

Antagonistic Contradictions: Criminal Law and Human Rights in China

Donald C. Clarke and James V. Feinerman

The institutions of criminal law and their relation to human rights in the People's Republic of China are worth studying for a number of reasons. First, it is in the realm of criminal law and human rights discourse that much of the Chinese conception of law itself is worked out. Secondly, criminal law in China, like criminal law anywhere, carries with it a theory of social order and disorder that is worth looking at for its own sake. One of the challenges facing Chinese criminal law today is that of rejustifying itself in the face of the enormous social changes that have taken place since the beginning of economic reform and China's opening to the outside world in the late 1970s. Thirdly, as long as human rights remain a matter of international concern, one cannot ignore the institutions of punishment that govern one-fifth of the world's population. This article gives an overview of issues of criminal law and human rights as they affect Chinese society today.¹

Criminal Law

For most of the history of the PRC, the official view has been that crime is a product of class society – a society based on the private ownership of the means of production. According to this theory, the socialist system not only does not produce crime, but brings about its eventual extinction. As the decades since 1949 passed, however, and crimes with no plausible class-based explanation continued to occur – indeed, as harsh anti-crime campaigns were justified with the rhetoric of a breakdown in social order and an *increase* in crime² – the traditional theories were quietly dropped. Newer and more sophisticated studies found the roots of crime in features of contemporary Chinese society such as rising expectations and dissatisfaction with poverty, the transitional structures of economic reform such as the dual price system, and the overcentralization of power and the inadequacy of supervisory institutions.³

These theoretical developments have important implications for the future direction of Chinese criminal law. No longer is criminal law a

1. For an excellent and well-informed discussion of many of the issues and institutions mentioned only briefly here, see Lawyers Committee for Human Rights, *Criminal Justice with Chinese Characteristics* (New York: Lawyers Committee for Human Rights, 1993). This book was authored by Timothy A. Gelatt, to whose memory this article is dedicated.

2. See generally Note, "Concepts of law in the Chinese anti-crime campaign," *Harvard Law Review*, Vol. 98, No. 8 (June 1985), pp. 1890–1908.

3. See, for example, He Bingsong, "Woguo de fazui qushi, yuangu yu xingshi zhengce" ("Trends and causes of crime in our country and criminal policy") *Zhengfa luntan (Politics and Law Forum)*, No. 5 (1989), pp. 37–45 (Part 1); No. 6 (1989), pp. 1–11 (Part 2).

temporary expedient for handling hostile class elements: on the one hand, crime will continue to be produced by the conditions of socialist society, and on the other, the era of Communism, when the state (and with it law) withers away, has been officially put off for several decades at least, if not permanently.

The limits of "criminality" in China. In looking at Chinese criminal law, it is important to understand that, as in other countries, not all deviant and punishable behaviour is labelled "criminal"; on the other hand, "law" has come to mean, at least in the context of criminal behaviour, the punitive regime.

While there are a number of historical antecedents for this view, of crucial importance in modern China is Mao Zedong's famous distinction between "antagonistic" and "non-antagonistic" contradictions.⁴ Antagonistic contradictions are those between parties with fundamentally opposed interests – "the people" and "the enemy" – while non-antagonistic contradictions occur between parties with fundamentally identical interests: the people. The former are dealt with by methods of dictatorship and compulsion, the latter by the "democratic" methods of persuasion and education.

Law is frequently identified with dictatorship, compulsion and the enemy. This was made quite clear during the anti-crime campaigns of the early 1980s, when contemporary commentators wrote that "the primary function of [law] ... is to suppress enemies."⁵ At the same time, it is recognized that not everyone who disturbs social order is an enemy. Ordinary offences against public order belong to the category of non-antagonistic contradictions among the people. The traditional identification of law and compulsion with dictatorship and enemy classes, however, has made it difficult to accept the notion that courts and law are the proper institutions for handling such matters. Therefore, a wide variety of institutions labelled "administrative" have come into being for the purpose of handling social deviance "among the people." The much-used phrases "punished according to law" and "dealt with according to law" mean not "punished according to proper legal procedures" but "given a formal punishment under the Criminal Law, not an administrative sanction under (for example) the Security Administration Punishment Regulations."⁶ Although traditional Chinese legal theory recognizes that occasionally compulsion may be necessary among the people, such compulsion is described as "different in principle" from dictatorial compulsion.⁷

4. The most commonly cited source for this theory is his 1957 speech "On the correct handling of contradictions among the people." A revised and edited version of the speech appears in English in Mao Tse-tung, *Selected Works of Mao Tse-tung* (Vol. 5) (Beijing: Foreign Languages Press, 1977), pp. 384–421.

5. Cui Min, "Xuehui shiyong he yonghao falü wuqi" ("Learn how to use and use well the weapon of law"), *Faxue zazhi* (*Jurisprudence Magazine*), No. 5 (1983), p. 14.

6. The Security Administration Punishment Regulations are discussed in greater detail below.

7. Mao Zedong, "Contradictions among the people."

Formal criminal law and regulations. The importance of the formal criminal law in the life of the ordinary citizen is relatively limited. It certainly plays a smaller part than the procedures for “administrative” punishments which can be quite severe but provide far less in the way of formal protections for the defendant.

The major statutes in the field of criminal law are the Criminal Law (CL) and the Criminal Procedure Law (CPL), both passed in 1979 and effective from 1980. The CL, a Western-style penal code on the German model, is divided into two sections: the General Part (*zongze*), providing the basic principles underlying the application of the Criminal Law, and the Special Part (*fenze*), listing specific crimes.

The General Part defines general notions of crime, making social danger a key element. It discusses criminal responsibility, distinguishing between intentional and negligent acts and providing for diminished responsibility in various circumstances, such as where the offender is young or mentally ill. There are also rules on sentencing and parole and a statute of limitations.

Permissible punishments are listed and defined in chapter 3 of the General Part of the CL. Control (*guanzhi*) lasts from three months to two years. The convict continues to work and receive wages at his or her place of employment and must report regularly to the local police. Criminal detention entails confinement in a local detention house for 15 days to six months. Detention for less than 15 days is considered an “administrative punishment,” provided for under a different statute, the Security Administration Punishment Regulations. Penal servitude means confinement for a period of six months to 15 years (20 years in the case of multiple crimes) or for life. The offender is generally sent to “reform through labour”: hard labour in a prison camp.⁸ Finally, the death penalty may be imposed either for immediate execution (subject to appeal and review) or with a two-year suspension. If the convict is observed to have demonstrated sufficient repentance and reform during the period of suspension, the sentence may be commuted to penal servitude for life or for a period of 15 to 20 years. The CL also provides for the supplementary punishments (which, despite their name, may be imposed by themselves) of fines, confiscation of the convict’s property and deprivation of political rights for a period after release from prison.

