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中国劳动教养制度的

检讨与改革

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Re-assessing and Reforming of The Labor Re-education System in China

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前 言

随着我国物质文明、精神文明和政治文明的不断发展进步，国家日益重视人权的保障问题。2004年3月，我国最高立法机关以宪法修正案的形式在宪法中增设“国家尊重和保障人权”的规定，更加凸显了切实保障人权的重要性和将之纳入法制化轨道的必要性。因此，人权保障之法律制度的健全、改革和完善，将会成为国家法制建设中一项极为重要的工作。

众所周知，确立于20世纪50年代的劳动教养制度，在其存续的50年间，为维护国家政治稳定和社会安定，预防和减少违法犯罪作出了重要贡献。但是，随着中国法治化进程的迅速推进和公民人权意识的日益觉醒与加强，劳动教养制度受到了前所未有的批评与质疑：在法律层面，其是否具有充分的根据；在理论层面，其法律性质和定位是否具备合理性；在实践层面，劳动教养制度有渐变为“二劳改”即刑罚执行的倾向；在国际层面，该制度与有关国际公约中关于保障人权的要求存在相当的冲突。因此，关于劳动教养制度是存是废的争论不绝于耳，如何改革劳动教养制度也众说纷纭，从而使得劳动教养制度的完善日益成为法制建设中一个必须给予充分重视且要尽快提出解决之道的问题。在这样的情况下，不管是刑事法律理论界还是实务界，对劳动教养制度都给予了充分的关注和相当深入的研究。

从总体上看，学者对劳动教养制度的完善和改革问题的研讨，基本上都是在刑事法治和保障人权的层面上展开的，很多研究成果和结论对我国劳动教养乃至刑罚、行政处罚制度都有很大的影响。不过，学者关于劳动教养制度的论著虽然数量非常可观，形式多

样,但是,客观而言,质疑和否定的论述颇多,很多学者都坚定地主张彻底废除劳动教养制度。这种一劳永逸的做法确有值得肯定之处,但在很大程度上忽略了劳动教养制度在社会生活中已经发挥的实际作用。其实,真正需要注意的是,如何在法治和人权的轨道上改革和完善劳动教养制度。这就需要综合学者们对劳动教养制度的种种论述,从劳动教养制度的演进轨迹入手,客观地分析其功能和效用,准确地把握劳动教养制度所存在的缺陷,摒弃劳动教养制度的不足和错讹之处。正是基于这样的考虑,在北京师范大学刑事法律科学研究院的重要合作伙伴——加拿大刑法改革与刑事政策国际中心的资助下,北京师范大学刑事法律科学研究院组织精干的学术力量,立意于劳动教养制度的完善(而非简单、彻底地废除),理论联系实际、深入地分析劳动教养制度否定论、废除论的不足,肯定劳动教养制度的历史作用和现实效能,论证劳动教养制度改革的必要性和可行性,并对劳动教养制度改革的具体内容,如劳动教养制度改革的方向和原则、改革的立法和司法体现及其实体、程序、执行问题的改革等内容作出全面的研究,尽可能地提出改革之道、完善建议和相关对策。同时,为了开阔本课题的研究思路,我们邀请了加拿大刑法改革与刑事政策国际中心的专家学者对国外尤其是加拿大轻罪处理之立法与司法经验进行了研究。

本书共分为十个专题。第一专题是劳动教养制度的历史沿革,由廖万里博士(最高人民法院应用法学研究所副研究员)负责;第二专题对劳动教养制度与相关制度作了比较研究,由陈琴博士(中国人民公安大学犯罪学系讲师)、黄晓亮博士(北京师范大学刑事法律科学研究院讲师)负责;第三专题归纳和分析劳动教养制度改革研究的理论争议,由刘志伟博士(北京师范大学刑事法律科学研究院教授)、周国良博士(北京师范大学刑事法律科学研究院博士生)负责;第四专题主要对改革劳动教养制度的必要性作出论证,由马松建博士(郑州大学法学院教授)负责;第五专题主要阐述我国劳动教养制度改革的方向与原则,由阴建峰博士

