

Community Sanctions:
A Comparative Study between China and Europe

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Abbreviations

CCP Chinese Communist Party

CFR Charter of Fundamental Rights of the European Union

CNKI China National Knowledge Infrastructure

CoE Council of Europe

CSMs Community sanctions and measures

ECHR European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR European Court of Human Rights

EU European Union

MJ Ministry of Justice

MPS Ministry of Public Security

NGOs Non-Governmental Organizations

NPC National People's Congress

PRC People's Republic of China

PS Public Surveillance

RTL Re-education Through Labour (lao dong jiao yang, 劳动教养)

SC State Council

SPC Supreme People's Court

SPP Supreme People's Procuratorate

Glossary

Balancing Leniency and Severity (kuan yan xiang ji, 宽严相济)

Beating with a small stick, beating with a large stick, penal servitude, life exile, and the death penalty (chi, zhang, tu, liu, si; 笞, 杖, 徒, 流, 死)

Benevolence (ren, 仁)

Centralised Administration (ji zhong guan li, 集中管理)

Compulsory Isolation and Drug Detoxification (qiang zhi ge li jie du, 强制隔离戒毒)

Clan (zong zu, 宗族)

Combining Punishment and Leniency (cheng ban yu kuan da xiang jie he, 惩办与宽大相结合)

Combining Suppression and Leniency (zhen ya yu kuan da xiang jie he, 镇压与宽大相结合)

Criminal Detention (ju yi, 拘役)

Desecration of the corpse (lushi, 戮尸)

Detention for Education (shou rong jiao yu, 收容教育)

Detention for Training the Juvenile Offenders (shou rong jiao yang, 收容教养)

Disciplining Teams of Reform through Labour (lao dong gai zao guan jiao dui, 劳动改造管教队)

Dismemberment (ling chi, 凌迟)

Exposure of the head (xiao shou, 枭首)

Five Punishments (wu xing, 五刑)

Harmonious Society (he xie she hui, 和谐社会)

Harmony (he xie, 和谐)

Heavy Penaltyism (zhong xing zhu yi, 重刑主义)

Honesty (lian, 廉)

Landlords, rich peasants, counter-revolutionaries, and malefactors (di, fu, fan, huai fen zi, 地富反坏分子)

Laws (fa lv, 法律)

Love relatives (qin qin, 亲亲)

Mass Line (qun zhong lu xian, 群众路线)

Masses (qun zhong, 群众)

Nationalist Party (guo min dang, 国民党)

Open Trial (gong shen da hui, 公审大会)

Production Teams (sheng chan dui, 生产队)

Public Security Committee (PSC, zhi an bao wei yuan hui, 治安保卫委员会)

Punishment (xing, 刑)

Involuntary Commitment in Mental Health Facilities (qiang zhi yi liao, 强制医疗)

Re-education Through Labour (lao dong jiao yang, 劳动教养)

Reform Through Labour (lao dong gai zao, 劳动改造)

Regulations (fa gui, 法规)

Rites (li, 礼)

Righteousness (yi, 义)

Respect the noble (zun zun, 尊尊)

Respect the elder (zhang zhang, 长长)

Six Codes (liu fa, 六法)

Shame (chi, 耻)

Slavery (nu, 奴)

Tattooing, cutting off the nose, chopping off the feet, castration, and the death penalty (mo, yi, fei, gong, da pi; 墨, 剕, 剕, 宫, 大辟)

Ten Abominations (shi' e, 十恶)

Three Beneficial Principles (san ge you li yu, 三个有利于)

Chapter One. Introduction

Background

Before the initiation of community corrections programmes in China, the ratio of community-based punishments to custodial punishments in sentences was very low.¹ The legal provisions for community-based punishments had many deficiencies. The executive task of community-based punishments was limited to supervision, and the arrangements for supervision of the criminals under community-based punishments were not clarified. Since 2003, the Supreme People's Court (SPC), the Supreme People's Procuratorate (SPP), the Ministry of Public Security (MPS), and the Ministry of Justice (MJ) have embarked on pilot community corrections programmes. The programmes intend to attach supervision and management, education and correction, and assistance tasks to the existing community-based punishments and to improve the cooperation between various agencies and grassroots organizations in the implementation of community corrections programmes. Compared with the previous tasks of community-based punishments, the Western concept of 'correction' has been introduced. In 2009, the SPC, the SPP, the MPS, and the MJ were set to roll out community corrections programmes nationwide. In 2011, Amendment VIII of the Criminal Law introduced community corrections. Thus far, however, the National People's Congress (NPC, China's top legislating body) has not made any law to provide for community corrections in detail.

Community corrections may not only come to be the alternatives to imprisonment, but may also become alternatives to some semi-formal administrative punishments in China. As in many countries around the world, minor legal infractions are labelled administrative violations rather than crimes in China. The reach of administrative punishments is much broader than that of criminal punishments. Theft, for example, is always punishable, but most thieves are punished by administrative punishments instead of by criminal punishments. Only those who steal a very large amount of property, commit theft repeatedly, steal from a special institution such as a bank, or steal cultural relics receive criminal punishments. The NPC has enacted several laws on administrative punishments. However, the police may impose some administrative punishments or administrative coercive measures that do not exist in any law promulgated by the NPC and that even contradict the laws issued by the NPC. These administrative punishments and administrative coercive measures are neither formal

¹ The number of the convicts sentenced to community-based punishments was 127 272, and the number of the convicts sentenced to custodial punishments or death penalty was 551 213 in 2002 (The Editing Committee of the Law Yearbook of China, 2003, p. 1320).

punishments nor informal punishments. Formal punishments usually denote punishments enforced by official agencies pursuant to the law, and informal punishments refer to punishments conducted on basis of morality by non-official groups or persons (Xiaoming Chen, 2004; S. Jiang, 2013; S. Jiang, Lambert, & Wang, 2007; S. Jiang & Lambert, 2009; S. Jiang, Wang, & Lambert, 2010; Ren, 1997). This thesis deems these forms of administrative punishments and administrative coercive measures that are executed by the police but without firm legal basis and due legal procedure as semi-formal punishments in contemporary China.

The most notorious semi-formal punishment is the now abolished Re-education Through Labour (RTL, lao dong jiao yang, 劳动教养) system. RTL was based on regulations made primarily by the police that conflicted with the Legislative Law and the Constitution. The police both decided RTL cases and implemented the system. Minor legal violators under RTL could be detained for one to four years. In 2013, the abolition of RTL and the promotion of community corrections were juxtaposed on the agenda of the Central Party Committee of the Chinese Communist Party (CCP). Some scholars regarded the agenda as evidence that some minor legal violators who have previously been punished under RTL might now fall under the scope of community corrections (L. Jiang & Zhang, 2014; R. Liu, 2015; Williams, 2014; B. Zhao & shang, 2015).

In Western jurisdictions, the origins of community sanctions were closely connected to disillusionment with imprisonment. At the end of the 18th century and the beginning of the 19th century, prison was designed as a panacea to turn the criminals into decent people but later it was found that prison just produced high re-offending rates with high costs. Probation then emerged as a suspension of imprisonment in countries with common-law traditions and suspended sentences emerged as a suspension of the execution of imprisonment in countries with civil-law traditions. It was believed that the criminals could thus avoid 'contamination' in prison and be rehabilitated through individualised treatment when they were supervised in the community. After the mid-1960s, support for progressive penal welfare strategies waned (Garland, 1985; Rothman, 1980), and the idea of community sanctions as a means of changing criminals for the better was downplayed. However, the adoption and expansion of community sanctions continued, and a new generation of community sanctions emerged, albeit with change in their rationale. The justifications for community sanctions focused more on their greater cost-effectiveness, on their position in the sentencing tariff which targeted different levels of seriousness with imprisonment, or on their role in risk management. Although the justifications varied, 'in most jurisdictions in and beyond Europe, offenders under supervision (whether as an alternative to prosecution or sentence, as a community sentence in its own

right, or as part of a post-custody licence) heavily outnumber those detained in custody' (Daems, van Zyl Smit, & Snacken, 2013, p. 171).

Since the introduction of community corrections programmes, scholars have been debating the relevance of Western experiences with community corrections (S. Jiang et al., 2014; L. Lu, 2007; Z. Wu, Cai, & Peng, 2012). The Chinese punishment system is different from the Western punishment system. The coexistence of criminal punishments, and semi-formal punishments is a distinctive feature of the Chinese punishment system. Community corrections compete with imprisonment and semi-formal punishments. Moreover, the broader social and cultural contexts within which the punishment system is set differ drastically from those in the West. It is not yet known how community corrections can achieve the effects that are intended in the Chinese context.

Definitions related to community sanctions and measures

As McNeill and Beyens (2013) and Robinson and McNeill (2015) argue, the penal subfield of community-based punishments is labelled and defined by different terms, such as 'community corrections', 'community penalties', 'probation services', 'community sanctions', 'community sentences', 'community punishments', 'supervision in the community', 'non-custodial measures', and 'alternatives to imprisonment'. In North America and Australia, the term 'community corrections' is preferred. This refers primarily to probation, parole, and intermediate sanctions, such as halfway houses, residential centres, work furlough, and other programmes for managing offenders in the community (McCarthy, McCarthy, & Leone, 2001; Petersilia, 1998). In the UK, the term 'community penalties' is widely used. This denotes punishments structurally located between custody and financial penalties. What distinguishes community penalties from financial penalties is that they are personally restrictive, involving some active contact with a penal agent, but unlike custodial sanctions, this contact takes place in a community-based setting. Discussions about community penalties in the UK often exclude offenders whose original sentences are custodial, notably parole (Raynor, 2012a; Rex, 2013). The United Nations (UN) uses the terms 'non-custodial measures', 'alternatives to imprisonment' and 'alternatives to incarceration'. The terms 'prison alternatives' and 'non-custodial penalties' have long been used interchangeably. The term 'non-custodial measures' used in the UN 'Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)' adopted in 1990, denotes a wide range of sanctions and measures that are implemented outside the prison from pre-trial to post-sentencing, including both front-door and back-door measures.

