Can a Government Compulsorily Make Her Citizens More Free? – Revisiting Non-Judicial Detentions Under the People's Republic's Administrative Regulations and Their Justifications

YI Yanyou

TABLE OF CONTENTS

Can a Government Compulsorily Make Her Citizens More Free? – Revisiting Non-Judicial Detentions Under the People's Republic's Administrative Regulations and Their Justifications

YI Yanyou*

I. INTRODUCTION

Under the Constitution and Criminal Procedure Law of the People's Republic of China, the governmental organizations which have the power of approving an "arrest" are the People's Procuratorate and the People's Courts,[1] and only the People's Courts have the power to convict a citizen of a criminal charge.[2] Even though western governments do not consider a prosecution division of a government as a judicial organ, the People's Procuratorate has been upheld as one as a Chinese legal tradition for more than thirty years. Therefore, we may divide different types of detentions into three categories: (1) those decided or approved by the People's Procuratorate and the People's Court – *judicial detentions*; (2) detentions other than those made by a People's Procuratorate or a People's Court – *non-judicial detentions*, which includes *criminal detentions* (*xingshi juliu*) under the Criminal Procedure Law,

* LL.M. (University of Warwick); PhD. (Chinese University of Political Science and Law); assistant professor, Faculty of Law, Tsinghua University.

[1] 宪法, Xian fa [Constitution] art. 37, § 1 (1982) (P.R.C). China promulgated four Constitutions. That is, the 1954 Constitution, the 1975 Constitution, the 1978 Constitution and the 1982 Constitution. The 1982 Constitution has been revised four times in the past 28 years, but all the amendments are regarded as parts of the 1982 Constitution.

[2] 刑事诉讼法, Xing shi su song fa [Criminal Procedure Law] (promulgated by the Nat'l People's Cong., Mar. 17, 1996) 1960-63, 1979-81 FA GUI HUI BIAN 282 (P.R.C.) (This law was adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, and revised in accordance with the Decision on Revising the Criminal Procedure Law of the People's Republic of China, adopted at the Fourth Session of the Eighth National People's Congress on March 17, 1996), art. 12.

administrative detentions (*xingzheng juliu*) under the Security Administration and Punishment Law (SAPL); (3) and other detentions based on initial decisions and approvals by administrative officials other than prosecutors or judges.

Although all non-judicial detentions are decided by administrative organs, they function in different ways. From a functionary point of view, they may be grouped into at least three types. The first group consists of detentions which can be used as tools of criminal investigation and crime control, which includes *stop for further questioning* provided by the People's Police Law, *criminal detention* provided by the Criminal Procedure Law (CPL), and the already abolished *shelter for examination*. The second group involves *work-study schools*, which uses compulsory measures to detain and rehabilitate minors. The third group is constituted by *rehabilitation through labor*, *shelter and education*, *coercive drug rehabilitation*, the already abolished *shelter and repatriation*, and *administrative detention* under SAPL. These measures are grouped together because they are of similar nature and are not justified clearly.

All three groups of non-judicial detentions are more or less related to constitutionalism. For example, the constitution provides for *arrests* in criminal procedure, but does not provide for *criminal detention*. So what is the nature of a *criminal detention*? Under the constitution, how long should a *criminal detention last*? As to the *work study school*, does it violate young people's right to a fair opportunity for education? All these issues are of great significance, and it is not easy to resolve so many problems in one essay. Therefore, this essay deals with only one of the three groups of detentions. This essay focuses on the third group of non-judicial detentions because the third group is deemed as the most problematic category.

This essay explores the way non-judicial detentions attain legitimacy, revealing the reasons that justify non-judicial detentions, and discussing desirable reforms for these detentions.

Part I gives a brief introduction of Chinese non-judicial detentions which are still in use, including their origins, targets, time limits and process. Part II explores how Chinese Government justifies non-judicial detentions from official documents and relative discourses, and demonstrates how Chinese Communist Party (CCP)

and Chinese Government view these measures, how the CCP deals with the relationship between these measures and the Constitution, and how the CCP tried to get legality and legitimacy for non-judicial detentions from their interpretation of these measures. Part III demonstrates what "personal freedom" means in a liberal constitutionalism and shows the problems with the justifications provided by Chinese official documents, and explores why these interpretations provided by Chinese Government may not stand in a modern society. Part IV further clarifies the significance of the ideology behind non-judicial detentions, and exemplifies the dangers if the rule of law is non-existent, together with an analysis of the promulgation of the SAPL. Part V points out that the Chinese Government may alter its position on this issue, and should seek to introduce judicial review for non-judicial detention and to establish a comprehensive rule of law and constitutionalist system. The conclusion provides an overall summary of the issues identified in this article.

II. DETENTIONS UNDER ADMINISTRATIVE REGULATIONS

There are five forms of detentions: (1) *rehabilitation through labor*, (2) *shelter and rehabilitation*, (3) *coercive drug rehabilitation*, (4) s*helter for repatriation* and (5) *administrative detentions* under SAPL that belong to the third group of non-judicial detentions. Since *shelter for repatriation* has already been abolished and therefore does not harm the Chinese rule of law, this essay will not discuss this issue. On the contrary, the *administrative detention* under SAPL has already been declared as a punishment, it thus shall have particular emphasis in this essay as an exemplification for different arguments. Hence, this part only gives introduction to the former three non-judicial detentions.

A. Rehabilitation through Labor

Rehabilitation through labor (RTL) is also categorized as *re-education through labor*, and was firstly provided by the Decision of the State Council Regarding the Question of Rehabilitation through Labor, which was approved at the 78th Meeting of the Standing

Committee of the National People's Congress on August 1, 1957.[3] It is worth noting that, this regulation was originally decided by the State Council, and later approved by the Standing Committee of the NPC of PRC. This Decision was reaffirmed by Resolution of the Standing Committee of the National People's Congress Approving the Supplementary Provisions of the State Council for Rehabilitation through Labor in 1979.[4] Three years later, the Ministry of Public Security provided an Implementing Rule Concerning the Rehabilitation through Labor, which was approved by the State Council.[5]

Originally, there were only four types of individuals targeted for RTL, including: (1) those who will not engage in honest pursuits, involve themselves in hooliganism, commit larceny, fraud or other acts for which they are not criminally liable or violate public security rules and refuse to mend their ways despite repeated admonition; (2) counterrevolutionaries and anti-socialist reactionaries who commit minor offences and are not criminally liable and who have been given sanctions of expulsion by government organs, people's organizations, enterprises or schools, and as a result have difficulty in making a living; (3) employees of government organs, people's organizations, enterprises and schools which are authoritative, but have refused to work for a long period, violated discipline or jeopardized public order, and have been given sanctions of expulsion, and as a result have difficulty in making a living; and (4) persons who refuse to accept the work assigned to them or the arrangement made for their employment and settlement after their demobilization from military service, or who decline to take part in manual labor and production despite persuasion, keep behaving disruptively on purpose, obstruct public officials from performing their duties and refuse to mend their ways despite repeated

[3] *See* 国务院关于劳动教养问题的决定, Guo wu yuan guan yu lao dong jiao yang wen ti de jue ding [Decision on the issues concerning about Rehabilitation Through Labor] (adopted by the Standing Comm. Nat'l People's Cong., promulgated by St. Council, Aug. 3, 1957, effective Aug. 3, 1957) 1956-57 FA GUI HUI BIAN 642 (P.R.C.).

[4] *See* 国务院关于劳动教养的补充规定, Guo wu yuan guan yu lao dong jiao yang de bu chong gui ding [Supplementary Provisions Concerning Rehabilitation Through Labor] (promulgated by St. Council, Nov. 29, 1979, effective Nov. 29, 1979) 1949-85 SI FA XING ZHENG GUI ZHANG HUI BIAN 490 (P.R.C.).

[5] 劳动教养试行办法, Lao dong jiao yang shi xing ban fa [Implementing Rules Concerning Rehabilitation Through Labor] (promulgated by St. Council, Jan. 21, 1982, effective Jan. 21, 1982) 1949-85 SI FA XING ZHENG GUI ZHANG HUI BIAN 548 (P.R.C.).

admonition.[6] But with the promulgation of new regulations, its targets were also broadened. When the Implementing Measures of Rehabilitation through Labor were promulgated, its targets were broadened from 4 types into 6 types.[7] In the recent regulations, its targets were broadened to ten types of behaviors.[8]

According to an official statistic, during the years of 1957-2001, there were more than 3800,000 persons who were rehabilitated.[9]

B. Shelter and Education

Shelter and Education, also known as *detention and education*, is a measure targeted at prostitutes or clients of prostitutes. Since the founding of the PRC, the CCP government has been making efforts on eliminating prostitution. Between 1949 to 1958, Shanghai established Women's Labor Training Centers to shelter prostitutes. The shelter centers 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.[10]

According to the Chinese Government, prostitution was eradicated from that time. But with the open-policy market reform and the development of economy, the phenomenon of prostitution boomed again and was tightly connected to the growing numbers of

---

[6] 国务院关于劳动教养问题的决定, Guo wu yuan guan yu lao dong jiao yang wen ti de jue ding [Decision on the issues concerning about Rehabilitation Through Labor] (adopted by the Standing Comm. Nat'l People's Cong., promulgated by St. Council, Aug. 3, 1957, effective Aug. 3, 1957) 1956-57 FA GUI HUI BIAN 642 (P.R.C.). art. 1.

