

Understanding Criminal Punishment and Prisons in China

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Abstract

This article provides an interpretation of the evolution of criminal punishment and prisons in China from an historical perspective. The historical investigation reveals that the current ganhua and paternalistic or fatherly approaches to prison corrections are expressions of an underlying cultural tradition that is deep and abiding. However, the existence of the paradoxical goals of punishment and reformation at the level of the implementation of prison sentences, which can erode the protection of the rights of prisoners, is contingent upon political and legal decisions that can be changed by acts of law and legal reform.

Keywords

China, criminal punishment, prison

Introduction

Due to China's dramatic social transformation since 1979 coupled with soaring crime rates, the Chinese imprisonment system is under massive pressure (Dutton & Xu, 2005). As prison populations continue to expand in China, the question of the legal position or the rights of prisoners has become a pressing issue, particularly in light of the human rights discourse. Consequently, both

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internal and external pressures have led to the comprehensive study of foreign law and the assimilation of Chinese law to international practices, beginning in the 1980s (J. F. Chen, 1999). Although these developments would appear to lend credence to the convergence thesis that suggests that the Chinese and Western imprisonment systems are coming closer, others have pointed to counterinfluences at work that are actually moving the two systems further apart. Notably, in a recent study, Wu and Vander Beken (2013, p. 207) explained that, given the very different historical and institutional contexts, the likelihood of the implementation of an “autonomous version” of the human rights framework in China seems low. Indeed the universal discourse of human rights will not alter the fundamental reality that differences in values undermine, to some extent, the universality of the human rights regime as an empirical matter.

Despite the various partial truths in accentuating sociocultural differences between China and West, the challenge of transplanting Western rights rhetoric into China is properly directed against ethnocentricity and following blindly, not against rights in general. No society in today’s world should be exempt from guaranteeing basic rights to its people. However, comparative justice scholarship, as noted above, must pay enough attention to the legal culture, that is, “the network of values and attitudes relating to law that determines when, why, and where people turn to law or government, or turn away” (Friedman, 1975, p. 34) or, as Nelken (2004) defines, “relatively stable patterns of legally-oriented social behaviour and attitudes” (p. 1). The way that imprisonment is used as a punishment in Chinese society undoubtedly expresses deep, abiding cultural traits that are not liable to change easily. Nevertheless, when thinking about “culture,” we must also pay attention to the different dimensions of culture, taking care not to confuse steadfast cultural legacies with transient political decisions (Garland, 2005). The political meaning of the use of prisons is much easier to change than the emotional and cultural attitudes that are the building blocks of Chinese legal culture.

The purpose of this article is to provide an interpretation of the evolution of criminal punishment and prisons in China from an historical perspective to identify the legal decisions concerning the use of prisons that have been shaped by persistent cultural attitudes and those that are made by fleeting political choices. An understanding of the forces that gave birth to the present-day penal practices and identifying the historical and social conditions upon which they still depend will provide a sound basis for a discussion on how to “build up” prisoners’ rights in contemporary China. The historical investigation reveals that the current *ganhua* (感化) and paternalistic or fatherly approaches to prison corrections are expressions of an underlying cultural tradition that is deep and abiding. Importantly, the existence of the

paradoxical goals of punishment and reformation at the level of the implementation of prison sentences, which can erode the protection of the rights of prisoners, is contingent on political and legal decisions that can be changed by acts of law and legal reform.

This article is structured as follows. The first section documents the rise of the ancient Chinese civilization from roughly the 8th to the 3rd century BC and illustrates its implications for Chinese legal culture. This is followed by the interpretation of the evolution of punishment and prisons in China. The last section presents the conclusion.

Chinese Civilization and the Conflict Between the Theories of Li and Fa

Greece and China have a fundamental intellectual difference in their approaches to philosophical questions. It has been argued that the Chinese tended to engage in context-dependent and *holistic* perceptual processes by attending to the relationship between an object and the context in which the object is located (Nisbett & Miyamoto, 2005). Confucianism, which is the dominant Chinese philosophy, is a prime example of this holistic approach. One fundamental goal of Confucianism is to achieve a harmonious social order in which each person is able to realize his or her full potential as a human being through mutually beneficial relations with others. Emphasizing the individual's self-consciousness to maintain the social order, Confucians stressed that individuals should self-perfect themselves through internalization of *li* (礼, rites). *Li* is, in essence, a set of ethical norms that provides guidance for appropriate behavior in all circumstances of life, spanning from ordinary daily activities to special ceremonies, prescribed on the basis of a person's social status (Kaempfer, 2006). To Confucius, positive law, which is backed by punishments, sends the wrong kind of message. In Confucius's words:

Guide the common people by government edicts and keep them in line with *xing* (刑 punishment), and they will stay out of trouble but will have no sense of shame. Guide the common people by virtue and keep them in line with *li* (礼, rites), and they will have a sense of shame and moreover will reform themselves. (*Analects*, 2: 3)

Early Confucian ethics provided poor evidence in favor of positive law, and those ethics were rivaled from the very beginning. Legalism (*fajia*法家), which arose during the early Warring State period (475-221 BC), advocated a social control program that was in direct conflict with Confucian ideals. From

a legalistic view, human beings are naturally greedy and selfish. Thus, virtue, cultivation, and moral examples are inadequate to maintain the social order because people's base instincts will constantly drive them to wrongful behavior (Ren, 1997). The only way to make people behave correctly and to achieve a well-ordered society is by an impartial system of rewards and punishments. Legalists advocate the centralization of a ruler's authority through the creation of a vast bureaucracy and extensively written laws, and the use of a harsh, universally enforced penal code to ensure compliance with state policy. It is clear that legalistic *fa* (法 positive law), which contains commands and prohibitions and uses punishment to ensure its implementation, is one of the means to serve the interests of the ruler, not necessarily the common people, and legalistic ideas can hardly be regarded as a result of scientific theory and the use of formal logic.