The Criminal Law does not so much define which acts are punishable as prescribe what the sanctions shall be when relatively severe punishments are deemed in order. The definition of crime is accomplished outside the Criminal Law by reference to political exigencies or generally accepted standards of morality. There is little perceived danger in allowing government officials to impose their own standards of morality, since Chinese state ideology does not accept the legitimacy of multiple standards of morality.

8. For a personal account of life in a labour camp, see Lai Ying, *The Thirty-Sixth Way* (Garden City, NY: Doubleday, 1969). An excellent general study is Harry Hongda Wu, *Laogai – The Chinese Gulag* (Boulder: Westview Press, 1992).

Consider, for example, the provision for analogy (Article 79 of the CL): a “crime” not stipulated in the CL (or elsewhere) may be punished according to the most nearly applicable article. This shows that if rules defining crime are “law,” then the very notion of “crime” is not a “legal” concept; the determination of whether a particular act constitutes a crime is something that must take place *outside* the CL. Thus, while the CL tells you what punishment to apply for a particular crime, it is often unhelpful in determining *whether* a crime has been committed.⁹ In this respect, the CL resembles the rules for punishment of Imperial China, which stipulated any number of punishable acts in great detail, but also contained provisions allowing for analogy and punishing “doing what ought not to be done.”

The Special Part lists various crimes and their punishments. Pride of place goes to counter-revolutionary crimes, which are defined as “all acts endangering the People’s Republic of China committed with the goal of overthrowing the political power of the dictatorship of the proletariat and the socialist system” (Art. 90). Despite their textual prominence, however, government statistics show that counter-revolutionary crimes are utterly insignificant in number – a mere 0.28 per cent of all criminal cases decided by courts from 1983 to the end of 1987,¹⁰ and 0.06 per cent in 1992.¹¹ Indeed, counter-revolution appears to have been the one major crime whose incidence decreased in the 1980s.¹²

The other chapters in the Special Part cover crimes of endangering public security, undermining the socialist economic order, infringement of personal and democratic rights, property violation, disruption of the order of social administration, disruption of marriage and the family, and dereliction of duty and corruption.

The Special Part is a relatively skimpy 103 articles. The Criminal Code of the Republic of China used in Taiwan, by contrast, contains 258 articles in its Special Part. One reason for the relative simplicity of the Chinese CL is that the provision on analogy offers an escape hatch in case of imperfect or careless drafting. Another reason is that the CL is supplemented by numerous other pieces of special legislation either specifically criminalizing a certain act or prohibiting an act and providing vaguely that “where it constitutes a crime, criminal responsibility shall be affixed,” without providing any guidance as to under what circumstances the performance of a prohibited act would constitute a crime. Finally, it must be remembered that the CL is as much a political text as a legal one; its drafters were concerned with providing a legal basis for state action, not with worries about due process, and it was designed to be used by

9. See, for example, Art. 139, para. 1, which punishes but does not define rape. Para. 2, by contrast, does define one act that will constitute rape: having sexual relations with a girl under 14.

10. He Bingsong, “Woguo de fazui qushi, yuangu yu xingshi zhengce” (Part 1), p. 40.

11. *Zhongguo falü nianjian 1993* (*Law Yearbook of China 1993*) (Beijing: Zhongguo falü nianjian she, 1993), p. 935.

12. In many cases, it is likely that what are in fact political offences are prosecuted under other rubrics.

judicial and public security cadres with a low educational level. Although the late 1980s and early 1990s have seen a movement among the Chinese legal community to revise the wording of the Criminal Law in an attempt to make it technically more elegant, no revision has yet taken place.

The Criminal Procedure Law sets out the procedure to be used in the administration of the Criminal Law. It is not a procedure to be applied to *all* punitive proceedings, since, as discussed below, punishments of up to four years' imprisonment can be imposed under other, "non-criminal" statutes. The various time limits imposed under the CPL, for example, do not apply if a suspect is being detained or investigated, as is quite possible, under some other rubric.

Jurisdiction to try cases in the first instance is divided in Article 15 of the CPL among different levels of courts according to the nature of the case. Basic-level people's courts are the courts of first instance in ordinary criminal cases. Where some factor takes the case out of the ordinary – counter-revolution, a sentence of life imprisonment or death, the involvement of foreigners – jurisdiction lies with the intermediate-level people's court, the provincial-level higher people's court, or even in some cases (such as the trial of the Gang of Four) the Supreme People's Court. These rules recognize the realities of the court system. Judges at the higher level are more likely to be legally sophisticated than those at lower levels. In addition, the court system operates within a larger political system where bureaucratic rank is extremely important. Courts and their officials have greater prestige and clout at higher levels.

The CPL allows defendants a single appeal (*shangsu*) to the court at the next higher level. The procuracy can also protest (*kangsu*) a decision in the first instance. No standard is set out for appeal: a criminal defendant could contest findings of fact, findings of law or the sentence imposed. The court of second instance may if it wishes conduct what is essentially a new trial. Unlike an Anglo-American court, but like courts in civil law systems, it is not bound to accept the findings of fact below. Indeed, it is required "to conduct a complete review of the facts determined and of the law applied in the judgment of first instance, and is not limited to the scope of an appeal or protest."¹³ Another form of appeal is the petition (*shensu*). A petition is an application for review of a judgment that has already taken legal effect. It is a request to reopen a case, and is not subject to any time limits.

It would be misleading to present an account of the rules regarding trials and appeals without including an account of how trials actually operate. In criminal cases, the function of what is called the trial is not to determine guilt or innocence. That determination is made at an earlier stage of the proceedings. If there were any doubt about the guilt of the suspect, the trial would not take place. Its purpose is to educate, not to confuse. As a recent set of official instructions to lawyers put it,

Defence is not a matter of victory or defeat, and the legal adviser is not competing

13. Criminal Procedure Law, Art. 134.

with the procuratorial and court personnel to see who comes out on top; it is a propaganda effort, directed at the citizens, to condemn vice and praise justice.¹⁴

Once the didactic purpose of the trial is understood, it is easy to see how the government can claim, as it frequently does, that a trial to which admission was by ticket only met the legal requirement of being “public.”¹⁵ A public trial, in this interpretation, is any trial with an audience, regardless of how that audience is selected.