[7] 劳动教养试行办法, Lao dong jiao yang shi xing ban fa [Implementing Rules Concerning Rehabilitation Through Labor] (promulgated by St. Council, Jan. 21, 1982, effective Jan. 21, 1982), art. 10, 1949-85 SI FA XING ZHENG GUI ZHANG HUI BIAN 548 (P.R.C.).

[8] 公安机关办理劳动教养案件规定, Gong an ji guan ban li lao dong jiao yang an jian gui ding, [Regulations on Public Security Organs Dealing with Cases of Reeducation Through Labor] art.9, *in* 刘建国主编: 劳动教养适用对象, 办案程序, 文书制作法律依, Lao dong jiao yang shi yong dui xiang, ban an cheng xu, wen shu zhi zuo, fa lu yi ju tong lan [TARGETS, PROCESSES, DOCUMENTING, AND LEGAL BASIS OF REHABILITATION THROUGH LABOR] (Liu Jian Guo Ed., 2002), pp. 327-29.

[9] 难忘的历程: 劳动教养工作45年, Nan wang de li cheng: lao dong jiao yang gong zuo 45 nian [INDELIBLE EXPERIENCE: 45 YEARS EXPERIENCE OF WORKING FOR LABOR REEDUCATION] 4, (Admin. Of Reeducation Through Labor Of Dep't Of Justice, Assoc. Of Reeducation Through Labor ed., 2003) (P.R.C.).

[10] *See* 卖淫嫖娼与社会控制 (彦欣 编, 1992), Mai yin piao chang yu she hui kong zhi [PROSTITUTION AND SOCIAL CONTROL] (Yan Xin ed., 1992); *see also* Sarah Biddulph, *The Production of Legal Norms: A Case Study of Administrative Detention in China*, 20 UCLA PAC. BASIN L.J. 217, 229 (2003).

criminal offenses. Thus Chinese regulators concerned with public security made efforts to strike down prostitution again. In 1991, the NPC Standing Committee passed The Decision on Strictly Prohibiting Prostitution and Using Prostitutes.[11] This Decision has been relied upon as the "legal basis" for the detention power. The Decision sets out the formal legal basis for the shelter-for-education power as follows:

Those who offer prostitution services or employ prostitutes may be coercively detained (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.[12]

Shortly after the Decision on Strictly Prohibiting Prostitution and Using Prostitutes, the Ministry of Public Security issued another notice, the Notice on Conscientiously Implementing the Standing Committee of the NPC Decision on Strictly Prohibiting Prostitution and Using Prostitutes on 23 November 1991.[13] As we can see from the Notice, regulators intended to "fill the legislative gap" until the State Council issued a further measure.[14] The State Council issued a subsequent measure in 1993 – the Measures for Shelter and Education of Prostitutes and Clients of Prostitutes,[15] which largely adopted the contents of the 1991 Ministry of Public Security Notice.

[11] *See* 全国人民代表大会常务委员会关于严禁卖淫嫖娼的决定, Quan guo ren min dai biao da hui chang wu wei yuan hui guan yu yan jin mai yin piao chang de jue ding [Decision on Strictly Prohibiting Prostitution and Using Prostitutes] (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 4, 1991, effective Sep. 4, 1991) 1987-97 XIAN XING FA LV FA GUI HUI BIAN 454 (P.R.C.).

[12] *Id*. art. 4, §2.

[13] 公安部关于认真贯彻执行全国人大常委会关于严禁卖淫嫖娼的决定的通知, Gong an bu guan yu ren zhen guan che zhi xing quan guo ren da chang wei hui guan yu yan jin mai yin piao chang de jue ding de tong zhi [Notice on Conscientiouly Implementing the Standing Committee of the NPC's Decision of the Strict Prohibition against Prostitution and Using Prostitutes] (promulgated by the Ministry of Pub. Sec. Nov. 23, 1991) XIAN XING FALV FA GUI HUI BIAN.

[14] *Id*. art. 4.

[15] 卖淫嫖娼人员收容教育办法, Mai yin piao chang ren yuan shou rong jiao yu ban fa [Measures for Shelter and Education for Prostitutes and Clients of Prostitutes] (promulgated by St. Council, Sept. 4, 1993) 1993-94 FA GUI HUI BIAN 126 (P.R.C.).

C. Coercive Drug Rehabilitation

From the very beginning of the founding of the PRC, the Central Government Council promulgated the Order of Strictly Prohibiting Opium,[16] which provided the legal basis for the government to prohibit the production or usage of opium. In 1952, the CCP conducted a national movement on prohibiting drug uses. From 1949 to 1953, there were more than 80,000 drug criminals punished by people's courts, among which more than 800 criminals were sentenced to death. At the same time, there were more than 20,000,000 drug users sent to rehabilitation.[17]

Unfortunately, from the beginning of 1980s, a large amount of drugs swarmed into China, and China was overwhelmed by drug-related-crimes to take measures on prohibiting drugs again. On 8th March, 1982, the fifth Standing Committee adopted the Decision on Severely Punishment of the Seriously Damages Economic Crimes,[18] which provided death penalties for drug criminals. But not until 1990, there were no separated laws or regulations concerning the usage of drugs. In 1990, the Standing Committee of the NPC issued a Decision on Strictly Prohibiting Drugs,[19] which became the current legal basis for coercive drug rehabilitation. The State Council's Measures on Coercive Drug Rehabilitation followed this Standing Committee Decision five years later, in January 1995.[20] 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 an increased fine up to RMB 2,000, administrative

[16] *See* 禁毒工作手册 97 (黄绍智等 编, 1993), Jin du gong zuo shou ce [HANDBOOK ON DRUG PROHIBITION] 97 (Huang Shaozhi et al. eds., 1993), Shanghai Sanlian Bookstore.

[17] *See* 苏智良，中国毒品史, SU ZHILIANG, Zhong guo du pin shi [HISTORY OF CHINA'S DRUGS] 465-66 (Shanghai People's Press, 1st ed. 1997).

[18] 全国人民代表大会常务委员会关于严惩严重破坏经济犯罪的决定, Quan guo ren min dai biao da hui chang wu wei yua hui guan yu yan cheng yan zhong po huai jing ji fan zui de jue ding [The Decision on Severely Punishment of Seriously Damages Economy Criminals] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 8, 1982).

[19] *See* 关于禁毒的决定, Guan yu jie du de jue ding [Decision on Prohibiting Using Drugs] (promulgated by the Standing Comm. Nat'l People Cong., Dec. 28, 1990, effective Dec. 28, 1990, ineffective June 1, 2008) 50 FA LU XING ZHENG FA GUI GUI ZHANG SI FA JIE SHI FEN JUAN HUI BIAN 100 (P.R.C.).

[20] 强制戒毒办法, Qiang zhi jie du ban fa [Measures on Coercive Drug Rehabilitation] (promulgated by St. Council, Jan. 12, 1995, effective Jan. 12, 1995) 1995-96 FA GUI HUI BIAN 155 (P.R.C.).

detention, coercive drug rehabilitation on drug addicts, and rehabilitation through labor for recidivists.[21]

Noticeably, there is no corresponding judicial process for all the above mentioned detentions. All these detentions are solely determined by public security organs. Although in each provincial level there is a committee for RTL, members of such committee are all public security officials. Protections for suspects and defendants in criminal procedure such as the right to defense lawyers, the right to be heard publicly, the right to challenge the collegial members, are all denied in the process of deciding detentions. In addition, until the Administrative Litigation Law promulgated in 1989, there was no judicial review for the decision of RTL. As to the time limits for these detentions, although DRTL promulgated in 1957 did not provide a time limit for RTL, the SPRTL promulgated in 1979 provided that time limit for RTL is three years, with one year's extension.[22] Time limit for shelter and education is between six months and two years.[23] Time limit for coercive drug rehabilitation is three to six months, with a maximum extension up to one year in total.[24]

III. JUSTIFICATIONS FOR NON-JUDICIAL DETENTIONS

Chinese Government provided justifications for non-judicial detentions on a variety of occasions. This part tries to show the logic behind these justifications through studying official documents, high level leaders' speeches, and the people's courts' judgments concerning the detentions.

A. The Term "Punishment" is Deliverately Avoided to Modify Non-

[21] *Id*. art. 8.

[22] *See* 国务院关于劳动教养的补充规定, Guo wu yuan guan yu lao dong jiao yang de bu chong gui ding [Supplementary Provisions Concerning Rehabilitation Through Labor] (promulgated by St. Council, Nov. 29, 1979, effective Nov. 29, 1979) 1949-85 SI FA XING ZHENG GUI ZHANG HUI BIAN 490 (P.R.C.).

[23] 卖淫嫖娼人员收容教育办法, Mai yin piao chang ren yuan shou rong jiao yu ban fa [Measures for Shelter and Education for Prostitutes and Clients of Prostitutes] (promulgated by St. Council, Sept. 4, 1993) 1993-94 FA GUI HUI BIAN 126 (P.R.C.).

