Chinese law on juvenile delinquency and its efficiency
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Abstract

An overall reduction of juvenile criminal cases in China can be explained by the reform of procedural law which allows Chinese prosecutors to stop criminal proceedings in many cases and apply educational measures. Another reason for the success in reducing juvenile delinquency can be seen in the ideological side of combating the youth crime. Chinese ideological response to juvenile crime is a mixture of Confucian culture and Marxist theory. These are not new. What is new is the adaptation of the Western idea of procedural rights at the same time. This eclectic approach achieved good results in reducing juvenile delinquency rates. The presence of Confucian values offers a good ground for restorative justice practices to be administered by the courts. This strong emphasis on moral education makes Chinese law different from the Western models of juvenile justice which lacks the presence of social ideals, morality, patriotism, and collectivism. The paper examines legal framework of juvenile delinquency law in the Chinese Confucian and socialist ideological context.

Keywords: China, Juvenile delinquency, Criminal procedural law, Ideology, Confucianism, Marxism.

บทคัดย่อ

การปรับปรุงกฎหมายวิธีพิจารณาความอาญาส่งผลให้จำนวนคดีอาชญากรรมของเด็กและเยาวชนในประเทศจีนโดยทั่วไปมีจำนวนลดลง ซึ่งการปรับปรุงดังกล่าวที่หันมาใช้มาตรการทางการศึกษาช่วยให้อัยการจีนสามารถยุติกระบวนการพิจารณาคดีอาญาได้ในหลายๆ คดี นอกจากนั้นสาเหตุอีกประการหนึ่งที่มีส่วนทำให้การกระทำความผิดทางอาญาของเด็กและเยาวชนมีจำนวนลดลงคืออุดมการณ์ในการต่อต้านอาชญากรรมของเด็กและเยาวชนของจีนที่มีพื้นฐานมาจากการผสมผสานระหว่างวัฒนธรรมขงจื้อและทฤษฎีมาร์กซิสต์ไปพร้อมๆ กับการรับเอาแนวคิดตะวันตกในเรื่องสิทธิเชิงกระบวนการที่ทำให้เกิดผลดีในการลดอัตราการกระทำผิดของเด็กและเยาวชน การมีอยู่ของค่านิยมลัทธิขงจื๊อนั้นเป็นพื้นฐานที่ดีสำหรับการดำเนินกระบวนการยุติธรรมเชิงสมานฉันท์ที่จะดำเนินการโดยฝ่ายตุลาการ การให้ความสำคัญอย่างมากกับการศึกษาในด้านศีลธรรมดังกล่าวทำให้กฎหมายของจีนแตกต่างจากรูปแบบกระบวนการยุติธรรมของคดีเด็กและเยาวชนแบบตะวันตกซึ่งขาดอุดมคติทางสังคม ศีลธรรม ความรักชาติและลัทธิส่วนรวม บทความนี้จะพิจารณาถึงกรอบในทางกฎหมายว่าด้วยการกระทำผิดของเด็กและเยาวชนในบริบทอุดมการณ์ขงจื๊อและบริบทสังคมนิยมของประเทศจีน

คำสำคัญ: ประเทศจีน, การกระทำความผิดของเด็กและเยาวชน, กฎหมายวิธีพิจารณาคดีอาญา, อุดมการณ์, ลัทธิขงจื๊อ, ลัทธิมาร์กซิสต์

Introduction

It has been reported by the official China Daily in 2017, that there has been achieved a dramatic reduction in recorded juvenile crime: "The number of court cases involving minors - children age 17 and younger - has fallen by almost 50 percent in the past five years, according to a report published by the National Bureau of Statistics. The report shows that China's courts dealt with 35,743 cases involving minors last year, a fall of 47.6 percent compared with 2012."[1] This report stands in a sharp contrast with the reports some over ten years ago. Similar to many countries, China experienced a strong growth of juvenile crime in the beginning of the century. One Chinese judge acknowledged in 2005 that juvenile crime was growing at about 10 per cent every year.[2] According to other figures released at a seminar comprising juvenile tribunal judges and scholars in Beijing in September 2005, the number of convicted offenders in the first seven months of that year was 23 per cent higher than the same period in 2004. Rape, robbery, theft, assault and fighting were the most frequently committed crimes by young offenders since 2002.[3] Thus, the report in 2017 indicated a significant achievement in the Chinese efforts to control youth crime.

The decline of an overall juvenile delinquency in China continued in 2018. However, in 2019, China saw a moderate increase in juvenile criminal cases to the number of 61,295 prosecuted minors, 5.12% higher than the year before (58,307 minors). [4] The number remains still much lower than in 2014 when 77,405 juveniles were prosecuted. While a decline continued in relation to many offences, particularly for the age of 14 to 16 year-olds, the most dramatic increase is observed in relation to sexual offences including rape.[5] Despite this recent increase, the overall reduction of juvenile crime in China is dramatic. There can be several factors that explain the tendency. One is demographic. The Chinese government implemented until recently one child policy.[6] There are also other fundamental changes

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[1] Cao Yin. "Revised law sees fall in recorded juvenile crime." *China Daily,* December 21, 2017, [online] Available from : https://www.chinadaily.com.cn/newsrepublic/2017-12/21/content_35356108.htm. [24 February 2021] See also: *China daily* "Juvenile delinquency cases decline for 9 years in China." February 18, 2018 [online] Available from : https://www.chinadailyhk.com/articles/30/232/50/1518949835048.html. [24 February 2021]

[2] Cao Li. "Youth Offenders Get Voluntary Service" *China daily,* April 16, 2005, [online] Available from : http://www.chinadaily.com.cn/english/doc/2005-04/16/content_434743.htm [24 February 2021]

[3] Liu Li. "Legal reform likely as juvenile crime rises." *China Daily,* September 17, 2005. [online] Available from : http://www.chinadaily.com.cn/english/doc/2005-09/17/content_478587.htm [24 February 2021]

[4] Supreme People's Procuratorate of the PRC. *White Paper on Juvenile Procuratorial Work (2014-2019)* June 1, 2020. [online] Available from : https://www.spp.gov.cn/xwfbh/wsfbt/202006/t20200601_463698.shtml?XFgSUhveL5u1=1602212531094#2. [24 February 2021]

[5] Ibid.