(北京师范大学刑事法律科学研究院副教授) 负责; 第六专题着重分析劳动教养制度立法与司法化的模式, 由庄劲博士 (中山大学法学院副教授) 负责; 第七专题探讨劳动教养制度改革中的实体问题, 由时延安博士 (中国人民大学法学院副教授) 负责; 第八专题探讨了劳动教养制度改革中的程序问题, 由陈志军博士 (中国人民公安大学法律系副教授) 负责; 第九专题研究“劳动教养执行制度的改革问题”, 由黄晓亮博士 (北京师范大学刑事法律科学研究院讲师) 负责; 第十专题研究了国外轻罪处理之立法与司法经验, 由加拿大刑法改革与刑事政策国际中心研究员、维多利亚大学法律系教授 Maureen Maloney Q. C. 和加拿大刑法改革与刑事政策国际中心研究员艾琳·斯金内德尔负责。此外, 本书还将笔者于 2003 年 6 月接受最高人民法院研究室委托的课题“劳动教养制度司法化改革方案”的最终研究成果《中国劳动教养制度司法化改革方案》作为附录收入。

作为一个重要的刑事法治问题, 劳动教养制度对于社会秩序的维护和公民的权利保护有着非常重大的影响, 其改革完善问题不仅需要学者的积极理论探索, 也需要实务部门的具体执法实践加以验证。希望我们的研究能为理论研究提供启发, 为立法和执法部门提供参考。

赵秉志
2007 年 10 月

Balancing the Needs in the Reform of Labour Re-education

—An English Introduction

Vincent Cheng Yang*

On June 1, 2008, a landmark shift took place in the labour re-education system of China. The Law on Prohibition of Narcotic Drugs entered into force, which requires the transfer of incarcerated drug addicts, who account for the majority of inmates in labour re-education camps, to specialized drug treatment centres. This, as a labour re-education officer in Shantou of Guangdong recently noticed, signalled an upcoming major reform to “the half-a-century old labour re-education system” and once again raised fundamental questions about its future. ①

In the on-going development of building a “harmonious society” in China, the future of labour re-education is not only a hot issue for debate on public security, but also one of the most critical benchmark indicators of the status of overall human rights and the commitment to the rule of law. The publication of this book, entitled as “Re-assessing and Reforming the Labor Re-education System in China” is another visible product

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① Lin Mu-Tao, 2008, “A Preliminary Discussion on What to Do When Facing the Reform of Labor Reeducation”, www. zgldjy. com. 2008-05-30.

of the cooperation between the Beijing-based on College of the Science of Criminal Law at Beijing Normal University in China and the Vancouver-based on International Centre for Criminal Law Reform and Criminal Justice Policies in Canada. As the Chinese Editor-in-Chief, Professor Zhao Bingzhi indicates in the Preface, the book presents the findings of extensive research work that have been accomplished by the Chinese legal scholars at his College during the past four years. The chapters in the book offer a research-based comprehensive package of reforms to the legislative or regulatory framework of the existing labor re-education system as well as its judicial process and enforcement structures. At the request of the College, this became one of the project activities that the International Centre was able to assist in its Implementing International Standards in Criminal Justice in China Project, which was funded by the Canadian International Development Agency (CIDA) as an important initiative of programming on governance in China. I would like to take this opportunity to congratulate Prof. Zhao and his colleagues for the outstanding research work accomplished by them and thank my Canadian colleagues Prof. Maureen Maloney, QC, and Ms. Eileen Skinnider for their contribution of two impressive chapters to this joint publication. The financial support of CIDA to the Project and to this publication is gratefully acknowledged.

In traditional Chinese texts, labour re-education is described as a system that, as a learned author puts it, plays an important role in "improving and strengthening the socialist legal system, protecting the interest of the state and the people, safeguarding the personal rights and democratic rights of the citizens, maintaining social order, and ensuring the

smooth progress of socialist modernization and construction.”^① This position is however debatable. Labour re-education has been a controversy in the Chinese legal science for over a decade. Indeed, the conventional view was already facing challenges back in the 1980s, when scholars and many experts working in the Chinese justice system started to question the lawfulness of the system and advocate its abolition.^② The debate continued through the 1990s and recent years. In 2000, for example, Professor Chen Guangzhong, an eminent jurist in the field of procedural law, concluded that:

The system of labour re-education in our country is an administrative sanction of longer-term deprivation of personal freedom. It is much harsher than some of the light penalties provided for under the Criminal Law. However, it is far from being perfect in law and system, has great defects in practice, and is in an urgent need of reform.^③

The debate in China has attracted great international attention, too. During a major Symposium on the International Covenant on civil and Political Rights (ICCPR) and Criminal Justice held in Beijing in December 2000, for example, the United Nations High Commissioner of Human Rights Mdm. Mary Robinson offered her observations about the

① Li Kang-tai, 1988, “Labour Re-education,” in Wu Lei (Ed.), *The System of Justice in China*. Beijing: Renmin University of China Publishing House. Chapter 10. pp. 288 – 303, at pp. 289 – 290.