[24] 强制戒毒办法, Qiang zhi jie du ban fa [Measures on Coercive Drug Rehabilitation] (promulgated by St. Council, Jan. 12, 1995, effective Jan. 12, 1995) 1995-96 FA GUI HUI BIAN 155 (P.R.C.).

judicial Detentions in a Long Period

1. No non-judicial detentions are classified as detentions

Many western scholars express that all the above measures resulted in depriving a citizen's liberty shall be translated as "detentions".[25] However, if we look closely into regulations and interpretations surrounding those detentions, we may find that, although these measures look so similar with deprivations or restrictions of citizen's liberties, theoretically, the CCP and Chinese Government do not see them as *arrest*, *detention*, or *punishment*. On the contrary, almost all official documents term them as *compulsory administrative measures*. For example, both Decision Of The State Council Regarding The Question Of Rehabilitation Through Labour and the Implementing Rules Concerning Rehabilitation through Labor provides:

Rehabilitation through labour is a measure whereby education and reform are mandatorily imposed on persons who are interned for rehabilitation through labour, and is also a measure to resettle them and provide employment for them.[26]

Similar discourses are provided in regulations for shelter and education:

The term shelter for education used in this measure points to an administrative coercive educational measure which aims to provide legal and moral education for prostitutes and clients of prostitutes, and to gather them up to take part in producing as well as laboring, and to provide them diagnoses and treatment for sex diseases.[27]

---

[25] *See, e.g.*, Biddulph, *supra* note 10; *see also* Randall Peerenboom, *Out of the Pan and into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detentions in China*, 98 NW. L. REV. 991, 993 (2003-04). Meanwhile, this article is not blaming those scholars for their translation. They have their experience in their own country, and that is why it is difficult for them to understand the Chinese government's position. Put anyone in their position, it must be easy for him/her to agree that all these measures shall be called "detention", or, "imprisonment". This is the reason why this article still uses the term "detention" in the title, and uses the term "detention" referring to those "shelters" whenever necessary)

[26] *See* 国务院关于劳动教养问题的决定, Guo wu yuan guan yu lao dong jiao yang wen ti de jue ding [Decision on the issues concerning Rehabilitation Through Labor] (adopted by the Standing Comm. Nat'l People's Cong., promulgated by St. Council, Aug. 3, 1957, effective Aug. 3, 1957) art. 2, at 1956-57 FA GUI HUI BIAN 642 (P.R.C.).

[27] 卖淫嫖娼人员收容教育办法, Mai yin piao chang ren yuan shou rong jiao yu ban fa [Measures for Shelter and Education for Prostitutes and Clients of Prostitutes] (promulgated by St. Council, Sept. 4, 1993) 1993-94 FA GUI HUI BIAN 126 (P.R.C.).

Therefore, no such administrative regulation was entitled with "detention". Instead, they were always called as *shelter (shourong)*, *rehabilitation* (*jiaoyang)*. It seems that the CCP and the Government took it very cautious to avoid using the term *detention* and the term *punishment*. Instead of terming them *detentions* or *punishments*, they would rather call them *shelters*, *rehabilitations*, or anything else.

2. Non-judicial detentions are not constitutionally regarded as a form of punishment

That the Chinese Government does not treat non-judicial detentions as punishments is also the very reason that the Decision concerning about Rehabilitation through Labor did not resort to Article 19 but Article 100 of the Constitution. Article 19 reads: The People's Republic of China protects the system of people's dictatorship, eliminates any betraying behavior and counterrevolutionary acts, and punish all Chinese traitors and counterrevolutionaries.[28] While Article 100 reads: Citizens of the People's Republic of China must observe the Constitution and the law, must observe labor discipline and public order, and must respect social morality. [29]

It seems that Article 100 could not be a basis for the RTL, at least on the first glance. But the Decision Concerning about RTL did mention that it was provided according to Article 100 of 1954 Constitution. It should be a tradition for the CCP to resort to the Constitution when it enacted a new law or a new regulation. For example, the 1954 Regulations on Arrest and Detention expressly declared that the promulgation of that Regulation was according to the Constitution.[30] On the other hand, the DRTL faced many criticisms when it was being drafted and discussed. Thus the provision just aimed to attack those who criticized and protested the drafting of the DRTL. Just as an editorial reads:

---

[28] 宪法, Xian fa [Constitution] art. 19, §1 (1982)

[29] *Id*. art. 100.

[30] *See* 逮捕拘留条例, Dai bu ju liu tiao li [Regulation on Arrest and Detention] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 23, 1979, ineffective Jan. 1, 1997) art. 1, 1979 FA GUI HUI BIAN 135 (P.R.C.).

The Decision concerning about the Rehabilitation through Labor, as was approved by the Standing Committee of the National People's Congress, shall be regarded as a law. This "law" is a great creation during the socialist reformation and legal establishment, and it is also a concrete measure to implement Article 100 of the Constitution. The rightists attack the RTL, claiming that it violates the Constitution. RTL is meaningful in reforming the society and realizing long term aims, and shall not only be applied at present, but also be applied during the whole transitional stage. Even after the success of the establishment of socialism, the RTL still has its merits, as long as social misconduct exists. Only through labor can bad elements be reformed.[31]

This position of the CCP and Chinese Government has not only been embodied in regulations, but also in judicial judgments. In *Wang Zhaoping v. The Rehabilitation Through Labor Committee of Tianjing City*, after the narration of the facts in this case,[32] the judgment declared:

Article 2 of the Provisional Implementing Measures of the Rehabilitation through Labor promulgated by the State Council on 21st January 1982 provided: "Rehabilitation through labor is an administrative compulsory educating and reforming measure, and is a method of dealing with contradictions between the people."[33] This provision clearly defined RTL as an administrative compulsory measure, and therefore, it does not violate the provision that

[31] 社论，为什么要实行劳动教养?, 人民日报, Editorial, *Why Shall We Implement Rehabilitation through Labor?*, PEOPLE'S DAILY, Aug. 4, 1957, at A1.

[32] The facts found by the court are as follows: in the evening of May 18, 1999, Wang Zhaoping, Wang Jinliang and Si Baoyuan went to the Yuanyang Restaurant in Heping district in Xiamen. Before they entered the restaurant, Wang Zhaoping told the others to obey his command. He then scratched the cotton of an attendant in the restaurant, shouting at him: "Call your manager and tell him that I am a hooligan from Beijing." Meanwhile, Wang and the others belated as well as insulted the attendant Qi. When the phone call got through, Wang Zhaoping told the manager Zou by the phone call: "You must come here right now or you will be in a big trouble…" After Zou's coming, Wang pointed to Si Baoyuan and shouted to Zou: "Now you get well along with yourself and lead a good life. Whatever you think, you must do me some favor. Did you see my brothers? Their showing fees are 800 yuan. You must spend at least 2000 yuan to accommodate us with a good dinner…" In the morning of May 19, Wang Zhaoping told Zheng Zuguo: "we are prepared to go to Zou and to get 2000 yuan which was promised last night."On May 21, Wang Zhaoping and Wang Jinliang, Xu XX went to the Yuanyang restaurant. Manager Zou took a box of money (100 yuan each), sat with Wang Zhaoping, and gave the money to Wang. Wang Zhaoping put it into his pocket.

[33] In 1957, Chairman Mao differentiated contradiction among people and contradictions between the people and the enemy. The former ones shall be resolved through persuasion, education and rehabilitation. The latter ones shall be dealt with severely.

administrative regulations may set administrative punishments except punishments of restricting personal freedom" which is provided by Administrative Punishment Law of PRC. Consequently, decisions on rehabilitation through labor according to the Provisional Implementing Measures of Rehabilitation through Labor are legal as well as valid.[34]

3. Citizens detained are treated differently than those being criminally punished

From the very beginning, the CCP and Chinese Government made it clear that those being rehabilitated should not be treated as criminals. As one of the regulations concerning rehabilitation through labor says:

Those being rehabilitated are different from those being reformed criminals, and therefore, they should be strictly separated. The government shall set particular place to administrate them, and shall not hybrid them into convicted criminals, let alone regarding them as criminals. The government shall strictly manage them on one side, and shall permit them to make suggestions in learning, producing, and living on the other, so that they can lead a democratic life.[35]

It is important that the CCP does not regard those being rehabilitated as criminals. As a logical consequence, those being rehabilitated shall be paid for their work. As one of the legal documents concerning RTL says:

Persons undergoing rehabilitation through labor shall be appropriately paid with wages according to the actual work they do; a suitable amount may be deducted from their wages for the support of their dependents or reserved for their own expenses in settling down to a stable life.[36]

---

[34] 王兆平与天津市劳动教养管理委员会劳动教养决定上诉案, Wang Zhaoping v. Tianjin City Comm. of Rehab. through Labor (Tianjin Super. Ct, June 1, 2000), *available at* http://law.chinalawinfo.com (last visited May 13, 2010).

[35] 中共中央, 国务院批转公安部关于做好劳动教养工作的报告的通知, Zhong gong zhong yang guo wu yuan pi zhuan gong an bu guan yu zuo hao lao dong jiao yang gong zuo de bao gao de tong zhi [Notice of the Approval of the Public Security Ministry Concerning the work of Rehabilitation Through Labor by the Central Committee of the CCP and the State Council] (promulgated by St. Council, Sep. 14, 1980, effective Sep.14, 1980) 1949-85 SI FA XING ZHENG GUI ZHANG HUI BIAN 496.