[6] Fernando Gavin. "China has dropped its one-child policy, but women aren't having more children". February 23, 2018. [online] Available from : http://www.news.com.au/lifestyle/parenting/babies/china-has-dropped-its-onechild-policy-but-women-arent-having-more-children/news-story/4e5fb65604d7a08b97e0384f3cc1cf27 [24 February 2021]

in the Chinese society. This paper will look at two factors which play a significant role in reduction of juvenile delinquency since 2014: legal mechanism of addressing juvenile crime and ideology.

Chinese Legal Response to Juvenile Delinquency

How can the reduction in juvenile crime in China since 2014 be explained? One has to look a little bit back to the previous history of juvenile crime and legal responses to it to satisfactory answer this question. Some of the reasons of growing juvenile crimes in China were very similar to other developing countries: the change in the social structure of the society, particularly urbanization and increasing social inequality, weakening of family control, materialism, wide spread of drugs and alcohol, a fundamental change in sexual attitudes and behaviour.[7] China was first attempting to adopt the Western model for juvenile delinquency justice since the reforms have been initiated in the end of 1970s. There was a conspicuous shift from an informal to a more formal system of control which found its expression in an increase of custodial sentences for juvenile offenders.[8] At the same time, China still lacked administrative procedures clearly defined by law for handling juvenile delinquents.[9]

The overall structure of juvenile justice system was rather chaotic in the beginning of the century. The first juvenile tribunal was established in 1984 in Shanghai. The initiative came from the local courts and authorities rather than from the central government.[10] Before that, juvenile offenders were treated in the same way as the adults.[11] This treatment was blamed for the high degree of recidivism. After juvenile tribunals were set up under the principles of "instruction, reform and redemption" instead of imposing punishment on the youth, the recidivism rate was significantly reduced. Prison sentences were normally replaced by probation with a strong emphasis on moral education. Offenders were sent to detention homes. The success of Shanghai tribunal's policy led to the establishment of such tribunals all throughout China. The specificity of juvenile delinquency in Shanghai was that much of it was attributed to youth gangs. The later campaign against them led to tougher measures which affected the policy of juvenile tribunals. "The meaning of juvenile court in China might

[7] Wan-Ning Bao, **Delinquent youth in a transforming China: a generation of strain.** (Springer. 2018).

[8] Dennis Wong, "Juvenile protection and delinquency prevention policies in China." **Australian & New Zealand Journal of Criminology** 37.1_suppl 2004: 52-66.

[9] Ibid. P. 62.

[10] Lening Zhang, "Juvenile delinquency and justice in contemporary China: a critical review of the literature over 15 years." **Crime, law and social change** 50.3 2008: 149-160.

[11] Ibid.

be quite different from its Western counterpart, and it is more appropriate to refer to a juvenile tribunal. The Supreme Court and the local courts have established the juvenile courts with different forms. For example, the Supreme Court has set up the steering division for juvenile tribunals within its research office, whereas several higher courts such as the Beijing Higher Court have set up juvenile tribunals."[12]

Surprisingly, the complete uniformity of juvenile tribunals is still lacking. "The terms utilized to describe Chinese juvenile tribunals vary across jurisdictions. For example, they can be called criminal tribunal's juvenile collegiate panel, juvenile criminal tribunal, or juvenile comprehensive tribunal. Official data from 2016 show that there are 2,249 juvenile tribunals, including 1,246 collegiate panels, 405 juvenile criminal tribunals, 598 comprehensive tribunals, representing a diversified field practice."[13] However, juvenile tribunals are set up in the majority of basic (primary) courts,[14] which constitute the first level of Chinese judicial system. All Chinese courts are divided into four levels. There are basic people's courts, intermediate people's courts, High People's Courts and the Supreme Court.[15] Generally, most of the criminal cases are tried in primary courts. Only very serious cases are tried in intermediate courts. Eventually, all courts on a higher level also established juvenile tribunals following the guidance from the Supreme Court.[16]

So far, there is no separate legislative act which sets up procedural law specifically for juvenile criminal cases. The procedure is largely regulated by the Criminal Procedure Code of 2012, which contains a special procedure section for juvenile cases.[17] China became a member to the *UN Convention on the Rights of the Child and entered into the United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("the Beijing Rules") in 1991. Therefore, its law does provide a special treatment of juveniles offenders. The issues outside the scope of criminal procedure are covered by two major legislative acts: the Law of the Protection of Juveniles of PRC (1991, 2006)[18] and the *Law of Prevention*

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[12] Ruo Hui Zhao, Hong Wei Zhang, and Jianhong Liu, "China's juvenile justice: A system in transition." In: Winterdyk, John A., ed. **Juvenile justice: International perspectives, models and trends** (Boca Raton, Florida: CRC Press, 2014), 137-162. 152.

[13] Hong Wei Zhang, and He, Ni "Phi", "Status, Issues, and Challenges of Chinese Juvenile Justice" in **Journal of Contemporary Criminal Justice** (2018): 34(2), 219-229. 223.

[14] Guoling Zhao, "Juvenile criminal justice system in China" in Liqun Cao, Ivan Y. Sun, and Bill Hebenton, (Eds.). **The Routledge handbook of Chinese criminology** (London: Routledge, 2014) 103-115. 106.

