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The Power to Detain in a Dual State Structure

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After four decades of legal reform, what kind of progress have the Chinese authorities made in controlling the power to detain, reducing its arbitrariness, and making the repressive arm of the state legally accountable? Has the fear of police power, in particular the proverbial panic of a knock at the door in the middle of the night, been reduced or increased? This essay argues that there are both changes and continuities, as the power to detain is largely defined and shaped by China's regime type.

In liberal democracies, detention power tends to converge on three issues: first, differences in social/political status are no longer relevant, and common legal rules apply to all types of detention based on the fundamental right of personal freedom; second, political mechanisms and legal rules are in place to reduce state arbitrariness in depriving citizens of personal freedom; and finally, detention is subject to enhanced juridical control, with access to lawyers and judicial scrutiny serving as the litmus test for its legality. Indeed, the transition from a police-centric legal system to a court-centric one is often regarded as the hallmark of genuine democratisation, and the degree to which personal freedom is protected

offers a meaningful index to measure the status of rule of law in a particular society. (Cao et al. 2014).

After four decades of legal reform in China, what kind of progress has the country made in controlling the power to detain, reducing its arbitrariness, and making the repressive arm of the state legally accountable? Has the fear of police power, in particular the proverbial panic of a knock at the door in the middle of the night, been reduced or increased? A general answer to these questions is that there are changes and continuities, as the power to detain is largely defined and shaped by China's regime type.

A Crystallised Duality

China is an authoritarian party-state under the leadership of the Chinese Communist Party. The Party monopolises all political powers and this leadership is unchallengeable. While repression alone cannot adequately explain China's authoritarian resilience, it has undoubtedly played a key and indispensable role in securing social stability. The repressive arms of the Party-state, the police in particular, have been given broad political and legal power to detain in order to maintain the political order. At the same time, since the late 1970s, the Party has embarked on legal reform to regularise and regulate the exercise of state power in the social and economic spheres. A key aim of this reform is for the Party to regain legitimacy and credibility in the eyes of the ordinary people through the promotion of the rule of law (Peerenboom 2007). With this goal in mind, the Party thus expands or restricts the state power to detain according to the need to maintain and legitimise the political order.

Contrary to detention in a liberal legal system, detention in China continues to diverge because different types of detention are used to fend off different risks and serve different political purposes. Legal accountability varies according to the status of the detainees, the political nature of an offence, and the evolving

position of the police in the political and legal system over the decades. Legal control of detention remains weak in politically-sensitive cases, such as national security and corruption-related offences. In those cases, access to lawyers and effective judicial control, the hallmark of a liberal order, are entirely absent or substantively missing. On the other hand, legal accountability in other types of detention has been thickening and deepening, with an enhanced threshold in substantive law, detailed procedural requirements, and increasingly meaningful and important external supervision over the process, including from lawyers and judges (Nesossi et al. 2016).

There is therefore a firmer and more crystallised demarcation in the power to detain between ordinary cases and politicised, sensitive cases; between routine justice and extraordinary justice; and between the normal state and prerogative state (Fraenkel 2010). This duality is significant to understanding different powers that the state has to deprive citizens of their personal freedom and different legal remedies for detainees and their lawyers.

Defining the Boundaries of Unlawfulness

Constitutional protection of personal freedom is expressed in a cautious way in China. While Article 37 of the Chinese Constitution states explicitly the inviolability of personal freedom, it prohibits only 'unlawful detention' (非法拘禁) and other deprivations or restrictions of the personal freedom of citizens that are 'unlawful' (非法). Given the decisive role of 'unlawfulness' in examining the legality of detention and other forms of deprivation of freedom, its meaning and boundaries with Chinese law need further clarification.

The main test for 'unlawfulness' is provided for by the 2001 Law on Legislation, which centralises the rule-making power in relation to the power to detain in the National People's Congress and its Standing Committee. The

State Council and its ministries—the Ministry of Public Security in particular—used to have the power to detain but, have been stripped of the power, legally at least, from 2001. The most visible achievement of the Law on Legislation is the restrictions it places on police power to impose administrative detention and the gradual procedural protection in personal freedom in relation to minor offences. Historically, Chinese police had the power to deprive minor offenders of their personal freedom independently of the courts, and they were empowered to do so mostly by executive orders without clear legislative authorisation. The Law on Legislation has made a significant portion of such administrative detention unlawful due to the lack of legislative support and, as a result, the executive organs have been pressured to abolish administrative detention power and subject detention in those cases to some forms of legal accountability.

