal suspects in detention, getting access to case files, and collecting evidence, constitute the three biggest struggles for criminal defense prior to trial (Halliday & Liu, 2007). It is because notwithstanding the Criminal Procedure Law 1996 tends to expand the role of the defense lawyer, its corresponding regulations, such as judicial interpretations, provide conflicting provisions in the consideration of the interests of law enforcement agencies (Liu & Halliday, 2009). This legal indeterminacy surely increases confusion and reduces certainty in the lawyer's operation of defense duties, and hence deteriorating the lawyer's role in the administration of pre-trial justice. In addition to legal uncertainty, a wide range of extralegal elements, including the Chinese unique political, institutional and ideological frameworks, also wield the chilling effect on the willingness of lawyers to take on criminal and administrative detention cases (See, e.g., Chen, 2008)

The Deficiencies and Corresponding Reforms of China's Pre-trial Process

Three decades of legal reform from the days of Mao has produced remarkable changes with respect to laws, practices, institutions in China's pre-trial justice system. Over time, a socialist pre-trial stage with two-tier line of defense has been formed and had a profound impact on China's crime prevention and social order policies. But the reality shows that the pre-trial process in China remains in essence a system of rule by law rather than the rule of law. Professor Randall Peerenboom identifies rule by law as a form of instrumentalism where law is merely a tool to be used by the state to control others without imposing meaningful restraints on the state itself. In such a scheme, law is not supreme and is usually trumped by the dictates and political policies of the rulers (Peerenboom, 2002). This scenario pertinently reflects the authorities' practices in China's pre-trial process, where law is usually designed, interpreted and used to serve the official goals of crime control and punishment. The authorities themselves, however, are neither challenged nor constrained by law in the exercise of their powers.

Therefore, many legal scholars have sought to explore the deeper roots both within and outside the legal context to explain this dilemma. Professor Chen Ruihua, for example, claims that one of the most salient causes of the miscarriage of justice at the pre-trial stage is the lack of a neutral and independent checks and balances system (Chen, 2005). Such a review scheme is expected to effectively supervise and restrain the authorities' practices to ensure that the equilibrium of powers between the suspect and the law enforcement agencies maintained prior to trial (Chen, 2008). Further, he asserts that the institutional and conceptual frameworks of the criminal justice system in China discourage the pre-trial process from being operated in a legal and fair manner (Chen, 2005). Chen argues that the unique "streamlined work" pattern of administering pre-trial criminal justice enables the Chinese police and the procuratorates to carry out the investigatory and procuratorial activities, respectively, without the intervention of the judiciary (Chen, 2008). The judiciary, however, is viewed as the last arbiter in the entire criminal process to ensure that "criminal justice" is finally served (Chen, 2008). In such an operational model, the police and procuratorates are afforded paramount powers to perform their legal duties in an unlimited fashion, while the judiciary is required to collaborate with them to achieve the ultimate goal of crime control (Chen, 2008).

In respect of the administrative justice system, the authorities' discretionary power in the imposition of administrative detention merits more serious attention as well. Professor Randall Peerenboom, while favoring the retention of administrative detentions, admits that the lack of due process, including a prompt judicial review system, is likely to result in the malpractice of the administrative justice system (Peerenboom, 2004). In his view, although eliminating administrative detentions and subjecting minor offenders to the criminal sanctions will push them into the harsh and decidedly unfriendly penal system, force them to live with hardened criminals, and result in their being forever stigmatized as convicts (Peerenboom, 2004), the widespread use of administrative detention in contemporary China fails to provide a solid legal basis to deprive offenders' liberty (Peerenboom, 2004). This perception is echoed by another China-law academic, Professor Sarah Biddulph, who perceives Chinese administrative detentions as the product of the "second line of defense" (police administrative powers) (Biddulph, 2007). While asserting that administrative detention forms an integral and distinctive part of the social order, which facilitates flexibility in dealing with the changing problems of social order (Biddulph, 2004), she points out that Chinese administrative detention powers are poorly defined and abusively used (Biddulph, 2007). It is thus imperative to legalize the environment in which administrative detention powers are defined, enforced and supervised. She believes that legislation in this case is a way of providing legal grounds to justify the existence of the administrative justice system and will necessarily result in the restraint on the abuse of administrative power (Biddulph, 2007).