[15] Yifan Wang, Sarah Biddulph, and Andrew Godwin, **A Brief Introduction to the Chinese Judicial System and Court Hierarchy** (Melbourne: Asian Law Centre, 2017).

[16] Zhao, "Juvenile criminal justice system in China," 105-106.

[17] Criminal Procedure Code of the PRC, 2012. Articles 266-276.

[18] 《中华人民共和国未成年人保护法》[Law of the People's Republic of China on the Protection of Minors] (People's Republic of China) Standing Committee of the National People's Congress, Order No.70, 1 June 2007.English translation is available at : http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383869.htm.

of Juvenile Delinquency of PRC (1999).[19] The scope of the first statute is much broader than the issues of juvenile crime. The latter statute, adopted in 1999, relates directly to juvenile delinquency. It is of great interest because it is very different from the content of legislation in other countries. It primarily deals with the prevention of juvenile delinquency rather than dealing with juvenile criminal acts. However, several articles cover the ways Chinese juvenile criminal justice system must function.

Those laws as well as the newly revised *Criminal Law of PRC and Criminal Procedure Law of PRC* 2012[20] contain only general provisions concerning the penalty and procedure of juvenile delinquency. There are many by-laws which regulate the issues of youth justice in a more detail: Rules of Public Security Organs in Handling Juvenile Lawbreaking and Delinquency Cases, Rules of People's Prosecution Service in Handling Juvenile Delinquency Cases, Certain Rules of the Supreme People's Court in Trial Juvenile Delinquency Cases, etc.[21]

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[19] 《中华人民共和国预防未成年人犯罪法》 [Law of the People's Republic of China on Prevention of Juvenile Delinquency 1999] (People's Republic of China) Standing Committee of the National People's Congress, Order No. 66, 11 January 1999, revised in 26 October 2012. English translation is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383561.htm.

[20] 《中华人民共和国刑事诉讼法》[Criminal Procedure Law of People's Republic of China] (People's Republic of China) National People's Congress Stand Committee, Order No.55, 14 March 2012. English translation is available at https://www.cecc.gov/resources/legal-provisions/criminal-procedure-law-of-the-peoples-republic-of-china

[21] See for example:《关于办理少年刑事案件的若干规定（试行）》[Several Provisions on Trial Criminal Cases Involve Young Offenders Operation (Trial)] (People's Republic of China) Supreme People's Court, January 1991.

《关于审理少年刑事案件聘请特邀陪审员的联合通知》 [Notice on Employ Special Jury on Juvenile Criminal Trail] (People's Republic of China) Supreme People's Court, the National Education Committee, the Central Committee of the Communist Youth League, All-China Federation of Trade Unions, Women's Federation, 15 April 1991. [online] Available from : http://www1.people-daily.com.cn/item/flfgk/gwyfg/1991/113610199101.html. [24 February 2021]

《公安机关办理未成年人违法犯罪案件的规定》 [Rules for the Public Security's Handling of Criminal Cases Involving Minors] (People's Republic of China) Ministry of Public Security, 23 October 1995. [online] Available from : https://www.waizi.org.cn/doc/89582.html. [24 February 2021]

《关于审理未成年人刑事案件的若干规定》 [Several Provisions on Sentencing Young Offenders] (People's Republic of China) Supreme People's Court, 12 April 2001.

《人民检察院关于办理未成年人刑事案件的规定》 [Notice of the Supreme People's Procuratorate on Issuing the Rules for the People's Procuratorate's Handling of Criminal 14 Cases Involving Minors] (People's Republic of China) Supreme People's Procuratorate, 3 March 2002. [online] Available from : http://www.humanrights.cn/html/2014/2_0617/731.html [24 February 2021]

《最高人民检察院关于进一步加强未成年人刑事检察工作的通知》[Notice of the Supreme People's Procuratorate on Further Strengthening Criminal Procuratorial Work related to Minors] (People's Republic of China) Supreme People's Procuratorate, 2 December 2014. [online] Available from : https://www.spp.gov.cn/xwfbh/wsfbt/201501/t20150109_87789_1.shtml [24 February 2021]

《中华人民共和国刑事诉讼 法》的解释》 [Interpretation of Supreme People's Court on Application of Criminal Procedure Law] (People's Republic of China) People's Supreme Court, 1 January 2013. 《关于审理未成年人刑事案件的若干规定》 [Several Provisions on Sentencing Young Offenders] (People's Republic of China) Supreme People's Court, 12 April 2001, invalid in 2015, replace by 《最高人民法院关于适用》

《最高人民检察院关于进一步加强未成年人刑事检察工作的通知》[Notice of the Supreme People's Procuratorate on Further Strengthening Criminal Procuratorial Work related to Minors] (People's Republic of China) Supreme People's Procuratorate, 2 December 2014. [online] Available from : https://www.spp.gov.cn/xwfbh/wsfbt/201501/t20150109_87789_1.shtml [24 February 2021]

Those by-laws have a tremendous influence on the way the process against juvenile offenders is carried out. For example, before their enactment, it was reported that the judge of the tribunal himself conducted investigation and did sentencing.[22] The reason for broad investigating powers was the necessity for a judge to understand well the offender in order to educate him. That eventually was considered as making judges in the juvenile tribunals partial and leading to tough penalties for juveniles even by the Chinese standards. At the moment, there are special departments in the office of the public prosecutor which deal with juvenile cases.[23]

There are also lay judges who are recruited from educational, political, and social institutions.[24] It appears, however, that those lay persons do not actually decide cases.[25] Their task is to assist the professional judges. They are also involved in a unique socialist law practice of regular visiting schools and families of the delinquents by the officials to gather information concerning the delinquent and his background. This system functions not only in the post-trial process of supervising the reformation of the delinquent behaviour, but also in the pre-trial period of gathering information used by the prosecutor and the court. Organizing lay persons in the neighbourhood of the offender to do regular visits and to keep an eye on the offender's behaviour could contribute to setting up an efficient system of control over children who are at risk of offending.