The best example of this process relates to the abolition in 2013 of the infamous ‘reeducation through labour’ (劳动教养) system, which allowed the police to imprison minor offenders for up to three years. While international and domestic actors pressured the Party to abolish the system, a golden thread that tied all criticisms together in defeating the government’s position was the simple fact that the rules underpinning those labour camps were unlawful according to the Chinese law. In 2003, after the tragic death of Sun Zhigang—a young migrant who passed away as a result of physical abuse suffered while being detained under China’s custody and repatriation system (Hand 2006)—the State Council was similarly forced to nullify another executive order that authorised the police to detain vagrants and repatriate them to their hometowns from cities. To this day, the Law on Legislation continues to hold the police accountable in detaining minor offenders, such as prostitutes, without legislative support. Due to the impact of the Law on Legislation, drug rehabilitation and compulsory psychiatric treatment have

been placed in a proper legal framework, creating opportunities for legal accountability in medical/welfare-based detention.

Outside administrative detention, criminal detention for non-political cases, including serious crimes, has been placed under more tightened legal control. Thanks to the exposure of a series of high-profile scandals related to wrongful convictions based on confessions extracted through torture, which shocked the conscience of the nation, legal rules and mechanisms have been put in place and implemented in part to rein in abusive detention practices and torture in interrogation (Nesossi 2019). Those mechanisms include a functional separation between the police who investigate and the police who detain, to reduce the incentives and opportunities of abusive detention; a more proactive on-site procuratorial supervision in detention facilities; better access to lawyers and more generous provision of legal aid in routine criminal cases; the mandatory use of videotaping of interrogation in certain serious criminal offences; and a clear legislative authorisation procedure, as well as the requirement for courts to treat torture claims more seriously.

Such mechanisms have all helped to create a better ecosystem in the criminal process in which rights are to be taken more seriously. A related legal change, which is equally significant, is the attempt to reduce the use of pre-trial detention by institutionalising various diversion programmes from detention, such as criminal reconciliation, and by increasing the opportunities for bail (Jiang 2016). The combined impact of this incremental and partial reform is the emergence of a slightly more liberal-leaning detention regime, in relative terms, in ordinary, non-political cases. Better protection of personal safety and meaningful restriction on the power to detain is essential for building trust in, and creating legitimacy for, the Party-state; and the detention reform is part of the demand from civil society for a

broader legal reform. The Party's ability to adapt to changing circumstances—in this case the increasing demand for justice in criminal cases—through law reform, explains the authoritarian resilience.

A Double-edged Sword

However, the law is a double-edged sword, both limiting and empowering the state, and legality can be abusive and serve an anti-liberal agenda. Having engaged with legal rhetoric and practices for four decades, the Party-state's attitude has changed from one of suspicion and fear of legal rules—which led it to avoid and marginalise law—to one of acceptance, in which it actually uses the law to its advantage. The Party has now come to realise the empowering dimension of law and is aggressively using it to legalise previously illegal practices. This transition from avoidance to engagement defines an emerging authoritarian legality in China, which is mostly clearly seen in the shifting legality of police power to detain.

Using the law to empower the Party-state in general, and its repressive arm in particular, is a new endeavour. It gained momentum in 2012, when the Criminal Procedural Law (CPL) was further amended. At that moment, the Party-state found the confidence and resolve to formally and openly legalise extraordinarily repressive measures—while repressive powers abounded in China, they were rarely legalised in much of the legal reform era. The 1979 CPL effectively limited police power of detention to three days, after which procuratorial approval was required, but the police entirely ignored the restriction and instead used the extra-legal 'sheltering for interrogation' (收容审查) prerogative, an unlimited power of administrative detention, to facilitate criminal investigations. The three-day restriction was merely window-dressing, until 1996 when the National People's Congress finally amended the

CPL and extended detention time to 30 days in exchange for a withdrawal of the police's power of sheltering for interrogation.

