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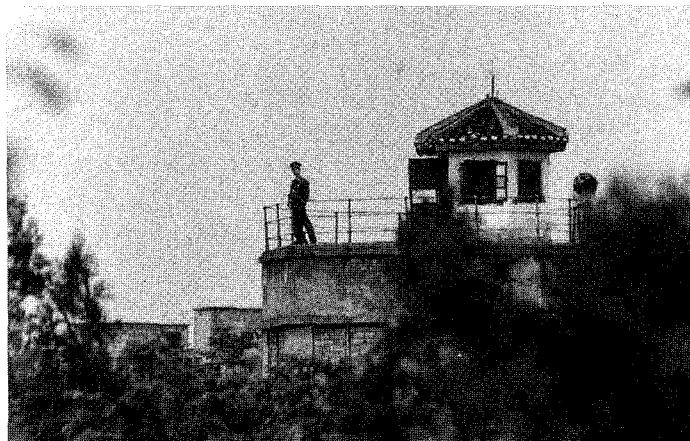
A Jail by Any Other Name: Labor Camp Abolition in the Context of Arbitrary Detention in China

*Harry Wu**
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INTRODUCTION

In recent years, Chinese lawyers, judges, and ordinary citizens have rallied in widespread opposition to the Chinese government's use of "laojiao" forced labor camps to punish non-criminal behavior. In response to this mounting pressure, the central government revealed plans to eliminate the lao jiao labor camp system following the Third Plenum of the 18th Party Congress held in November 2013.¹ Although announced intentions of abolishing this relic of Maoist repression is a welcome development, such reform would not address the more fundamental injustice of officially sanctioned arbitrary detention that underpins the lao jiao system. Beyond lao jiao labor camps, Chinese police also routinely send political dissidents and alleged petty criminals to other types of equally arduous detention facilities without according them genuine due process protections.

Meaningful reform aimed at tackling this broader underlying issue would require enhancing the authority of the judiciary relative to public security forces in China's system of law enforcement. Moreover, this power transfer must coincide with the establishment of a judicial system committed to upholding substantive rule-of-law principles. Such restructuring, however, would require overcoming immensely powerful political resistance and altering fundamental guiding principles of China's criminal justice system. Anticipated reform proposals that fall short of these necessary adjustments represent nothing more



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than a nominal change: the perpetuation of the same jail under a different name.

THE LAOJIAO AND ARBITRARY DETENTION IN CHINA

LABORING FOR STABILITY: THE LAOJIAO AS A TOOL OF REPRESSION

The Chinese Communist Party's forced labor camp system has long served as a primary component of governmental efforts to maintain political stability.² Modeled after the Soviet Union's infamous gulag,³ Mao Zedong established "laogai" (reform through labor) labor camps to punish convicted criminals⁴ and "laojiao" (re-education through labor) labor camps to incarcerate so-called class enemies and petty criminals without the time and evidentiary burdens of a trial.⁵ Although laogai sentences theoretically carried a fixed term,⁶ lao jiao inmates originally served terms of indefinite duration.⁷ In 1979, however, authorities limited lao jiao sentences to four years, which has remained the maximum term of confinement.⁸ In response to pressure to abolish reform-through-labor, authorities ostensibly ended the laogai system in 1994 by changing the name of these labor camps to "prisons" (jianyu).⁹ The government has continued, however, to openly use lao jiao camps to incarcerate suspected petty criminals and political dissidents without presenting any evidence of criminal wrongdoing.

Recent, high-profile lao jiao sentences have sparked public outcry over China's persistent use of forced labor camps to

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punish non-criminal behavior. One case involved a woman who received an eighteen-month laoiao sentence after publicly criticizing local police who failed to adequately investigate serious crimes committed against her eleven-year-old daughter, including kidnapping, rape, and forced prostitution.¹⁰ The Chinese public also rallied behind Ren Jianyu, a twenty-five-year-old civil servant who received a two-year laoiao sentence after criticizing disgraced politician Bo Xilai on Weibo, China's equivalent of Twitter.¹¹ In a perceived attempt to calm potentially destabilizing unrest, a number of central government officials began calling for a re-examination of the laoiao system in early 2013.¹² In November 2013, the central government formally announced plans to abolish the laoiao labor camp system.