The Council of Europe (CoE) chooses ‘probation’, ‘alternative penal measures to imprisonment’ and ‘community sanctions and measures’ to delineate this penal subfield. ‘In the 1960s and in the early 1970s, it was primarily probation and aftercare which were the subject of both reports and resolutions of the European Committee on Crime Problems (CDPC). If the question of other alternatives to imprisonment was included, it was most often in the form of general recommendations to consider measures similar to probation and aftercare’ (Rentzmann, Robert, & de Europa, 1986, p. 2). The most influential legal instrument in this field was Resolution (76)10, ‘On Certain Alternative Penal Measures to Imprisonment’. In the 1990s, the language of ‘alternative penal measures to imprisonment’ transformed into ‘community sanctions and measures’. Recommendation No. R (92)16 refers to ‘community sanctions and measures’ as:

*‘sanctions and measures which maintain the offender in the community and involve some restriction of his liberty through the imposition of conditions and/or obligations, and which are implemented by bodies designated in law for that purpose. The term designates any sanction imposed by a court or a judge, and any measure taken before or instead of a decision on a sanction as well as ways of enforcing a sentence of imprisonment outside a prison establishment. Although monetary sanctions do not fall under this definition, any supervisory or controlling activity undertaken to secure their implementation falls within the scope of the rules’.*²

The Recommendation CM/Rec(2010)1, ‘On the Probation Rules’, reaffirms the concept of ‘community sanctions and measures’. Meanwhile, it refers to probation as:

*‘the implementation in the community of sanctions and measures, defined by law and imposed on an offender. It includes a range of activities and interventions, which involve supervision, guidance and assistance aiming at the social inclusion of an offender, as well as at contributing to community safety’.*³

Recommendation CM/Rec(2017)3 replaces Recommendation Rec(2000)22, ‘On Improving the Implementation of the European Rules on Community Sanctions and Measures’, and Recommendation No. R (92)16, while remaining the definition of ‘community sanctions and measures’ under the latter.

² Glossary of the Recommendation No. R (92) 16.

³ Glossary of the terms used of Recommendation CM/Rec (2010)1.

The European Union (EU) uses ‘probation measures and alternative sanctions’ and ‘supervision measures’. Under Framework Decision 2008/947/JHA, ‘probation measures’ means ‘obligations and instructions imposed by a competent authority on a natural person, in accordance with the national law of the issuing State, in connection with a suspended sentence, a conditional sentence or a conditional release’; ‘alternative sanction’ means ‘a sanction, other than a custodial sentence, a measure involving deprivation of liberty or a financial penalty, imposing an obligation or instruction’.⁴ Under Framework Decision 2009/829/JHA, ‘decision on supervision measures’ means ‘an enforceable decision taken in the course of criminal proceedings by a competent authority of the issuing State in accordance with its national law and procedures and imposing on a natural person, as an alternative to provisional detention, one or more supervision measures’; ‘supervision measures’ means ‘obligations and instructions imposed on a natural person, in accordance with the national law and procedures of the issuing State’.⁵

Many European academics prefer the term ‘community sanctions and measures’ when they discuss this penal subfield in Europe. Robinson (2016, p. 104) considers the key strength of this definition to be its inclusivity: it succeeds in capturing both front-door and back-door measures. According to McNeill and Beyens (2013, p. 4), given the avowedly European focus, it makes sense to settle on the commendably neutral, if somewhat technical, European label ‘community sanctions and measures’, defined by the CoE. Robinson and McNeill (2015, p. 6) dismiss the use of foreign labels in a European context, such as the American term ‘community corrections’; reject ‘probation’ as a shorthand term to describe the field; avoid labels that define the field in terms of what it is not, such as, non-custodial penalties and alternatives to prison; and opt for the distinctly European term ‘community sanctions and measures’ (CSMs), defined by the CoE, despite the fact that this term is recognised as being too broad for their purposes. This thesis also uses CSMs to refer to this penal subfield.

Aim and scope

This research comprises a comparative study of community sanctions in China and in the West. Through a comparison of the law and practice of community sanctions, as well as the historical, cultural, social and political contexts under which community sanctions have developed in China and in the West, this thesis aims to examine what the different roles of community sanctions in China and in the West, have been, are and will be. Rather than concentrate on a

⁴ Article 2 of the Framework Decision 2008/947/JHA.

⁵ Article 4 of the Framework Decision 2009/829/JHA.

concurrent parallel analysis of legal rules, emphasis is placed on comparing the function of community sanctions in Chinese and Western legal systems. As many scholars acknowledge, a fair legal comparative study requires the researcher to examine the historical and social context of the problem and the proposed solutions (Friedman, 1975; Konrad & Hein, 1998; Nelken, 2004). What this implies is that comparative justice researchers should make sure that they have a fair grasp of what is thought and what happens in societies being compared (Nelken, 2010, pp. 7,8).

In the West, many academics examine the function of punishments, notably community sanctions, from legal, sociological, and criminological perspective. McNeill (2013a, p. 173) finds the definition of community sanctions to be 'all form and no function', and the substance and essence of community need to be scrutinized from criminological, legal, philosophical and sociological vantage points. Hudson (2003), Cavadino and Dignan (2007) and Tonry (2006) also regard penology as an interdisciplinary subject. According to Hudson (2003), penal sociology is concerned with the function of law and punishment in modern society, as well as the historical and social context under which the penal system develops; penal jurisprudence is concerned with what the values embodied in and upheld by the criminal law ought to be; and administrative criminology is concerned with the strategies for the implementation of penal aims espoused by the state, and on the basis of the currently fashionable penal philosophy and sociological insights that prove useful for the administrative project. Cavadino and Dignan (2007) also discuss the crisis in the English penal system in terms of three facets: penal sociology, penal philosophy and administrative criminology. They explore penal sociology to explain the crisis; investigate penal philosophy to understand the crucial crisis of legitimacy in penal system; and employ criminology to analyse the current responses to the crisis in various aspects of the system, and proposing their own agenda to solve the crisis. Tonry (2006) distinguishes between normative purposes, primary functions, ancillary functions, and latent functions in sentencing. The normative function comprises the sentencing justifications. The primary functions of sentencing are the imposition of appropriate punishments and the prevention of crime through deterrence, incapacitation, rehabilitation, and moral education. The ancillary functions are the imposition of punishment in an efficient and cost-effective manner, the sound management of resources, and the communication of legitimacy, public reassurance, public confidence, and basic social norms. The latent functions of sentencing are represented by its use for personal, ideological, or partisan political goals. For McNeill (2013a, p. 173), although Tonry 'does not explain his framework in these terms, we might suggest that, albeit with notable exceptions, philosophers and jurists tend study and discuss the normative functions and primary purposes of sentencing, criminologists tend to examine its ancillary

functions and sociologists tend to study its latent functions. The same taxonomy of perspectives can be applied to community sanctions’.

As exotic subjects, penal sociology and criminology were not introduced into China until the end of the 19th century. According to Broadhurst and Liu (2004, p. 4), ‘the application of modern methods of social science research as applied to a whole range of crime and criminal justice issues is in its infancy’. Therefore, it is not feasible to interpret the function of Chinese community-based punishments from the vantage points of penal sociology and criminology in the Western sense.

This thesis prefers instead to compare the function of community-based punishments through two themes: first, the role of community-based punishments in the penal system; second, the role of punishments, notably community-based punishments in society, and how the social, cultural, and political dynamics shape their role. To compare the first theme, the thesis examines the penal philosophy underlying the legal provisions for community-based punishments, and considers whether that penal philosophy is realized in the sentencing and execution of community-based punishments. To compare the second theme, the thesis explores the shifts in the penal system and examines how the social, cultural, and political forces stimulate those shifts.

Questions and methodology

The thesis formulates five research questions to substantiate the research aims:

- 1) What is the Chinese legal framework for community corrections? What are the rationales underlying the Chinese penal system, especially community corrections? Is there any deviation from those rationales in the sentencing and execution of community corrections?
- 2) What shifts have taken place in the Chinese penal system? How did the shifts happen? How did the shifts influence the features of the community-based punishments?
- 3) What is the Western/European legal framework for CSMs? What are the rationales underlying the Western/European penal system, especially CSMs? Is there any deviation from those rationales in the sentencing and execution of CSMs?
- 4) What shifts have taken place in the Western/European penal system? How did those shifts happen? How did the shifts influence the features of community sanctions?
- 5) What are the convergences and divergences between the Western/European and Chinese legal frameworks for community sanctions? What are the convergences and divergences between the legal philosophies of Western/European and Chinese

community sanctions? What caused those convergences and divergences? Are China and the West following a similar or different track regarding the legal framework and the legal philosophy for community sanctions?

