

A new study lifts the lid on how China's hazy criminal justice system works, writes **Jerome Cohen**

Not a pretty picture

How the government of one-fifth of humanity punishes its own people continues to attract worldwide attention. Many foreign media reports concern human rights activists victimised by

the mainland's blatantly unfair criminal justice system, such as artist Ai Weiwei (艾未未). Others emphasise the faceless thousands executed every year for non-political offences. Yet, although much is known about published laws and some individual cases, surprisingly little reliable data exists about the functioning of the system as a whole.

This week's publication of *Criminal Justice in China: An Empirical Inquiry* represents a giant step forward in expanding our understanding of how the mainland's formal criminal process works. This volume, the product of years of painstaking research by Professor Mike McConville, dean of the faculty of law of the Chinese University of Hong Kong, and an able group of colleagues, dwarfs anything previously available in scale, scope and comprehensiveness.

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The picture that emerges is one of a Communist Party-led, police-dominated criminal justice system in which prosecutors and especially judges play generally passive and restricted roles. In this respect, China is very different from not only Anglo-American jurisdictions, but also its democratic East Asian neighbours – Taiwan, South Korea and Japan, where prosecutors, whatever their imperfections, now actively supervise and restrain the police. In all democratic countries, courts as well as prosecutors are sympathetic to the challenges facing police, but usually act with at least some independent political authority to provide checks on police powers. In China, by contrast, the police are king, in law as well as practice.

It is important, of course, to improve the protection offered to suspected offenders by China's criminal procedure legislation, which is due for another round of revision before the end of the year, and

McConville's work demonstrates the need for further reforms in all criminal cases. For example, the revised law should clearly guarantee defence lawyers' ability to genuinely assist detained suspects undergoing interrogation. It should also effectively require witnesses to testify in court trials, so that they can be cross-examined.

Yet, as McConville notes, whatever the reforms introduced, China's Criminal Procedure Law always seems to contain enough ambiguities, loopholes and exceptions to enable the police to retain unfettered powers, thanks to the lobbying power of the Ministry of Public Security, the Ministry of State Security and the Communist Party's Central Political and Legal Committee. Moreover, the system affords no effective ways for lawyers to challenge self-serving, plainly illegitimate police interpretations and misapplications of the law.

Even more fundamentally, McConville emphasises the extent to which contemporary Chinese culture buttresses police distortions of those universal legal norms that do manage to get embedded in the country's legislation. In practice, those protections are undermined by antagonistic values, attitudes and customs that derive not only from today's Leninist "people's democratic dictatorship" but also from the impact of traditional Chinese society. Lack of sympathy for the rights of criminal suspects and lack of respect for those who defend them run very deep in China, as does the primacy of *guanxi* (human relationships) over rules.

Moreover, on the mainland punishment also takes many forms that go beyond the formal criminal process. The police have many options for depriving people of their personal freedom without even the cursory review of other agencies. Every year, they detain huge numbers of minor offenders for up to 15 days per infraction for violations of the Public Security Administration Punishment Law, which are not considered to be crimes.

They also detain hundreds of thousands of more serious offenders for up to three years of incarceration known as "re-education through labour", with the possibility of a fourth year being added. Yet this, too, is not deemed to be criminal punishment, but merely an "administrative" sanction that is not

deserving of even the minimal procedural protection associated with China's formal criminal process. The police are similarly authorised to detain drug and prostitution offenders for significant periods without seeking approval from prosecutors, judges or any other officials.

Most disturbingly, the police and other officials increasingly are imposing entirely extra-legal detention of varying durations on a broad range of people. Many would-be petitioners have been illegally consigned to unofficial, unidentified "black jails". Without a shred of legal authorisation, police "disappear" human rights activists and their lawyers, often subjecting them to physical and psychological abuses.

It is more than a year since the courageous lawyer Gao Zhisheng (高智晟) vanished for the second time after revealing his hideous torture by police. Recently, the domestic security divisions of several cities' police bureaus have been disappearing "rights lawyers" for periods ranging from three to 70 days in an obvious attempt at intimidation. Some find that, even after completing prison sentences, police continue to forcibly isolate them from society, restricting them to their homes, as has been the case for Shanghai

lawyer Zheng Enchong since 2006, and, since last year, for the blind "barefoot lawyer" Chen Guangcheng (陳光誠).

When it comes to detention, only the party discipline inspection committees enjoy priority over the police. They regularly impose the dreaded *shuanggui*, a euphemism for the often lengthy, incommunicado confinement that party members suffer while undergoing investigation for corruption. No legal rules protect the party's approximately 80 million members from this nightmare. Those who are ultimately found by the party to have engaged in serious misconduct are only then transferred for official prosecution.

These non-criminal and extra-legal measures were beyond the scope of Professor McConville's latest work, but we can hope that he and his team might soon undertake the challenge of producing an equally insightful portrayal of these even more secretive police actions.

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