[36] 国务院关于劳动教养问题的决定, Guo wu yuan guan yu lao dong jiao yang wen ti de jue ding [Decision on the issues concerning about Rehabilitation Through Labor] (adopted by the Standing

Not only those being rehabilitated shall be paid for their work, but once the rehabilitated amend their behavior, the rehabilitated shall be employed by other units, otherwise they shall be released. Article 4 of the RTLR says:

If, in the course of their rehabilitation, persons undergoing rehabilitation through labor have mended their ways and are qualified for employment, they may be provided with other employment upon the approval of the organs in charge of rehabilitation through labor; if the units, parents or guardians who have previously petitioned for the persons concerned to be interned for rehabilitation through labor present another petition requesting that such persons be turned over to them for education and supervision, the organs in charge of rehabilitation through labour may also approve such petitions according to the actual conditions.[37]

In addition, after their release, they shall not be discriminated in employment and enrollment in schools.[38]

To comfort those being rehabilitated, to decrease the difficulties in rehabilitation, and to make it convenient for the rehabilitated to be employed, the rehabilitated shall have positions of work reserved for them. Those individuals whom behaved well during rehabilitation shall be employed by the unit he or she served before, and those who are not suitable for resuming their original work and those who are unemployed shall register in the street committee that the rehabilitated bank's account resided, and the street committee shall gradually arrange their job according to the needs of production and developments.[39]

The above-mentioned discourse seeks to prove one point: the purpose of non-judicial detentions is not to punish rehabilitants, and they cannot even be termed as *detentions*.

Comm. Nat'l People's Cong., promulgated by St. Council, Aug. 3, 1957, effective Aug. 3, 1957) 1956-57 FA GUI HUI BIAN 642 (P.R.C.). art. 2.

[37] *Id*. art. 4.

[38] *See* 国务院关于劳动教养的补充规定, Guo wu yuan guan yu lao dong jiao yang de bu chong gui ding [Supplementary Provisions Concerning Rehabilitation Through Labor] (promulgated by St. Council, Nov. 29, 1979, effective Nov. 29, 1979), art. 4, 1949-85 SI FA XING ZHENG GUI ZHANG HUI BIAN 490 (P.R.C.).

[39] Notice of the Approval of the Public Security Ministry Concerning the work of Rehabilitation Through Labor by the Central Committee of the CCP and the State Council, 1949-85 SI FA XING ZHENG GUI ZHANG HUI BIAN 496.

B. Non-judicial detentions are not to deprive liberties, but to liberate peoples

1. Non-judicial detentions are to liberate citizens

Since the purpose of non-judicial detentions is not to punish rehabilitants, what do they aim to achieve? This essay found that, from the CCP and the Chinese Government's point of view, all these measures are not to deprive citizens' liberties, but to liberate them. Almost all regulations declare that their aims are to "educate" (*jiaoyu*), "rescue" (*wanjiu*), and "influence" (*ganhua*).[40] Even the already eliminated "shelter and repatriation" also provided that its goal was to "provide relief to the vagrants and beggars without assured living sources in cities".[41] In order to separate those measures from punishment, the Measures on Coercive Drug Rehabilitation formally categorized *coercive drug rehabilitation* as an exercise of administrative coercive power. The purposes of those measures were at least ostensibly designed as education, treatment, reform, and not punishment. Specifically, the *coercive drug rehabilitation* is "an administrative measure coercively carrying out medical and psychological treatment, education of laws and morals in order to give up drug addiction."[42] Therefore it falls outside the legal category of administrative punishment, in a manner analogous to shelter for education in the prostitution context. It can be seen all these detentions are not to deprive a person's liberty but to make a person realize or broaden his true freedom.

This is particularly exemplified in the justifications for the RTL. At least from the governmental documents, it is obvious that the purpose of the RTL is to rescue and help those who need to be

[40] *See* 全国人民代表大会常务委员会关于严禁卖淫嫖娼的决定, Quan guo ren min dai biao da hui chang wu wei yuan hui guan yu yan jin mai yin piao chang de jue ding [Decision on Strictly Prohibiting Prostitution and Using Prostitutes] (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 4, 1991, effective Sep. 4, 1991), art. 2, XIAN XING FA LV FA GUI HUI BIAN 1900 (P.R.C.); *See also* 劳动教养试行办法, Lao dong jiao yang shi xing ban fa [Provisional Implementing Measures for Rehabilitation Through Labor] (promulgated by MINISTRY PUB. SEC., Jan. 21, 1982, effective Jan. 21, 1982), art. 3, XIAN XING FA LU FA GUI HUI BIAN 517 (P.R.C.).

[41] 城市流浪乞讨人员收容遣送办法, Cheng shi liu lang qi tao ren yuan shou rong qian song ban fa [Measures for Shelter and Repatriation of Vagrants and Beggars Without Assured Living Resources in Cities] (promulgated by the St. Council, May 12, 1982, ineffective June 18, 2003) art. 1, XIANXING FALU FAGUI HUIBIAN 619 (P.R.C.).

[42] 强制戒毒办法, Qiang zhi jie du ban fa [Measures on Coercive Drug Rehabilitation] (promulgated by St. Council, Jane 12, 1995, effective Jan. 12, 1995). art. 2, 1995-96 FA GUI HUI BIAN 155 (P.R.C.).

helped. As the first legal document of the RTL states, one of the purposes of the RTL is to resettle those who are interned for rehabilitation through labor and provide employment for them.[43] What is more, the CCP and the Chinese Government require the Managing and Educating officers must have the qualities of "three likes" when treating those being rehabilitated: "like parents to treat their children," "like doctors to treat their clients," and "like teachers to treat their students."[44]

2. Not everyone can benefit from non-judicial detentions

That the purpose of non-judicial detentions is not to punish, but to reform, to rehabilitate, and to rescue is almost always the position of PRC Government. One of the Chinese scholar has summarized the views of the CCP and the Government:

One of the differences between "punishment" and "compulsory education and reform" includes the difference of the targets: to those incollegiable and those deeply addicted by his sins, who insist on refusing the authorized dominating values, the legislature feels despaired. Therefore, they are also denied by "compulsory education and reform." Instead, after the legislature's deliberate speculations, only those who have an uneasily seen smile in his face to the authorized values are entitled to enjoy the "compulsory education and reformation."[45]

Therefore, non-judicial detentions may liberate people from laziness, idleness, addiction and other types of bad habits on the one hand, and may also prevent people from becoming criminals on the other hand. The *liberating* function thus affects citizens being rehabilitated in two directions: one is retrospective, and the other is prospective. The former focuses on the past, and the latter emphasis on the future.

---

[43] *Id*.

[44] INDELIBLE EXPERIENCE: 45 YEARS WORKING FOR REHABILITATION THROUGH LABOR, *supra* note 9, at 4.

[45] 王人博, 权力与技术*:* 对劳动教养问题的一个宪政学分析 642 (2001), Wang Renbo, *Quan li yu ji shu: dui lao dong jiao yang wen ti de yi ge xian zheng xue fenxi* [*Power and Technology: A Constitutional Analysis of the Problem of Labor Education and Rehabilitation*, 13 PEKING U. L.J.] 642 (2001).

3. Other elements that demonstrate liberation

It is logical and reasonable to deduce that the first official document for RTL did not provide a time limit for those being rehabilitated through labor.[46] It is also important to note that almost all non-judicial detentions could be replaced by each other. In other words, the difference between *shelter and education*, *coercive drug rehabilitation*, and *rehabilitation through labor* are ambiguous. According to these regulations, if a rehabilitated person use drugs again, he shall be rehabilitated through labor.[47] Again, if a prostitute or a client of prostitutes is caught by the public security organ committed the same misdemeanor again, he or she shall be sent to rehabilitation through labor.[48] This phenomenon also confirms that all non-judicial detentions are essentially the same in nature. Its main purpose is not to punish offending citizens, but to reform, to educate, and to rescue them. All these measures are to liberate those rehabilitated citizens, not to deprive their liberties. Through rehabilitations, citizens may be liberated from bad habits, addictions, idleness, and prevented from becoming criminals. They may become useful citizens for the construction of socialism in the future.

IV. CAN A GOVERNMENT COMPULSORILY MAKE HER CITIZENS MORE FREE?

This approach created by the Chinese Government raised a key question to China's constitutionalism: is the administrative branch of a Government entitled to decide whether a measure shall be adopted to benefit a citizen on a compulsory basis? It is easy to see that, if a

[46] The time limitation was added in 1979. *See* 国务院关于劳动教养的补充规定, Guo wu yuan guan yu lao dong jiao yang de bu chong gui ding [Supplementary Provisions Concerning Labor Reeducation] (promulgated by St. Council, Nov. 29, 1979, effective Nov. 29, 1979) 1949-85 SI FA XING ZHENG GUI ZHANG HUI BIAN 490 (P.R.C.).

[47] *See* 关于禁毒的决定, Guan yu jie du de jue ding [Decision on Prohibiting Using Drugs] (promulgated by the Standing Comm. Nat'l People Cong., Dec. 28, 1990, effective Dec. 28, 1990, ineffective June 1, 2008), art. 8, 50 FA LU XING ZHENG FA GUI GUI ZHANG SI FA JIE SHI FEN JUAN HUI BIAN 100 (P.R.C.).