This thesis prefers to use a historical approach to explore the function of community-based punishments in China and the West. It traces the evolution of the legal framework for punishment, the rationales underlying the legal framework, and the society, culture, and politics in which the legal framework grounded in China and in the West, respectively. Many scholars use China's distinctive historical backdrop to explain why the Chinese legal system has developed along a very different path from the Western legal system (Derk Bodde, 1963; Mühlhahn, 2009; Peerenboom, 2002; Qu, 1947; Ren, 1997). As Mühlhahn (2009, pp. 7-9) points out, recent European studies on the history of criminal justice show that three insights can be expected from historical research on criminal justice. First, law enforcement and punishment have to be seen as one part of a complex set of strategies for ordering society and exercising power. Second, historical research can provide scholars and students with access to the values and norms that were officially promoted and propagated in a society at a certain junction in time. Third, the history of criminal justice is closely related to the history of mentalities, especially of attitudes towards violence and death. Mühlhahn (2009, pp. 1-4) finds that 'a historical approach will aid in understanding the overall role of criminal justice in Chinese social life and its effects on both state and society', and that 'understanding criminal justice in China requires knowledge not only of its special parts and technicalities (such as criminal law or corrections) but also of criminal justice as an institution deeply rooted in politics, society, and culture' (Mühlhahn, 2009, p. 4).

Based on this general approach and the research questions, the research is divided into four stages:

The first research question is answered via a review of the policy and legal basis of community corrections. The thesis examines the reform process of community-based punishment, the official rationales and task arrangements of community corrections under the legal provisions and the joint statements made by the SPC, the SPP, the MPS, and the MJ, the range of the criminals considered to be deserving of community corrections under the judicial interpretations of how to determinate community corrections, and the task allocation under the local regulations on how to implement community corrections. Given the restriction on the access to some local regulations, the thesis explores the local regulations and local practices through a review of research articles on 'non-custodial sentencing', 'community corrections' and related topics published in Chinese language academic journals over the past

13 years (2003–2016),⁶ as well as the recent literature on Chinese community corrections in English. The thesis then analyses whether there are any disparities between the official statements, the judicial interpretation and the local regulations.

To answer the second research question, the thesis addresses the Chinese penal system from a historical perspective to understand why the practices of the penal systems take the forms they do in China. The thesis tackles interpretative problems, such as how social, political, and legal cultures inform perceptions of crime and crime control, and how the penal philosophy and the legal system respond to them. There is an enormous historical and legal literature on the Chinese penal system, written by both Chinese authors and Western authors. The thesis mainly consults the topics of legal traditions and legal reforms on the penal system. Building upon the literature on these topics, the thesis explores how the legal traditions and legal reforms influence the current features of community corrections in China.

The third research question is explored via a literature review of the legally binding documents and non-legally binding recommendations concerning CSMs at the European level. The thesis first reviews the objectives of CSMs under European instruments. The thesis then further examines the shift in focus on the effectiveness criteria of CSMs under these instruments. This is followed by a review of human rights standards in the context of the CSMs and their relationship with the objectives and effectiveness criteria of CSMs.

To answer the fourth research question, the thesis traces the evolution of community sanctions in Europe and identifies the shifts in penal justifications that have induced the changes in community sanctions.

While providing detailed references to the research conducted in response to the previous questions, the fifth question is answered through an examination of the similarities and differences between the Western and Chinese understandings of community sanctions. The thesis explores the role of community sanctions under the different definitions of crime in the West and in China. The thesis then analyses the different dimensions of reform in the context of community sanctions, and the way in which those different dimensions are reconstructed in the West and in China. This is followed by a reflection on the different relationship between punishment and reform in the two regimes.

⁶ Electronic versions of these articles can be accessed through the China National Knowledge Infrastructure (CNKI) on-line documentation page at <http://www.global.cnki.net/>.

Structure of the thesis

The thesis consists of six chapters.

Following the introduction chapter, chapter two introduces the Chinese legal framework and legal practice for community corrections. This chapter first describes the reform project initiated by the MJ. This is followed by an account of the target group of criminals under community corrections, the three missions of community corrections, and the task arrangements between the various agencies, social workers, and volunteers pursuant to the official statements at the national level. This chapter then explores how the executive and judicial agencies develop their own strategies to meet the new challenges of the reform project. This chapter compares official statements with local regulations and principal sources of sentencing decisions. This is followed by a review of the published regulations and inner regulations on the implementation of community corrections in the two most influential models, that is, the Beijing model and the Shanghai model, in detail, and the regulations in other regions in general. The chapter finds that there are disparities between the initial design of the execution of community corrections programmes and the actual rules on the implementation of community corrections pursuant to the local regulations. The official statements intend to institutionalize and professionalize the implementation of community corrections and plan to balance the education tasks, supervision tasks, and assistance tasks. However, the local bureaus of justice just recruit extra staff who are not employees of the state, to reinforce the routine supervision practices, and the education measures and assistance measures are very limited, owing to the varying degrees of difficulty in recruiting social workers and volunteers with professional skills to carry out other corrective measures. This chapter also discovers that there are gaps between the political rhetoric about promoting community corrections and the actual range of criminals considered deserving of community corrections according to the principal sources of sentencing decisions for community corrections. Even though the new criminal policy urges the courts to promote community corrections, in order to meet the high expectations of community corrections in reducing re-offending, the legislative and judicial bodies simply limit the convicts sentenced to community corrections to those who commit very petty offences. The risk of re-offending and the impacts of re-offending by convicts in these categories are small. This chapter concludes that China still uses imprisonment as the dominant penal paradigm, and community corrections only play a supplementary part in the penal system.

Chapter three introduces the unique characteristics of the Chinese penal system through an inspection of its evolution. In China, there are some punishments based on law, but

completely or partly conducted by unofficial groups, and there are some punishments conducted by official agencies, but on the basis of regulations that conflict with the law but which have the tacit approval of the authorities. This chapter refers to these punishments as semi-formal punishments. This system was closely related to the Chinese communitarian tradition. This tradition, which was rooted in Confucian and socialist theories, provided grounds for which offences deserved semi-formal punishments and which offences required formal punishments. There were two types of offence: one type of offence violated the interests of members within the community, meaning the offence could be dealt within the community according to the prevailing morality or the informal regulations, while the other type of offence offended interests beyond the community or infringed upon the interests of the whole community, meaning the offences had to be punished pursuant to the penal code. The semi-formal punishments usually replaced the deserved minor formal punishments, so that the formal punishments were mainly applied to punish gravely immoral offenders deserving of serious blame. However, political and legal reforms in the last two decades have challenged the traditional division between formal punishments and semi-formal punishments. The political concept of a harmonious socialist society and the criminal policy of balancing leniency and severity provide the theoretical foundations to break the division, and the principles of the socialist rule of law requires all types of punishments to avoid overtly conflicting with the legal system. Thus, the semi-formal punishments face abolition. Nonetheless, this chapter reveals that, albeit with a firm basis in the Criminal Law and Criminal Procedural Law, community corrections resemble semi-formal punishment in some ways. The implementation of community corrections bends the rules within laws to some extent. In practice, social workers who are not employees of the state perform some tasks of the executive branches of the government. This chapter concludes that constructing a more humane and lenient punishment system not only requires more clauses on individual rights and freedoms in the criminal laws and criminal procedure laws but also stricter constraints on state power. If the executive agencies still abuse their power, it will be difficult to implement in full the lenient punishments set forth in the Criminal Law and the Criminal Procedural Law.

Chapter four discusses the legal philosophy relating to CSMs under European instruments. The number of persons under CSMs in the criminal justice system has grown rapidly in many European countries. In response to this phenomenon, the CoE has issued several recommendations on CSMs in recent decades. The EU has also published two framework decisions concerning CSMs that are legally binding on its member states. This chapter examines the shifts in the general legal philosophies of the European instruments with regard to CSMs, through a review of the subtle changes in the rhetoric thereof. Results show that

CSMs are increasingly promoted because of their inherent value, rather than simply because they provide a way of reducing the use of imprisonment. The European instruments assert the interdependence of the two objectives of offender rehabilitation and public protection, regard the indicators related to both as criteria for effective supervision, and understand CSMs as being not only efficiency oriented but also as being based on Europe's human rights framework. However, a particular concern – risk management of dangerous offenders – leads to looser interpretations of some human rights principles. To retain the European image of resisting punitiveness, this problem can be addressed by a firmer and stricter interpretation of these principles.

Chapter five reviews the evolution of the penal philosophy underlying community sanctions in Europe. The penal strategy for community sanctions is shaped by the prevalent penal philosophies at any particular time. Different schools of penal thought, on the basis of different broader theories of political obligation, imply different penal strategies, although there is no simple equation between penal philosophies and penal strategies. Only at certain times does, the synthesis of penal justifications advocated by a designated school of penal thought fit the penal temper. This chapter sketches the history of community sanctions under different penal strategies in the West, and reviews how the evolution of penal justifications shapes the scope and function of community sanctions. Community sanctions were the key means of rehabilitation. After the decline of rehabilitationism, just deserts theory, the forerunner of human rights theory, attracted the attention of policy makers. When rehabilitationism re-emerged, it also incorporated the values of just deserts theory to avoid inflicting extra punishments. Human rights theory provides a basis for a principled compromise between utilitarianism and retributivism. It allows the adaptation of community sanctions to both moral claims and utilitarian purposes (including managerialism and rehabilitationism).