Imperial China: Criminal Punishment as the “Facilitator” of Morality and the Shame of Imprisonment

The Supremacy of “de” and the Subservience of “xing”

In the Han Dynasty (202 BC-220 AD), Dong Zongshu (179-104 BC), a Han Confucian, integrated the legalist and *Yin-Yang* (阴阳) schools of thought to create his own Confucian doctrines. He overhauled the standard interpretation of the Confucian classics and advocated combining the functions of *li* and *fa* by emphasizing the supremacy of *de* (德 morality) and the subservience of *xing* (刑 punishment). Eventually Emperor Wu (157-87 BC) adopted Confucianism as the official orthodox doctrine. The synthesis of Confucian and legalist ideals in fact provided imperial China with a basic rationale for the administration of justice and punishment that continued to influence the way criminal justice operated up to the 20th century (Wu & Vander Beken, 2012). In particular, the emphasis of the supremacy of *de* and the subservience of *xing* (德主刑辅), or the idea of “morality given priority over penalty,” was fundamental to the administration of justice in the imperial state.

The supremacy of “de.” The supremacy of *de*, on one hand, explains that the vast majority of people can be educated to be good. The Confucian school adhered to the premise that humans are innately good (*Mencius, Teng Wen Gong*, I) and that their good qualities *can* be brought out through education. The ultimate goal of a Confucian's personal cultivation is to achieve self-perfection, as represented by the concept of *ren* (仁 benevolence), which means becoming the most genuine, most sincere, and the most humane

person one can be (*Analects*, 6: 30). The process of self-perfection requires self-discipline and the observation of *li* (*Analects*, 12: 1). Through internalization of *li*, individuals will develop a sense of shame when they have done something wrong. Then, shame will direct the person inward for self-examination, and will *motivate* the person to make socially and morally desirable changes (*Analects*, 2: 3). On the other hand, the supremacy of *de* also means *de zhi* (德治 rule by morality), which implies that it is the responsibility of the superiors to teach the subordinates moral codes and to persuade the wrongdoers to reform themselves. To Confucius, the superiors who are engaged in such moral education can best fulfill this obligation by virtue of their moral vision and the example they set. By so doing, the superiors inspire the subordinates with virtue and prevent them from crossing the social deviance line into criminal activity. Meanwhile, the people would also naturally defer to the ruler's example and to his or her leadership (*Analects*, 2: 1). With everyone participating willingly in observing *li*, social order was sure to result. Consequently, there would be no need for a harsh penal apparatus such as a suppressive instrument.

The subservience of "xing." Stressing the importance of organizing society by morality, Confucians did not completely dismiss punishments. The subservience of *xing* acknowledges that when certain members of society are not socialized to behave properly by way of education and persuasion, punishments may be applied as a last resort (*ChunqiuFanlu*春秋繁露, 11: 46). According to Dong Zongshu (*ChunqiuFanlu*, 10: 36), there are determined evildoers who are not affected by moral instruction, and the only way to induce such persons to refrain from doing evil in the future is through *fear* of punishment. However, the Confucian school emphasized that the punitive reaction to crime, which is a facilitator of morality, should be the *last resort*. It was a significant feature of criminal justice in imperial China that most offenses were adjudicated by extrajudicial and informal institutions. Confucian codes of morality (*li*) such as *xiao* (孝 filial piety) and family loyalty were enforced through legalistic rewards and punishment mechanisms. In this way, the throne, through unrelenting fortification of familial and social hierarchies, transformed the family into a *de facto* extension of the bureaucratic state. Imperial law unequivocally gave parents extended rights, ranging from the right to punish children physically to the right to order their child's suicide for moral reasons (Ren, 1997). The result, in theory, and to a remarkable degree in practice, was a system designed to educate wrongdoers in a subtly graded way, which began with the minor punishment fathers used to "persuade" their children to confess and recognize moral faults. It then increased to still minor, but sometimes different mechanisms available to

intervening authorities, and finally climaxed with the potential application of more severe punishments inflicted by formal legal authorities. This complex gradation of hierarchical powers, certainly, allowed the formal penal apparatus to function as a last resort.