BEYOND LAOIAO: INSTITUTIONALIZED ARBITRARY DETENTION IN CHINA

Although eliminating the laoiao serves as a victory over a particularly reviled tool of repression, treating laoiao abolition as a significant step toward aligning the Chinese criminal justice system with international human rights norms misses a larger point: the laoiao is only one component of China's vast system of arbitrary detention institutions.¹³ Ending this specific form of imprisonment would not eliminate the broader practice of detaining individuals in gross violation of international standards.

The UN Working Group on Arbitrary Detention (UNWGAD), the UN body charged with investigating cases of arbitrary detention, established three separate categories of arbitrary detention. First, the deprivation of liberty without any possible legal basis. Second, the deprivation of liberty in response to the legitimate exercise of certain freedoms enshrined in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).¹⁴ Third, the failure to observe international norms related to a fair trial, resulting in "such gravity as to give the deprivation of liberty an arbitrary character."¹⁵

With regard to the first category of arbitrary detention outlined by the UNWGAD, deprivation of liberty without legal basis, Chinese authorities routinely incarcerate dissidents and petitioners in black jails—a catch-all term for extrajudicial detention centers—without offering even a pretext of legal justification.¹⁶ In addition, Chinese police apply cursory and highly discretionary procedures to impose prolonged sentences, thereby compromising protections enshrined in the Chinese Constitution, Administrative Punishments Law, and the Law on Legislation. The Constitution, for instance, prohibits arrest without prior authorization from a court or the People's Procuratorate.¹⁷ Furthermore, the Administrative Punishment Law requires that procedures for administrative punishment are just, open, and based on facts, and that the punishment is proportionate to the degree of social harm inflicted.¹⁸ The Law on Legislation mandates that only the Standing Committee of the National People's Congress may pass laws under which an individual may be deprived of his liberty, a power that may not be delegated to other governmental entities.¹⁹

Despite these foundational protections, police regulations provide quasi-legal cover for authorities to detain individuals for years in abusive facilities without initiating criminal proceedings or even providing evidence of criminal wrongdoing.²⁰

This supremacy of mere police regulations over constitutionally enshrined protections and duly enacted law exemplifies the public security authorities' dominance over the judiciary and procuratorate in the administration of criminal justice in China.

In regards to the second category of arbitrary detention outlined by the UNWGAD, the UDHR and the ICCPR classifies the following basis for imprisonment as amounting to arbitrary detention: receiving information or expressing ideas through any medium, manifesting religious beliefs, exercising the right to move freely and establish residence within the state, and peacefully assembling. Chinese authorities, however, routinely detain people for making political statements, expressing certain religious beliefs, traveling to Beijing to petition the central government, and organizing public protests.²¹ In addition to defying these international norms, incarcerating individuals for exercising fundamental human rights violates protections incorporated in the Chinese Constitution.²²



Courtesy Harry Wu

Related to the third category of arbitrary detention, the UDHR and ICCPR also embody international norms related to criminal procedure protections that guard against arbitrary detention. Although China has not ratified the ICCPR, it did sign the ICCPR with intent to ratify at a later date. At the very least, China's status as a signatory obligates it to "refrain from acts which would defeat the objects and purpose" of the ICCPR.²³ Additionally, the UNWGAD explicitly referenced fair trial protections enshrined in the ICCPR when it determined that Chinese authorities arbitrarily detained an individual after failing to provide adequate due process protections during trial.²⁴ In accordance with the UDHR and ICCPR, defendants are entitled to the following procedural protections: (1) the presumption of innocence, (2) a public hearing before an independent and impartial tribunal, (3) legal counsel of his or her choosing, (4) free legal counsel if indigent, (5) adequate time and resources to prepare a defense and communicate with legal counsel, and (6) to examine and obtain evidence from adverse witnesses. As discussed later in this article, the extent to which China's criminal procedure framework fails to provide defendants with these basic due process protections often amounts to arbitrary detention.