Like any performance, a criminal trial may need to be rehearsed beforehand. Thus, it is not uncommon for the court leadership to decide on the disposition of the case well before the trial is held. This practice, known as *xian pan hou shen* (verdict first, trial second), is so widespread that references (and criticisms) even in the official press are numerous. If the case is of any importance, the verdict will be decided by the local Political-Legal Committee of the Party. Again, this practice is widely acknowledged:

[Although the Political-Legal Committee] is in name an organ of co-ordination among the police, procuracy and courts, it is in reality an organ of leadership for all three. It involves itself directly in adjudication work, and in some cases decides the verdict itself.¹⁶

Corresponding to the relatively minor role assigned the trial “judge” – indeed, a term like “hearing officer” might be better suited to his role – is that assigned to the defendant’s lawyer. In general, the lawyer’s role is at most to plead mitigating circumstances. In some cases, it may even be to “do a good job of ideological work on the defendant and his family members, encouraging them to admit the crime and submit to the law.”¹⁷ In the rare case where the lawyer intends to argue the defendant’s innocence, he or she must often obtain the government’s permission before doing so.¹⁸

14. Shanghai Municipal Lawyers Association Research Department, “Shanghai zhuyi zuohao ‘dongluan anjian’ de xingshi bianhu gongzuo (huibao tigang)” (“Shanghai concentrates on doing a good job of criminal defence work in ‘turmoil-related cases’ (outline of report)”), *Shanghai lüshi* (*Shanghai Lawyer*), No. 427 (10 January 1990), pp. 10–15; translated in Human Rights in China, *Going Through the Motions: The Role of Defense Counsel in the Trials of the 1989 Protesters* (New York: Human Rights in China, 1993), pp. 16–20.

15. In 1987, for example, a Taiwanese man was arrested and expelled from China for attempting to attend the trial, proclaimed “public” by the government, of a political defendant in Shanghai. Daniel Southerland, “China ousts Taiwanese for Shanghai protest,” *Washington Post*, 24 December 1987, p. A9. The government correctly interpreted his attempt to attend a “public” trial without government permission as a political challenge and reacted accordingly.

16. Sun Jiebing, “Dangqian fayuan shishi duli shenpan de zuli ji duice” (“Obstacles and solutions to the implementation of independent adjudication by courts today”), *Xiandai faxue* (*Modern Jurisprudence*), No. 1 (1989), p. 45.

17. All-China Lawyers Association, “Guanyu dangqian zai shenli dongluan he fangeming baoluan anjian zhong de lüshi bianhu gongzuo qingkuang tongbao” (“Circular on ‘The defence work of lawyers in the current trials of cases related to the turmoil and counterrevolutionary rebellion’”), *Shanghai lüshi*, No. 427 (10 January 1990), pp. 1–3; translated in Human Rights in China, *Going Through the Motions*, pp. 7–8.

18. Timothy A. Gelatt, “Lawyers in China: the past decade and beyond,” *New York University Journal of International Law and Politics*, Vol. 23, No. 3 (Spring 1991), p. 762;

Security Administration Punishment Regulations. The Criminal Law is intended to reach only relatively serious offences against society. This does not mean, however, that non-serious offences go unpunished. Those are covered by other “administrative” regulations and practices,¹⁹ prominent among which are the Security Administration Punishment Regulations (SAPR),²⁰ a set of rules providing for “administrative punishments” originally issued in 1957 and revised and updated in 1986 and again in 1994.

The SAPR are an important item of criminal legislation (although they would not be labelled “criminal” in China). Their reach is extremely broad, and unlike the Criminal Law, they are administered by the police, not the courts. The relative importance of the SAPR is indicated by official statistics: the public security organs took up almost three million SAPR cases in 1992, compared with only 423,000 criminal cases taken up by the courts.²¹

The difference between SAPR punishments and those imposed under the Criminal Law is that the former are considered “merely” administrative punishments. From the defendant’s point of view, the difference is that maximum sentences under the SAPR are much lighter than those under the Criminal Law. The scope of the SAPR is set out in Article 2:

Where an act that disrupts public order, interferes with public safety, infringes the personal rights of citizens, or damages public or private property constitutes a crime under the Criminal Law of the People’s Republic of China, criminal responsibility shall be pursued according to law; where criminal punishment is not warranted and a security administration punishment should be imposed, such punishment shall be imposed according to these Regulations.

The SAPR provide for three punishments: a warning, a fine of up to 200 *yuan* for most offences²² and detention for up to 15 days. In general, the determination of a violation and its punishment is made by the public security bureau at the city or county level, but warnings and fines of up to 50 *yuan* may be imposed by public security sub-stations. The defendant may appeal to the public security organ at the next highest level.

footnote continued

“Circular on ‘The defense work of lawyers’,” in Human Rights in China, *Going Through the Motions*, p. 8.

19. On punitive administrative regulations and practices in general, see Lawyers Committee for Human Rights, *Criminal Justice with Chinese Characteristics*; Amnesty International, *China – Punishment Without Crime: Administrative Detention* (New York: Amnesty International, 1991). A number of important documents frequently referred to in this and other discussions of the subject have been collected and translated, with an introduction, in Edward J. Epstein (ed.), “Legal documents and materials on administrative detention in the People’s Republic of China,” *Chinese Law and Government*, Vol. 27, No. 5 (1994).

20. Zhonghua Renmin Gongheguo zhi’an guanli chufa tiaoli (Security Administration Punishment Regulations of the People’s Republic of China), effective 1 January 1987, as amended, in *Guowuyuan gongbao* (*State Council Gazette*), No. 11 (27 June 1994), pp. 440–48.

21. *Zhongguo falü nianjian 1993*, pp. 935, 941.

22. Gambling, opium-smoking, and prostitution-related offences are subject to vastly greater fines of thousands of *yuan*.

The post-1986 version of the SAPR provides for an additional appeal out of the public security bureaucracy to a people's court. This is an extremely significant reform in its implications, although its practical effect will be limited so long as courts and public security organs are simply two arms of the same "political-legal" apparatus.