Careful Punishment and the Shame Penalty of Imprisonment as Forced Labor

Legalists would frankly admit that the use of draconian punishments even for the slightest wrongdoing serves the goal of keeping people in check through fear, but Confucians maintain that punishments need to be *zhong* (中 appropriate) to meticulously fit the crime. For Confucius, it was very dangerous for the ruler to use punishment excessively, because then, “the people are unable to see the link between sanctioned violence (right punishment) and moral values, and the result is chaos and disorder” (Mühlhahn, 2009, p. 19). The idea of *zhong* punishments found expression in the significant transformation of legal penalties since the Han dynasty. From the Han to the Sui dynasty (581-618 AD), the mutilating forms of punishment, except for the death penalty, were gradually abolished and were replaced by the so-called New Five Punishments (新五刑): *chi* (笞 beating with a light stick), *zhang* (杖 beating with a heavy stick), *tu* (徒 penal servitude/imprisonment as forced labor), *liu* (流 exile), and *si* (死 the death penalty). Because the degree of punishment had to correlate exactly with the nature of the severity of the crime, each of the punishments was divided into several grades or scales. As the New Five Punishments were gradually established, the prison became the most essential part of the system of punishment in imperial China.

Here, one has to be mindful of the primary function of a legal penalty, which is to deter potential criminals through fear of punishment. Given that the use of shame is a prominent technique for social control and child rearing in Chinese culture, imprisonment as forced labor was designed as a *shame penalty* and was conceived as moral condemnation informing the public about the offense and the offender as much as it was conceived as a procedure for inducing in the offender a sense of guilt and repentance. The goal of imprisonment in the Tang Code Commentary (*tanglvshuyi*唐律疏议) is paraphrased as follows: “The one who is sentenced to *tu* (徒) is a slave; its [purpose] is to enslave and to disgrace the convict (6: 57).” Using *tu* as a penalty worked as a great deterrence. This is apparent because being put in prison for a criminal conviction is a stigma in society significantly attached to group honor and morality, and degradation by being treated as a “slave” is a significant psychological bite, carrying the bitterness of being treated as an inferior.

Nevertheless, shaming in the minds of the feudal Chinese elite was not just a way to inflict pain and degradation on people, it was also a way to “educate” them. The Commentary brings the educating effect of imprisonment to the forefront. The Commentary states that

[a]ccording to the Rites of Zhou (*zhoulǐ* 周礼), “the prisoners should be detained in *huan tu* (圜土) and given labour tasks in order to educate them. [For those who manage to reform themselves], the heavy offenders can be released after three years; the medium offenders can be released after two years; and the light offenders can be released after one year.” (Volume 168)

It was thought that the “hardship” (*kunku* 困苦) of penal servitude was capable of forcing the convicts to feel repentance, and therefore, become motivated to rehabilitate themselves (*zhoulizhushu* 周礼注疏, 34). However, this educational function was not present in prisons throughout imperial Chinese dynasties. As the prisoner was first and foremost considered a “slave,” the logic that actually governed the prison’s operation was driven more by pragmatic economic concerns than by an impulse to reform individuals.

Mao Era: Criminal Punishment as “Stigmatizing” to Deter and for Correctional Imprisonment

The turning point of Chinese legal development came during the decades before and after the 19th century, when Western imperialism invaded China and the Qing (1644-1911) government was forced to conduct political and legal reforms to stay in power. Hence, New Policies (*xinzheng* 新政) were initiated, including the revision of the legal system. In January 1911, the government put into effect the “New Penal Code of the Great Qing.” Nonetheless, the first wave of penal modernization could not take root during the turbulent period following the Qing dynasty’s collapse. Three years later after Cixi’s death, the Qing dynasty was overthrown by the Wuhan Uprising on October 10, 1911. The establishment of the Republic of China in 1912 by the Nationalist Party (known as the *Guomindang* or GMD) aroused high expectations, but within about 5 years, the central government collapsed completely, and China slipped into an unstable period of warlord factionalism, imperial Japan’s invasion, and a civil war between GMD and the Chinese Communist Party (CCP) from 1946 to 1949. The establishment of the People’s Republic of China (PRC) in 1949 was often claimed by Chinese Communists as a total break with China’s feudal past. Replacing Confucianism, Marxism–Leninism became the official orthodoxy governing

social transformations and national affairs. Nevertheless, looking closely at the criminal justice system of the Mao era, one can see that the “modern” Chinese prison regime has, to one degree or another, a certain affinity with the past.

Criminal Punishment for Suppression and as a Last Resort

An historically embedded cultural trait—“the subservience of *xing*”—kept the Chinese punishment regime firmly in place during the Mao era; criminal punishment was reserved only for suppressing offenders who committed serious crimes and was especially directed toward class enemies who did not accept and support the Communist leadership. In his well-known speech “On the People’s Democratic Dictatorship,” Mao (1967, pp. 445-446) talked about how a socialist society should react to deviant actions committed by the people and counterrevolutionary actions of the enemies. The people who commit crimes might demand imprisonment or even the death penalty, but, in general, *persuasion* rather than coercion is the standard method to educate wrongdoers among ordinary people. The punitive punishment of the criminal justice system is mainly used as a *suppressive* instrument to punish class enemies. Mao’s systematic distinction between the people and enemies of the people was not something new and purely inspired by Communist thinkers. As we have observed, it has been an important part of Chinese politics to govern society in accordance primarily with *li* through persuasion and moral example, and the punishment power of the government must be “restricted” to those who are incorrigible.