ADMINISTRATIVE DETENTION IN CHINA

BLACK JAIL OR WHITE JAIL, SO LONG AS IT IS ARBITRARY DETENTION

Beyond laoiao labor camps, current administrative arbitrary detention methods include soft detention,²⁵ law education

centers,²⁶ psychiatric hospitals,²⁷ “shuanggui” detention,²⁸ drug rehabilitation centers, and “black jails.”²⁹ Despite having different names, these institutions share a number of defining characteristics. Most importantly, the decision to confine people in these facilities is issued administratively, meaning it is delivered in the absence of judicial oversight. In practice, this means that individuals are often incarcerated at the whim of public security forces in violation of Chinese law and international arbitrary detention standards.³⁰ Sentences in these facilities range from a few days to a number of years. Just like in lao jiao labor camps, inmates in many of these detention centers are reportedly subjected to forced labor and physical abuse.³¹

In line with the Party’s overriding concern with maintaining societal stability, many of these administrative detention institutions were established to appease mounting pressure to end or reform problematic detention facilities of the past. For example, in 2003, the central government outlawed custody and repatriation centers in response to public outrage over the death of a migrant worker in custody. In place of these facilities, police established black jails to detain petitioners.³² Likewise, since 2008, the Chinese government has purportedly ended the practice of sending drug users to lao jiao labor camps, instead placing addicts in “more humane” drug rehabilitation centers.³³ Rather than representing a shift toward providing greater due process protections, “patients” in these facilities are still incarcerated at the discretion of public security organs for a minimum sentence of two years.³⁴ Moreover, several human rights organizations assert that inmates in drug rehabilitation centers are forced to labor under conditions nearly identical to circumstances in labor camps.³⁵ In provinces that have already phased out labor camps, many lao jiao facilities have simply been transformed into drug rehabilitation centers.³⁶ In October 2013, lawyer Tang Jitan traveled to a law education center, another recently invented detention facility, to visit a client only to find that the facility was just an extension of a lao jiao labor camp, perhaps forecasting what awaits many current lao jiao inmates. If history is any indication, abolition of the lao jiao will likely coincide with increased reliance on alternative forms of arbitrary detention.

ARRESTING REFORM: PUBLIC SECURITY FORCES AS A BARRIER TO CHANGE

Meaningful reform of China’s system of arbitrary detention institutions would require stripping public security forces of their extensive power to impose prolonged detention in the absence of independent judicial oversight. In order to implement such changes, reformers would have to overcome overwhelming resistance from entrenched power at the central, provincial, and local levels of government.

As a practical matter, the Ministry of Public Security (MPS), which theoretically administers the Public Security Bureau (PSB), serves as a formidable political obstacle to ending prolonged administrative detention in China. The MPS views the use of administrative detention as a valuable security tool.³⁷ In addition, the state’s ability to detain individuals without presenting evidence of criminal wrongdoing preserves the immense power of the public security apparatus. Threats to the continued use of administrative detention would frustrate policing efforts and represent an unwelcome check on the political clout of the

MPS. The extensive presence of MPS officials serving in senior positions in the central government³⁸ and the amount of money allocated to domestic security forces, which exceeds military expenditures, demonstrates the tremendous power of the public security forces. Political restructuring during the 2013 National People’s Congress only enhanced the power of public security officials in the central government and strengthened the Party’s commitment to maintaining social stability.³⁹ In light of these realities, Chinese human rights experts have described the MPS as a primary obstacle to ending arbitrary detention in China.