② For example, in 1989, when the author was an editor of the journal *Democracy and Law* (Minzhu Yu Fazhi) in Shanghai, there were officials making well-articulated contributions to the journal for the abolition of labour re-education in China.

③ “The Master of Procedural Law – Academic activities and ideas of Professor Chen Guangzhong,” in *Collection of Papers Celebrating Professor Chen Guangzhong’s 70th Birthday*. 2000. Beijing: Zhongguo Fazhi Publishing House. pp. 1 – 20, at pp. 19 – 20.

needs to change labour re-education in accordance with international standards.^① More recently, the preparation of legislative reforms to labour re-education by the National People's Congress is being closely monitored by international observers. Although some are very critical, many commentators are trying to encourage positive reforms in the line of international standards.^② Indeed, positive changes are taking place towards the right direction. In the past five years, for example, as an option to replace labor re-education, the NPC Standing Committee at least listed the draft Law on the Treatment of Unlawful Behaviours in its legislative agenda three times.^③ In the practice of the existing system, several initiatives have also launched trying to reduce its negative impact to some ex-

① In December, 2000, I was invited by the OHCHR as one of its four "international resource experts" to participate and delivered a presentation in the China-OHCHR Symposium on Minor Offences in Beijing, which was the first of a series of symposiums co-organized by the OHCHR and its Chinese counterpart Ministry of Foreign Affairs through the China-OHCHR Human Rights and Rule of Law Project. In this exercise, the term "minor offence" refers to those offences that are subject to labour re-education. In her opening speech to the symposium, Mdm. Robinson advocated the abolition of the system because of its fundamental inconsistency with basic standards of ICCPR. I was pleased to provide a background analysis for her speech.

② For example, see Amnesty International, "Abolishing Re-education through Labour and other forms of punitive administrative detention". AI Index: ASA 17/016/2006.

③ See news reports in the Chinese press, e. g., "Our Country Will Examine the Law on the Treatment of Unlawful Behaviours" (14/03/2005), <http://www.law-star.com/cac/25001971.htm>; "Our Country Will Make A Law on the Treatment of Unlawful Behaviours" (05/02/2006), <http://www.law-star.com/cac/25010533.htm>; "Law on Treatment of Unlawful Behaviours (draft) On 2007 Legislative Agenda", <http://law-star.com/cac/30005014.htm>.

tent.^① Further, several influential studies have been completed on potential options of the reform by government task forces and scholars, including a 2007 Ministry of Justice task force team report “On the Reform and Improvement of Labor Re-education System in China”, and an academic publication entitled “Rationality and Order: A Study on Labor Re-education in China”. The debate among Chinese scholars on this subject matter has become more transparent and interesting in recent years as well.^②

As the English introduction to the book, this paper is to offer some observations of the on-going debate in China from an international perspective. The paper consists of three parts. It starts with a brief review of important changes in Chinese law that, for the promotion of socialist legality, have created a sense of urgency to reform or abolish the current system of labour re-education. It then examines the problems of labour re-education by comparing it with well-recognized international standards and suggests that systematic and real reforms or abolition will help China to fulfil her commitment to the United Nations human rights standards. The third part of the paper proposes a series of changes to ensure that the reform or abolition of labour re-education will better safeguard, rather than jeopardize, law and order in the Chinese society. These changes in-

① See “An Overview: China Actively Pushing Ahead the Reform of Labor Re-education and Improving the Quality of Work to Rescue (the inmates)” (17/11/2003), <http://www.sina.com.cn/2003-11-17/22571135119s.shtml>; “Countrywide Preparation to Reform Labor Re-education, Will Focus on Semi-Open Administration (of the system)” (03/12/2004), <http://www.sina.com.cn/c/2004-12-03/01264416853s.shtml>.