Chapter six examines community sanctions from a comparative perspective. This chapter intends to provide some insights into the divergence and convergence about the understanding of community sanctions in the West and in China. Community sanctions play different roles in the West and in China. This reflects their distinct definitions of crime and criminal punishment. The reach of crime and criminal punishment in China is much narrower than in the West. Community sanctions are sanctions of medium-level severity in the tariff of criminal punishments in the West, whereas in China they are minor criminal punishments that can be more lenient than some semi-formal punishments. The development of community sanctions in the West arose from the move to reduce imprisonment, while promotion of

community corrections in China is preconditioned by the reform of semi-formal punishments. The understandings of offender reform in the context of community sanctions in the West and in China are also different. These understandings of the causes of crime shape the methods of reform. The explanations for crime in China are more socially oriented and less individually oriented than those in the West. Correspondingly, the orthodox model of reform is the re-education mechanism in China and the correctional model of rehabilitation in the West. However, both in the West and in China, some reform initiatives do not fit within the traditional mould. When reform, or rehabilitation, or re-education take place, both in the West and in China, they require a holistic understanding, a reform approach that is not rooted in the culture may not fare well in practice. In spite of their differences, the orthodox models of reform in the West and China have some common problems. These problems are a disregard for the pains of reform, and the infantilisation of offenders. Although both the West and the China have resolved to solve them, these problems remain. Reform in the context of community sanctions should increase the protection of those fundamental values guaranteed by law rather than reduce them.

The final chapter is the summarization of the research findings of this thesis.

Chapter Two. Legal Framework for Chinese Community Corrections

1. Introduction

The SPC, the SPP, the MPS and the MJ jointly launched a pilot community corrections programme in 2003. It is stated that community corrections as a punishment implementation measure is the opposite of custodial disposition because during established sentencing terms, criminals under community corrections programmes receive assistance to address their respective mental and behavioural problems and are reintegrated into society by specialised state organs with the help of non-governmental organisations (NGOs) and volunteers.⁷ Community corrections programmes can be applied to existing community-based punishments, that is, public surveillance (PS), suspended sentences, parole, temporarily serving a sentence outside prison and deprivation of political rights⁸ under the Criminal Law and the Criminal Procedure Law.⁹ The idea of community corrections was disseminated nationwide in 2009 and was introduced into the Criminal Law in 2011 and the Criminal Procedure Law in 2012.

After the initiation of the pilot community corrections programme, community corrections became a subject of intense debate in China. There are 462 articles on the topic of ‘community corrections’ in the core scholarly printed journals¹⁰ listed on the website of the China National Knowledge Infrastructure (CNKI). These articles review community corrections in China from both theoretical and empirical approaches. The authors of these articles are not only from academia but are also from the courts, the procuratorates, police offices, and the bureaus of justice. There has been little effort in Western literature to analyse the community corrections

⁷ Article 1 of the Announcements on the Development of Pilot Locations for Community Corrections (the Announcements, Guan yu kai zhan she qu jiao zheng shi dian gong zuo de tong zhi, issued by the SPC, the SPP, the MPC, and the MJ on 10 July 2003).

⁸ In Amendment VIII of the Criminal Law, which was issued in 2011, the deprivation of political rights is excluded from community corrections programmes.

⁹ Article 2 of the Announcements.

¹⁰ The Chinese-language core journals are the most influential journals in a variety of academic realms. They are evaluated by China's Library Information System according to citation frequency and impact factor every three or four years. Currently, there are 121 comprehensive core journals on humanities and social sciences and 27 specialised journals on law. These leading journals are highly respected by Chinese scholars and are accessible to policy makers in China.

system that has recently been introduced in China. Chinese community corrections has only been covered in detail by six English-language journal publications. S. Jiang et al. (2014) provides an account of the evolution, the implementation and the challenges of community corrections in China. S. Jiang et al. (2015) analysed the data of 764 Chinese citizens on the use of community corrections methods and found that most respondents supported the use of community corrections methods. S. Jiang, Lambert, et al. (2016) and S. Jiang, Jin, et al. (2016) evaluated the data from a survey of 225 community corrections officers in a Chinese province. S. Jiang, Lambert, et al. (2016) inferred that the majority of Chinese community corrections officers were satisfied with their jobs. S. Jiang, Jin, et al. (2016) discovered positive relationships between formalisation and rehabilitation, as well as between formalisation and punishment, and concluded that Chinese community corrections officers integrated punishment and rehabilitation orientations. Two other articles were written by E. Li (2015, 2016). One of his articles explores the linkage between the practice of Chinese community corrections and a theoretical model from Western criminal justice systems, namely, actuarial justice. The other article analyses the gap between rhetoric and actual operation in Chinese community corrections. S. Jiang et al. (2014), S. Jiang et al. (2015), S. H. Jiang, Lambert, et al. (2016), S. Jiang, Jin, et al. (2016) and E. Li (2015, 2016) all introduce Chinese community corrections in rhetoric through literature reviews and examine Chinese community corrections in practice through interviews with officers and social workers. In S. H. Jiang et al. (2014), S. Jiang, Lambert, et al. (2016), and S. Jiang, Jin, et al. (2016), Chinese policy on community corrections was retrieved from official websites such as the MJ's website. When S. Jiang, Jin, et al. (2016, p. 775) explored the relation between formalisation, rehabilitation and punishment, they defined formalisation as the degree to which written rules are available for jobs and roles in an organisation, but they did not elucidate what the written rules are. In Li (2015, 2016), the rhetorical and policy basis of community corrections was retrieved from both the statements of the central authority and the regulations of the local bureau of justice in Shanghai. E. Li (2015, 2016) found evidence of actuarial justice in the detailed regulations of the local bureau of justice in Shanghai, which is subtly inconsistent with the official rationale.

This chapter postulates that the several terse joint statements on community corrections formulated by the SPC, SPP, MPC and MJ only explain the official rationale, the mission statements and the division of the tasks in general. They do not elaborate on who is eligible for community-based punishment or how to implement community corrections in detail. The detailed regulations instructing practitioners on how to carry out community corrections are issued by the local bureaus of justice, and the detailed instructions guiding how to issue community-based punishments are set forth by the SPC. These local regulations and judicial

documents not only reiterate the overt rationale alleged by the central authorities but also manifest the covert rules within the bureaucracy and the local capacity to realise the tasks of community corrections. Thus, the inconsistencies between the official statements and the detailed regulations can reveal the actual rationale underlying community corrections.

This chapter explores the gap between the official statements and detailed regulations on determining and executing community corrections. The next section describes the reform project mapped out by the Research Group on Community Corrections of the Ministry of Justice (2003). The third section examines the disparity between the official statements and the rules in the two prototype models in executing community corrections. The fourth section first looks at the amendments on community corrections and is followed by an analysis of the range of community corrections under the judicial interpretation on criminal policy, the sentencing guidelines and the guiding criminal judgments.

2. The rise of community corrections in a decade

2.1. The initiation of community corrections

Due to the dramatic social transformation beginning in 1979 coupled with soaring crime rates, the current Chinese criminal justice system suffers from prison overcrowding. It is reported that there are more than 1.5 million offenders were serving their sentences in prison in 2002 (Research Group on Community Corrections of the Ministry of Justice, 2003). The MJ, thereby, resolved to solve this problem and organised an official research group to conduct a comparative study on the alternatives to imprisonment between China and other developed countries. The Research Group on Community Corrections of the Ministry of Justice (2003) compared the scope of community-based sanctions, the agencies that made the decisions on community-based sanctions, the agencies who executed the community-based sanctions, cooperation between the agencies and the volunteers and the tasks of community corrections. It was found that Chinese community-based sanctions have many deficiencies with regard to the lack of correction programmes, the lack of professional teams to execute the sanctions and the lack of cooperation among different agencies. The ratio of custodial sentences to non-custodial sentences in China was strikingly lower than the ratio in most developed countries.

Before the initiation of the pilot community corrections programme, the missions of community-based sanctions pursuant to legal provisions were limited to supervision, and the arrangement of supervisory tasks was not clarified. The Criminal Law and the judicial explanations authorised the police to supervise the offenders under community-based sanctions with the cooperation of work units and grassroots organisations, to respond to the

infringement of the offenders under community-based sanctions, to revoke suspended sentences and parole under certain circumstances and to announce the termination of the community-based sanctions if the offenders observed the rules during their sentence terms.¹¹ The Research Group on Community Corrections of the Ministry of Justice (2003, p. 4) illustrated that the internal regulation of the police on the execution of community-based sanctions before 2003 provided some concrete supervisory tasks to the police, including how to file legal documents on the supervision process, how to designate a supervisory group to manage a specific case, and how to network with grassroots organisations to involve them in supervising the offenders. However, under these transparent published legal provisions and internal administrative regulations, it was still not very clear which supervisory tasks could be assumed by the work units and the grassroots organisations and why these NGOs had the power to supervise the offenders under community corrections.

The Research Group on Community Corrections of the Ministry of Justice (2003) elucidated why community-based sanctions were rarely handed down in China. The scope for community-based sanctions under the Criminal Law in China was very limited and this meant the courts could only sentence community-based sanctions in very few cases. Even worse, because of the limited mission of community-based sanctions, the abstract content of supervisory tasks, the unclear division of tasks between the police and the grassroots organisations and the poor cooperation among different agencies, superficial supervision was the only actual task in executing community-based sanctions. Because the judge must consider the effects of a sentence on the offenders and the community, the oversimplified task of community-based sanctions, in practice, further resulted in the reluctance of the court to issue community-based sanctions, even if the case could fall within the scope of community-based sanctions under the Criminal Law. The Research Group on Community Corrections of the Ministry of Justice (2003) recommended a schedule for developing community corrections. The first step was the improvement of the execution system of community corrections within the current legal framework. The recommendation suggested implementing corrections programmes to facilitate the reintegration of the offenders into society. The correction programmes should be managed by professional teams, with the collaboration of different agencies, grassroots organisations and volunteers. The second step

¹¹ Articles 38, 40, 76, 77, 85 and 86 of the Criminal Law. Article 15 of the Suggestions on Strengthening and Regulating Temporarily Serving Sentence outside Prison (the Suggestions, Guan yu jia qiang he gui fan jian wai zhi xing gong zuo de yi jian, issued by the Central Committee of Public Security Commission, the SPC, the SPP, the MPS and the MJ on 25 June 2009).

was the amendment of the legal provisions on community corrections. The goal of the recommendation was to broaden the scope of community corrections and to solidify the conditions under which those who were convicted could qualify for community corrections.