The social power structure in the post-Revolutionary era brought Mao’s idea into reality. In the process of building a new elite power structure, the Communists departed from the imperial thrones that had stressed family loyalty by displaying higher loyalty to the state. During the early decades of socialist construction, the informal social control preferred by Confucianism was largely institutionalized through an urban household registration system, which linked individuals’ residency with their entitlement to social programs. The strict control of population mobility effectuated different social control mechanisms in the community, which were primarily responsible for handling local disputes and wrongdoers who had committed minor offenses (Whyte & Parish, 1984). When individuals violated rules under the Security Administration Punishment Act,¹ the police had the authority to impose a series of administrative sanctions without formal litigation. Consequently, the formal court process was operated in a comparatively limited way by prosecuting cases only involving serious offenders, especially political opponents or counterrevolutionaries deemed dangerous to the socialist state.

Criminal Punishment as “Stigmatizing” to Deter and for Education

The formal criminal justice system, for Chinese Communists, is preserved solely for the purpose of class suppression through ruthless terror and violence. Mao (1967) said, “The state apparatus. . . is violence and not ‘benevolence’” (p. 446). Like the Confucian tradition, Mao insisted that the primary function of the criminal justice system was to eliminate evil individuals and deter others from committing the same acts through *fear* of punishment. They differed, however, in that Confucianism centered on “shame” penalties to induce guilt and repentance, whereas Mao claimed the symbolic value of “state violence” in deterrence and education.

Penalties in the Mao era included public surveillance, imprisonment (fixed-term and life imprisonment), and the death penalty. Even though the criminal penalties themselves were not “shame” penalties as their imperial predecessors, the criminal justice system played a powerful role in *stigmatizing* the convicts to terrify and instruct the public. For example, different kinds of degradation ceremonies, such as mass trials (*gongshendahui* 公审大会) and mass sentencing rallies (*gongpandahui* 公判大会), provided an important avenue through which the emotive representations of public shaming and moral indignation toward crime and criminals were constituted. In the mass trial, “dramatic devices such as staging, props, working scripts, agitators, and climactic moments” were used to engage the sentiment of the audience and direct indignation toward the convicts (Mühlhahn, 2009, pp. 182-183). The death penalty was also frequently executed on the spot. The ritualized public displays of violence during these trials not only terrified the counterrevolutionaries, it no doubt also had a profound effect on the public consciousness. By “executing one man to warn a hundred others” (杀一儆百), degradation ceremonies showed the strong arm of the state and sent the message that anyone who was against the order of the socialist state would be suppressed “ruthlessly.”

Imprisonment in Theory: Paternalistic Corrections

Mao openly expressed his favorable attitude toward the form of terror to suppress serious offenders; nonetheless, he also said that individuals in an antagonistic class could be reformed through “forced” socialist *education* and *persuasion* in prison. In Mao’s view, classes were formed on the basis of beliefs or worldviews and a transformation of thinking was possible. “Man can be reformed, and the key to success is that the correct policies and methods are adopted” (S. A. Wang, 1999, p. 75). Indeed in his theory, Mao inherited and

defended basic Marxist–Leninist principles, but what distinguishes Mao from Marx and other classical Communists is that he further “developed his theory within the framework of traditional Chinese philosophy” (Ren, 1997, pp. 70-71). The operation and management of the Chinese prison, then, cannot be understood outside the Confucian ethical considerations and practices that underpinned them. It has been well-documented that although the *laogai* (劳改) system² is derivative of the Soviet model, the actual practices and internal regimes implemented under the system show marked differences from the one adopted by the Soviet Union. Mao’s prison was in fact a “collective” corrections system constructed upon the rhetoric of “education” and “persuasion” (S. A. Wang, 1999), which, in part, paralleled the existing education and persuasion systems exemplified in families and communities. In this respect, the prison regime was inextricably linked to the traditional belief that human nature is generally good and profoundly malleable, and it is the inherent responsibility of the superior to help the subordinates to recognize their problems and to reform themselves. The superior within the prison, according to Mao, is the prison staff. “[T]he cadre plays a key role in guiding the inmates in thought reform . . . the success of thought reform depends on us (the prison cadre)” (S. A. Wang, 1999, p. 75).

Imprisonment in Practice: Prison as a Tool Undermines the Correctional Purpose

Although Mao’s educational reform of criminals may well be effective, it was an argument that did little to break down the strongly held political association between imprisonment and suppression. The political understanding of prison as a *tool* for “suppressing” and “punishing” class enemies radically undercut the intended correctional purpose of prisons and rendered prisons modern-day institutions of “slavery.” On one hand, integrating the *laogai* system into the national economy and organizing engagement in large-scale manufacturing was said to help bring forth a proletarian consciousness among the prison workforce, but penal labor in large-scale economic production, as Dutton and Xu (2005) pointed out, was retributive in nature and typically a form of “punishment” in the eyes of the Chinese. The radical emphasis on production and productivity that had been building up since the mid-1950s and culminated in the Great Leap Forward factually resulted in physical and psychological trauma in the labor units.