In response to aforementioned ideological and practical deficiencies, many legal professionals and practitioners have provided the government their reformative thoughts and proposals on how to reform China's pre-trial justice system over the last decade. Not surprisingly, the propositions are aimed mainly at procedural justice and limits on the authorities' powers (The People's Procuratorates, 2007; Wang & Peng, 2007). Professor Chen Guangzhong, for example, suggests a massive modification for the CPL 1997 in compliance with universally accepted norms of human rights protection. He claims in his book that the current criminal procedure law only provides general and abstract principles that are theoretically consistent with international standards. The practical implementation in essence falls far short of the minimum requirements and necessitates an overhaul of the legislation (Chen, 2005). Professor Chen Ruihua and Lawyer Tian Wenchang, on the other hand, intend to amend the CPL 1997 by focusing on the heightening of the lawyer's stature in the criminal procedure. They argue that the lawyer's defense power needs to be greatly strengthened to directly protect the suspects' legal rights, in order to counterbalance the authorities' paramount discretion (Tian & Chen, 2007).

In the field of the administrative justice, Professor Sarah Biddulph calls for the legalization of administrative detention powers and the limitation of state or police power (Biddulph, 2007). She claims that viewed by the rule of law framework, police powers in imposing administrative detention should be subject to legal norms and separated from the Party's control (Biddulph, 2007). Most importantly, a legal scheme that regulates and controls the exercise of state power, in particular to control chronic abuse by the police of their administrative detention powers ought to be built (Biddulph, 2007). A number of Chinese scholars, however, are inclined to borrow European Security Defense Punishment (Bao'an Chufen) to regulate administrative detentions as a whole (See, e.g., Wang, 1996; Fang, 2002; Chen, 2004). They believe that the Chinese minor offenders subjected to the administrative detentions shared the same characteristics of those in the

security defense system, and need to be treated under a different system other than administrative incarceration or criminal sanctions (Fang, 2002; Chen, 2004). I, on the other hand, illustrate that the general reforms aimed at the formulation and rationalization of the use of administrative detentions are of no use to the realization of educative, rehabilitative functions in helping minor offenders go back the society and their community. I therefore conclude that a community correctional scheme that provides community-based programs to re-socialize minor offenders is a more effective way to prevent recidivism and further crime (Li, 2010).

Is the Rule of Law Applicable in the Promotion of China's Pre-trial Process?

It thus gives rise to a question whether a rule-of-law legal system may be a prerequisite to all proposed reforms of constructing a regularized pre-trial justice system. In contrast to the rule by law norm, the rule of law, according to Professor Eric Orts, refers to “a normative and political theory of the relationship of legal institutions and the political state that includes, but is not limited to, a theory of limited government through some form of constitutional separation between the judiciary and other state powers” (Orts, 2001). Simply put, the rule of law means to rule the country in accordance with law, and requires that the law imposes restraints on the state and its rulers (Peerenboom, 2002). This definition seemingly suggests that rule of law may shape the theoretical basis to build a legalized pre-trial process, where a truly balanced distribution of powers between the authorities and offenders is expectable.

1. The Party's Influence

China has endorsed the rule of law since the mid 1990s. Since then, numerous laws and regulations have been enacted at both the national and local level, while considerable efforts and resources have been spent on the developments of legal institutions and profession (Zou, 2000). In practice, however, the implementation of the rule of law has been unsatisfactory in China. Many scholars argue that the Chinese political framework, namely single party socialism, is incompatible with the rule of law because the Party is reluctant to subject its power to law (Lubman, 1999). This view is particularly reflected in the launch of the “hard strike” campaigns. During the crackdowns, many new “laws and regulations” were passed, and instrumentally employed as the disguise of political policies (Lubman, 2006). The authorities were in reality required to follow the “new legislation” as the operational guides in lieu of the existing laws. Not surprisingly, while the Party enjoys using law as an instrument to enforce Party policies, it is unlikely that the ruling elites will impose any restraints on their wide discretion. This certainly explains the long-standing lack of checks and balances mechanism and the plight of lawyers in the Chinese pre-trial process. Even though the CPL 1997 and relevant administrative regulations set out procedural requirements to control the abuse of the authorities' powers, the effectiveness is actually subject to the Party's willingness to abide by them.