The research on community corrections conducted by the MJ directly influenced the policy-making in the pilot community corrections programmes. The Announcement on the Development of Pilot Locations for Community Corrections (the Announcement) formulated the community corrections mission statements and the division of the responsibilities among different agencies. The missions of community corrections included not only supervision but also correction and assistance. The tasks of community corrections were to strengthen the management and supervision of the offenders under community corrections pursuant to the Criminal Law, the Criminal Procedure Law and administrative regulations in order to ensure the efficient and effective enforcement of community corrections; to strengthen the moral and legal education of the offenders under community corrections and to correct their psychological and behavioural problems to give them the opportunity to repent their actions and lead law abiding lives in the future; and to help the offenders under community corrections to resolve issues regarding employment, their livelihoods and their psychology so that they may adapt to social life.¹² The Announcement encouraged cooperation among various agencies including the police, the bureaus of judicial administration, the courts and the procuratorates. The police were still responsible for the supervision of the offenders under community corrections, but it was no longer the agency that played the primary role in the enforcement of community corrections. The Announcement empowered the bureaus of justice as leaders in the pilot community corrections programme. The bureaus of justice were to collaborate with the police in supervising the offenders and coordinate different agencies and grassroots organisations in correcting and helping offenders. The courts were to make full use of community-based sanctions pursuant to the Criminal Law and judicial explanations and to consult with the bureaus of justice when they delivered community-based sanctions. The procuratorates were to monitor the process of community corrections.¹³

¹² Article 2.1 of the Announcements.

¹³ Article 3 of the Announcements.

2.2. The dissemination of community corrections from the pilot programme to nationwide programmes

The SPC, the SPP, the MPS and the MJ jointly issued the Announcement on Expanding the Pilot Location of Community Corrections across the Country in 2005, and the Suggestions on Enforcing the Pilot Community Corrections Nationwide in 2009. However, in the following year after the promulgation of the Suggestions on Enforcing the Pilot Community Corrections Nationwide, the community corrections programmes did not really cover all the criminals under community-based sanctions across the country. The book titled *The Application and Execution of Community Corrections Programmes* (Z. Wu et al., 2012) lists the number of offenders that received different community-based sanctions and who were in the community corrections programmes from 2007 to 2011 and states that the data were collected from the MJ documents; however, it does not mention how the data were collected and exactly which documents were used. Data on the number of offenders who received community-based sanctions, consisting of offenders who are in community corrections programmes and those who are not, are unavailable. The SPC publishes the number of offenders who are issued different sanctions every year, including PS and suspended sentences. The number of offenders under parole and temporarily serving sentences outside prison, whose original sentences were imprisonment, is also not readily available to the public. The available data are still not sufficient to clearly reveal how many offenders received community-based sanctions and how many of those who received community-based sanctions are in community corrections programmes at the same time. The two censuses can only provide an approximation of the ratio of offenders under PS and suspended sentences who are in community corrections programmes to those who are not in community corrections programmes. The number of offenders under PS in the community corrections programmes was 7746 in 2010 (see Table 2). Considering that the sentencing term of PS is from three months to two years and that the number of offenders sentenced to PS was 16,833 in 2009 and 16,171 in 2010 (see Table 1), more than half of the offenders under PS were not in the community corrections programmes in 2010. In the same vein, the number of the offenders under suspended sentences in community corrections programmes was 194,414 in 2010 (see Table 2). Considering the sentencing term of a suspended sentence is from six months to three years and the number of offenders issued suspended sentences was 249,111 in 2008, 250,635 in 2009, and 265,230 in 2010 (see Table 1), there are many offenders with suspended sentences who were not in community corrections programmes in 2010.

Table 1. Number of different punishments in criminal sentences nationwide from 1999 to 2014

	Number of offenders issued independent fines, independent deprivation of political rights or deportation	Number of offenders under public surveillance	Number of offenders with suspended sentences	Number of offenders under criminal detention, imprisonment and/or the death penalty	Total number of offenders issued criminal punishments
1999		7515	90,387		608,269
2000		7822	102,459		646,431
2001		9481	110,494		751,146
2002	12,121	9994	117,278	551,213	690,606
2003	14,275	11,508	135,927	569,645	733,358
2004	17,611	12,553	154,429	568,731	753,324
2005	19,575	14,604	184,366	610,693	829,238
2006	32,054	16,166	206,541	629,085	883,846
2007	24,675	15,882	227,959	648,094	916,610
2008	27,447	18,065	249,111	695,369	989,992
2009	23,554	16,833	250,635	688,421	979,443
2010	22,430	16,171	265,230	684,632	988,463
2011	22,125	14,829	309,297	686,215	1,032,466
2012	23,602	12,853	355,302	762,675	1,154,432
2013	24,819	14,641	356,523	742,570	1,138,553

2014	23,951	12,226	368,129	760,225	1,164,531
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Source: The data between 1999 and 2001 are from the MJ's research (The Research Group on Community Corrections of the Ministry of Justice, 2003); the data from 2002 to 2012 and 2014 are from the *Law Yearbooks of China* (The Editing Committee of the Law Yearbook of China, 2003, p. 1320; 2004, p. 1054; 2005 p. 1065; 2006, p. 988; 2007, p. 1065; 2008, p. 1106; 2009, p. 1000; 2010, p. 919; 2011, p. 1051; 2012, p. 1065; 2013, p. 1210; 2015, p. 1033); and the data in 2013 are from the SPC's website (SPC, 2014).

Table 2. Number of the offenders issued different criminal punishments in community corrections programmes from 2007 to 2011

	Number of offenders under public surveillance in community corrections programmes	Number of offenders with suspended sentences in community corrections programmes	Number of offenders under parole in community corrections programmes	Number of offenders temporarily serving sentences outside prison in the community corrections programmes	Total number of offenders in community corrections programmes
2007	3631	76,185	9076	12,903	101,795
2008	3644	87,348	10,600	13,522	115,114
2009	5065	121,975	15,168	16,480	158,688
2010	7746	194,414	30,621	21,814	254,595
2011	11,561	260,331	44,899	27,555	344,346

Source: *The Application and Execution of Community Corrections Programmes* (Z. Wu et al., 2012). The book states that the data are collected from the MJ documents but it does not mention how the data are collected and exactly which documents were used.

Amendment VIII of the Criminal Law issued in 2011 added provisions that offenders who were sentenced to PS, suspended sentences, or parole shall be subject to community corrections and might be issued a restraining order against them.¹⁴ This makes community

¹⁴ Articles 38, 72 and 85 of the Criminal Law.

corrections programmes a legal requirement in the implementation of community-based sanctions. The revised Criminal Procedure Law promulgated in 2012 also stipulates that criminals who are sentenced to community-based sanctions should be eligible for community corrections.¹⁵ Since then, corrections programmes should be implemented in executing all community-based sanctions.

3. Reframing the execution of community corrections

The MJ published the Provisional Implementing Measures of Community Corrections in 2004. After community corrections was introduced into the Criminal Law and the Criminal Procedure Law, various agencies responsible for the implementation of community corrections began to draft regulations specifically geared toward community corrections. The SPC, the SPP, the MPS and the MJ jointly issued Implementing Community Corrections Measures in 2012 and the MJ drafted a regulation on community corrections. These legally binding instruments also functioned in concert with the MJ's research and further clarified specific measures for different tasks and how to apportion the measures to various agencies.

3.1. The three missions of community corrections

In the 2003 document, supervision and management (Jian du guan li, 监督管理) was prioritised over education and correction (Jiao yu jiao zheng, 教育矫正). Since 2009, the order of the three missions has been prioritised as education and correction, supervision and management, and assistance. The detailed requirements of the three missions are summarised in the subsections below.

3.1.1. Education and correction

The goal of education and correction is to encourage offenders to repent and re-establish social bonds. Community corrections institutions shall provide study activities related to public morality, legal knowledge and current affairs to improve offenders' moral character and legal understanding.¹⁶ They shall also employ psychiatrists to deliver psychological

¹⁵ Article 258 of the Criminal Procedure Law.

¹⁶ Article 2.2.1 of the Announcements. Article 28 of the Provisional Implementing Measures of Community Corrections (the Provisional Implementing Measures, She qu jiao zheng zan xing ban fa, issued by the MJ on 1 July 2004). Article 3.1 of the Suggestions. Article 15 of the Implementing Measures of Community Corrections (the Implementing Measures, She ju jiao zheng shi shi ban fa, issued by the SPC, the SPP, the MPC, and the MJ on 10 January 2012).

counselling to the offenders.¹⁷ Additionally, offenders under community corrections who can work shall participate in community service to cultivate a sense of social responsibility, to work for the common good, and for discipline.¹⁸ Offenders under community corrections shall participate in no less than eight hours of educational study and no less than eight hours of community service each month.¹⁹ The community corrections institutions shall devise an individualised corrections plan for each offender under their supervision based on a comprehensive evaluation of the offense, display of remorse, personality traits and daily life environment. The corrections plan shall be adjusted over time to achieve optimal results.²⁰

3.1.2. Supervision and management

Community corrections institutions should have the offenders under surveillance and should investigate whether they observe the rules pursuant to the Criminal Law. Under the Criminal Law, offenders under PS, suspended sentences or parole shall report on his or her own activities as required by the supervision institution; observe the regulations for receiving visitors stipulated by the supervision institution; and apply to obtain approval from the supervisory institution for any departure from the city or county in which he or she lives or for any change in residence.²¹ The offenders under PS may be subject to a restraining order against them, which means they are prohibited from engaging in certain activities, entering certain areas or places or contacting certain persons during a suspended sentence. In addition, an offender under PS exercises no right to freedom of speech, press, assembly, association, procession or demonstration without the approval of the organ executing the PS.²² The offenders temporarily serving sentences outside prison as well as their bail bondsperson shall apply to obtain approval from the supervisory institution for any departure from the city or county in which the offender lives or for any change in residence, and report regularly on their medical diagnosis.²³ To effectively supervise the offenders, the community corrections

¹⁷ Article 30 of the Provisional Implementing Measures. Article 17 of the Implementing Measures.