Courtesy Harry Wu

Attempts to end prolonged administrative detention would also encounter intense opposition from local governments. As with other state institutions, the Communist Party exerts control over the PSB and its subordinate offices through tiao-kuai (块) governance, an interlocking system of vertical (tiao) control from higher level administrative bodies and horizontal (kuai) control from local Party committees.⁴⁰ Within the public security system, the (tiao) hierarchy flows from the MPS at the central government level to the PSB at the provincial level to public security offices at the prefecture level. As such, a given PSB office theoretically serves two masters: the MPS (tiao) and the provincial government (kuai). Although this system enables the central government to effectively control other state organs while allowing for a degree of flexibility at the local level, in the context of police work, this system grants local authorities unbridled power. This power imbalance stems in part from the need for increased autonomy in order to adequately handle unique local security challenges, the secrecy inherent in police operations, and the unmatched coercive power held by public security organs. Hardly unique to China, Terry Moe, a highly regarded expert on public bureaucracy, asserts that policing is the quintessential example of an administrative activity that is extremely difficult to monitor for local abuses.⁴¹

The immense power enjoyed by regional and local public security forces is also the result of official Communist Party policy encouraging decentralized control over the police, a practice rooted in Mao Zedong’s directive that “security work must emphasize Party leadership . . . and in reality accept direct leadership by Party committees.”⁴² Although the tiao-kuai system theoretically vests vertical (tiao) power in higher level public security administrative bodies, superior police departments one level up are only permitted to “assist” local governments by making “suggestions” that officials are supposed to

“consider.”⁴³ Public security departments are strictly bound by horizontal (kuai) power exercised by Party committees. As a result, the central government has less control over local police forces than it does over other administrative agencies governed by binding vertical (tiao) power.

The reality of public security officials serving almost parallel to powerful government officials further exacerbates problems of accountability.⁴⁴ According to a 2012 survey, ninety percent of provincial police chiefs concurrently served as officials at the highest levels of the provincial government, with some holding multiple positions on ruling standing committees.⁴⁵ As demonstrated by a recent study of budget allocations made by provincial governments after public security officials assumed powerful positions, public security officials who double as Party committee members often substantively alter government policy in favor of public security interests.⁴⁶ More than just formulating policy and budgets, local government authorities also control the appointment of local public security personnel, an arrangement that ties job stability and prospects for advancement to loyalty to local leaders. Such powers of persuasion undoubtedly make local officials even more likely to defer to regional interests that conflict with central government policy.⁴⁷ As such, even if reformers could overcome resistance to ending arbitrary detention in the central government, instituting such monumental changes at the local level would prove exceedingly difficult.

THE JUDICIAL SYSTEM AND ARBITRARY DETENTION

In addition to curtailing the power of China’s public security forces to impose administrative sentences, eliminating arbitrary detention in China would require significant reform to the country’s judicial system. In light of the Communist Party’s overriding concern with maintaining stability and the lack of due process protections granted to politically sensitive criminal defendants, if security forces were stripped of prolonged detention powers, the Chinese government would likely increasingly use courts to impose prison sentences for political offenses. Truly ending arbitrary detention in China thus requires establishing a judicial system committed to substantive rule-of-law jurisprudence that would adjudicate all cases in which the accused faces prolonged detention.

THE ILLUSION OF DUE PROCESS

The existing criminal procedure framework undermines rule-of-law principles by failing to sufficiently deter official misconduct, allowing the presentation of overly prejudicial evidence, permitting prolonged secret detention, and failing to ensure that defendants are adequately represented at trial. Despite winning the praise of some pundits,⁴⁸ practical application of the 2012 revised Criminal Procedure Law (CPL) falls short of international standards prohibiting arbitrary detention.

Enacted in March of 2012, the CPL prohibits the use of torture in obtaining confessions, guards against self-incrimination, and excludes the use of illegally obtained evidence.⁴⁹ Considering, however, that law enforcement officials have long relied on such practices to secure convictions, it seems highly unlikely that this year-old statute will rein in entrenched abuses of power. The power of authorities to override CPL provisions reinforces this path dependence. Officials may merely declare that a confession was not obtained through coercion.⁵⁰ Effectively permitting the admission of confessions obtained through police coercion invites authorities to intimidate suspects into falsely admitting guilt, thereby enabling the jailing of dissidents without concrete evidence of criminal wrongdoing.