[48] *See* 全国人民代表大会常务委员会关于严禁卖淫嫖娼的决定, Quan guo ren min dai biao da hui chang wu wei yuan hui guan yu yan jin mai yin piao chang de jue ding [Decision on Strictly Prohibiting Prostitution and Using Prostitutes] (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 4, 1991, effective Sep. 4, 1991) , art. 4, 1987-97 XIAN XING FA LU FA GUI HUI BIAN 454 (P.R.C.).

government is entitled with the power to compulsorily "benefit" her citizens, the compulsory measure of *coercive drug rehabilitation*, the *rehabilitation through labor*, the *shelter and education*, and the already abolished *shelter for repatriation* could all be easily justified without Constitutional ground, for the Constitution does not and will never prohibit the Government from liberating or benefiting its citizens.

A. Personal freedom is a notion different from inner freedom

Modern ideas about individual liberties do not support this argument. For this opinion garbled the difference between the notion of individual liberty and inner freedom. Inner freedom means that a person could act on his own deliberation, will, belief, and ration, instead of on impulsion or passion, which are often regarded as irrational. According to this inner freedom, when a person is controlled by his ardor and loses his temper or his volition in an important situation, and fails in resisting outer temptation such as a beauty, we may deem him "unfree." Similarly, when a person could not make a choice due to the lack of a particular knowledge, we may also deem him "unfree." Contrastingly, when a person is able to resist some special temptation, or when one happens to have the knowledge for making a choice in a particular situation, we may regard this person as a free being.[49]

But this type of "freedom" is not the same with personal freedom or individual liberty. For, the term "liberty" does only concern the relationship between an individual and others, and an intrusion of a person's liberty must only result from others' coercion. Whether or not a person is able to rationally make a choice or insist on a determined resolution, differentiates one from a person that could be compelled by others' will. As Hayek put it correctly:

Whether or not a person is able to choose intelligently between alternatives, or to adhere to a resolution he has made, is a problem distinct from whether or not other people will impose their will upon him.[50]

---

[49] As for the differences between individual liberties and "inner freedom", see F. A. HAYEK, THE CONSTITUTION OF LIBERTY 15 (University of Chicago, 1960) (1978).

[50] *Id*. at 15.

It is in this very point that the Chinese Government misinterpreted the term of "individual liberty" and the term of "inner freedom". The Government incorrectly interpreted the latter term to give the Government power to take any measures in order to realize "full liberty" for every individual. The Chinese Government also viewed that it was entitled to make choices for its citizens, thereby negating that each individual shall be the best one in determining what could maximum his benefit.

From this point of view, measures such as *rehabilitation through labor*, *shelter and education*, and *coercive drug rehabilitation*, could not be justified according to modern constitutionalism. For all these measures result in depriving a citizen's individual liberty, and are compulsory measures from outer world of an individual. They all constitute "coercions" to those being sheltered, rehabilitated, and educated. Although their aims are not to punish those being sheltered, but to "rescue" them, to liberate them from bad habits, to protect them from being banished by their peers, this is only justified from an inner perspective. In other words, those measures might make those being rehabilitated, educated or sheltered more freely in making their choices, so that they may be deemed "free from bad habits, laziness, and degeneration," but they are deprived of their "outer liberties" when being rehabilitated, educated, and sheltered. If the government really intends to help those citizens, she shall do it by provide fee-free services, such as labor technique training in England.[51]

B. Deprivation of citizen's personal freedom always requires judicial approval

According to a libertarian,[52] both proper and improper uses of state power are possible, and the means of confining its exercise to proper uses are to promulgate and enforce positive law. As John Lock correctly puts it:

---

[51] 王运生 & 严军兴, 英国刑事司法与替刑制度 (1999), WANG YUNSHENG & YAN JUNSHENG, Ying guo xing shi si fa yu ti xing zhi du [BRITISH CRIMINAL JUSTICE AND CRIMINAL PENALTY REPLACEMENT SYSTEM] (1999).

[52] Although there are different theories of libertarian, this article treats them as a whole, contrasting with the theory of despotism.

Whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those law; and to employ the forces of the community at home only in the execution of such laws.[53]

For a libertarian, a Constitution is needed because it restricts "the reach of the state by a proper specification of what it may and may not do," and "keeps a government in order."[54] To attain this objective, a Constitution is often akin to those generally associated with the "rule of law," which refers to a minimum requirement of the supremacy of law. In protecting citizens from arbitrary invasions, the constitutionalism always agrees that "freedom of men under government is to have . . . a liberty to follow my own will in all things, where that rule prescribes not, and not to be subject to the inconstant, uncertain, arbitrary will of another man."[55] For all citizens, anything is permitted unless the law prohibits it. For the government, nothing is permitted unless the law prescribes it. All rights are entitled to citizens, and the government only has obligations. As Paine argues, all government has of itself no rights, "they are altogether duties."[56]

Noticeably, the term "inviolable" does not mean in no circumstances that a citizen's liberty may be violated. Instead, it only means that citizens' personal freedom shall not be unreasonably violated. Put it another way, when the law declares that a citizen's personal freedom is inviolable, it merely protects citizens from arbitrary violations. When a citizen violates the laws that give him such protection, his personal freedom may also be violated.[57] Therefore, the term "inviolable" merely points to arbitrary violation.

---

[53] JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT: AND A LETTER CONCERNING TOLERATION 64 (J. W. Gough ed., 1946).

[54] RICHARD S. KAY, *American Constitutionalism*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 22 (Larry Alexander ed., 1998).

[55] LOCKE, *supra* note 53, at 13.

[56] THOMAS PAINE, *The Rights of Man*, *in* THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE 343, 383 (Philip S. Foner ed., 1974).

[57] In many western legal documents, the protection for citizens against a Government's invasion is confined to "unreasonable violation". For example, the fourth amendment of the U.S. Constitution reads: "The right of people to be secure in their persons, houses, papers, and effects, *against unreasonable searches and seizures*, shall not be violated …"

In preventing arbitrary violation, a universal method is to require a judicial approval when depriving a citizen's personal freedom.

C. The notion of compulsory liberation is the biggest problem of non-judicial detentions

The Chinese Constitution also provides procedural safeguards for citizens' personal freedom. Article 37 of the Constitution of the People's Republic of China reads:

> Freedom of the person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ. Unlawful detention or deprivation or restriction of citizens freedom of the person by other means is prohibited, and unlawful search of the person of citizens is prohibited.[58]

Whatever the interpretation for this provision shall be, that its purpose to protect citizens' personal freedom is unquestionable. However, if a government is empowered to compulsorily make her citizens free, such provision is invalid. Therefore, we may deduce that, the Chinese Constitution also allows judicial intervention in deciding or approving a measure that deprives of a citizen's liberty. To declare detentions without judicial approval is thus unconstitutional.

However, if a measure that in fact deprives of a citizen's personal freedom may be justified by the flip side of a coin of liberating a citizen from laziness or idleness etc., this in turn goes beyond the restriction provided by the Constitution. Therefore, it is the notion that a government can compulsorily make her citizens free which justifies the use of non-judicial detentions and ruined the construction of constitutionalism. This is because the government did not regard non-judicial detentions as punishments but instead

[58] 宪法, Xian fa [Constitution] art.37, § 1 (1982) (P.R.C). The 1954 Constitution merely provided the first two sections of the provision. The infra texts will also trace to the 1954 Constitution. Although they are different in the third section, this difference shall not give actual influences in my analysis.

exempted themselves from giving a proper justification. Conversely, it is argued that the Government must provide justifications for non-judicial detentions and provide procedural safeguards for those being detained.

V. SIGNIFICANCE OF ADMINISTRATIVE DETENTIONS

The notion that a government may compulsorily make her citizens more free ruins the constitutionalism and rule of law in China. However, this has not been fully recognized in the Chinese legal scholarship. Instead, most of the Chinese legal scholars pay more attention to some superficial aspects of non-judicial detentions. This part focuses on one of the critiques against non-judicial detentions which is most frequently mentioned, and exemplifies its insufficient in revealing the problems of non-judicial detentions by analyzing the promulgation of SAPL.

A. The biggest problem of non-judicial detentions is not the lack of legal basis

All non-judicial detentions suffered critics from the Chinese scholars,[59] and among those critiques, lack of legal basis must be the most significant one. Almost all scholars unanimously contended that those measures were lacking of legal authority. For example, Professor Chen Xingliang contended that, the RTL has not abided by the principle of legalism, and this is the principal problem in the RTL system.[60] In an essay objecting the RTL, the author's first reason

[59] Professor Peerrenboom generalized critics against non-judicial detentions as six types: (i) due process concerns, usually means the lack of the judicial review in determining a detention and the lack of procedural safeguards; (ii) punishments are often more severe than provided by the criminal law code, thus made those punishment unfair to those being punished; (iii) conditions in detention centers are deplorable; (iv) the scope of each of the regulations is vague, so that many people that should not had been detained were detained; (v) there is a lack of valid legal basis because the APL and Law of Legislation require all deprivations of personal freedom to be based on a law, (vi) there is no transparency and thus resulted in abusive mistreatment of individual detainees and misuse of the system for financial gains. Peerenboom, *supra* note 25, at 1011.