The inhumane catastrophes in the *laogai* system, on the other hand, must also be seen from the legal context of the People’s Republic. Mao had a poor opinion of law. For him, the law was a suppressive tool to be used by the

proletariat as a weapon in class struggles against the enemy to realize the people's democratic dictatorship. Owing to the dominance of a heavily instrumental understanding of law, the legal restraints on the power of the prison varied in accordance with the changes in the official attitude toward law and depended largely on the political mode used to address class struggles (Wu & Vander Beken, 2012). It then helps to explain why the system lacked internal barriers to prevent or limit the catastrophes in the labor units when an inconceivably large number of inmates died because of inhumane and miserable conditions.

Reform Era: Criminal Punishment and Imprisonment—“Old Wine in a New Bottle”

Upon Mao's death and the subsequent political downfall of the “Gang of Four” in 1976, the CCP's devotion to the political struggle against class enemies faded away. In 1978, the CCP declared that the large-scale, nationwide political movement should cease and emphasis on the Party's work should be shifted to socialist modernization. Since then, rule of law and legal reform have become hot topics, and the new Chinese leadership has made rapid progress on the legislative front. Nonetheless, our analysis below suggests that the CCP cannot escape the same historical impasses by ruling China in an “old” way and that the contemporary Chinese prison/correctional system is, in many clearly identifiable ways, very traditional.

A Comprehensive Social Control Approach and Criminal Punishment as a Last Resort

Although revolutionary justice is no longer emphasized, moral persuasion and early prevention is still regarded as the key tenet in crime control in China (X. Chen, 2002). Adhering to the cultural continuities, a comprehensive approach (*shehui zhianzonghezhi* 社会治安综合治理) in combating crime was advocated and adopted by the Chinese government. A “comprehensive” approach means:

[U]nder the leadership of the national and local governments, every factory, enterprise, government office, school, neighbourhood, people's commune and production brigade etc. is fully mobilized and required to play its role in maintaining public order in its own area, to prevent, reduce and forestall crimes through ideological, political, economic, educational, administrative and legal work so as to maintain a good public order. . . In the meantime, it is necessary to make full use of mass media such as radio, television and newspapers and

educate the people in observing law and social ethics, thereby raising their consciousness in combatting criminal offenders (X. Gao, 1983, p. 4).

This social control mechanism, as Schurmann (1968) described, is before-the-fact socialization, not after-the-fact arrest. The broad masses, such as the family, the school, the work unit, the neighborhood committee, and the mass media, are relied upon for preventing crime and providing support to the formal criminal justice system. Similarly, as in the prereform era, the police, without court approval, have the authority to impose administrative sanctions on individuals guilty of minor offenses or public order violations. In this manner, the vast majority of deviants were resocialized by nonprofessional bodies in the community or their cases were handled by police agencies and consequently settled out of the formal criminal justice apparatus.

Criminal Punishment Is Still “Stigmatizing” to Deter and Educate

In line with the above-mentioned preference for moral and ethical persuasion in crime control, policing and penal strategies still seem to reflect the values and aspirations of prereform China: the old rhetoric of “ruthless” or “severe” punishment and the old strategies of “public shaming” and “stigmatizing.” From the early 1980s, China suffered from steadily increasing crime rates as a result of the rapid process of industrialization, urbanization, and modernization. In 1981, to tackle the soaring crime rate, the Chinese government began to wage war on crime by implementing the “Strike Hard” (*yanda*^{严打}) criminal policy. *Yanda* anticrime campaigns were then successively launched in 1983, 1996, 2001, and 2010. During the campaigns, the police, the procuratorate, and the court made a concentrated effort over a specified time period to attack targeted crimes “severely and swiftly.” On June 13, 2010, the Ministry of Public Security launched the fourth nationwide *yanda* campaign lasting for 7 months to “severely crack down on every type of serious violent crime.” In the first 5 months of the 2010 *yanda* from June to the end of October, the public security organs uncovered over 515,000 cases and over 457,000 criminal suspects were arrested.³ Similar to the political mass campaigns of the Mao Era, the anticrime campaigns included arrest and sentencing rallies that aimed to *stigmatize* the suspect or convict in public arenas. In a relatively communitarian society such as China, the theatrics of arresting, adjudication, and sentencing in fact extend beyond their immediate function of carrying the message of the power of the state in combating crime. They also carry the images of community disapproval and moral condemnation

(X. Chen, 2002), and therefore, are acting as part of a wider program of public education and crime control in Chinese society.

Imprisonment: Contradictions in “Punishment” and “Reformation” Traditions

Ganhua and Paternalistic Corrections. Resembling Mao’s *laogai* system, which was operated under the principle of “combining punishment with reformation” (惩办与改造相结合), apart from punishment, *corrections* were still the most important functions of the Chinese prison after the 1980s. In defining the prison’s functions, the Prison Law of the People’s Republic of China states that “[a] prison shall, with regard to prisoners, implement the principle of combining punishment with reform and combining education with labour, in order to transform them into law-abiding citizens” (Article 3). The current correctional rationale of the prison, as the tradition of “detering through fear of punishment,” can also be best understood via reference to the past: the belief that individuals are malleable and can be educated and persuaded to reform themselves and consequently behave in proper ways.