② For the Ministry of Justice task force report, see <http://www.861lawyer.com/Site/hn110/ShowArticle.shtml>. Also see Chu Huaizhi, Chen Xinliang and Zhang Shaoyan (eds.), 2002, *Rationality and Order*. Beijing: The Law Press. Further, during 2003-2006, at least 14 LL. M students in China wrote their thesis with a focus on the reform of labor reeducation, and at least 100 papers were published in China to discuss the same topic.

clude the use of the formal criminal justice system in the handling of minor criminal offences to ensure equality and fairness in the procedure, depoliticalization and diversion, the introduction of restorative justice, summary convictions in cases of guilty pleas to avoid undue delay of the proceedings, the use of effective alternatives to short-term incarceration, and the restoration of community-based supervision and correctional programs. This balanced abolitionist approach aims at enhancing the protection of public safety and the rehabilitation of minor offenders while satisfying the requirements of international human rights standards.

1. The 1982 Regulations vs. Changes in Chinese law

The main body of regulations governing the current system of labour re-education is Trial Implementation Methods for Labour Re-education, a document issued by the Ministry of Public Security and "approved in principle" by the State Council in 1982. The 1982 Regulations define labour re-education as "an administrative measure of compulsory education and reform for persons receiving it."^① In reality, this is a system that empowers the police to deprive of someone's personal liberty for one to four years without a trial. In 1982, the Ministry was simply to set more detailed regulations for a system that had been in operation for almost thirty years on the basis of only a few short sections of rules that had not even been publicized. Therefore, the issuance of the document was considered a progress in regulating an existing practice and the legitimacy of the power of the Ministry of Public Security in making such regulations was not an issue for debate.

China has achieved significant progress in developing "a socialist country under the rule of law" and in "building a harmonious society" during recent years. In the late 1990s, important legislative changes

① Article 2.

were accomplished, which have created an urgent need to abolish the current system of labour re-education. The continuing existence of labour re-education conflicts with at least four legislations enacted by the National People's Congress since 1996.

(1) The Law of Administrative Sanctions of 1996 stipulates that "administrative sanctions" that are deprivations of personal freedom can only be provided for by the law rather than by administrative regulations.^① Under this Law, the Ministry of Public Security and the State Council do not have the power to make a regulation to impose administrative sanctions on individual citizens if the nature of the sanctions is the deprivation of personal freedom. Although the 1982 Regulations avoided the use of the term "administrative sanction", labour re-education is undoubtedly the severest type of administrative sanction in China. In comparison with the legal standards of many other countries, labour re-education would be an equivalent to medium-term imprisonment, and the labour re-education institutions would be classified as medium to high security prisons.

(2) The amended Law of Criminal Procedure of 1996 has led to the incorporation or enhancement of some important principles and procedural safeguards of human rights in the Chinese criminal process. These principles and safeguards include open trial, access to lawyer and legal aid, new limits on the duration of pre-trial detention, and the exclusive power of the courts to convict people after trial.^② These changes have

① Articles 9 (deprivation of personal freedom by administrative sanction must be provided by law) and 10 (no administrative regulation shall provide the deprivation of personal freedom as administrative sanction).

② Articles 11 (open trial), 12 (no person shall be found guilty without being judged as such by a court according to law), 96 (access to lawyer in police investigation and pre-trial detention).

made labour re-education increasingly "unfit" with the basic concepts and the entire legal structure of the present Chinese justice system, given that it allows the de facto conviction and sentencing of minor offenders by a non-adjudicative body (i. e., the labour re-education committee), that the decisions are made without trial, and that formal procedural safeguards are not available to the accused persons going through the process. The use of labour re-education also defeats the purpose of all the reforms in criminal procedure. Furthermore, the practice can become abusive. There is apparently not much incentive for the police to hand over a case to the prosecutor and the judiciary when they can conveniently convict the person without trial and incarcerate him for a duration that can be longer than what he would get if he were processed by a court.

(3) The amended Criminal Law of 1997 for the first time officially recognized the classical principles of *nullum crimen sine lege* (no crime without law), *nulla poena sine lege* (no punishment without law), and stipulated the principle of proper proportion between crimes and punishments.^① The recognition of these principles aims at improving the protection of individual liberty and further challenges the system of labour re-education. The 1982 Regulations provide a list of minor offences and wrong doings that are not clearly defined in legal terminologies. The Regulations allow the use of incarceration of up to three years in the name of "educative measures." No sentencing criterion is found in the Regulations. In addition, the duration of labour re-education can be extended to one more year or become indefinite by compulsory "in-camp employment." This kind of "educative measure" in essence is severer than the non-custodial punishment and short-term imprisonment under

① Articles 3 (no crime and punishment without law) and 5 (proportion between crimes and punishments).

the Criminal Law for ordinary criminal offenders.