¹⁸ Article 3.1 of the Suggestions. Article 16 of the Implementing Measures.

¹⁹ Article 16 of the Implementing Measures.

²⁰ Articles 23 and 29 of the Provisional Implementing Measures. Article 3.1 of the Suggestions.

²¹ Articles 39, 75 and 84 of the Criminal Law.

²² Article 39 of the Criminal Law.

²³ Article 12 of the Regulations on Temporarily Serving Sentences outside Prison (Zan yu jian wai zhi xing gui ding, issued by the SPC, the SPP, the MPS, the MJ and the Health Commission on 24 October 2014).

institutions shall periodically contact the offenders; visit their homes, workplaces, schools and local communities; make their reports;²⁴ and communicate with them in the office under special circumstances.²⁵ Technology such as electronic monitoring could be utilised to track and monitor offenders. Community corrections institutions should maintain different surveillance intensities with regard to the sanctions imposed on the offender and the offender's risk level, formulate a routine evaluation system, and connect the evaluations with the judicial decisions on the commutation of the sentence and the revocation of community-based sanctions.²⁶ When an offender under community corrections has violated the regulations on community corrections or the restraining order, or even escaped supervision, his or her case shall be investigated promptly.²⁷

3.1.3. Assistance

The primary goal of the assistance mission is to teach offenders how to support themselves after their non-custodial sentences have come to an end. Community corrections institutions shall coordinate with relevant departments and NGOs to undertake vocational training and employment guidance according to the needs of the offenders.²⁸ Correctional institutions also help urban offenders apply for subsistence allowances and help rural offenders contract for land.²⁹ Offenders under community corrections are not supposed to experience education, employment or social welfare discrimination.³⁰

²⁴The offenders under community corrections shall periodically report at an appointed time. In addition, they shall report to the community corrections institutions immediately when there are changes in residence or work, when there are major unforeseen events in the family, or when the offender encounters persons who may have a harmful influence on his or her correction.

²⁵ Articles 19 and 20 of the Implementing Measures.

²⁶ Article 34 of the Provisional Implementing Measures. Article 21 of the Implementing Measures.

²⁷ Article 34 of the Provisional Implementing Measures. Article 3.2 of the Suggestions. Articles 19 and 24 of the Implementing Measures.

²⁸ Article 33 of the Provisional Implementing Measures. Article 3.3 of the Suggestions. Article 18 of the Implementing Measures.

²⁹ Article 3.3 of the Suggestions.

³⁰ Article 36 of the Implementing Measures.

3.2. Cooperation in the implementation of community corrections

The bureaus of justice should coordinate various agencies, social workers, volunteers and grassroots organisations to conduct all the tasks at different phases of community corrections.³¹

First, the bureaus of justice should make an advisory report when the agency with the power to make decisions on community-based sanctions would like to know about the impacts on the community where the offender lives if the offender serves his or her sentence in the community. The bureaus of justice should inquire into the living conditions, the family and social relations, the consequences and influences of the crime, the previous record and the reaction of the grassroots organisations and the victim. Then, they should offer the agencies advice on whether there are major adverse influences on the community if the offender is sentenced to community-based sanctions and what the contents of a restraining order should be regarding the offender's behavioural and psychological issues.

Second, the offices of justice at the grassroots level should create individualised correction programmes for different offenders under community corrections according to the enquiries they made, organise correction teams for different offenders, compile dossiers on the offenders and regulate the correction programmes with regard to the correction progress of the offenders. The bureaus of justice should report to the agency that makes the decision on community-based sanctions if the offender does not register in the bureau of justice pursuant to the verdict and should ask the offenders to register in a designated local office of justice in three days if the offenders register in the bureau of justice on time. The office of justice at the grassroots level should organise a correction team for the offender after he or she comes to register. The leader of the correction team should be an officer in the local office of judicial administration. Other members of the correction team should be drawn from a pool of social workers, members of grassroots organisations, and the relatives, colleagues, teachers, classmates or guardians of the offender, and other volunteers. The offices of justice at the grassroots level should sign agreements with the members of the correction team and clarify their responsibilities. The office of justice at the grassroots level should declare the correction programme when the offender and all the members of the correction team are present. In the declaration, the office of justice at the grassroots level should inform the offender of the rules

³¹ The Provisional Implementing Measures; the Implementing Measures; and the Suggestions on Further Strengthening Connections and Cooperation in Community Corrections (Jin yi bu jia qiang she qu jiao zheng gong zu xian jie pei he guan li de yi jian, issued by the SPC, the SPP, the MPC, and the MJ on 21 September 2016).

that he must observe, the legal consequences of infringement, and his or her rights and responsibilities and introduce the members of the correction team and their duties.

Third, the bureaus of justice take over the routine supervisory tasks from the local police and become the coordinators of the education and assistance tasks. The bureaus of justice should recruit and manage social workers and volunteers and cooperate with the bureau of civil affairs, the bureau of labour and social security, the bureau of education, social workers, volunteers and grassroots organisations in conducting the education and assistance tasks.

Fourth, the bureaus of justice should evaluate the offenders' performance in the correction programmes, and their evaluations can influence the commutation or the revocation of community corrections. The bureau of justice should issue a warning if the offender under community corrections does not register on time or violates the rules on reporting on his or her own activities, receiving visitors, applying to obtain approval for any departure from the city or county in which he or she lives or for any change in residence; is absent from a correction programme activity without excuse; does not submit the medical diagnosis on time without excuse when temporarily serving a sentence outside prison; infringes on the restraining order and the circumstance involves a minor; or if he or she violates other rules in some form. The bureau of justice should transfer the case to the police, and the police should inform the bureau of justice of the result if the offender's violation should be punished through administrative penalties. The bureau of justice should propose a recommendation on the revocation of a suspended sentence or parole and provide evidence to the court that makes the decision if the offender violates the restraining order and the circumstances are serious; does not register or escapes from surveillance for more than a month; was punished through administrative penalties but continues the violation; received more than three warnings but continues the violation; or seriously violates another rule. The court should decide within a month. The recommendation of the bureau of justice and the decision of the court should be sent to the procuratorate and the police as well. The bureau of justice should propose a recommendation on the revocation of temporarily serving a sentence outside prison and provide evidence to the court that makes the decision if the offender is found to be ineligible to temporarily serve a sentence outside prison; received a warning for departing from the city or county in which he or she lives without application and continues the violation; was punished through administrative penalties but continues the violation; received more than two warnings but continues the violation; received a warning for failing to report regularly on their regular diagnosis, but continues the violation; the grounds for temporarily serving a sentence outside of prison no longer exist and the sentence still continues; the

bondsperson does not qualify any longer and the offender cannot propose a new bondsperson; or if he or she seriously violates other rules.

The bureau of justice should propose a recommendation on commutation and provide evidence to the court if the offender's performance deserves commutation pursuant the Criminal Law and judicial explanations, that is, the offender makes a confession and indicates remorse, observes the rules, actively participates in education and community service, and makes a worthy contribution to society. The court should decide cases eligible for PS, suspended sentence and parole within a month and the cases for temporarily serving sentences outside prison within two months. A copy of the recommendation drafted by the bureau of justice and the decision made by the court should be sent to the procuratorate and the police.

3.3. Local regulations on the execution of community corrections

To lay the groundwork for nationwide implementation, the community corrections pilot programmes were carried out first in six relatively developed provinces or municipalities. Beijing and Shanghai are the most developed cities and the earliest to put community corrections into practice on a trial basis in China. Among the trial models, the achievements of Beijing and Shanghai are most influential. There are several published regulations in Beijing and Shanghai that generally instruct how to implement community corrections.³² There are also many inner regulations that give detailed guidance on how to carry out various community corrections tasks. Despite the fact that the complete texts of these inner regulations are not readily available to the public, some provisions in these inner regulations are revealed in published reports and articles written by officers who participated in community corrections and scholars who are permitted to cooperate with the officers to conduct research on community corrections. It is a great challenge for local agencies to cope with changes in executing community-based punishments. The bureaus of justice, social workers and volunteers need to play new roles and undertake new missions in community corrections. This section introduces how the new tasks are carried out and how social workers

³² The published regulations include the Suggestions on Implementing Pilot Community Corrections in Beijing (Beijing shi Guan yu kai zhan she qu jiao zheng shi dian gong zuo de yi jian), the Regulations on Implementing Community Corrections in Beijing (Beijing shi she qu jiao zheng shi shi xi ze), the Suggestions on Promoting the Standardisation of Community Corrections in Shanghai (Guan yu tui jin ben shi she qu jiao zheng gui fan hua gong zuo de yi jian), and the Provisional Regulations on Classified Corrections for the Offenders under Community Corrections in Shanghai (Shanghai shi she qu fu xing ren yuan fen lei jiao zheng zan xing gui ding).

and volunteers are authorised to complete various tasks pursuant to published and internal regulations – in detail in Beijing and Shanghai and in general in the other regions.