[60] 陈兴良，中国劳动教养制度研究，理性与秩序：中国劳动教养制度研究 164 (2002), CHENG XINGLIANG, Zhong guo lao dong jiao yang zhi du yan jiu, Li xing yu zhixu: Zhongguo lao dong jiao yang zhi du yan jiu [*Research in China's System of Rehabilitation through Labor*, *in* RESEARCHES IN CHINA'S SYSTEM OF REHABILITATION THROUGH LABOR] 164 (Chu Huaizhi & Chen Xingliang & Zhang Shaoyan, eds., 2002).

for completely eliminate the RTL system is that it lacks a legal basis.[61] Even in supporters of maintaining and reforming the RTL system, most of them acknowledge that this system did lack a legal basis, or, at least, did not comfort with the principle of legalism.

It is true that the Chinese Legislature has not provided a law (*falu*) for the system of Rehabilitation through Labor. However, this is not the most difficult problem for the Chinese Government. Because according to the Chinese experience, it is easy for the Chinese Government to get a law from its Legislature. In fact, in order to meet the need for those who appeal for a legal basis for RTL, or those who object RTL for its lack of legal basis, a Legislature has been projected, and relative researches have already been initiated.[62] If the plan develops smooth, the legislation might be enacted in a foreseeable future. Therefore, just as Professor Peerenboom correctly pointed out: "there can be little doubt that if the international community or the Chinese domestic reformers insist on a law, the NPC will provide one if the NPC decides that the particular form of administrative detention is necessary and justified on the merits."[63] As for this point, we may take detentions under SAPL for example. The detention under SAPL is also a non-judicial detention without judicial access in the determining process, which is now under the Security Administration and Punishment Law.

B. Detentions in SAPL: Lessons that should be learned from the promulgation of SAPL

Just like other administrative regulations, the Security Administration and Punishment Law also originated from an administrative regulation. The first legal document concerning administrative detention is Regulations of the People's Republic of

[61] 胡卫列, 劳动教养制度应予废除, 行政法学研究, 37, 37-42 (2002), Hu Weilie, Lao dong jiao yang zhi du ying yu fei chu [*The System of Rehabilitation through Labor Shall Be Abolished*] 1 ADMIN. L. REV. 37, 37-42 (2002).

[62] 劳动教养立法研究 (司法部劳教局 & 中国劳动教养学会 编), Lao dong jiao yang li fa yan jiu [RESEARCH ON LEGISLATION ON REHABILITATION THROUGH LABOR] (BUREAU OF REEDUCATION-THROUGH-LABOR ADMINISTRATION & CHINA REHABILITATION THROUGH LABOR ACADEMIC SOCIETY eds., Law Press, 2004).

[63] Peerenboom, *supra* note 25, at 1044.

China on Administrative Penalties for Public Security (SAPR), which was promulgated in 1957 by the Standing Committee of the NPC. In 1986, this regulation was reaffirmed by the Sixth National People's Congress and promulgated again by Order No. 43 of the President of the People's Republic of China, and came into force on January 1, 1987.[64]

The Law of the People's Republic of China on Public Security Administration Punishments (SAPL 2005), was adopted on August 28, 2005 at the 17th session of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on August 28, 2005, and came into force on March 1, 2006.[65]

Both the SAPR and the SAPL authorize administrative punishments for those who harm the public order, infringe upon the personal rights of citizens or cause harm to public or private property when such offenses are not serious enough to constitute a crime according to the Criminal Law.[66] According to the SAPR and SAPL, public security officers are authorized to impose detentions upon citizens up to a maximum of fifteen days.[67] In fact, the SAPL provided detentions for at least 120 types of acts violating public security administration, and for many acts, detention is the only choice, or, at least the first choice.[68] Do those detentions provided by the SAPL have a constitutional basis? According to the prior analysis, there is no constitutional basis for those detentions because there is no judicial intervention when deciding detentions.

In almost all important laws, especially when the law provided measures that result in depriving or restricting citizens' liberties, the law always declares a constitutional basis in the law itself. When the SAPR promulgated the first time, it provided that its

[64] 中华人民共和国主席令, Zhonghua Renmin Gongheguo Zhuxiling [Order of the President] No. 43, Sep. 5, 1986 FA GUI HUI BIAN 83.
[65] 中华人民共和国主席令, Zhonghua Renmin Gongheguo Zhuxiling [Order of the President], No. 38, Aug. 28, 2005.
[66] *See* 治安管理处罚条例, Zhi an guan li chu fa tiao li [Regulations on Administration and Penalties for Public Security] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 22, 1957, ineffective Jan. 1, 1987), art. 2, 3 FA LU FA GUI QUAN SHU 99 (P.R.C.).
[67] *Id*. art. 6 (there are at least 61 articles concerning detentions in the SAPL).
[68] The law provides more than 120 types of acts violating public administration and punishment in Chapter Three, and almost for each act of violating public administration it provides a punishment of detention, except for two acts (provide respectively in article 36 and article 58).

constitutional basis, that is, Article 49 and Article 100.[69] According to the official interpretation of the Chinese Government, the concrete constitutional basis of the 1957 SAPR is Article 49, section 14, and the spirit of Article 100. As Luo Ruiqing has put it:

From the standpoint of ideological sources, although our country has already basically realized socialist reform of the ownership of the means of production, the socialist reform that is going on politically and ideologically in the minds of the people is still far from completion. Some people still maintain the bourgeoisie's evil habits of benefiting themselves at the expense of others, caring nothing for public morality, and not observing public order. Many acts that violate security administration are demonstrations of the clash between this individualist thinking and collectivist thinking. In order to protect furthering the people's interests and to safeguard the order of socialist construction, we must, at the same time we strengthen the work of ideological education, put into effect necessary, coercive administrative punishments for all acts that violate laws and discipline and corrupt morality by disrupting public order, interfering with public safety, infringing citizens' rights of the person, and damaging public or private property. This is the common desire of the vast masses of the work of the security of society. On the basis of these reasons and in keeping with the spirit of Article 49, Paragraph 12, and Article 100 of the Constitution, [70]it is quite necessary for our country today to adopt and to promulgate a security administration punishment act.[71]

The Contents of Article 49, Paragraph 12, and Article 100 in 1954 Constitution were remained in the Constitution of 2004. However, this time the NPC did not provide a constitutional basis for this law. What made the Chinese Government give up providing a constitutional basis in the SAPL? Do they think that the law's

[69] *See* 治安管理处罚条例, Zhi an guan li chu fa tiao li [Regulations on Administration and Penalties for Public Security] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 22, 1957, ineffective Jan. 1, 1987), art. 1, 3 FA LU FA GUI QUAN SHU 99 (P.R.C.).

[70] *See*宪法, Xian fa [Constitution] art. 49, ¶12 (1954) (P.R.C.). For art. 100, see *supra* note 29.

[71] 罗瑞卿, 关于中华人民共和国治安管理处罚条例草案的说明 (1957), LUO YUQING, *Guan yu zhong hua ren min gong he guo zhi an guan li chu fa tiao li cao an de shuo ming* [AN EXPLANATION ON THE DRAFT OF THE REGULATIONS ON ADMINISTRATION AND PENALTIES FOR PUBLIC SECURITY, *in* PEOPLE'S DAILY] Dec. 23, 1957, at A1. For English version, see JEROME ALAN COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION 202 (Harvard University Press, 1968).

constitutional basis is so obvious that there is no necessity to declare a constitutional basis in the law itself? Or, do they acknowledge that Article 49 and Article 100 could not constitute a legitimate constitutional basis for the administrative punishment? Although there is no access to the accurate answer for this question, we may still assume the second explanation more reasonable. Firstly, according to Article 49, paragraph 12, there is little space for the Government to interfere with citizens' liberties. Undoubtedly, the state shall exercise the power to protect interests of state, to preserve public order and to safeguard the rights of citizens. However, it is difficult to argue that deprive every citizen's liberty comforts to the interests of state. It is also difficult to justify that in order to preserve public order, the government may deprive a citizen's liberty without a judicial procedure. Furthermore, even if a citizen violates law, he or she shall still be entitled to be a citizen, and thus shall be protected by the government either. Therefore, using Article 49, paragraph 12 as the constitutional basis may result critiques from legal scholars or possible dissenting opinions among the legislature.

Secondly, Article 100 could not be used as a constitutional basis for the SAPL. Although the constitution provides that "citizens of the People's Republic of China must observe the Constitution and the law, must observe labor discipline and public order, and must respect social morality", it does not clearly provide that everyone violates such a provision shall be sanctioned by law. If we interpret the constitution in good will, instead of apparition it, such a provision is rather a moral persuasion than a legal obligation. Even if it does mean that acts violating labor discipline, public order or social morality shall be punished by depriving a citizen's liberty, its process shall not be an administrative one, for we cannot interpret one article without regard to another one. Instead, when we interpret a provision, we must prowl around, look in one article between another, and with a systematic view. Therefore, even if we assume that the Government may implement a punishment to a citizen, it shall abide by Article 37 of the constitution too.

The Legislature deliberately avoided using Article 19 as the constitutional basis of SAPL. Since once the SAPL resorts to Article 19 of the Constitution it becomes more obvious that administrative detentions are also punishment, and therefore made it

more difficult to get around Article 37 of the Constitution, which requires judicial approval for depriving citizens' personal freedom.