Therefore, one of the most crucial factors that may promote the operation of China's pre-trial process, or the prospect of relevant legal reforms, is whether the state is prepared to unconditionally implement rule of law. It is noted that some legal professionals are at odds with the mainstream view over the Party's influence on the enforcement of the rule of law. Professor Randall Peerenboom, for instance, takes the view that the Party in China now only plays a limited role in the daily operation of the legal system (Peerenboom, 2002). While acknowledging the Party is still a major force influencing the direction of

legal reforms, he points out that the Party's role has retreated and its power has been transferred to the society and law enforcement agencies (Peerenboom, 2002). He further argues that the obstacles to realizing a law-based order is diverse, including a weak judiciary, poorly trained judges and lawyers, immature legal consciousness and unsound legal system (Peerenboom, 2002). Indeed, since the 2000s China has underpinned the supremacy of law and tended to prioritize law over power in the governance of the state. The efforts to promote the legal infrastructure and environment have also been made in the context of ongoing legal reforms (Orts, 2001). However, the extent to which these intentions are substantialized is doubtful, as the Party has long shown its skeptical and ambivalent attitudes towards the force of law and the impact of legal reform in the regulation of the country.

The reasons are multi-faceted. Above all, the aforementioned reforms require a drastic transformation in philosophy of administering pre-trial justice. Since the establishment of the formal criminal justice system, the Party has been struggling to solve conflicts between striking crimes and protecting human rights, substantive justice and procedural justice and justice and efficiency (Liu & Halliday, 2009). The CPL 1997 is actually a product of balancing these opposite interests (Liu & Halliday, 2009). In this law, lots of inner contradictions are present, including some obvious conflicting prescriptions. Unsurprisingly, given China's criminal procedure has long been dominated by the rhetoric of punishment and retribution, the authorities are concerned that the shift of focus onto the suspects' rights in any further revision is likely to hinder the state's ultimate pursuit of crime control. For example, the strengthening of suspects' rights in the pre-trial process necessarily entails the improvement of the lawyer's legal entitlements and limitations on the authorities' discretion. The state will have to take the interests of every participant in the pre-trial process into account to re-allocate their powers in order to create an adversarial balance between the accusatory and the suspect. Similarly, as administrative detention is characterized as an adjunct to criminal sanction in China's social order policy (Biddulph, 2007), its use is philosophically consistent with criminal justice, and shows the punitive and deterrent elements in preserving social order. Although concerns have often been raised about the legality of administrative detention, the government is unwilling to rationalize administrative detention powers with the higher degree of legitimacy. This is because the current administrative justice system has so far served as a very effective instrument in structuring crime prevention strategies. Any ideological redefining of administrative detention may lead to confusion in its use, hence undermining far-reaching social order policies.

Secondly, the reforms are most likely to result in the radical changes to the institutional and conceptual framework of the pre-trial process, for which the Party may have not yet been prepared. Specifically, to comply with the rule of law, the legal duties of law enforcement agencies may be re-assigned to meet the procedural requirement of legality. A judicial checks and balances mechanism, for instance, has proven badly needed at the pre-trial stage. It means that the introduction of such a review system requires the role of the judiciary to be re-specified, because the Chinese Constitution explicitly states that the People's Procuratorate is now the only supervisory organ in the Chinese legal system. At the same time, the reforms are to compel the police and procuratorates to adjust their new roles. It is foreseeable that the adoption of a judicial checks and balances system is going to take over their most exclusive powers, such as the discretion to detain suspects without due process prior to trial, and oversee their practices in the administration of justice. In the

meantime, the legalization of administrative detention powers necessitates structural and philosophical reforms as well in the contemporary administrative justice system. For example, as imposing punitive administrative detention is unlikely to benefit offenders' re-socialization and their reintegration into the society, community correction based on educational programs becomes a proper alternative to serve the ultimate goals of correction and rehabilitation (Li, in press). This proposition hence requires a wholesale retreat of the police and increasing reliance on community resources, including the street committees, social organizations, community voluntary workers and legal practitioners. Moreover, to ensure that community correction will be operated in a rule-of-law manner, the judiciary must be involved, playing an arbitral role in determining whether a minor offender should be sent to receive community treatment. Clearly, these reforms are to re-conceptualize the inherent functions of law enforcement agencies and systematize the legal institutions in accordance with the rule of law. It is thus difficult to judge how keen the Party is to make such effort and how deeply China's legal culture will bear the imprint of new characters of law enforcement agencies.