3.3.1. The Beijing Model

In Beijing, the community corrections programme was administrated by the prisoner re-education liaison.³³ The liaison is a member of the Municipal Bureau of Justice. Since 2003, a leading committee was established comprised of members from the Municipal Bureau of Justice, the Municipal People's Court, the Municipal People's Procuratorate, the Municipal Bureau of Public Security, the Municipal Bureau of Civil Affairs, the Municipal Bureau of Labour and Social Security and the Municipal Office of the Comprehensive Treatment of Social Security.³⁴ The committee is based in the Municipal Bureau of Justice. Hence, the Municipal Bureau of Justice plays a leading role in implementing the programmes. In addition to the officers of the Municipal Bureau of Justice, prison guards and social workers are enrolled as members of the professional teams to run the community corrections programmes. Additionally, to encourage community participation, several 'Yangguang' (阳光) community corrections service centres have been built to recruit and train social workers and volunteers³⁵ (Dan, 2011; Jing Zhang, 2013). The Beijing Model was also called the '3+N' Model. In this model, '3' refers to the professional teams, including the officers of the Municipal Bureau of Justice, prison police officers and social workers, while 'N' refers to volunteers (S. Jiang et al., 2014; The Research Department of the Ministry of Justice, 2008).

The programme puts an emphasis on strengthening the supervision of offenders. The aim of drafting prison guards into the professional teams is to make the officers in the bureau of justice aware that 'community corrections is a process of executing punishment and thus it is

³³ The Report on Drafting the Guards in the Prison into Community Corrections and the Programmes of Education and Help for Ex-prisoners (Guan yu chou diao jian yu lao jiao gan jing can jia she qu jiao zheng he an zhi bang jiao qing kuang de bao gao, issued by Beijing Bureau of Justice on 3 February 2008).

³⁴ The Suggestions on Implementing Pilot Community Corrections (Guan yu kai zhan she qu jiao zheng shi dian gong zuo de yi jian, issued by the Political and Judiciary Commission under the Beijing Committee of the CCP and Beijing Municipal Office of the Comprehensive Treatment of Social Security).

³⁵ The Notice on Strengthening the Yangguang Community Corrections Service Centres (Guan yu jia qiang yang guang she qu jiao zheng jian she de tong zhi, issued by the office of the leading committee on community corrections in Beijing in September 2006).

punitive, coercive and serious'.³⁶ Every local office at the grassroots level has at least one prison guard participating in the entire process of community corrections for a particular offender (Jing Zhang, 2013).³⁷ The goals of Beijing Model are that every offender is supervised, no offender escapes supervision, no offender commits a subsequent crime, and no offender jeopardizes the social order.

The Yangguang community corrections service centres are funded by the bureau of finance, administrated by the bureau of justice, and their offices are located in the bureau of justice at district or county level.³⁸ To safeguard the security of the Olympic Games, the first corrections service centre was built in the Chaoyang District, a month before the Olympic Games would be held there. By the same token, electronic monitoring was first employed to supervise criminals under community corrections several months before the inauguration of the Olympic Games. The service centre in Chaoyang was meant for offenders under community corrections as well as those who were recently released from prison (Dan, 2011). The corrections service centre in Chaoyang are considered to have achieved remarkable results because none of the people from this service centre committed crimes in the two years following the Olympic Games (S. Huang & Wang, 2010).

Moreover, an auxiliary goal of the program is that the need for social worker generates more local employment opportunities. The assistants to community corrections officers are a type of social worker and their jobs are to help the officers administer community corrections.³⁹ They are recruited by the Yangguang community corrections service centres from unemployed women who are over the age of 40 and have been out of work for more than three months, unemployed men over the age of 50 who have been out of work for more

³⁶ Article 4.1 of the Report on Drafting the Guards in the Prison into Community Corrections and the Programmes of Education and Help for Ex-prisoners (Guan yu chou diao jian yu lao jiao gan jing can jia she qu jiao zheng he an zhi bang jiao qing kuang de bao gao, issued by Beijing Bureau of Justice on 3 February 2008).

³⁷ The Responsibilities of the Prison Guard in Community Corrections (She qu jiao zheng gong zuo jian yu lao jiao gan jing gang wei zhi ze, issued by Beijing Bureau of Justice in July 2005).

³⁸ The Notice on Strengthening the Yangguang Community Corrections Service Centres (Guan yu jia qiang yang guang she qu jiao zheng jian she de tong zhi, issued by the office of the leading committee on community corrections in Beijing in September 2006).

³⁹ The Suggestions on Recruiting Assistants to Community Corrections Officers (Guan yu zhao pin she qu jiao zheng xie guan yuan gong zuo de yi jian, issued by Beijing Bureau of Justice and Beijing Bureau of Labour and Social Security in 2007).

than three months, unemployed women over the age of 35 who have been out of work for more than one year, and unemployed men over the age of 40 who have been out of work for more than one year.⁴⁰ After passing the recruitment examination and completing a two-week training, the social workers can sign an employment contract with the Municipal Bureau of Justice. They can receive a wage of approximately 1700 yuan per month (Jing Zhang, 2013). The social workers on the professional team are full-time workers but their duties are more administrative in nature. Every social worker is in charge of supervising five criminals under community corrections and fifteen ex-offenders who were recently released from prison (Z. Lin, 2007). Their work involves taking part in developing a corrections plan, filling out documents, regularly visiting the families of offenders under community corrections, and keeping the Municipal Bureau of Justice informed about the offenders under community corrections. The frequency of visits and reporting are dependent on the classification of the criminals. Offenders in community corrections are classified into a three-tiered system. Convicts are placed into the A, B, and or C group, with A as the highest tier, based on their danger to society and re-socialization level. Their tiers corresponds with intensive supervision, normal supervision, and minimum supervision.⁴¹ (Z. Lin, 2007; Y. Wang & Li, 2007). The assistants to community corrections officers do play a prominent role in intensifying the supervision.

Volunteers recruited by the Yangguang community corrections service centres are primarily from among pensioners (retired civil servants, retired professionals and retired teachers), civil servants, members of neighbourhood committees and village committees, college students and family members of offenders and ex-offenders (H. Wang, 2007). The Yangguang community corrections service centres regularly organise moral education and legal education seminars for the offenders, under the guidance of the Municipal Bureau of Justice and arrange for volunteers to periodically provide one-on-one assistance. The service centre also engages

⁴⁰ The Notice on Recruiting Assistants to Community Corrections in Yangguang Community Corrections Service Centre in Huairou District of Beijing Municipality in 2016 (2016 nian Beijing shi Huairou qu Yangguang she qu jiao zheng fu wu zhong xin zhao ping she qu jiao zheng xie guan yuan gong gao, issued by the Yangguang Community Corrections Service Centre of Huairou District on 11 July 2016, <http://www.bjsgwy.org/2016/0712/6109.html>).

⁴¹ The Provisional Regulations on the Dynamic Analysis of the Offenders under Community Corrections (She qu jiao zheng ren yuan dong tai fen xi gong zuo zan xing gui ding, issued by the office of community corrections in Beijing in 2005); the System on the Analysis of the Comprehensive Situations of the Offenders under Community Corrections (She qu fu xing ren yu zong he zhuang tai ping gu zhi biao ti xi, issued by the office of community corrections in Beijing in 2005).

companies and college professors to provide psychological counselling and vocational training. For those who have the capacity and willingness to work, the service centres recommend them for jobs (Qin, 2013). For those who were homeless, unemployed, and away from their relatives, the service centres also provide temporary accommodations (The Bureau of Community Corrections of the Ministry of Justice, 2010).

3.3.2. The Shanghai Model

A similar leading committee was formed and community corrections service centres known as 'Xinhang' (新航)⁴² in Shanghai were established as well. Unlike other pilot locations, the Shanghai Bureau of Justice must purchase its community corrections services and has no power to control the operations (Dan, 2011).

The Xinhang community corrections service centres provide collective education, psychological counselling, cognitive-behaviour programmes, and reintegration assistance (Bureau of Community Corrections of the Ministry of Justice, 2016). Concurrently, they must conduct normal monitoring and management and organise the offenders to participate in community service. The ratio of civil servant employees to employees recruited by Xinhang is 1:50. The civil servants from the police office, the court, the procuratorate, and the Shanghai Bureau of Justice are obliged to guide the social workers employed by Xinhang. They are withdrawing from the community corrections programmes at 25% percent per year. Every residential district has a Xinhang workstation with two or three social workers (H. Chen, 2014). Each social worker employed by Xinhang undergoes an intensive training programme before beginning work. The training is a total of 120 hours and is taught by professors specialising in social work or law. The social workers must also engage in a minimum of 48 hours of additional training annually (Lina Wang, 2008).

The bureau of labour and social security allocates funds to Xinhang regarding the number of social workers there. Xinhang also raises money from private donations. The government appropriated 40,000 yuan for every social worker per year in 2004. They can receive a wage from 1500 to 2000 yuan per month based on their educational backgrounds (Y. Gu, 2008; Lina Wang, 2008). In 2008, Liu Qingyuan, the Director-General of Xinhang, complained that a funds shortage loomed large as the appropriated funds had not changed in four years (Y. Gu, 2008). The wage of a social worker is lower than the average wage in Shanghai in 2007, at 2892 per month. The caseloads are heavier but the income of social workers cannot rise accordingly.

⁴² See <http://www.xhang.com/index.asp>.