Principles of Chinese Juvenile Delinquency Justice

Chinese law as well as the laws of other countries exempts juveniles from the full application of penal laws. Article 49 of Criminal Law of PRC[26] does not allow death penalty to be applied to those who do not reach 18 years of age at the time of committing the crime. Article 17 states:

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[22] *China Women Judges Association.* "Organized System, Current Situation and Development of Chinese Juvenile Tribunal." **The Seventh Biennial Conference of the International Women Judges: conference report.** (Entebbe, Uganda: 09-13 May, 2004), 4.

[23] Zhao et al."China's juvenile justice: A system in transition," 137-162.

[24] Zhuoyu Wang and Hiroshi Fukurai, "China's Lay Participation in the Justice System: Surveys and Interviews of Contemporary Lay Judges in Chinese Courts" in **East Asia's Renewed Respect for the Rule of Law in the 21st** Century. (Leiden: Brill Nijhoff, 2015), 111-136.

[25] Ibid., 135.

[26] 《中华人民共和国刑法 [Criminal Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No. 83, 1 October 1997, revised in 1 November 2015. English translation is available at http://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm.

> *"A person who has reached the age of eighteen who commits a crime shall bear criminal responsibility. A person who has reached the age of fourteen but not the age of eighteen who commits the crimes of intentionally killing another or intentionally injuring another, even causing serious injury or death, and the crimes of rape, robbery, drug trafficking, arson, explosion, and poisoning shall bear criminal responsibility. A person who has reached the age of fourteen but not the age of eighteen who commits a crime shall be given a lesser punishment or a mitigated punishment. When a person is not criminally punished because he has not reached the age of sixteen, the head of his family or guardian is to be ordered to subject him to discipline. When necessary, he may also be given shelter and rehabilitation by the government."*

It appears from the reading of this provision that punishment of minors is foreseen only in the most serious cases, and even in those cases the punishment must be lighter than for adults' cases. These provisions, however, do not spell out the guidelines on how much punishment must be reduced in juvenile cases. It is interesting fact that the duty to ensure that the offender does not commit crime again is mainly given to the head of the family or guardian. This provision reflects the traditional Chinese view on the family as an autonomous sell of the society.

The way in which Chinese Penal Code can be flexibly applied to juvenile cases is seen well in sexual offences committed by the youth. According to Article 236 (2) of Chinese Criminal Law, a person who has sex with a minor girl under the age of 14 is deemed to commit an offence of rape even though the girl has given her consent. Apparently, Chinese courts found some difficulty to apply this provision to the cases where the offender was the minor himself below 16 years of age. The Supreme Court had to concede that Article 236 (2) does not apply to the boys below 16 years of age, if there were no serious consequences and the incidents were few.[27]

[27] See: Article 6 of the Chinese Supreme Court's Interpretation of Some Aspects of Law in Deciding Juvenile Cases《最高人民法院关于审理未成年人刑事案件 具体应用法律若干问题的解释 adopted on January 11, 2006. Chinese Text is available at: http://www.gov.cn/ziliao/flfg/2006-01/24/content_169194.htm.

There is a general principle of Chinese law that the investigating, prosecuting and judging officials must look at the circumstances and the reasons underlying delinquent behavior of minor offenders.[28] In adult cases, the main attention is on the evidence related to the facts of the offence and the guilt of the offender. The underlying reasons and circumstances of criminal behaviour of the adults may still be important in deciding the case, but there is no general obligation in Chinese law for the law officers to take them into account when choosing a measure of punishment for the adults. These things tend to fall under the discretion of the decision makers. In juvenile cases, it is different. The law officers on all stages of criminal law process must look at those reasons and circumstances. In other words, one can speak of a general right of juvenile delinquents that the adverse circumstances of their lives shall be taken into account by the court as a mitigating factor in imposing a penalty. It also applies to all law enforcement officers. The prosecution can also propose to the court a lighter or mitigated punishment, or suspension of punishment, or exemption from punishment altogether.

Similar to other countries, Chinese law adheres to another fundamental principle of juvenile criminal justice on the priority of education over punishment.[29] Chinese legal provisions are full of references to education. It is declared to be the cornerstone principle of preventing juvenile delinquency.[30] Article 6 of the Chinese Law on Juvenile Delinquency states:

> *"Juveniles shall be educated in ideals, morality, the legal system as well as in patriotism, collectivism and socialism. Juveniles who have reached the age of receiving compulsory education shall, while receiving the education mentioned above, be educated for prevention of crimes.*

[28] The principle is reflected in Article 268 of *Criminal Procedure Law of PRC* 2012. This has been well articulated in many provisions of 《关于办理少年刑事案件的若干规定（试行》[Several Provisions on Trial Criminal Cases Involve Young Offenders Operation (Trial)] (People's Republic of China) Supreme People's Court, January 1991. The Chinese text can be found at: http://jb.nbggw.gov.cn/cat/cat111/con_111_6369.html.

[29] See Article 266 of Criminal Procedure Law of PRC 2012.

[30] See Article 2 of Law on Preventing Juvenile Delinquency. 1999.