Thirdly, notwithstanding that China has begun to accept the international norms, such as human rights, derived from western legal regimes, the Party is reluctant to fully incorporate them into domestic laws. China has always insisted that adoption of universal rules ought to depend on local circumstances, such as cultural, ideological and economic particularities (Peerenboom, 2005). In particular in the field of human rights protection, the government believes that greater weight should be placed on collective rights, and more importantly, on the interests of the state (Weatherley, 1999; Gang, 1994). The state is therefore hesitant to greatly strengthen suspects' and offenders' rights in the pre-trial process. Influenced by the far-reaching rhetoric of crime control, it is not surprising that the Chinese government has encountered greater difficulties in balancing the goal of punishing criminals to protect the community and the requirement of safeguarding the suspects' human rights to ensure legality (Ting, 2004). In essence, although the supremacy of crime control has been widely used as a pretext to rationalize the state's resistance, the Party is more worried about the threat posed by philosophical globalization to its sovereignty. China, as a single-party country, is concerned that the extensive acknowledgement of international laws and principles may invite external interference in its domestic affairs (Li & Jia, 2009). Some scholars, for example, take the view that the signing of the international human rights treaties enables the western society to justifiably criticize China's human rights record (Guo, 2003). It specifically shows in China's attitude to the annual reports issued by the US State Department and the Amnesty International on China's human rights situation. In response to criticism, the government discontentedly calls the allegations groundless and accuses those making the allegations of interfering in its internal affairs and undermining the state's political stability (CNN Politics, 2009). It is true that while China has now developed as one of the most open-minded nations in the world, the Party's political supremacy is viewed superior to everything. Therefore, some political academics impliedly point out that the assimilation of some western ideologies in the Chinese social and regulatory frameworks may arouse the expectation of the public towards bourgeois democracy and values, which are in conflict with Chinese political teachings (Chen, 2006).

2. The Unprepared Legal System

It has been evidenced that the Chinese Communist Party values its control over Chinese society more than it does legal reform (Lubman, 1999). Therefore, China's legal development is more driven by the Party's will in achieving certain political goals rather than a product responding to the social values of the dominant culture. As such, the Party's resoluteness to subject its power to the law according to the rule of law determines the further institutionalization and legalization of China's pre-trial process. However, the rule of law theory requires not only meaningful restraints on state power, but also a comprehensive and well-enforced legal system where fair procedures and consistent enforcement of the law in the form of trials, hearings, rules of evidence and due process are present (Woo, 1999). Despite the fact that the Chinese government has embarked on legal reforms since the late 1970s, the legal system in China is dysfunctional and corrupt (Chen, 1983; Potter, 1999). Therefore, even if the Party tends to enforce rule of law in the administration of pre-trial justice, the existing legal culture and practice creates the great practical obstacles in its genuine implementation.

It is widely acknowledged that China's legal system severely suffers from legal indeterminacy and uncertainty in the current legislation (Potter, 2004), which is likely to discourage the state from implementing the rule of law. In the legal hierarchy of the pre-trial procedure, there are a large number of laws and corresponding regulations found to formulate the administration of pre-trial justice. It is because the Chinese lawmakers opt to intentionally draft laws in broad terms with more general language. Meanwhile, they are fond of issuing complementary rules to interpret loosely-defined laws, such as the CPL 1996, to allow local bureaucrats to exercise considerable ingenuity in promoting domestic interests (Lubman, 1999). While ideological and structural contradictions arise due to the enormous quantity of legislation at the different levels, ambiguities and inconsistencies in the implementation of the law are produced (Liu & Halliday, 2009). Indeed, many legal scholars wish to reform the pre-trial process by significantly modifying the CPL 1997 and drafting new laws to regulate the use of administrative detentions. Yet how to solve the disparities between proposed legislation and existing operating regulations remain unanswered. It is not uncommon that many provinces and major cities have enacted supplementary criminal and administrative regulations pursuant to their local conditions. In particular in the administrative justice system, localities rely heavily on the provincial rules and directives that cohere with the domestic characteristics to handle administrative offenders. It thus gives rise to the concern that new legislation may continue to exhibit characteristics that marked earlier norms. While the underlying laws are modified at a macro level, the localities are most likely to continue their drafting of interpretative regulations to clarify new undefined and ambiguous provisions in the consideration of local interests.