In the 1950s, the correctional aspect of the prison was largely political, trying to root out the wrong belief in the political prisoner’s mind. In the new era, crime was viewed primarily as a result of deviant thought, and a change of heart was possible by reformation (Shaw, 1998). To form and reform the individual’s mind and behavior, the *ganhua* (感化) and *patriarchal* approaches continues to be considered the “ideal.” As Dikötter (2005) demonstrated, the notion of *ganhua* (感化) was never seriously challenged in China and is still an important part of Chinese thinking regarding prison reform. According to D. P. Zhang (2010, p. 4) the notion of *ganhua* (感化) is the “core of penology” in modern China. *Guanhua* has no direct English language equivalent, but could be roughly translated as “helping people (both thought and behavior) toward positive changes through specific actions or kind persuasions.”⁴ In the prison/correctional system, the term *ganhuajiaoyu* (感化教育) features a “holistic or comprehensive” strategy (P. Wang & Lin, 2009). That is, a variety of social forces, such as family, school, and communities, should be mobilized to support and help the prisoners psychologically as well as financially, and a variety of methods, such as legal–moral education, cultural education, career education, and productive labor, should be adopted to inspire the prisoners’ willingness to self-improve and to comply with social norms.

As we have seen, Chinese families and communities, which historically served various important functions, such as taxation, military, mediation, and welfare services have long been important institutions of informal social

control in China. Under these communitarian social conditions, individuals almost always find themselves belonging to a closely integrated group that reflects their honor or shame. This group concern and mutual “interest” also ensure interdependency and reinforces *ganhua* as a mechanism in reforming wrongdoers (Wu & Vander Beken, 2012). Before the 1980s, however, the practice of involving social forces in reforming prisoners lacked formalization and professionalization. Since the 1980s, the Chinese leaders have attempted to build up a more stable and formal legal order and Mao’s mass line strategy, which emphasized the importance of mobilizing and organizing the masses to participate in the processes of criminal justice have been reaffirmed and developed officially. In 1990, the Bureau of Labor Reform of the Ministry of Justice of the PRC published “the Summary of the Working Conference of Audio-visual Education and Deepening Education Reformation” and required the prisons to work with various social forces and to sign the “help-education contract” (*bangjiaoxieyi* 帮教协议) with the social forces to educate, persuade, and reform the inmates.

According to Article 68 of the “Prison Law of the People’s Republic of China,” promulgated on December 29, 1994, and amended on October 26, 2012, “[s]tate organs, public organizations, units of armed forces, enterprises, institutions, personage of various circles and family members or relatives of prisoners shall assist prisons in doing a good job in the education and reform of prisoners.” In 2003, the “Provisions on the Work of Prison Education and Reform” was adopted and provided details on “Social Help and Education” (*shehuibangjiao* 社会帮教) in Chapter VI. The social help and education included the help from “all forces of the society” (Article 39): the families, the work units (*danwei* 单位), the schools, the local governments, the volunteers, and the legal aid organizations (Article 40, 41, 42). As an empirical matter, using data from a survey of inmates in prison and reform camps in the city of *Tianjin*, a study of China’s *bang-jiao* (帮教)⁵ strategy found that the crime control strategy in China reflects its distinctively communitarian character: “[o]rganizing people from all parts of an offender’s life (family, school, neighborhood, work, police) into a focused group appears to provide a formidable social force for reintegrating offenders into the community” (L. Zhang et al., 1996, p. 220). From a theoretical standpoint, the *bang-jiao* strategy thus can be viewed as an organizational mechanism to facilitate the social control process that Braithwaite (1989) calls “reintegrative shaming,” a societal response to crime that affirms wrongdoing, while encouraging the acceptance of offenders into society (pp. 84-97).

The *ganhua* approach is also reflected in the *patriarchal* or *fatherly* approach in the prison regime. It is worth noting that Chinese patriarchy fundamentally differs from that found in the West. Jamieson (1921) noted that

there is no Chinese concept equivalent to *patria potestas*; in Chinese, the relevant concept identifying patriarchy is *xiao* (孝). More specifically, *patria potestas* defines jurisdictions within which a person can exercise personal discretion, and accordingly defines relations of authority between people. *Xiao* defines roles, actions, and values that accompany the roles, and, accordingly, a person's duty to a role. These two concepts imply different ideas about the nature of patriarchal domination both within and especially beyond the family (Hamilton, 1984). Hence in China, a patriarchal relationship between the cadre and the inmate means that the prison officer, with an integrative use of sentiment and reason, should act toward the prisoner as a caring father toward his son (Dikötter, 2005; Jiang et al., 2014). The "Provisions on the Work of Prison Education and Reform" has a specific chapter concerning "Individual Education" (Chapter III). "Individual Education" means that "[a] prison shall, in light of each prisoner's specific information, arrange the people's police of the prison to hold pertinent individual education for him" (Article 14). Empirically, interviews with the prison officers also found that the patriarchal approach was used to reform inmates' thought and behavior in the prisons.⁶ As Chao Zhang, who is a prison officer working in *yunhe* (运河) prison in *shangdong* (山东) province and put full effort in *guanhuajiaoyu*, stated,