> *Education for prevention of juvenile delinquency is for the purpose of enhancing juveniles' legal conceptions, helping them heed the harm done to themselves, their families and the community by their violations of law and criminal actions and become aware of the legal responsibilities incurred by such violations and actions and of the importance of obeying rules of discipline and laws and preventing themselves from breaking laws and committing crimes."*

One of the important measures applied to juvenile delinquents, is "educational assistance" which is expressed in three major forms.[31] In the first form, the assistance is done by the police in reprimanding offenders and their parents. In the second, the judge, when being satisfied with the evidence of repentance, instruct the offender to study or work in the community under the supervision of schools or work units, and the police. The third form appears in the cases of those young people who are released from detention institutions. They are placed at work and supervised by the work units together with local administration.

Even though Article 6 of the Law on Preventing Juvenile Delinquency underlines the importance of moral education, it appears from the interviews and observations of the author in China that moral education in the form of educational assistance did not always involve a fundamental change in moral attitudes. It was often reduced to a mere calling on the offender to conform to the social rules under the threat of punishment, and controlling his subsequent behaviour. This type of "moral" education in many cases was based not so much on the awakening of the sense of care for other people, as on the awakening of the fear of stigmatization and exclusion in the event of a failure to conform to the expectations of the social group. A "moral" person in such educational system was the one who obeys the seniors such as the police, teachers, local administrators, and parents, rather than the one who chooses to act morally on his ethical beliefs and moral sentiments such as sympathy, love, compassion, etc.

In this context, the recent dramatic decrease of juvenile crime may not necessarily be explained by the effectiveness of educational measures per se. Because of the structural changes in Chinese society, educational assistance unlikely yield the same effect as when applied within a social group without a stronger cohesion, family and neighborhood bonds

[31] Wong, "Juvenile Protection and Delinquency Prevention in China," 59.

of mutual assistance. The increased use of incarceration by Chinese courts prior to the reform of 2012 can serve as an indication of the ineffectiveness of the old educational mechanisms.[32] However, the very fact that Chinese law still continues to acknowledge the importance of moral education of juvenile offenders can open the door for more effective models of rehabilitation of juvenile offenders in changed social and economic environment.

An important principle of Chinese juvenile system is the idea of repentance. If a juvenile offender has shown repentance, then he can be released completely or the measure of punishment can be significantly mitigated. The natural question is how a judge can be sure that repentance is genuine. One official Chinese report stated:

> *"The Supreme People's Court directs in the Explanations on Several Issues of Laws Applicable to Criminal Cases Involving Juveniles that a juvenile offender who can admit to his faults, accept the court sentence, meet the standards of behaviour for the reformed criminals, and study positively cultural and technical know-hows may be regarded as showing signs of "real repentance.""*[33]

It appears that the principle of repentance can work only in the post-trial stage. There is also a provision that if a convicted juvenile has displayed merit, then he can be released. The same report indicated:

> *"A juvenile offender who can expose and denounce the criminal activities committed by inmates, which have later been proved, and who have stopped other inmates from escaping, doing violence to others or sabotaging can be regarded as displaying "merit.""*[34]

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[32] Shlomo Giora Shoham, Ori Beck, and Martin Kett, eds., **International Handbook of Penology and Criminal Justice,** (Boca Raton, Florida: CRC Press, 2007), 29.

[33] Government of China. "A Written Reply Concerning the List of Issues raised by the Committee on the Rights of the Child." 1996. Reply to issue 28. The text was available in 2007: http://www.unhchr.ch/tbs/doc.nsf/0/bc86ee35257da298c125636c004bd33d?Opendocument.

[34] Ibid.

However, Article 271 of the Criminal Law of PRC and Criminal Procedure Law of PRC 2012 allows a People's Procuratorate to make a conditional non-prosecution decision on a minor in relation to the offences contained in Chapter iv (crimes of infringing upon citizens' right of the person and democratic rights), Chapter v (crimes of property violation), and Chapter vi (crimes of obstructing the administration of public order) if the offender can be punished as little as 1 year of imprisonment if there is an evidence of repentance. These parts of criminal code represent an overwhelming majority of juvenile cases. Most provisions allow judges to impose a penalty of one year or less, except where there are aggravating circumstances. For example: Article 234 of Criminal Law of the PRC states:

> *"Whoever intentionally inflicts injury upon another person shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance.*
>
> *Whoever commits the crime mentioned in the preceding paragraph, thus causing severe injury to another person, shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years; if he causes death to the person or, by resorting to especially cruel means, causes severe injury to the person, reducing the person to utter disability, he shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death, except as otherwise specifically provided in this Law."*

In other words, a juvenile who displays repentance may be exempted from prosecution under the first part of this article, since he can be punished as little as 1 year or even less, but he cannot be exempted if the offence is classified under its second paragraph. Article 271 of Criminal Procedure Law of PRC opens the door for applying the principles of restorative justice as it requires consultation with the police and the victim. The news report quoted above explains the reduction of juvenile cases exactly to the application of this provision.[35] Article 272 of the same law specifies further conditions for non-prosecution decision in which educational measures play an important role.

[35] Yin, "Revised law."

This brief examination of the Chinese law on juvenile delinquency shows the unwillingness of Chinese law makers to apply penalties against juvenile offenders on the one hand, and the desire to use education as the means of tackling youth crime. One can see here the influence of the old traditional Confucian moral values. The core of a Confucian approach to juvenile delinquency consists in the belief that moral education can change the life of a person. Moral education is achieved by cultivating certain outward actions towards family and community. The source of moral cultivation lies in the personal effort of the individual assisted by family and community. For Confucius, compliance to the social norms is achieved by performing duties towards family first, and then to the society as a whole.

An empirical research conducted by Hong Lu and others in Shanghai confirms the Confucian influence on judicial decision making.[36] The research was centered at the informal control carried out through shaming by neighbours in some districts of Shanghai. Even though this research did not concentrate on specific cases involving juveniles, (it was done in the form of interviews with almost 500 residents on a basis of a systematic sampling strategy), it indicated a strong presence of Confucian moral ideas in informal forms of control. Such features like filial piety and loyalty continue to play an important role, even though it was noticed that they "have been substantially reduced due to changes in values and family structure."[37] The Confucian values continue to play an important role in the system of juvenile justice.