Re-education through labour. Between the SAPR and the Criminal Law stands the institution of re-education through labour (*laodong jiaoyang*) (RETL). RETL should not be confused with reform through labour (*laodong gaizao*), a punishment generally accompanying a sentence of penal servitude under the Criminal Law and governed by separate regulations. A 1985 article provides a standard explanation of the purpose behind RETL:

If we look at the phenomena of infringement of law (*weifa*) and crime (*fanzui*), we find that in every country there exists a group of people who have not broken major laws, but whose actions fall somewhere between crime and error, people who threaten public security and whom it is difficult for the courts to deal with. In its handling of those who infringe the law or commit crimes, China has established a category at a level between the punishment of security administration offences and criminal sentencing by the courts, namely, re-education through labour.²³

Like the SAPR, then, the regulations on RETL depend crucially upon the distinction between minor lawbreaking and gross violations that rise to the level of crime.

RETL first received a statutory basis in 1957, and its continuing viability was confirmed in 1979.²⁴ For most of the 1980s and early 1990s, it appears to have been governed, if at all, by the Trial Procedures on Re-education Through Labour, a Ministry of Public Security document of uncertain legal status issued in 1982 and made public only in 1989.²⁵ These regulations have been supplemented, although apparently not replaced, by the 1992 Detailed Rules on the Implementation of Law in the Administration of Re-education Through Labour.²⁶

Despite the documentary basis, which in any case remains largely unknown to both ordinary citizens and legal specialists,²⁷ RETL remains something of a loose cannon among China's penal institutions. Persons

23. Dang Guoqing, "Qiantan laodong jiaoyang xuexiao" ("A brief discussion of labour re-education schools"), *Zhongguo fazhi bao* (*Chinese Legal System News*), 29 April 1985, p. 3. The translation is slightly modified from that provided in Amnesty International, *Punishment Without Crime*.

24. Guowuyuan guanyu laodong jiaoyang de buchong guiding (Supplementary Rules of the State Council on Re-education Through Labour), 29 October 1979, in *Zhonghua Renmin Gongheguo falü quanshu* (*Compendium of the Laws of the People's Republic of China*) (Changchun: Jilin renmin chubanshe, 1989), p. 1574.

25. Laodong jiaoyang shixing banfa (Trial Procedures on Re-education Through Labour), 21 January 1982, in *ibid.* p. 1583.

26. Ministry of Justice, "Laodong jiaoyang guanli gongzuo zhifa xize" ("Detailed rules on implementing the law in the administration of re-education through labour"), 10 August 1992, in *Guowuyuan gongbao*, No. 26 (1 December 1992), p. 1055.

27. This complaint is made in Fu Ge, "Laodong jiaoyang lifa de lilun yu shijian" ("The theory and practice of legislation on re-education through labour"), *Faxue* (*Jurisprudence*), No. 7 (1987), p. 44.

can spend up to four years at a stretch in RETL, a sentence much longer than the 15 days maximum under the SAPR and harsher than certain *criminal* punishments such as control (*guanzhi*), criminal detention (*juyi*) (maximum of six months) and even penal servitude (minimum six months). Indeed, a sentence to RETL can result in internal exile for life: under a number of circumstances, including simply having the sentence extended for a year, the authorities can cancel prisoners' urban registration and require them to stay at the labour camp as "free labourers" under conditions very similar to those of prisoners. Yet its rules are very loose – it can be imposed, for example, on "counter-revolutionary elements and anti-Party, anti-socialist elements whose crimes are minor" and "those who are employed but for a long period of time refuse to labour, stir up trouble unreasonably, disrupt the lives of those around them, and do not respond to admonition" – and its application is subject to almost no oversight or review. The simple and moralistic language of the RETL regulations, a remnant of an earlier day in Chinese legal drafting, offers a striking contrast with that of the SAPR, which uses over ten times the number of characters to set out its offences, although they merit substantially lesser terms of confinement.

Custody and investigation. Custody and investigation (*shourong shencha*)²⁸ (CI) has been aptly described as a "legal quagmire."²⁹ Although the practice is discussed in academic journals and referred to in legislation, there is no publicly available document authorizing the practice or prescribing its procedure. The idea behind CI is that suspicious persons need to be detained while police investigate the crimes that they have committed or might commit. It is not supposed to be used on persons whose identities are known and who are unlikely to leave the local area. In practice, CI blurs the line between investigation and punishment. It has been described as a method of "simultaneously educating the criminal, making him perform labour, and investigating him."³⁰

CI is administered entirely at the discretion of public security organs with no external supervision. Not surprisingly, the potential for abuse is great. Although the rules that govern CI appear to allow a maximum of three months' detention, in practice these limits are often grossly exceeded. It seems clear from Chinese sources that public security organs have frequently expanded the scope of CI, taking in persons whose identities are known and who are from the local area, in addition to those who have merely violated administrative or civil laws.³¹ Moreover, in

28. *Shourong shencha* is usually translated as "shelter and investigation." Although *shourong*, perhaps most precisely translated as "to take in," can mean to shelter, in this context it means to take into custody, and the benevolent connotations of "shelter" are out of place.

29. Amnesty International, *Punishment Without Crime*, p. 9.

30. "Shourong shencha shi zenme hui shi?" ("What is custody and investigation?"), *Zhongguo fazhi bao* (*Chinese Legal System News*), 30 August 1986, p. 3.

31. This fact is attested to not only by numerous reports in the Chinese press, but also by a recent Ministry of Public Security regulation that admits as much: *Guanyu jinyibu kongzhi shiyong shourong shencha shouduan de tongzhi* (Notice on Further Controlling the Use of

some areas the procuracy itself, without any legal basis, has adopted the practice of detaining persons for investigation.

In 1980, the State Council issued a Notice providing that custody and investigation and re-education through labour should be “unified” under the single rubric of re-education through labour. This did not quite abolish CI, however, because it continued to allow detention for essentially the same reasons that had traditionally justified CI. In practice, the Notice has had no effect. CI continues in much the same form as before, not only in substance but also in name.³²

International Human Rights Law

The relationship between China’s criminal law and the PRC’s undertakings with respect to international human rights is as intimate as it is problematic. As the previous section makes clear, serious potential for abuse of civil liberties persists in the PRC, despite provisions of China’s criminal law, constitution and even international treaties to which China has acceded. International human rights organizations, such as Amnesty International and Human Rights Watch, have reported a wide range of human rights violations over long periods of time. Particularly in the aftermath of the Tiananmen demonstrations and subsequent crackdown, the inadequacies of China’s justice system were brutally evident to outside observers. This section will examine a few of the obligations the emerging international human rights regime imposes upon the Chinese government and what congruence (or lack thereof) exists with the current Chinese legal order, especially with regard to criminal procedure.