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Perhaps most troubling, the 2012 CPL establishes a dual-track criminal justice system; although the new statute theoretically strengthens protections for individuals accused of ordinary crimes, the law does not extend these due process rights to individuals accused of committing politically sensitive crimes. Rather, the CPL authorizes the use of “secret investigations,” which are regulated by undisclosed guidelines, to collect and present evidence against an individual accused of embezzlement, bribery, terrorism, organized crime, drug-related crime, or “endangering society.”⁵¹ The revised CPL also permits authorities to detain alleged criminals under residential surveillance for up to six months at a “designated residence” without access to counsel in cases that involve terrorism or endangering national security.⁵² Moreover, law enforcement officials are not obligated to provide notification of detention to family members of an accused criminal in such cases when it would “impede the investigation.”⁵³ In other words, the CPL permits detention in an undisclosed location for six months without notification when an individual is accused of committing a vaguely defined crime under equally vague circumstances. As such, the CPL provides legal cover for authorities to incarcerate dissidents in a manner substantially similar to the unlawful detention methods long used by the PSB.

The CPL also fails to ensure that criminal defendants receive adequate legal representation. Although the CPL requires authorities to provide access to legal counsel after commencing prosecution, defendants routinely go unrepresented in criminal proceedings. In fact, Yu Ning, President of the All China Lawyers Association, asserted that only thirty percent of criminal defendants actually obtain legal counsel.⁵⁴ The seventy percent of criminal defendants who lack access to an attorney likely do not vigorously challenge the admissibility of evidence prohibited under the CPL. In politically sensitive cases, defendants are often unable to obtain counsel of their choice, either due to police harassment of prospective attorneys⁵⁵ or because counsel is appointed for a defendant against his will.⁵⁶ Even when a defendant retains competent counsel of his choosing, the prosecution’s authority to deny access to adverse evidence in cases involving state secrets makes it exceedingly difficult to prepare a defense.⁵⁷ Severe restrictions on attorney-client communication

and the state's power to prohibit a defense attorney from making a court appearance compound problems of adequate representation in state secrets cases. Lawyers who manage to mount a defense despite these obstacles are further constrained by Article 306 of the Criminal Code. Referred to as "Big Stick 306," this vaguely worded provision outlines harsh penalties for obstructing justice and fabricating evidence.⁵⁸ Authorities have loosely interpreted Article 306 to punish attorneys who zealously advocate for political dissidents.⁵⁹ As a result of these procedural shortfalls, 99.8 percent of criminal defendants in China are ultimately convicted of crimes,⁶⁰ making the criminal justice system little more than a tool of official repression.

Beyond these procedural deficiencies, crimes outlined in China's criminal code provide authorities with legal cover to impose lengthy prison sentences for political offenses, in violation of international standards. Such crimes include terrorism and offenses falling under the penumbra of "inciting subversion of the state," the charge that replaced Mao-era counter-revolutionary crimes as a primary means to imprison political dissidents. As noted by Nicholas Bequelin, a Chinese human rights expert at Human Rights Watch, authorities often invoke such crimes as a pretext to "crackdown on dissidents, human-rights lawyers, civil-society activists and Tibetan and Uighur separatists."⁶¹ As an example, authorities sentenced Nobel Peace Prize winner Liu Xiaobo to an eleven-year jail term for inciting subversion as punishment for his participation in the *Charter 08 Manifesto*, a document urging Chinese officials to adopt rule-of-law reforms and permit democratic political parties.⁶² Over the past year, Chinese authorities have only intensified efforts to imprison civil society activists who advocate political reform.⁶³