While the 30-day detention rule may have worked for ordinary criminal cases, it could not satisfy the police in their investigation of 'sensitive' cases, including cases related to political dissidents. To hold those political offenders longer, the security police had to distort a legal mechanism called 'residential surveillance' (监视居住), a community supervision mechanism that authorises the police to release suspects on bail and then put them under surveillance at their residences. Controversially, before 2012 the police seized the opportunity to place political and religious offenders, among others, at police-designated locations for up to six months. In response, in 2012 the CPL was further amended and a special mechanism called 'designed residential surveillance' (DRS, 指定监视居住) was created to legalise secretive detention. Under article 73 of the amended CPL, DRS may apply in three types of offences: terrorism, national security, and major corruption. The 2012 amendment thus legalises the previously extra-legal practices—once the DRS is triggered, a person vanishes into a black hole, while all their legal rights are placed under de facto suspension for months, if not years (Rosenzweig 2013).

Legal Nihilism

Once the psychological barriers that prevented the Party-state from passing repressive law were removed, the practical benefits of a legally-empowered authoritarian regime became apparent. To take one step further toward politicisation in the prerogative state, the Party has used the law in a nihilistic and paradoxical way merely to create extra-legal spaces through legislative acts. Legality thus serves principally as a trapdoor function to cover a political decision with a mere veil

of lawfulness. The development of the Party's detention power from *shuanggui* (双规) to *liuzhi* (留置) serves as a good example of the nihilistic use of the law (Li 2019; see also Caster's essay in the present issue). The Party's disciplinary inspection committees (DICs) punish Party members for violating Party rules and, under *shuanggui*, used to have the power to detain them for a period of time for investigation. The DICs derived the political power to detain exclusively from the Party and this prerogative did not comply with a minimum degree of legality in the constitutional sense. The Party thus wielded extensive criminal law powers without any constitutional justification or legal authorisation, a situation which it was hard-pressed to justify (Fu 2017).

To compensate for this deficit of legality, in 2018 a National Supervision Law was enacted to create a new National Supervision Commission (NSC, 国家监察委员会), which aims to wrap a thin veil of legality around the Party's disciplinary inspection committees without disturbing the pre-existing power arrangement. In doing so, the state has effectively been absorbed into the Party. The institution of the disciplinary inspection committee continues as is, although it also now calls itself the NSC. The infrastructure of the previous detention regime remains intact: suspects are detained in the same facilities, interrogated by more or less the same officers, and controlled by the same guards. Officially, *liuzhi* and the entire supervisory/disciplinary process has a political nature, and thus is beyond any legal control: lawyers are off-limits, and no legal institutions, including the judiciary, are involved until the Party finishes investigating its case. The National Supervision Law serves to provide legality for the Party's disciplinary operation while excluding the entire legal system, thus throwing the disciplinary inspection process back into a black hole (Li 2019; Li and Wang 2019).

The Emergence of the Prerogative State

All the legal abuse and nihilism outlined above, not to mention the mass internment in Xinjiang, crystallise the emergence and consolidation in China of a new prerogative state, in which legal rules governing detention are first marginalised and then replaced by political rules that follow the agenda of the Party-state. By nihilistic view of law in the prerogative state, I refer to a view of the law merely as a political tool that is devoid any normative content or commitment and represents a significant departure from the legal system that China has been constructing. In the case of the shift from *shuanggui* to *liuzhi*, for example, the principal object in legalising *shuanggui* was to concentrate political power in anti-corruption enforcement, and at the same time to create a thin veil of legality to end off domestic and international criticisms.

China is establishing a political regime of detention for political and religious offenders. The thin veil of legality that has been created can barely shroud the political nature of this form of detention and the near irrelevance of the law in those politically-sensitive cases. At the same time, legal reform in routine justice in the normal state continues to place detention in non-political cases under meaningful legal control, creating a dual state structure in the power to detain. Future research should focus on exploring the interaction and mutual impact between the normative state and the prerogative state; between ordinary justice and extraordinary justice; and between the people and state-designated enemies. ■