The international human rights framework. The United Nations Charter (UN Charter) and the Universal Declaration of Human Rights (UDHR)³³ are at the base of internationally recognized human rights. China claims that it recognizes the principles of the UN Charter³⁴; the PRC also has called the UDHR “the first international human rights document.”³⁵ Article 56 of the UN Charter requires all members of the United Nations to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” The principles articulated in the UN Charter and UDHR were later codified in the Inter-

footnote continued

the Method of Custody and Investigation), 11 June 1991, in *Zui'an sucheng shouce* (*Handbook on the Prosecution of Criminal Cases*) (Beijing, 1992), pp. 260–62.

32. See, for example, *ibid.*

33. Universal Declaration of Human Rights, General Assembly Res. 217A(III), United Nations Document A/RES/217A (III) (1948) (UDHR).

34. State Council, “Human Rights in China,” reprinted in *Beijing Review*, 4–10 November 1991, at p. 42 (1991 State Council Report).

35. *Ibid.* p. 8.

national Covenant on Civil and Political Rights (ICCPR),³⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁷ Although China is not a signatory to either Covenant, it supports their aims as having a positive role in achieving the purposes and principles of the UN Charter concerning respect for human rights. Moreover, even for states not parties to the ICCPR and ICESCR, the international legal concepts represented in them provide authoritative evidence of the customary international law of human rights, stemming from the basic principles of the UN Charter. Legal enactments parallel to numerous provisions of the Covenants are enshrined in domestic Chinese legislation, including the Constitution, Criminal Law and Criminal Procedure Law. A few representative cases of the dissonance between stated Chinese (and international) norms and China's actual practice are examined below.

Torture and cruel or degrading punishment. The UDHR (Art. 5) and ICCPR (Art. 7) provide that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The ICCPR designates this right as "inalienable," unable to be circumscribed even for public emergencies.³⁸ UDHR and ICCPR protection was extended in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention),³⁹ ratified by China in October 1988. Under the Torture Convention, states "shall take effective legislative, administrative, judicial or other measures to prevent" torture in their jurisdictions⁴⁰ and must make acts of torture offences under criminal law.⁴¹ Other acts of cruel, inhuman or degrading treatment or punishment not amounting to torture, if committed by or with the consent of a government official, are also prohibited. Also, interrogation practices should be revamped in order to prevent torture; victims of torture should have access to competent authorities, to redress, and to fair and adequate compensation.

Notwithstanding safeguards in the Criminal Law⁴² and Criminal Pro-

36. International Covenant on Civil and Political Rights, General Assembly Resolution 2200 (XXI), U.N. GAOR, 21st Sess., Supp. (No. 16) 52, U.N. Doc. A/6316 (1967), reprinted in *International Legal Materials*, Vol. 6, p. 368 (1967) (ICCPR).

37. International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 2200A(XXI), U.N. GAOR, 21st Sess., Supp. (No. 16) 49, U.N. Doc. A/6316 (1967), reprinted in *International Legal Materials*, Vol. 6, p. 360 (1967) (ICESCR).

38. ICCPR, Art. 4, para. 2.

39. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 39/46 Annex, 39 U.N. GAOR, Supp. (No. 51) 197, U.N. Doc. E/CN.4/1984/72, Annex (1984), reprinted in *International Legal Materials*, Vol. 23, p. 1027 (1984) (Torture Convention).

40. Torture Convention, Art. 2, para. 1. China takes the position that since the Torture Convention, as international law, is legally binding in China, no additional domestic implementing legislation is required to implement it.

41. *Ibid.* Art. 4, para. 1.

42. Art. 136 of the Criminal Law (no coerced statements); Art. 134 of the Criminal Law (punishing injuries resulting from torture); Art. 143 of the Criminal Law (no unlawful detention; sanctions beatings, humiliation, serious injury or death resulting therefrom); Art.

cedure Law,⁴³ as well as statements made by China confirming its compliance with the Torture Convention,⁴⁴ torture and other forms of cruel, inhuman and degrading treatment and punishment⁴⁵ still prevail in China. Detainees and prisoners often suffer severe physical and psychological injuries as a consequence. Inadequate medical care in prison results in untreated injuries; thus, prisoners and detainees may actually die from torture in prison or shortly after their release.⁴⁶

Torture and mistreatment of detainees in detention centres and prisons are reportedly due, in part, to the government's hostile attitude towards political prisoners, the pressure to extract confessions, the absence of a presumption of innocence in Chinese law, the lack of effective judicial supervision over the police, and the lack of proper procedures for redress of complaints of torture.⁴⁷ Even though Article 41 of the 1982 Constitution states that citizens may file complaints against any state official for "violation of the law or dereliction of duty," plus the Criminal Law penalizes state personnel who violate the law⁴⁸ and a 1989 Administrative Litigation Law allows citizens to sue government officials who infringe upon their rights,⁴⁹ imprisoned or detained Chinese appear unable to enforce these rights at present.⁵⁰ Indeed, under the current interpretation of the Administrative Litigation Law, citizens wronged by police in the course of a criminal investigation cannot bring suit at all, because the action of the police is deemed to be an "act of criminal investigation," not an "act of administration."⁵¹

footnote continued

189 of the Criminal Law (no corporal punishment or abuse inflicted by judicial personnel on prisoners) (punishable only "when the circumstances are serious").

43. Art. 32 of the Criminal Procedure Law (prohibiting torture to coerce statements and threat, enticement, deceit or other unlawful methods of gathering evidence).

44. Amnesty International, *Torture in China* (1992) (AI Torture Report) notes widespread practice of torture and ill-treatment of prisoners in the PRC, based on a memorandum which Amnesty International addressed to the Chinese government in early November 1992.

45. Torture and other forms of mistreatment most often occur during interrogation and reportedly include: beatings; assaults with electric batons; use of handcuffs, shackles and chains; suspension by the arms or feet; confinement in tiny and/or dark cells; deprivation of sleep or food; exposure to cold or heat; prolonged solitary confinement; and force-feeding of prisoners on hunger strikes. *Ibid.* pp. 5–10.

46. *Ibid.*

47. See *ibid.* pp. 46–53.

48. Criminal Law, Arts. 136, 143, 147 and 189.

49. See Lawyers Committee for Human Rights, *Criminal Justice with Chinese Characteristics* (New York: Lawyers Committee for Human Rights, 1993), pp. 75–76 (predicting that the Administrative Litigation Law is unlikely to be effective in political cases). The State Compensation Law of 1994 promises an additional means of redress for official misconduct, including false arrest and police brutality, but it seems unlikely to be any more effective in practice than its predecessor.