Thus, Chinese law reflects a remarkable affinity to the use of ethical concepts such as moral education of the offenders, their repentance and moral reformation. It appears that the meaning of those terms in Chinese context offers a distinct *ideological* perception of youth criminal justice different from those found in the developed countries such as Germany, France and the UK. In those countries, the main emphasis is made on the rights of the offender rather than his repentance. The law in the West tends to use ethically neutral and descriptive language. The expression of Chinese statutes may appear to a Western lawyer as a piece of propaganda left over from the old communist past rather than a legal text. That would be a wrong judgement. There is much more than propaganda in the exhortative statements of Chinese legal statutes. There is a deep cultural belief in China

[36] Hong Lu, Lening Zhang, and Terance D. Miethe, "Interdependency, Communitarianism and Reintegrative Shaming in China" in: **Social Science** Vol. 39, 2 (2002): 189-201.

[37] Ibid.

that ethics, politics, and law cannot be separated from each other. Such holistic view of law is different from the West where law is conceived as a mechanism to ensure that the individual rights are observed. There is, however, a new tendency in Chinese law. It is also becoming increasingly concerned with procedural rights.

The Rights of Juveniles

China has adopted international obligations concerning the rights of child by becoming a party to the Convention on the Rights of the Child (1989) in 1992. Article 37(c) of the Convention states:

> *"Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."*

Chinese statutory law also contains the rule prohibiting placing juvenile offenders with adults. As in relation to other procedural rules, the lack of strict enforcement is commonly reported.[38]

Article 269 of Criminal Law of PRC and Criminal Procedure Law of PRC 2012 restricts the application of arrest and requires detention of young suspects to be separate from adults. There is a policy guideline for the investigating officers to let parents or guardian or teacher to be present when interrogating juveniles, but it is implemented at the discretion of the officer: *"when interrogating a juvenile delinquent, if the investigation of a case requires, the head of his family or guardian or teacher shall be notified to be present, unless it hampers the investigation or the notification fails."*[39] In Certain Rules in Trying Juvenile Delinquency Cases enacted by the Supreme People's Court in 1991, article 19 stipulates:

[38] U.S. Department of State. *Country Reports on Human Rights Practices. East Asia and the Pacific: China (includes Tibet, Hong Kong, and Macau)* - Bureau of Democracy, Human Rights, and Labor, 2016. [online] Available from : https://www.state.gov/j/drl/rls/hrrpt/2016/eap/265334.htm [24 February 2021]

[39] 《关于办理少年刑事案件的若干规定（试行 [Several Provisions on Trial Criminal Cases Involve Young Offenders Operation (Trial)] (People's Republic of China) Supreme People's Court, January 1991.

"Before the court trial, the juvenile defendant's legal representative shall be notified to be present in court. In case the legal representative is unable or indeed unsuitable to be present, other guardians or adult relatives shall be notified to be present."

General criminal procedure rights for adults in relation to detention and arrest are applied to juveniles. There is also administrative detention which has less procedural restrains. The use of administrative arrest has been restricted as it can be seen in the example of one of the oldest administrative detention practices known as "Custody and Repatriation" (Chinese: *shourong qiansong*). It was an administrative procedure, established in 1982 and ended in 2003, by which the police in China could detain people if they did not have a residence permit, and return them to the place where they could legally live or work. The procedure was bitterly criticized following a tragic death of a young man, Sun Zhi Gang, in one of the detention centres.[40] The practices of extorting money and forced labour were claimed to be common there. Even though this particular form of detention has been abolished, the administrative forms of detention continue to exist in China. Nevertheless, the general tendency of Chinese law is evident: reducing arbitrary detention based on the idea of citizen's rights. Abolition of the system of custody and repatriation, according to one report, led to the reduced number of children detained administratively.[41]

In Chinese Criminal Procedure Law, there is a general right to legal representation by the means of an advocate. By-laws enacted by the Supreme Court allow such representation at an early stage in the cases involving minors. In *Certain Rules in Trying Juvenile Delinquency Cases* enacted by the Supreme People's Court in 1991, article 19 states: *"Before the trial and when the juvenile court deems it as necessary, arrangement may be made for the legal representative or the guardian to meet the juvenile defendant."*[42] The right to legal representation has been strengthened in Criminal Law of PRC and Criminal Procedure Law of PRC 2012, Article 266: *"People's courts, people's procuratorates and public security organs shall ensure the litigation rights of minors when handling criminal*

[40] Keith J. Hand, "Using law for a righteous purpose: the Sun Zhigang incident and evolving forms of citizen action in the People's Republic of China." **Columbia Journal of Transnational Law,** (2006): 45, 114-195.

[41] U.S. Department of State. *Country Reports on Human Rights Practices. East Asia and the Pacific: China (includes Tibet, Hong Kong, and Macau)* - Bureau of Democracy, Human Rights, and Labor, 2007. [online] Available from : http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm [24 February 2021]

[42] Quoted in: Government of China. "A Written Reply Concerning the List of Issues raised by the Committee on the Rights of the Child." 1996. Reply to issue 26.

cases committed by minors, ensure the availability of legal assistance for minors, and assign judges, procuratorial personnel and investigators who are familiar with the physical and mental characteristics of minors to undertake the cases." Article 267 requires that a legal defender is assigned even for a minor who is suspected in committing a crime.