Ironically, there is an oxymoron among the Chinese legal scholarship on the SAPL after its promulgation. There was no objection against non-judicial detentions provided by the SAPR in the past 50 years, except RTL.[72] A reasonable explanation is that the detention provided by the SAPR and the SAPL is not very long, for one of the objections against RTL is that it is severer than criminal punishment provided by the Criminal Law.[73] But what really counts for a constitutionalist is not the extent of a Governments' violation of the Constitution, but whether or not a Government abides by the Constitution. In this vein of argument, if a government can legitimately deprive a citizen's liberty for one day without a constitutional basis, then it begs the question of whether ten day, ten months or even years would be tolerable.

The law does provide some procedural safeguards for those facing the administrative punishment. For example, the law requires the policemen to comply with the law when conducting investigation, and prohibits interrogating by torture or obtaining evidence by methods of menacing, enticing or cheating.[74] Inconceivably, the law even provides that "any evidence gathered by illegal means shall not be used as the basis of a punishment,"[75] which means that even real evidence that is illegally obtained by such as illegal searches shall also not be used as the basis of a punishment. This is a much more severe requirement than that of the Criminal Procedure Law. According to the CPL, although torture, menacing, enticing and cheating are all strictly prohibited, the CPL itself does not require to exclude evidence gathered through

[72] There were some comments in media, including internet. But almost all those medias sang high praise for the promulgation of the SAPL, and some even acclaim that the law is a progress, for it limits the police power, and protect human rights. This essay is not blaming those who regard it as a progress. This essay just want to remind that, firstly, whether the law comforts to the Constitution; and secondly, so many laws were not implemented in practice, including the most important Constitution, how can those procedures be implemented by police officers?

[73] *See supra* note 57.

[74] 治安管理处罚法, Zhi an guan li chu fa fa [Law on Public Security Administration Punishments] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Mar. 1, 2006), art. 79, §1, at 2005 FA LU HUI BIAN 45 [hereinafter SAPL] (P.R.C.).

[75] *Id*. §2.

those illegal methods in criminal procedure.[76] Although the Chinese judicial interpretations require excluding confessions, testimonies, statements made by victims obtained by illegal methods, they do not exclude evidence illegally gathered by searches and seizures.[77] It seems that the SAPL advances with a big step. However, what is written does not mean it is being implemented in practice. As there is no judicial hearing, and the accused has no right to lawyers and other procedural safeguards, it is difficult to implement the above mentioned provisions in practice.[78]

The most problematic is that, almost no one, no scholar protests the passing of the SAPL. This might be the most important reason for the CCP and the Chinese Government to change their position in interpreting the nature of rehabilitation through labor.[79] It may result in a profound influence in the Chinese efforts toward constitutionalism and rule of law as the CCP and the Chinese Government had been very cautious in dealing with non-judicial detentions. They had been so cautious that they did not enact a law to legalize those detentions. Unfortunately, with people and legal scholars anesthesia and torpidity, the CCP and the Chinese Government may regard that there is no risk in promulgating such laws that authorize police to deprive citizen's liberties for as long as 3-4 years. The only thing that the CCP and the Chinese Government shall consider is its possible international influences and protests from abroad. If so, the human rights discourse and constitutionalism and rule of law will truly become a "gift of the west to the rest".[80]

---

[76] 刑事诉讼法, Xing shi su song fa [Criminal Procedure Law] (promulgated by the Nat'l People's Cong., Mar. 17, 1996), art. 43, 1960-63, 1979-81 FA GUI HUI BIAN 282 (P.R.C.).

[77] 人民检察院刑事诉讼规则, Ren min jian cha yuan xing shi su song gui ze [Rules on People's Procuracy Conducting Criminal Litigation Actions] (promulgated by the People's Procuratorate of the People's Republic of China, Jan. 18, 1999, effective Jan. 18, 1999), art. 265; 最高人民法院关于执行中华人民共和国刑事诉讼法若干问题的解释, Guan yu zhi xing zhong hua ren min gong he guo xing shi su song fa ruo gan wen ti de jie shi [Interpretation on the Implementation of the Criminal Procedure Law] (promulgated by the Supreme People's Court, June 29, 1998, effective Sep. 8, 1998), art. 61.

[78] This does not mean that all those provisions are totally meaningless. On the contrary, citizens may use those provisions as weapons against arbitrary processes and arbitrary decisions from police organs. Although it is sure that those really committed misdemeanors will be in difficulties in taking those protecting provisions, those innocent persons may use them to protect themselves when necessary. However, in a liberal society, not only those innocent people need protections against arbitrary punishments, but also those challenging authorative values need protections against unfair persecutions. In this very point, this essay concerns the possible failure of those provisions in enforcing the SAPL.

[79] See part V and the texts and footnotes accompanying it.

[80] *See* UPENDRA BAXI, *Preface*, THE FUTURE OF HUMAN RIGHTS 5 (1st ed. 2002) (U.K.).

The promulgation of the SAPL also explicitly demonstrated that administrative detention problem could not be resolved merely by pointing out its lack of legal basis. After the promulgation of the SAPL, the detentions provided by this law will be used more broadly. Furthermore, the using of detentions seems legal as those detentions now have a legal basis, a law promulgated by the Chinese National People's Congress, and its process seems comparatively fair. As a consequence, we may reasonably believe that, once the RTL is promoted to a law, it will also be adopted dauntlessly and more widely, and the Chinese human rights protection will become even worse.

Therefore, it is no use protesting the lack of legal basis of non-judicial detentions. While it is easy for the Chinese Government to provide a legal basis for all administrative detentions, it is difficult for China to prevent her Government from promulgating rules depriving citizens' liberties in the name of liberating them.

VI. FUTURE OF THE CHINESE NON-JUDICIAL DETENTIONS

A. The quietly changed nature of non-judicial detentions and increasing possibility of promulgating laws for non-judicial detentions

Noticeably, in varieties of regulations concerning about rehabilitation through labor, the nature of RTL was not always consistent. According to the 1957 Resolution, RTL is both a "compulsory educating and reforming" measure and a "method of employing those being rehabilitated."[81] In 1982 Provisional Implementing Measures for Rehabilitation through Labor, its nature is defined as a "compulsory administrative educating and reforming measure," and a "method of dealing with contradictions between the people."[82] These expressions seem at least ostensibly the same.

[81] 卖淫嫖娼人员收容教育办法, Mai yin piao chang ren yuan shou rong jiao yu ban fa [Measures for Shelter and Education for Prostitutes and Clients of Prostitutes] (promulgated by St. Council, Sept. 4, 1993), art. 2, 1993-94 FA GUI HUI BIAN 126 (P.R.C.)..

[82] *See* 国务院关于劳动教养的补充规定, Guo wu yuan guan yu lao dong jiao yang de bu chong gui ding [Supplementary Provisions Concerning Rehabilitation Through Labor] (promulgated by St. Council, Nov. 29, 1979, effective Nov. 29, 1979) 1949-85 SI FA XING ZHENG GUI ZHANG HUI BIAN 490 (P.R.C.).

However, in the Chinese White Paper on Human Rights Situation published in 1991, the Chinese Government seemed to amend her position on RTL. It pointed out: "Rehabilitation through labor is not a criminal punishment, but an administrative punishment." Again in 1995, PRC State Council in an official document called the RTL station as "executive organs of administrative punishment."[83] Here, the RTL was no longer an administrative compulsory measure, but an administrative punishment. Some scholars thus contend that the Chinese Government changed her position on interpreting the nature of the measure of RTL.[84] If this holds true, what made the Chinese Government change her position? This essay opines that, on the one hand, the alteration signifies that the Chinese Government at least in some extent acknowledged that a government cannot compulsorily make her citizens more free, and therefore began to acknowledge that non-judicial detentions are also detentions and their nature are also punishments. On the other hand, because the notion that to deprive a citizen's personal freedom shall be regulated by constitution and there must always be judicial authorization on depriving citizens' liberties have not yet been established, the Government dares to declare that non-judicial detentions are detentions as well as punishments without providing judicial access.

It is worth noting that it is a gradual process for the Legislature of the Government to adopt those regulations and authorize them with legal positions. This gives people an impression that, whenever the Ministry of Public Security needs to invent a new method in maintaining social order, it may promulgate a new regulation. As long as no one objects to the new regulation, it functions. Once some scholars or those who are influenced by the new regulation protest its legality, the Ministry of Public Security organ will try to make it a law. 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

[83] 国务院关于进一步加强监狱管理和劳动教养工作的通知, Guan yu jin yi bu jia qiang jian yu guan li he lao dong jiao yang gong zuo de tong zhi [Notice Concerning Further Strengthening Prison Management and Rehabilitation Through Labor Work] (promulgated by the St. Council, Feb. 8, 1995).
[84] *See* 劳动教养学 (王顺安 & 高莹 编) Lao dong jiao yang xue [REHABILITATION THROUGH LABOR SCIENCE] 60-61 (Wang Shunan & Gao Ying eds., Law Press, 2002).

enforcement.[85] Thus there will be more and more regulations and laws concerning Chinese citizens' liberty promulgated, and the citizen's liberty will exist merely in paper, not in practice. In addition, under the current system, the Legislature is almost lacking of any checks and balances from outside, and whenever the CCP and the Chinese Government feel the need of a *law*, there will be a *law*.[86]

Admittedly, it is not necessary that the CCP and the Chinese Government are naturally inclined to continuously enact laws that deprive citizens' liberties because there are many infractions among which there are some who support rule of law.[87] However, just as Professor Peerenboom has correctly pointed out, even a democratic government knows the values of paying attention to the public's demand for law and order, and that "being tough on crime is a wining issue for politicians, especially when crime is rising, but even when it is not rising."[88] Hence, it is still possible that PRC Legislature may promulgate laws that might be unconstitutional in order to maintain social stability and public order if a liberal interpretation in the Chinese Constitution will not be systematically accepted soon. Furthermore, in a strict sense, there is no judicial review on the legislation. Consequently, once a *law* is promulgated, there is almost no way to protest the already existing *law*. Therefore, in some senses, no law is better than l*aws*. If there is no *law*, citizen can protest regulations comparatively easier. But once there is a *law*, it is almost impossible for citizens to challenge it successfully.[89]

[85] Michael Dutton & Lee Tianfu, *Missing the Target? Policing Strategies in the Period of Economic Reform*, CRIME & DELINQ., July 1993, at 316, 316-33.