50. AI Torture Report, pp. 52–53 (recounting lack of effective procedures for handling complaints) and pp. 53–56 (detailing AI's recommendations for prevention of torture).

51. Fang Shirong, "Xingzheng susong shou'an zhong dui gongan jiguan xingshi zhencha xingwei de shibie" ("How to distinguish an act of criminal investigation by public security organs when accepting administrative lawsuits"), *Faxue*, No. 8 (1994), p. 29.

Arbitrary arrest and detention. The UDHR (Art. 9) and the ICCPR (Art. 9) forbid arbitrary arrest or detention. Article 4 of the Political Covenant permits this right to be circumscribed “in time of public emergency” threatening the life of the nation (only “to the extent strictly required by the exigencies of the situation”). Notwithstanding similar provisions in the Criminal Law and the Criminal Procedure Law, individual Chinese are arrested, and detained for long periods of time, without access to lawyers, friends or families.

Under the Criminal Procedure Law, the police may detain individuals if, among other reasons, they are preparing to commit a crime, committing a crime, identified immediately after having committed a crime, discovered to have criminal evidence, or gravely undermining work, production or social order.⁵² Warrants for detention are required by law⁵³ but seldom produced. Once a suspect is detained, his family or work unit should be informed of the reasons for the detention and the place of custody within 24 hours, unless notification would “hinder” the investigation or is not possible.⁵⁴ In most cases, however, notification may be delayed for long periods or never issued.⁵⁵ The Criminal Law requires interrogation to take place within 24 hours of detention⁵⁶ and the police to apply to the Procuratorate (public prosecutor) within three days of the detention for review and approval of the suspect’s arrest (with a possible extension of one to four days under “special circumstances”).⁵⁷ The Procuratorate must approve the arrest or order the release of the suspect within three days of the application, though this may be delayed if the Procuratorate orders a supplementary investigation to be conducted.⁵⁸ Yet the police reportedly detain people for long periods of time in contravention of these provisions of the Criminal Procedure Law and the Human Rights Declaration, justifying their actions on the basis of unpublished regulations on “custody and investigation” and “supervised residence” as well as other methods not requiring procuratorial approval. These administrative forms of detention, purportedly abolished by a 1980 State Council document, are still used.⁵⁹ Political prisoners are also detained pursuant to the 1957 Decision of the State Council of the PRC on the Question of Re-education Through Labour, which provides for detention without trial of people considered to have “anti-socialist views”

52. Criminal Procedure Law, Art. 41.

53. *Ibid.* Art. 43.

54. *Ibid.*

55. See Amnesty International, *China: Violations of Human Rights, Prisoners of Conscience and the Death Penalty in the People's Republic of China* (London: Amnesty International, 1984), p. 92.

56. Criminal Procedure Law, Art. 44.

57. *Ibid.* Art. 48.

58. *Ibid.* Arts. 47 and 48.

59. Department of State, 104th Cong., 1st Sess., *Country Reports on Human Rights Practices for 1993: China*, Section 4, Section 1(d) (1993 State Department Report); Department of State, 103d Cong., 1st Sess., *Country Reports on Human Rights Practices for 1991* (Jt. Comm. Print 1992), p. 812.

or to be “hooligans,” for the stated purpose of “re-educating them through labour.”⁶⁰

Right to a fair and public hearing. The UDHR provides that everyone is entitled to a fair and public hearing by an independent and impartial tribunal⁶¹ and that anyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial, at which all the guarantees necessary for an adequate defence are available.⁶² Despite these protections, various due process rights protected by law are often denied.

The Criminal Procedure Law stipulates that all trials should be held in public, except those involving state secrets, juveniles and personal secrets.⁶³ The United States State Department has reported that “details of cases involving ‘counterrevolutionary’ charges have frequently been kept secret, even from defendants’ relatives, under this provision.”⁶⁴ In most cases, the trials are held in secret or in “public” before an officially selected audience and the defendant’s immediate family. Chinese trials have never been public in the sense that anyone who wishes can attend; the government claims that “seating is limited,” although this could be solved by admitting auditors on a first-come, first-served basis.⁶⁵

The Criminal Procedure Law does not provide that defendants are presumed innocent until proven guilty. On the contrary, it provides that the responsibility of the defence is to present evidence proving that the defendant is innocent, that his crime is minor, that the punishment should be mitigated or that the defendant should be exempted from criminal responsibility.⁶⁶ Under Chinese law, the courts have a duty to “guarantee that defendants obtain defence.”⁶⁷ Defendants have the right to defend themselves or to be represented by a lawyer, citizens recommended by a people’s organization or the defendant’s work unit, citizens authorized by the court, or close relatives or guardians.⁶⁸ Professional legal assistance,

60. 1994 State Department Report, Section 1(e). Re-education through labour is further discussed above.

61. Human Rights Declaration, Art. 10.

62. *Ibid.* Art. 11, para. 1. Art. 14, para. 3 of the Political Covenant lists a number of minimum guarantees to which every defendant is entitled: the right to be informed promptly of the nature of charge, adequate time for the preparation of a defence and to communicate with counsel of one’s own choosing, to be tried without undue delay and to examine hostile witnesses.

63. Criminal Procedure Law, Art. 111.

64. 1994 State Department Report, Section 1(e).

65. See Renmin fayuan fating guize (shixing) (Rules of Court of the People’s Courts (for trial implementation)), 11 December 1979, in *Zhonghua Renmin Gongheguo falü quanshu*, p. 289.

66. Criminal Procedure Law, Art. 28.

67. *Ibid.* Art. 8.

68. *Ibid.* Art. 26.

if available, may be retained only seven days prior to trial⁶⁹; in less time in certain cases involving serious endangerment to public security.⁷⁰

Freedom of opinion and expression. The right of each person to freedom of opinion and expression is embodied in the UDHR (Art. 19) and the ICCPR (Art. 19). Article 35 of the 1982 Constitution reads:

Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.

Thus it appears that China's 1982 Constitution contains provisions similarly protective of individuals' rights to freedom of expression as are found in the First Amendment to the U.S. Constitution; in reality, this is clearly not the case. In fact, "the constitution seems to bear no relation to the actual government of China. Citizens enjoy neither civil nor economic rights."⁷¹ The Four Basic Principles in the preamble of the 1982 Constitution, also known as the "Four Upholds," state that citizens should:

1. Uphold Marxism-Leninism-Mao Zedong Thought.
2. Uphold the leadership of the Chinese Communist Party.
3. Uphold the people's democratic dictatorship.
4. Uphold the leading role of socialism.