Concerning those prisoners who convicted of serious crimes, we have obligations and confidence to reform them into law-abiding citizens when they are released. Because those prisoners often serve long-term imprisonment and are under immense [psychological] pressure, we need to use different education methods and individualized plan and adopt the principle of "teaching according to aptitude" [to reform them]. (Lin & Liu, 2014)

The dominance of the punishment tradition. However, the *ganhua* and paternalistic approaches to prison corrections do not meet the expectations in practice. Actually, due to the *paradoxical* goals of punishment and education at the level of the *implementation* of prison sentences, the safeguards of the rights of prisoners are not fully recognized in the law, leading to practices that strayed from reformative incarceration. There is little doubt about the importance of the recognition of prisoner's rights in confinement, because the imbalance of power between prison staff and inmates entails an inherent risk of abuse and inhumane or degrading treatment. China's Prison Law dictates that

[t]he human dignity of a prisoner shall not be degraded, and his personal safety, lawful properties, and rights to defence, petition, complaint, and accusation, as well as other rights that have not been rescinded or restricted according to law, shall not be violated. (Article 7)

It nevertheless, as illustrated, also clearly states that, in addition to education, “punishment” is the principle of the administration of prisons. Consequently, the management of the prison, in general, focuses more on the need to *supervise* (*guanshu* 管束) and *control* (*kongzhi* 控制), than on restraining prison officers’ powers. This perspective is reflected by the strong emphasis on requiring inmates to be “obedient.” “A prisoner must strictly observe laws, regulations, rules, and discipline of the prison, subject himself to control, accept education, and take part in labour” (Prison Law, Article 7). Apparently, the law presupposes that the prison officer, being impartial and professional, can be largely trusted to guarantee the well-being of prisoners. However, conceived in the first place as a project that aims to deter crime through fear of punishment and stigmatizing inmates, the prison is inevitably influenced by the labels put prisoners such as “social pariah” (*shehuiqier* 社会弃儿) or “social dreg” (*shehuizhazi* 社会渣子), leading to the perception that the rights of the prisoners are not fundamental but originate from the *mercy* of the government.

As W. Gao (2006) shows, in the eyes of prison officers, inmates are generally considered to be social rubbish. Furthermore empirical studies of the relationship between punishment and interdependency in China found that Chinese informal social control appears to be paradoxical (Lu, Zhang, & Miethe, 2002; L. Zhang & Messner, 1994). It simultaneously commits to the principle of reintegrative shaming with vigorous efforts to reform and reintegrate prisoners, and to stigmatization by means of *yanda* campaigns with public display and severe punishment that often maximizes the effects of shame.

Thus, although the rights of prisoners are clearly defined in the law, in practice, the number of rights actually “granted” to the prisoner is closely related to how closely the prisoner follows the instructions of the officer. The result, unsurprisingly, is that correctional purposes are undermined by punishment intentions as imprisonment starts to engender as many problems as it was designed to solve. Overcrowding, psychological depression, and exploitative labor (W. Gao, 2006) are only a few of the many examples of the problems that have emerged in the Chinese prison system.

Conclusion

The present historical analysis reveals that, historically, Chinese leadership, based on the idea of “the supremacy of *de* and the subservience of *xing*” (morality given priority over penalty 德主刑辅) and through the interplay between Confucianism’s moral standards and legalist bureaucracy, has relied heavily on informal means to mitigate deviancy and resocialize individuals.

It also established a “powerful” image of the formal criminal apparatus that was responsible for punishing only gravely “immoral” offenders who should be seriously blamed and shamed. Meanwhile, based on the traditional belief that humans are correctable and in the transformative capacities of education and persuasion, it is also the goal of the Chinese prison to bring about a change of heart and mind in criminal offenders. The Chinese prison thus has two distinctive functions. The *deterrence/punishment* function emphasizes the shaming and repression for order maintenance, whereas the *reformation* function stresses the educative and rehabilitative value of imprisonment.

The Chinese prison system, with its dual goals of punishment and reformation, has either positive or negative effects depending on how it runs. On one hand, in a communitarian society, the symbolic nature of penal practices and state-organized and community-based corrections has the potential to encourage the reacceptance of inmates back into society. A promising modern framework in crime control is “reintegrative shaming,” described most notably in Braithwaite’s (1989) work. Braithwaite argues that shaming in punishment has both crime-inhibiting and crime-amplifying effects. When shaming is done reintegratively, it controls and reduces crime. Reintegrative shaming refers to a societal response to deviance that affirms wrongdoing while providing opportunities for the offender to reintegrate back into society. This discussion in many ways seems to fit the realities of the Chinese penal system. In the Chinese example, we observe both the practices of shaming in a thick cultural context and the practice of the state taking the primary responsibility in providing facilities to assist the reintegration of the inmates. However, it is worth noting that, on the other hand, the Chinese experience also suggests that the rhetoric, perceptions, and emotions invoked by the stigmatizing and forced approach—confirmation of a deviant “inferior” status required for control—has the effect of undermining the humanitarian correctional strategy, making it more difficult for the latter to carry out its policies and even leading to the abuse of power in prisons.