JUDICIAL EMPOWERMENT AND THE RULE OF LAW

Party control over the judiciary as a means to maintain political stability is a root cause of the failure of criminal justice in Chinese courts.⁶⁴ As with other government institutions in China, the legal system is governed by the tiao-kuai system.⁶⁵ This enables local governments and superior courts to exercise tremendous control over lower courts.⁶⁶ Moreover, as security officials invariably outrank legal professionals in China's political hierarchy, the judiciary is subordinate to the directives of public security officials and their mission of maintaining stability.⁶⁷ In addition to occasionally influencing criminal verdicts,⁶⁸ this power imbalance effectively eviscerates theoretical judicial authority to review administrative sentences imposed by police. In essence, it enables Party stability maintenance directives to supersede the legal authority of judges. According to He Weifang, a Peking University law professor and preeminent Chinese legal authority, the "superiority of police power over

judicial power is a greater obstacle to the construction of a rule-of-law society than the [tiao-kuai system]."⁶⁹ In light of this system of control, judicial empowerment and attendant substantive rule-of-law reform would require establishing a legal system free of undue influence from public security forces.

Judicial reform efforts would also entail bolstering ongoing efforts to improve the competence of judges and lawyers. As a result of heightened professional standards and changes to judicial promotion procedures, Chinese judges and attorneys are far more capable than their predecessors.⁷⁰ In fact, the number of college educated judges increased fivefold from 1995 to 2005.⁷¹ Moreover, the institution of a national bar exam, which had a fourteen percent passage rate in 2005,⁷² has improved the quality of legal professionals in China. A 2005 Supreme People's Court directive urging judges to accurately describe facts and legal arguments in judicial opinions has also improved the quality of the decisions.⁷³ This initiative has reportedly helped some judges resist external pressure when issuing judgments.⁷⁴ Despite these positive developments, nearly fifty percent of judges do not have a college degree.⁷⁵ A recent study also indicates that many judges earned diplomas from vocational or unaccredited institutions.⁷⁶ This lack of adequate legal training compromises the

institutional integrity of the Chinese judicial system, arguably making judges more susceptible to external influence. In light of these realities, judicial empowerment initiatives must entail strengthening educational and procedural reforms intended to foster the development of a legal culture in which trial judges render verdicts based on legal principle rather than pressure from political forces or popular demand.

In effect, legal reform aimed at ending arbitrary detention in China would represent nothing less than a paradigmatic shift in the fundamental guiding principles of China's criminal justice system. In contrast to the current overriding goal of maintaining political stability, such reform would entail promoting judicial integrity and the rights of the accused. This change would involve transitioning to "rule-of-law" from the current reality of "rule-by-law," the Party's practice of using laws, regulations, and police orders to impose its will.

CONCLUSION

Abolishing the laoiao labor camp system without addressing the more fundamental issue of arbitrary detention represents little more than cosmetic change to a deeply flawed criminal justice system. At root, meaningful reform would require establishing a more independent judicial system committed to upholding substantive rule-of-law principles that would adjudicate all cases in which the accused faces prolonged detention. Unfortunately,

Legal reform aimed at ending arbitrary detention in China would represent nothing less than a paradigmatic shift in the fundamental guiding principles of China's criminal justice system. In addition to defying these international norms, incarcerating individuals for exercising fundamental human rights violates protections incorporated in the Chinese Constitution.

in light of the challenges outlined in this article—including the Communist Party’s overriding emphasis on maintaining political stability through endowing public security forces with overwhelming political and coercive power—anticipated reform will

not address the underlying practice of incarcerating individuals in gross violation of international standards. Rather, if history serves as a guide, the Chinese government will merely use superficial legal reform as a proxy for meaningful political change.

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- ⁶⁵ *Id.* at 673. Tiao-kuai, literally "branch and lump," is the quasi-federal arrangement of government administration in China. The term refers to the vertical "branch" of power emanating from the central government and the "lumped" horizontal control exercised by local authorities. As a result of this system, Chinese government entities serve two masters: the central government and local officials. See generally Scot Tanner & Eric Green, *Principals and Secret Agents: Central versus Local Control Over Policing and Obstacles to "Rule of Law" in China*, 191 THE CHINA Q. 644 (2007).
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