Only those who uphold the Four Basic Principles are entitled to the freedoms outlined in the Constitution.⁷² This concept of limiting free speech is reinforced by the words of the Constitution's preamble.

There are numerous examples of citizens being punished for the expression of unwelcome critical views and other non-violent political crimes.⁷³ Indeed, an official document issued by the Central Political-Legal Commission of the Chinese Communist Party goes to great pains to refute the "incorrect and unsuitable" view that pure speech cannot be a crime, at least where it is counter-revolutionary in content or is a "vicious attack and slander" of central leading comrades.⁷⁴ Despite

69. *Ibid.* Art. 110.

70. Decision of the Standing Committee of the National People's Congress Regarding the Procedure for Rapid Adjudication of Cases Involving Criminal Elements Who Seriously Endanger Public Security, adopted by the Second Session of the Standing Committee of the Sixth National People's Congress, 2 September 1983, in *The Criminal Law and the Criminal Procedure Law of China* (Beijing: Foreign Languages Press, 1st ed. 1984), pp. 246-47.

71. William C. Jones, "Constitution of China," *Washington University Law Quarterly*, Vol. 63, p. 710 (1985).

72. Judith Shapiro and Liang Heng, *Cold Winds, Warm Winds* (Middleton CT: Wesleyan University Press, 1986), pp. 30-31.

73. See the long list of prisoners in Asia Watch, *Detained in China and Tibet* (New York: Human Rights Watch, 1994).

74. Central Political-Legal Commission, "Guanyu dui edu gongji, feibang zhongyang lingdao tongzhi shi fou goucheng fanzui wenti de yijian" ("Opinion on the question of whether viciously attacking or slandering central leading comrades constitutes a crime"), 17 December 1981, in Zuigao renmin jianchayuan konggao shensu jianchating (ed.), *Jubao shensu gongzuo fagui shouce* (*Handbook of Law and Regulations Relating to Reporting Malfeasance and Petitions*) (Beijing: Zhongguo da baike quanshu chubanshe, 1990), Vol. 1, p 72.

safeguards promised by Articles 35 and 41 of the 1982 Constitution,⁷⁵ the Chinese government also impedes the exercise of the freedom of opinion and expression directly through censorship and arrest of dissidents and indirectly through control of the media, the publication of printed material and textbooks used in colleges, universities and research institutes. Many intellectuals and scholars feel compelled to exercise self-censorship.⁷⁶

Freedom of assembly and association. The right of each person to freedom of peaceful assembly and association is embodied in Article 20 of the UDHR and in Articles 21 and 22 of the ICCPR.⁷⁷ Article 35 of the 1982 Constitution protects freedom of assembly and association, but the exercise of this right is limited by a variety of laws and regulations, including, first, Article 51 of the 1982 Constitution, secondly, a national law (the Demonstrations Law) enacted following the 1989 demonstrations in Lhasa and Beijing, which prohibits assemblies, parades and demonstrations if they “cause harm to the interests of the state, of society, and of the collective or other lawful freedoms and rights of other citizens,”⁷⁸ and thirdly, 1989 regulations requiring all organizations to be registered and approved by the governmental authorities.⁷⁹

The Demonstrations Law, in particular, severely restricts the “staging [of] lawful demonstrations.” It contains several provisions which leave great latitude for interpretation, such as the permission given to governmental authorities to reject an application for a permit to hold an assembly, march or demonstration if the event would “endanger national unity, sovereignty, or territorial integrity” or “involve agitation for ethnic separatism.”⁸⁰ Although the Demonstrations Law “does not apply to cultural and recreational activities, sports activities, regular religious activities, or traditional ethnic ceremonies,”⁸¹ it provides no guidance on what constitutes a “regular” or “traditional” activity.

75. Art. 35 provides that “citizens of [China] enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.” Art. 41 provides, in part, that “citizens of [China] have the right to criticize and make suggestions to any state organ or functionary.” However, Art. 51 of the 1982 Constitution provides that, in exercising freedoms and rights, the citizens of China “may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens.”

76. See 1994 State Department Report, Section 2(a).

77. Both articles state that no restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and necessary in a democratic society to protect the “interests of national security or public safety, public order ... public health or morals or ... the rights and freedoms of others.”

78. Law of the People’s Republic of China Governing Assemblies, Marches, and Demonstrations (passed by the Standing Committee of the National People’s Congress on 31 October 1989), Art. 4, in BBC, *Summary of World Broadcasts*, 2 November 1989. Municipal rules have been adopted for the implementation of the Demonstrations Law in Lhasa and Beijing.

79. See “Regulations on the registration and management of social organizations,” *State Council Gazette*, No. 21 (1989), pp. 779–783.

80. Demonstrations Law, Art. 12, paras. 2, 3.

81. *Ibid.* Art. 2.

Freedom of religion. The inalienable human right to freedom of thought, conscience and religion is stated in the UDHR (Art. 18) and the ICCPR (Art. 18). Religious freedom is also guaranteed by China's 1982 Constitution⁸² and the 1984 Minorities Law. In spite of these explicit provisions in international instruments and the domestic law, the practice and propagation of religion is subjected to a variety of restrictions imposed by the Chinese government.⁸³ After over a decade of greater religious freedom, which included the re-opening of many churches, mosques and temples closed because of the anti-religious and anti-foreign fervour of the Cultural Revolution, the past few years have witnessed extensive new restrictions on religious activities. Despite the constitutional protection of religious practice contained in Article 36 of the 1982 Constitution, the Chinese government has limited the exercise of that right to officially recognized, government-controlled religious institutions – ostensibly to prevent foreign “domination” of Chinese believers. Religious proselytizing is tightly constrained and no foreign missionary work is officially permitted. Buddhists, who are the largest group of religious believers in China, have been given the greatest latitude to practise their faith; but Tibetan Buddhism, with its political overtones resulting from the Dalai Lama's primacy as a religious figure, has been subjected to intensive repression.

The express protection of freedom of religion in the 1982 Constitution and other laws does not always meet the standards set out in international human rights documents. The UDHR and the ICCPR treat this as an “inalienable right,” which, under the ICCPR, may not be circumscribed, even in times of emergency. In addition, the ICCPR protects the freedom to manifest one's religion and provides that this right may be subject only “to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.” China violates the provisions of such international instruments by arguing that certain religious practice must be suppressed in the interests of public order.