[86] For China's legislating process, *see* LAW-MAKING IN THE PEOPLE'S REPUBLIC OF CHINA (Jan Michiel Otto & Maurice V. Polak, Jianfu Chen & Yuwen Li eds., Kluwer Law International, 2000). This does not mean that the CCP and China's Government will promulgate laws at their pleasures. Instead, the CCP and China's Government's legislating power will still be checked by public opinion, the Legislation Law, and different opinions among the groups within the CCP and the Government. But all these checks are soft, neither rigid requirements nor powerful restriction from the Constitution and the laws.

[87] *See* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 11 (Cambridge University Press, 2002).

[88] *See* Peerenboom, *supra* note 59.

[89] It is important to notice that although the abolishment of the Shelter and Repatriation was partly due to the three citizens' protest, it is not usually that easy for other Chinese citizens to protest against a law this way.

B. The way to retain detentions would be to introduce judicial access

The above analysis does not mean that China shall uproot all detentions provided by administrative regulations. On the contrary, this essay opines that these detentions should be retained on one hand, and be reformed on the other.

1. It is still necessary to retain detentions under administrative regulations in a substantive sense

One of the most significant reasons for retaining non-detentions substantively is that is that the Criminal Law's definition on crimes requires so. According to the Criminal Law, only when an act seriously endangers society shall it be deemed as a crime.[90] In other words, the definition of a crime includes both qualitative and quantitative elements. Therefore, if all non-judicial detentions are uprooted thoroughly, there will be a legal vacuum for those who committed minor offenses without criminal liability. Since all non-judicial detentions are unconstitutional because of the lack of judicial intervention, there are no procedural safeguards for those being rehabilitated or those being sheltered. They are in fact benefited from the loophole of the substantive criminal law. In addition, what really counts is not whether or not there are detentions, but whether or not the process of depriving a citizen's liberties is justice, and whether or not the process conforms to the provisions of the Constitution, which may be the last resort of a citizen who suffers from human wrongs and human sufferings. Therefore, as long as the procedural safeguards is ensured, it will not be problematic to retain detentions for those who commit minor offenses but not liable for crimes.

If all non-judicial detentions are retained, some changes must be done to these detentions in a substantive sense. Firstly, the law must clearly define the targets of these detentions. All administrative detentions provided by the already effective SAPL shall be incorporated to the RTL since they are in essence the same. Secondly, time limits for all detentions shall not surpass six month,

[90] 刑法, Xing fa [Criminal Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) art. 13, 1997 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 83 (P.R.C.).

because the minimum period for imprisonment provided by the Criminal Law is six months. Therefore, such changes will link up the detentions under new laws and imprisonment under the Criminal Law.

2. There must be a judicial process in deciding such detentions

Since the biggest problem is the lack of procedural safeguards required by the Constitution, the most desirable reform for detentions under administrative regulations are to introduce judicial process for all forms of non-judicial detentions, including detentions under SAPL. In addition, rights of the accused shall be protected in deciding detentions. The accused shall enjoy the right to get to know the accusation for his offense, the right to entrust lawyers for his defense, the right to refuse to answer unrelated questions put to him, and the right to confront with those who testifies against him. After the decision, the accused shall have the right to appeal to a higher level of people's court. In regards to the exclusion of illegally obtained evidence by state functionaries, this essay opines it not necessary and not desirable until such mechanism introduced as well as functions well in the formal criminal procedure.

With the above protections, citizens of the People's Republic of China will be able to authentically enjoy their constitutional rights under which no one shall suffer from arbitrary deprivation of his personal freedom.

3. In order to alleviate burdens of the current judicial system, it is desirable to establish magistrate court system

In realizing these proposals, an introduction of magistrate court might also be desirable. Their function is to decide whether or not a citizen shall be sent to *drug treatment* centers, *shelter for education* centers, or *rehabilitation through labor* centers. The panel of magistrate court shall be composed by a judge and two lay assessors. Lay assessors shall come from middle school headmasters and teachers, workers from factories and local people's congresses, and appropriate units. They must be independent, impartial and neutral. Particularly, they must not be affiliated to the public security organ.

Although these suggestions may not work immediately without a complete institutional reform, they are the first steps to strengthen China's constitutionalism and rule of law.

C. "Thick" Rule of Law and Constitutionalism are vital for PRC's future development

Besides the above mentioned measures, it is also necessary for China to establish rule of law and constitutionalism to protect citizens from arbitrarily deprivation of personal freedom. This will function in the long run, for the principle of rule of law and constitutionalism guarantee citizens personal freedom in two levels: one is the legislative level, and the other is the judicial level. The former guarantees that the National People's Congress not to promulgate regulations and other forms of laws depriving citizens' personal freedom unconstitutionally and the latter guarantees the judicial system performing their powers independently as well as impartially.

However, it is also important to choose what types of rule of law and constitutionalism to introduce. Professor Raz pointed out that the term "constitutionalism" used in legal discourse might be some times in a thin sense and sometimes in a thicker sense, and the seven-features-definition of the constitutionalism is used in a thick sense.[91] Similarly, Professor Peerenboom also divides theories of "rule of law" into two types: thin and thick. The former emphasizes on the formal or instrumental aspects of rule of law, while the latter stresses on incorporating political morality elements.[92]

It seems that, under current legal system, it is almost impossible for China to realize the "thick" constitutionalism and "thick" rule of law. However, this does not suggest that a thin rule of law is enough for China. On the contrary, it is also incorrect to argue that thin rule of law is acceptable. As indicated, the Government may promulgate lenient laws that facilitate the police to control the society, as it is still legitimate for the government to make lawful

---

[91] *See* Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, 153 (Larry Alexander ed., Cambridge University Press, 1998).

[92] *See* Peerenboom, *supra* note 87, at 4, 5.

rules complied by the police. Therefore, if there is merely thin rule of law, it is still possible for the Chinese Government to promulgate laws that contain administrative detentions violating the Constitution.

In addition, the CCP and the Chinese Government did not have self-conscientious of restricting the governmental power at the beginning of the founding of PRC. Only after the open and reform policy and the introduction of market economy and with the requirement of democracy and rule of law from scholars and mass did the CCP and the Chinese Government gradually felt necessary to restrict governmental power, and that the law is not merely a restriction to citizens, but also a restriction to the Government. Consequently, there is always a necessity to make the Chinese Government aware of such restrictions, and only through developing a thick sense rule of law and constitutionalism can this be achieved.

Admittedly, the Communist ideology might be changed with the progress of the society. In his essay on "The Theory of Market Modernization of Law," Cooter provided two alternatives for modernization of law. One is "political modernization", that is, politics leads and the economy follows. The other is "market modernization," that is, when the economy leads, the politics follows.[93] Therefore, it is possible for China to modernize her laws and construct constitutionalism through market modernization. However, if the basic features of rule of law have not been established alongside the development of economy, the law and ideologies behind the law may also revert to the original position. Especially when the legislature becomes an implementation of a Party's ideology, the reversion process will be easy.

VII. CONCLUSION

Although it seems contradictory, the Chinese non-judicial detentions were regarded as measures taken to liberate people, and liberation becomes the legitimate ground for these detentions. It is the ideological basis for non-judicial detentions that hamper the construction of constitutionalism and rule of law in China. The promulgation of SAPL is a good example. It is argued that only

[93] Robert D. Cooter, *The Theory of Market Modernization of Law*, INT'L REV. L. & ECON., June 1996, at 141, 141-72.

through establishing "Think" constitutionalism and rule of law can this inherent ideological contradiction be resolved. The gradual recognition that in a rule of law society a government shall not compulsorily liberate her citizens will render non-judicial detentions as punishments. With this recognition, non-judicial detentions shall undergo constitutional inspections. As a consequence, an introduction of judicial review in deciding a non-judicial detention becomes both desirable and expectable. The introduction of judicial process for non-judicial detentions may both retain and legitimize the current law on detention. This procedural reform is essential to develop "Think" constitutionalism and rule of law in China. This development may influence the Government to be more cautious in promulgating laws and administrative regulations. After years of development toward a libertarian road and "market modernization of law," China may become a more democratic country in the future.