(4) The Legislative Law of 2000 stipulates that the National People's Congress and its Standing Committee have exclusive power to make laws governing crime and punishment and laws on compulsory measures and sanctions for the restriction of personal liberty.^① It is the first time in Chinese history that a law clearly prohibits the executive branch of the government from making a regulation to impose restrictions on personal freedom. The 1982 Regulations are therefore *ultra vires*. The Standing Committee of the Congress or the State Council will inevitably repeal them in due course, as it is required under the Legislative law.^②

Hence, the 1982 Regulations can no longer cope with the reformed legal system in China. The current system of labour re-education is in conflict with provisions in the Legislative Law and the Law of Administrative Sanctions. It is also in conflict with the spirit of the law as defined under the reformed Law of Criminal Procedure and the Criminal Law. In addition, the practice of labour re-education also violates the principle of equality in the Constitutional Law of China. In terms of minimum procedural safeguards, labour re-education is discriminative to those who are labelled and processed as minor offenders, since these people are not entitled to the procedural rights that other offenders have according to the Law of Criminal Procedure. It is worth noting that the Law of Criminal Procedure is very likely to be re-amended very soon, probably in 2008, to further incorporate international standards.

① Article 8 (matters under the exclusive jurisdiction) and 9 (no delegated power to the State Council regarding matters of crime and punishment, deprivation of citizens' political rights, or restriction of personal freedom).

② Articles 87 (*ultra vires*) and 88 (power and responsibility to change or repeal laws and administrative regulations).

2. Labour Re-education vs. International Standards

In a major publication on the science of procedural laws in honour of Professor Chen Guangzhong, it was reported that this eminent jurist had proposed two options for a change to the current system of labour re-education. Option One is to abolish it and incorporate some of the provisions of the 1982 Regulations into the Law of Administrative Sanctions or other laws. Option Two is to retain it after these changes; (1) rename labour re-education as "security measures" (baoan chufen) and enact a law; (2) reduce the term of incarceration to six months to one year; (3) transfer the decision-making power from the police to the court and establish a procedure of trial; (4) provide the right to appeal and to seek compensation; and (5) request the procuracy to supervise the practice. Professor Chen is more supportive to Option One, i. e., the abolitionist solution. Option two leads to a de facto abolition, since it requires fundamental and comprehensive changes to the current system.^① These options and conditions are also seen in the chapters of this book.

Both options are to make the process compatible with well-established international standards. The 1982 Regulations were created with little consideration of these standards, because the country was in the early years of opening up to the outside world. China had just started to participate in the United Nations activities in human rights, crime prevention and criminal justice.^② Not many people in China were aware of the United Nations standards and norms.

During the past two decades, China has progressed in recognizing

^① See Qu Xinjiu, 2000, "Studies on Issues of Labour Re-education," paper presented at the Symposium on the ICCPR and Criminal Justice, Beijing, December 2000.

^② China sent its first delegation to attend the United Nations Congress on the Prevention of Crime and the Treatment of Offenders (the Sixth Congress) in 1980.

and implementing the United Nations human rights standards in crime prevention and criminal justice. In 1988, the People's Republic of China for the first time in her history formally celebrated the anniversary of the Universal Declaration of Human Rights. During 1997 – 1998, China signed both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. With the signing of the Covenants, the discussion of the future of labour re-education has to include international human rights standards. From this perspective, several Chinese scholars who contributed the chapters to this book are proposing options to systematically and comprehensively change the current system, which means de facto abolition or virtually a replacement. Piecemeal and partial changes will not work.

(1) A political birthmark inherited from the old years. Labour re-education was created by a document of the Central Committee of the CCP during the Movement of Eliminating Counter-revolutionaries in 1955.^① According to this internal document, labour re-education was to incarcerate and reform counter-revolutionaries and “other bad elements” that were discovered during this political campaign. The conditions to place these individuals under labour re-education were: first, their problems were not serious enough to justify a formal conviction and sentence; second, they were “politically unsuitable to keep their working positions”; and third, they would become a burden of employment if they were released into the society. In 1956, labour re-education institutions were established throughout the country to incarcerate these individuals. In 1957, a large number of Rightists were sent to labour re-education camps during the Anti-Rightists Movement, when the Standing Committee

① “Instructions on the Complete Elimination of Hidden Counter-Revolutionary Elements”, Central Committee of CCP, August 1955.