Factually, the current Chinese punishment system, in practice, relies greatly on the benefits of labeling in preventing and controlling crime, but it fails to adequately recognize the dangerous aspects of stigmatizing shaming in prison corrections and, especially, the protection of prisoners’ rights. As illustrated, due to the existence of the paradoxical goals of punishment and reformation at the level of the implementation of prison sentences, the scope of the rights of prisoners is opaque and vague, and therefore, opens to diverse interpretations. Notably, the relative autonomy of the goals of the implementation of sentences as compared with the goals of sentencing has been debated by many legal scholars and has been clearly recognized in continental European legal doctrines (van Zyl Smit & Snacken, 2009). van Zyl Smit and Snacken (2009), for

example, have explained that sentencing is an important symbolic moment in which a judge publicly expresses the censure of a particular offense with due regard to the responsibility and guilt of the offender, so the sentencing decision is primarily directed toward the past, namely, the offense that has taken place. Nonetheless, the theory of relative autonomy recognizes the complexity of the various aims of punishment at different stages of the criminal process and emphasizes that their importance may vary between the moment of imposing sentence and the implementation of the sentence. Concerning the implementation of prison sentences, as the majority of prisoners will eventually be released into society, the implementation of the prison sentence must be oriented toward the future, that is, toward reintegration/resocialization. In the theory of “reintegrative shaming,” Braithwaite (1989) also suggests that while shaming might contribute to crime control, shaming is also thought to encourage future criminal behavior when much of the effort is directed at labeling, but little effort is made to delabel the offender. Taken together, there are sound theoretical reasons to deemphasize the “punishment” function of imprisonment and the “forced” nature of corrections in the Chinese Prison law and to recognize rehabilitation as the primary goal of the implementation of prison sentences.

As the legal position of prisoners can only be determined on the basis of the clear aims of the detention (Lippke, 2002), recognition of rehabilitation as the primary aim of the administration of prisons facilitates discussions on the exact scope and content of prisoners’ rights in China. Furthermore, to address the issue of which rights are legitimately curtailed or intruded upon by incarceration, we must fully consider the Chinese legal culture that puts great emphasis on the *ganhua* and *paternalistic* approaches to corrections. Contrary to the Western culture in which individual rights and mental independence/autonomy are highly respected, the Chinese are inclined to feel that individuals are part of a closely knit collectivity and that the behavior of the individual should be guided by *roles*. Nonetheless, the Chinese approaches have suffered from a lack of a systematic, coherent theory for the recognition of prisoners’ rights in punishment. The current *ganhua* and paternalistic approaches are too abstract, proceeding without any reference to institutional issues and are too piecemeal, discussing prisoner’s rights generally while lacking systematic and coherent discussions that could direct the accumulation of prisoners’ specific, basic rights. Therefore, it will remain a challenge for comparative scholars in the future to either test Western theories in a Chinese setting or to create new theories regarding the full recognition and implementation of prisoners’ rights to facilitate their eventual reintegration into society. For instance, to test Western theories and to overcome the obstacle of shared knowledge between Western/European and Chinese legal scholars, both prisoners’ fundamental rights against state infringements and rights to state action under the European

legal perspective (van Zyl Smit & Snacken, 2009) must be carefully analyzed against the Chinese legal culture that puts great emphasis on *ganhua* and paternalistic corrections to generate clear and workable recommendations for Chinese legislative initiatives.

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Notes

1. Promulgated in October 1957.
2. *Laogai* (劳改), which means “reform through labour” had been used to refer to the use of penal labor and prison farms in the PRC. In 1994, the *laogai* system was renamed “prisons.” *Laogai* is different from *laojiao* (劳教), or reeducation through labor, which was a system of administrative detentions in the PRC (People’s Republic of China) in place from 1957 to 2013.
3. The 2010 strike-hard campaign: a well-prepared campaign and “the most gelivable” campaign [2010严打整治: 有备之战获誉“第一给力”行动]. January 14, 2011). *WWW.MPS.GOV.CN*. Retrieved from <http://www.mps.gov.cn/n2253534/n2253535/c4137484/content.html>
4. Xinhua dictionary 11th edition (Chinese edition; 2011), Commercial Press, Beijing.
5. *Bang-jiao* means assisting, guiding, and directing offenders, especially juvenile offenders to reintegrate into the community (L. Zhang et al., 1996, p. 208).
6. The prison officer uses “Familial Affection” to *ganhua* prisoners [狱警用“亲情文化牌”感化服刑人员]. *www.toutiao.com*. Retrieved from <http://toutiao.com/i6280345328201761281/>; Not taking a sentence after 8 years in prison; having the resentment of being severely punished [by imprisonment]; a stubborn prisoner was “moved” [by *ganhua*] by the prison officer [入狱8年未说1句曾怨恨称自己判得重顽固犯被狱警感化]. (May 22, 2016). *www.china.com.cn*. Retrieved from http://www.sohu.com/a/76595238_116897/; The tough female prison officer also has soft heart; using true heart to *ganhua* prisoners [女汉子狱警也有别样温情用真心真情感化服刑人员]. *chongqingwanbao*. Retrieved from <https://xw.qq.com/cmsid/20,150,307,008,439>

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