Discrimination based on race, sex, religion and language. China acceded to the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention Against Racial Discrimi-

82. Art. 36 of the 1982 Constitution provides that “citizens of the [PRC] enjoy freedom of religious belief. No state organ ... may compel citizens ... not to believe in any religion; nor ... discriminate against citizens who believe in ... any religion.” Only “normal religious activities” are protected; use of religion to “disrupt public order, impair the health of citizens or interfere with the educational system of the state” is proscribed. See also 1994 State Department Report, Section 2(c).

83. Tibetan Buddhists are the religious group in China which has suffered the most from the imposition of government restrictions on the practice of their religion. Catholics, Moslems, Protestants and Buddhists from other ethnic groups, including Han Chinese, have also been subjected to a variety of government controls. See Asia Watch, *Continuing Religious Repression in China* (1993) (discussing repression against Chinese Catholics and Protestants).

nation)⁸⁴ on 29 December 1981. Article 2(1) of this Convention provides that “States Parties ... undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination.” Article 5 further provides that states undertake to guarantee the right of everyone, on a non-discriminatory basis, to equality before the law, in the enjoyment of a long list of civil, social, economic and political rights.⁸⁵ In addition, the ICESCR protects a variety of economic, social and cultural rights,⁸⁶ and provides that such rights must be available on a non-discriminatory basis.⁸⁷

Although minorities in theory are accorded certain benefits by Chinese law and policies, in practice they suffer discrimination in housing, education, employment and other areas based on ethnicity, religion and language. The Chinese government propagandizes the major economic developments which are occurring in minority regions and the resulting increase in the quality of education and jobs, but such achievements do not necessarily benefit minority peoples, given the effects of massive migrations of Han Chinese settlers into those areas.

Conclusion

It is difficult to predict the future direction of Chinese criminal law and development of human rights consciousness. In the academic community and increasingly within the public security bureaucracy itself (including court and procuratorial officials as well as police) there are calls for change – if not for liberalization, at least for rationalization. Nevertheless, criminal law remains one area of law that has proved resistant to the forces of change affecting the rest of Chinese society. The arbitrary power of public security officials has not significantly lessened since the late 1970s. Although more procedural protections for citizens exist on paper, the police and other government actors either ignore them or invoke other regulations, such as those on custody and investigation, that negate them.

Moreover, criminal law and its institutions remain closely tied to politics and the Party. While industrial enterprises, for example, have

84. International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, reprinted in *International Legal Materials*, Vol. 5 (1966), pp. 350–368 (Convention Against Racial Discrimination).

85. For example, Art. 5 protects equal treatment before tribunals and all other organs administering justice; right to security of person; political rights; right to freedom of movement; right to freedom of thought, conscience and religion; right to freedom of opinion and expression; right to freedom of peaceful assembly and association; right to work; right to public health, medical care and social services; and right to housing, education and training.

86. The ICESCR provides, in relevant part, that all peoples have the right of self-determination and may freely dispose of their natural wealth and resources (Art. 1), the widest possible protection and assistance should be accorded to the family (Art. 10), everyone has the right to an adequate standard of living for oneself and one’s family (Art. 11), and everyone has the right to education (Art. 13). See also 1994 State Department Report, Section 5.

87. Art. 2, para. 2 of the ICESCR provides that such rights shall be available “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

increasingly jettisoned their political functions, the leadership of the Communist Party, and particularly its Political-Legal Committee, over the work and personnel of the criminal justice system remains to all appearances as strong as ever. One county Party secretary expressed this view in particularly direct terms at a meeting of the local Political-Legal Committee:

All of you sitting here, I ask you – you, the court president: if I hadn't put your name up, could you serve? You, the chief procurator: if I hadn't put your name up, could you serve? You, the public security chief: if I hadn't put your name up, could you serve? If you ask me, none of you could serve!⁸⁸

While political leaders decry police abuses and miscarriages of justice as loudly as citizens, so far none has seen fit to introduce the institutional changes, such as autonomy for courts and the abolition of secret rules, that would decrease the likelihood of such abuses occurring.

Still, the prognosis is not completely gloomy. Although law has traditionally been identified with punishment, it is increasingly associated with rules and rule-following. The complaint of many educated Chinese today is that “China has no law,” despite the explosive growth of legislation and connected institutions since 1979. What they mean is something very specific: the government is not restrained by its own rules, *and it should be*. Accession to additional international human rights instruments, attention to the requirements of those to which the PRC has already acceded and continuing scrutiny by the international human rights community may all act to constrain the worst abuses of the Chinese government and its officials.

Such general attitudinal shifts will not overnight bring changes to the practices of the public security organs. But they can change significantly the terms of public debate. Increasingly, articles in newspapers and legal journals appear that decry the cavalier attitude of government organs in general, and the police in particular, towards rules under which they supposedly operate. Now, government organs accused of acting “unlawfully” will never say publicly that they simply are not bound by legal rules⁸⁹; they will instead insist that they acted according to “relevant law” even while refusing to specify what that law is.⁹⁰ Nevertheless, if the

88. Quoted in Fang, “Renmin fayuan zai guojia jigou zhong de diwei” (“The position of the people’s courts in the structure of the state), *Faxue zazhi*, No. 4 (1985), at pp. 15, 16.

89. Officials who don’t know any better may, of course, say so privately. When Democracy Wall activist Liu Qing was unlawfully detained in 1979, one of his guards remarked to him, “‘Doing things according to law’ isn’t set in concrete; there are lots of exceptions. When the Public Security Bureau chief or the Beijing mayor or Party secretary or a Standing Committee member gives a direct order, even in the absence of proper procedures we have to lock the person up.” Liu Qing, *Yuzhong shouji (Prison Notebook)*, p. 27 (1981).

90. See, for example, “China revokes passport of expelled labor leader,” *New York Times*, 22 August 1993, at p. 6, reporting the expulsion from China of labour leader Han Dongfang. Officials at the New China News Agency in Hong Kong, China’s de facto embassy, told him he had been expelled and his passport revoked because he had broken Chinese law, but refused to say which laws he had broken, how he had broken them, or who had decided to revoke his passport. A similar claim – that Han’s passport had been revoked in accordance with “relevant laws and regulations” – was repeated by a Ministry of Public Security official later that month, but again the laws referred to were not specified. See “Han’s entry banned,” *China*

government must always claim to follow the procedures stipulated in law, this claim is obviously much easier to make if it actually does follow those procedures.

footnote continued

Daily, 28 August 1993, at p. 1. As of the date of writing, the government has not revealed the existence of any law that permits the expulsion of Chinese nationals from the country as a punishment or indeed for any other reason.