The principle of protecting the privacy of the offender and the limitation of publicity of juvenile cases is also affirmed in Chinese legislation.[43] This protection covers not only the judicial proceedings but also the pre-trial investigation. Juvenile's name, domicile, photo and materials based on which the juvenile may be identified must not be disclosed to the public. Moderation is prescribed in using compulsory measures against juvenile delinquents. Juveniles must be kept in custody separately from adults.[44] For some exceptions, juveniles enjoy the right not to be chained. Chinese law requires speedy handling of juvenile cases.

According to Chinese Supreme Law Guidance, there is a right of the minors to a special treatment. The trial must be conducted in different setting from the trial in adult cases. The atmosphere must be amiable towards the accused.[45] These provisions can serve as a good illustration of a law which contains rules more belonging to etiquette or morals with their Confucian connotations rather than a set of specific instructions capable of an accurate evaluation and measurement on whether an individual has complied with such instructions or not.[46] Being gentle, serious, patient, accurate, careful and true are virtues which can hardly be accommodated by the Western legal standards. On the other hand, the fact that the Chinese Supreme Court found necessary to issue such moral guidance can also point at the urgent need for ethical treatment of juveniles in contemporary China.

Thus, there is an increasing concern to protect the rights of minors in Chinese juvenile delinquency justice system. However, those rights are expressed in very general form and apparently are lacking clarity if being judged by the Western legal standards. The latter are focused largely on special procedural rights for young offenders, while Chinese law contains many general declarations as in the requirement that minors must be treated with gentleness

[43] See Article 45 of Law on Preventing Juvenile Delinquency 1999.

[44] See Article 46 of Law on Preventing Juvenile Delinquency 1999.

[45] See particularly Article 27 and Article 29 of 关于办理少年刑事案件的若干规定（试行） [Several Provisions on Trial Criminal Cases Involve Young Offenders Operation (Trial)] (People's Republic of China) Supreme People's Court, January 1991. The Chinese text can be found at: http://jb.nbggw.gov.cn/cat/cat111/con_111_6369.html .

[46] Ibid. The requirement: "The attitude of judges must be gentle and yet they should not lose seriousness"《审判人员的态度既要平缓又不失严肃》?bears strong Confucian connotations.

and at the same time with seriousness.[47] It appears, however, that this is the essence of the Eastern culture: to be less precise, more flexible, and trusting on the benevolent attitude and treatment of the decision makers and others in the authority.

Measures against Juvenile Offenders

In the past, Chinese written law used to be very harsh to juvenile offenders treating them not much differently from the adults. After the amendment of Chinese Criminal Law in 1997, less serious offences by minors were reclassified as non-criminal. As in all other systems of juvenile delinquency justice systems, the Chinese court has the final say as to what measure should be applied against a juvenile offender. Before the reform of 2012, prosecutors had little choice but to bring the case to the trial or to drop it altogether. The revision of the Procedural Law in 2012 significantly extended the powers of prosecutors particularly in relation to the offences that do not involve aggravating circumstances.[48] Now, Chinese prosecutors have got extensive powers such as warning, summoning parents, arranging mediation and to some extent determining the judicial way to deal with the offender.

If the case reaches the court, it may result in an imprisonment sentence, fine, suspended sentence or an exemption of the defendant from punishment. Exemption from punishment is normally accompanied by "educational assistance" described above. As it has been mentioned, China adheres to the Convention on the Rights of Child in eliminating death penalty for juvenile offenders, and the age is in itself a mitigating circumstance which the courts must take into account in choosing an appropriate penalty.

In the past, custodial measures could normally take two forms.[49] One was "reeducation through labour camp" *(laodong jiaoyang)* which is virtually a juvenile prison. This system was abolished in 2013, although there are reports that it continues to exist in some altered form.[50]

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[47] Ibid.

[48] See Article 271 of Criminal Procedure Law of PRC 2012.

[49] Wong, "Juvenile Protection and Delinquency Prevention in China," 60.

[50] Frank Langfitt, "China Ends One Notorious Form Of Detention, But Keeps Others" February 5, 2014. [online] Available from : https://www.npr.org/sections/parallels/2014/02/05/271412045/china-ends-one-notorious-form-of-detention-but-keeps-others [24 February 2021]

For a description of the system before its abolishment see: James D. Seymour and Michael R. Anderson, **New Ghosts, Old Ghosts: Prisons and Labor Reform Camps in China: Prisons and Labor Reform Camps in China** (London: Routledge, 2015).

Before enactment of the Law on Juvenile Protection in 1991, delinquents aged between 14 and 18 could be sent there without trial. The Chinese officials asserted in 1996 that the age of the young people who were sent there was from 16 to 18 years old.[51] The sentence could vary from one to four years. These camps were supposed to have educative rather than punitive function, as one official document put it: "All police officers at such centres are required to earnestly follow the principle of "education, reform and remedy" and to treat the juvenile inmates just like parents treating their children, teachers treating their students and doctors treating their patients."[52] Half a day in such institutions, according to the same document, was spent in moral, legal and cultural education.

Another form of custodial sentences are "work-study" schools *(gongdu)*. It was designed for juveniles aged between 12 and 18 who have committed minor offences. Articles 35 and 36 of the Law on Preventing Juvenile Delinquency directly refer to them. Admission to those schools does not require a court order. It is done with the consent of parents and must be approved by educational departments of local administration.

The difficulty which Chinese law faces is very similar to other countries. The old educational measures outside the wall of confinement becoming increasingly less effective due to fundamental changes in the society. The local government must take care of the offenders who were not given imprisonment sentences or those sentences were not imposed.[53] But there is very little they can do apart from threatening the offenders that they will be sent to prison if they keep violating law. There have been some attempts to change this situation, and to find new effective measures to address juvenile crime. It was reported by 'China Daily' that a 17-years-old, who received a suspended two-year sentence for robbery, signed up to a 200-hour social work contract at a Shanghai district court.[54] The contract required helping the old and sick people there. This type of contracts was introduced as early as in 2002. In 2004, it was reported, "the court's juvenile tribunal, set up in 1984 as the first in the country, has signed social work contracts with 27 young offenders," which appears as not a very impressive figure for a big city like Shanghai. The same report quoted a judge who gave a figure of 1,000 juvenile criminals for Shanghai in 2004. The practice of

[51] Government of China. "A Written Reply Concerning the List of Issues raised by the Committee on the Rights of the Child. 1996. - Reply to issue 27.