Second, a powerless judiciary is unable to bolster the procedural requirements of the rule of law. By examining the pre-trial process in China, a judicial checks and balances scheme has been widely viewed as a protective vehicle to ensure legality and constraints on the authorities' powers (Chen, 2008; Li & Liu, 2006). However, this institutional setting is most likely compromised by the unprofessionalism and limited authority of the Chinese courts. Many legal scholars claim that implementation of the law by the courts has been severely hampered by judges' low levels of legal education and professional standards (Lubman, 1999; Peerenboom, 2002; Wang, 2008). As many judges in China are transferred from military and administrative posts (Peerenboom, 2002), they are actually

poorly trained and find it difficult to catch up with ever-developing legal norms (Peerenboom, 2001). It thus raises the doubt over whether the Chinese judges are capable of playing the examining and supervisory role in a check and balances system. As suggested in the potential reforms, such a review scheme is supposed to serve as an impartial and authoritative arbitrator to balance the interests between the suspect and the authorities prior to trial. Accordingly, the judges are expected to regulate and control the authorities' practices according to the rule of law on one hand, and to guarantee the realization of legal rights of suspects and their lawyers on the other hand. These legal obligations suggest that the judges must acquire solid legal knowledge and a thorough understanding of rule-of-law principle. More importantly, the judiciary has to adapt the transition of its role from the last actor in adjudication to the arbiter throughout the pre-trial process. For example, given the Chinese criminal process is seen as a "streamlined process" where the police, procuratorates and courts are responsible for the operation of the investigatory, procuratorial and trial stage respectively, the judiciary, upon taking up the checks and balances duties, is required to obtain the same level of expertise, experience and knowledge as the police and procuratorates in the administration of pre-trial justice. Therefore, although since the late 1990 China has made lots of efforts to improve the quality of the judiciary,¹⁵ the courts in contemporary China are seemingly unable to quickly undertake the new commitments due to their incompetence and unskilledness.

The uncertainty of the judiciary to promote the rule of law is also attributed to the scarcity autonomy of the courts in the Chinese legal system. Many legal professionals observe that the Chinese judges are unlikely to decide cases independently in accordance with the law and without interference from other parties (Woo, 1991; He, 2004). Professor Peerenboom, for example, affirms that the courts' practice is largely interfered by both external and internal resources (Peerenboom, 2002). External interference refers to influences imposed by the Party, the legislature, the government, the bureaucracy, the other law enforcement agencies and social organizations. Internal interference means the intervention from inner resources, including senior judges, adjudicative committees, political-legal committees and higher levels of the courts (Peerenboom, 2002). It is true that the Chinese judges are in practice compelled to take account of a variety of extra-legal interests when they decide cases. In particular, in the courts' handling of specific cases and during the periods of nationwide campaigns such as "Hard Strike" movements, the judges are frequently asked to follow the central guides in adjudication and enforcement of law (Zhu, 2006). Further, in the institutional framework of the criminal procedure, the judiciary has always been a weakest law enforcement organ. Given the unique Chinese legal culture makes the judiciary a last actor to only carry out adjudication in the criminal process, the court in fact has little chance expressing its opinions on the handling of cases. Rather, to coincide with the ultimate goal of crime control, the judiciary has to coordinate with the police and procuratorates, and sometimes even take the directions from them (Chen, 2005). As such, there is every reason to believe that it is a long journey ahead for the Chinese judiciary to obtain independence and needed authority. Even if a judicial checks and balances mechanism is finally established, its practice would be more formalist than functional. Without a deep reform of the hierarchical structure of criminal justice, the enforcement of law by the judiciary will remain highly supervised and

¹⁵ For example, China passed the Judges Law in 1995 to address the issues of existing judges who lacked sufficient legal training, setting out the higher standards to qualify as a judge.

disrespected, gradually becoming similar to that in administrative agencies (Lubman, 1999; Chen, 2008).

Conclusion

Clearly, both subjective and objective elements manifest an unfavorable path ahead for the implementation of rule of law in China. Indeed, the adoption of a genuine rule-of-law legal system entails not only regulatory and institutional reforms, but also the transition in the ideology of administering pre-trial justice. It will certainly revolutionize the existing legal system and culture, and bring them up to a more advanced level that the current legal resources are inferior to. In particular, when a variety of interests are tangled and sometimes opposed in the pre-trial process, the operation of this procedure according to rule of law will have to sacrifice the incompatible philosophies, such as the unduly pursuit of crime control, in an attempt to guarantee justice and legality. Although China has undergone, and continues to be in the midst of, remarkable transformations of legal practice and development, its deep-rooted legal tradition and political framework do not allow a radical alteration in the Chinese legal system. Therefore, without China's true realization of the significance of law in the governance of the country, the proposed reforms are unlikely to practically achieve the legalization of the pre-trial justice system.

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