[52] Ibid.

[53] See Article 47 of Law on Preventing Juvenile Delinquency.

[54] Li, "Youth offenders."

social contracts, however, has not been mentioned recently by the Chinese scholars who emphasize the country's success in reducing juvenile delinquency.[55]

The experience of Shanghai court's juvenile tribunal deserves a special attention. The court was very innovative in finding effective measures to deal with juvenile offenders. For example, it was promoting counseling to the offenders who were addicted to the computer games and committed crime in order to get money for playing them. One judge said: "Robbery is the most frequently committed juvenile crime and often it is because the youngsters need to pay for the Internet games."[56] The Shanghai tribunal began apply supervision orders to each young criminal sentenced to probation or a fine. The tribunal also offered counseling to the parents which were blamed for the rise of crime. In other words, the Shanghai juvenile tribunal went far beyond its traditional role as a dispensator of threats and punishments. The fundamental difference between older and recent measures applied by the Chinese court is that the offenders are not so much punished as being treated as patients who need help and care.

Conclusion

One may conclude that the recent reduction of juvenile criminal cases can be explained by the reform of procedural law which allows Chinese prosecutors to stop criminal proceedings and apply educational measures. In this respect, the Chinese experience is of interest for other developing countries like Thailand. There is, however, a peculiarity which can hardly be applied to Thailand. There is something more in China than a change in the procedural law to decide juvenile delinquency cases. China has achieved good results in reducing juvenile delinquency rates thanks to its Confucian culture and Marxist ideology, which are used together with adopting the Western idea of procedural rights. The presence of Confucian values offers a good ground for restorative justice practices to be administered by the courts. The time when Chinese courts largely ignored restorative justice measures reflected a significant rise of juvenile offending.[57] The adoption of informal procedures to educate juvenile offenders proved to be beneficial.

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[55] See: Bingzhi Zhao, "Dealing With Juvenile Offenders: Successful Practices In China." **UNAFEI.** 2015 . [online] Available from : https://www.unafei.or.jp/publications/pdf/13th_Congress/22_CCLS.pdf. [24 February 2021]

[56] See fn. 53.

[57] Wong, "Juvenile Protection and Delinquency Prevention in China," 62.

Chinese law juxtaposes education and punishment reflecting at this point very well the Western approach. Article 44 of the Law on Preventing Juvenile Delinquency states: *"In investigating juveniles who have committed criminal offenses investigating for criminal responsibility, the guidelines of enlightenment, persuasion and reformation and the principle of taking enlightenment as the dominant factor while making punishment subsidiary shall be adhered to." A stronger emphasis on moral education makes Chinese law different from the Western models of juvenile justice which lacks the presence of "ideals, morality, the legal system as well as in patriotism, collectivism and socialism."*[58]

To a Western lawyer, the whole wording of Chinese law may appear more as a political directive rather than a legal rule. However, it underlines a specific cultural perception of law and its functions which is very different from the West. Law in the East is not only about clearly specifying the authority and the rights of the participants to a legal process, it is also the means to promote social cohesion and conformism to political will of the state. The Chinese philosophy of juvenile justice is influenced greatly by the doctrine of social determinism which maintains that the source of juvenile crime lies in the society, mainly understood as economic, conditions in which the juvenile offenders have been brought up. This belief, upheld in the Marxist philosophy, is shared not only by the Chinese criminologists. However, the idea of social determinism received its complete acceptance in China due to the communist ideology. It was stated in one of the official Chinese documents that: "The juvenile court shall take into full account the fact that the juvenile offenders are violators of the social order but also victims of the adverse social environment."[59] In other words, the emphasis is made on the external factors of juvenile delinquency. Offenders are the victims, and therefore they have the right to be helped to.

This social determinism strangely coincides with the Confucian moral ideals that education can change the life of a person. Confucian influence is particularly seen in the way in which obligations of the officials towards juveniles are formulated, and also in the emphasis on moral education and reformation of the offenders through repentance manifested in outward action. Whatever is the real impact of Confucianism on the contemporary Chinese law officers, it is evident that the Marxist doctrine of social determinism does not

[58] See Article 6 of Law on Preventing Juvenile Delinquency 1999.

[59] Government of China. "A Written Reply Concerning the List of Issues raised by the Committee on the Rights of the Child." 1996. Reply to issue 25.

mean that the morals of juvenile offenders are neglected. Both Confucian and Marxist ethics have one characteristic in common: the morals are primarily conceived in outward actions. Therefore, repentance, which Chinese criminal law so often allures to, is understood quite differently from the Judeo-Christian ethics.

Thus, the emphasis of the Chinese Juvenile Delinquency Law on cultivating good conduct among juveniles as well as guaranteeing their physical and mental well-being fits well in both Marxist and Confucian ideals of juvenile justice.[60] However, there is a deep contradiction between them. Confucius in the end saw the source of moral cultivation in the personal effort of the individual, while Marxism perceives such cultivation as determined by the materialistic conditions prevailed in the society. For Confucius, compliance to the social norms is achieved by the means of moral discipline, while for Marx, such compliance is accomplished by providing sufficient material conditions of social existence. The future will show whether this combination will continue to be effective in addressing youth crime.

[60] See Article 1 of the Juvenile Delinquency Statute.