This has led to the resignation of many excellent social workers. According to Liu Qingyuan, Xinhang does not receive much money in the form of private donations. He feels that because donations for the public good are taxed at 33 percent, this dampens the enthusiasm toward donating funds for the public good (Y. Gu, 2008). The heavy caseload and the high turnover rate among trained social workers make many innovations infeasible. For example, E. Li (2015) discovered through his interviews with officers and social workers in Shanghai's community corrections programmes that because of heavy caseloads (from 1360 in 2002 to 10,917 in 2011) and a lack of professional training, most respondents noted that the risk assessment tool was infrequently used in routine practice.

Volunteer work is administrated by an NGO. The Association of Volunteers for Helping and Educating Ex-offenders and Offenders under Community Corrections (she hui bang jiao zhi yuan zhe xie hui, 社会帮教志愿者协会)⁴³ raises funds for voluntary work, recruits employees and volunteers (both natural and legal persons), trains volunteers and guides them in their volunteer work. Though the bureau of justice heads up the association, the bureau gives the association the freedom to operate according to its constitution. Any citizen or legal person interested in volunteer work can fill out an application and send it to the Association of Volunteers for Helping and Educating the Ex-offenders and the Offenders under Community Corrections. If the association approves the application, the citizen or legal person will be a volunteer. Primarily, however, the volunteers in Shanghai are from pensioners, civil servants, members of neighbourhood and village committees and college students. According to the data of the association, 54% of the volunteers are members of neighbourhood and village committees, 9.1% are pensioners, 7.9% are civil servants, and 4.4% are college students (N. Chen, 2011).

The operations of both Xinhang and the voluntary association are made transparent to the public in Shanghai, which is a distinguishing characteristic among the community corrections services throughout China. Both Xinhang and the voluntary association have their own websites to keep track of their activities and publish the practical assistance sources available to offenders under community corrections and to ex-offenders. These practical assistance sources are similar to those provided by Yangguang in Beijing, including subsistence allowances, vocational training, psychological counselling and job recommendations.

⁴³ See <http://www.shbangjiao.com/index.asp>.

3.3.3. The models in other regions

In Beijing and Shanghai, the concrete tasks taken on by the bureau of justice, the social workers and the volunteers are practically the same. The most obvious difference between the Beijing Model and the Shanghai Model is simply the legal relationship between the government and community corrections service centres. In the Beijing Model, the bureau of justice governs service centres by authority, while in the Shanghai Model, the bureau of justice governs services centres and voluntary associations by contract. The government-purchase model in Shanghai is an innovation in China. The Research Department of the Ministry of Justice (2012) maintains that the government-purchase model may be disseminated to other cities in the future but it is currently infeasible for most underdeveloped regions, especially the Western regions in China. The financial problem is specially grim in villages in Western China (C. Kong, 2010; W. Tang, 2014). Notwithstanding the Implementing Measures of Community Corrections that require the cost of community corrections to be part of the budget plan, the bureaus of justice of many municipalities receive only the initiation finances for community corrections and the programmes are chronically underfunded (C. Kong, 2010; J. Zhang, Wu, & Zhang, 2010). The bureaus of justice in most regions are governing social workers and volunteers by authority. However, the Research Department of the Ministry of Justice (2012) finds that it is also very difficult for other cities to introduce the Beijing Model because other cities have much less staff under their authority who can participate in community corrections than in the capital.

Albeit infeasible to various extents, many cities borrow the local regulations on community corrections from Beijing and Shanghai. To date, the national programme has been in effect for six years and some areas have experienced various difficulties in carrying out community corrections pursuant to the regulations.

As the Research Department of the Ministry of Justice (2012) detects, the number of personnel in the bureaus of justice and their affiliates in some provinces or municipalities is far from sufficient. Prior to their involvement, the affiliates' missions were guiding legal education, legal consultation, mediation participation, dispute resolution on behalf of the township government, community security management, cooperation with the police station and local court to maintain public order and control crime, and the implementation of other legal services delegated by the bureau of justice. It sounds like many responsibilities but actually, other departments simply consult the affiliates for their law-related work. In some towns and villages, the affiliates of the bureau of justice only have about three staff members (S. Jiang et al., 2014; J. Zhang et al., 2010). In addition, the staff members are sometimes

required to work in other institutions on the side (Y. Wu, 2010). In some undeveloped provinces in West China, many villages are in isolated areas. Liangshan, a prefecture containing numerous ethnic communities, has approximately 100 staff members in its bureau of justice affiliates. These 100 staff members must manage approximately 600 towns and villages. When the workload of the bureau of justice rises dramatically due to community corrections, the number of staff members does not increase accordingly (S. Xu, 2015). As mentioned above, it is difficult for most regions to draft officers from other departments, as in the Beijing Model, and it is also difficult for many regions to purchase services, as in the Shanghai Model. In the past eight years, many provinces and municipalities have attempted to employ more officers to work on community corrections, but the size of an agency is restricted by the central authority. The bureaus of justice in many regions prefer to employ assistants to community corrections officers as social workers, like the Beijing Model. The selection standards for assistants to community corrections are not very high. The position does not require a high educational level and specific social work skills. The bureaus of justice in many regions also rely on the members of neighbourhood and village committees as volunteers to participate in community corrections. Neighbourhood committees and village committees are regarded as having grassroots autonomy in China but as Xiaoming Chen (2004) indicates, from a strict point of view, neighbourhood committees and village committees are quasi-formal because they do not form a part of the formal criminal justice system, yet they are established on the basis of certain legal regulations and often are guided by local bureau of justice organs or police. The assistants to community corrections officers and members of neighbourhood and village committees undertake many of the routine supervisory tasks, under the guidance of the officers in the bureaus of justice. However, some corrections measures in the regulations—such as comprehensive evaluations of the offenders, individual correction plans, and psychological counselling—lack sufficient funding and staff to get off the ground. Most regions do not have a risk assessment tool and cognitive-behaviour programmes, and some regions do not even have psychological counselling. In some local regulations, there are provisions on these measures but they are not required to be routine practice.

4. Revising the principal sources of sentencing decisions for community corrections

The published data show that the recidivism rate of offenders under community corrections is extremely low. It was 0.37% in Beijing in 2011 and 0.6% in Shanghai in 2012 (E. Li, 2016; Jing Zhang, 2013). Although Beijing and Shanghai allocate more resources toward implementing numerous correction measures than other regions, the recidivism rate of the offenders under community corrections in Beijing and Shanghai is higher than the average, and the recidivism

rate in Shanghai has been the highest among all the trial locations for many years (Wenju Zhang, 2014). The recidivism rate of criminals under community corrections was 0.22% in 2011 and remained under 0.2% in 2013 (Xin, 2014). The bureau of justice in one province even reported that the recidivism rate of criminals under community corrections in that province was just 0.015% (Zhitang Wang, 2014).

E. Li (2016) attributes the low recidivism rate to intensified supervision. Community corrections adopt a wide range of supervisory measures to curb the risk that offenders may present to society, and these approaches enable local authorities to effectively control the whereabouts and activities of offenders, keeping tight control over their behaviour. O. Yu and Zhang (1999); L. Zhang, Cao, Sun, and Heberton (2013) question the reliability of official Chinese data on crime. According to the *China Law Yearbook*, the recidivism rate of previous criminals and previous wrongdoers once under Re-education through Labour was 0.02% in 2008, 0.02% in 2009, 0.01% in 2010, 0.01% in 2011 and 0.47% in 2012. The statistical computations on recidivism rates were performed by the MJ, but the MJ never explained how the statistics were collected. O. Yu and Zhang (1999) discovered that there was significant underrepresentation of crime in the police-produced statistics in their case study.

This section hypothesises that the low recidivism rate also relates to the scope of criminals who can be sentenced to community-based punishments. As Weijun Wu, Xu, and Ren (2013) remark, the Political and Judiciary Commission under the Central Committee of the CCP made reducing the recidivism rate a primary standard for measuring the correctional system in 2008; since then, various agencies associated with community corrections all developed their own methods to cater to this requirement. Although the Research Group on Community Corrections of the Ministry of Justice (2003) plans to broaden the scope of the types of offenders who could be sentenced to community-based sanctions under the formal sentencing decision sources, in actuality, offenders in community corrections sentences are those not likely to commit future crimes. The current formal sources of sentencing decisions for community corrections are the Criminal Law and the Criminal Procedural Law. Except for these legal provisions, the judicial interpretations, the sentencing guideline, and the guiding criminal judgements set forth by the SPC also provide some guidance on how to issue community-based punishments. Although these SPC's documents are just deemed to be informal sources of sentencing decisions, they are necessary complements to the legal provisions. This section reviews the principal sources for sentencing decisions for community corrections (the Criminal Law, the judicial interpretations, the sentencing guidelines and the guiding criminal judgements), and the statistics on the decisions of community corrections

provided by the SPC. The section aims to examine what the scope of community-based sanctions was and is in the Chinese penal system, and explores the reasons for the change or the constancy.

4.1. The conditions of community corrections under the Criminal Law

4.1.1. Public surveillance (PS)

Under the Criminal Law, no crimes are punishable only by PS, independent fines or independent deprivation of political rights. Typically, PS, independent fines or independent deprivation of political rights fixed-term is issued in conjunction with imprisonment of less than three years or criminal detention as a choice of punishments for certain crimes. In practice, PS, independent fines and independent deprivation of political rights are rarely issued. As Table 1 illustrates, only 12,226 offenders were sentenced to PS in 2014, which accounted for 1.05% of all criminal punishments issued in 2014. The number of offenders under PS is decreasing.

The term of PS shall be not less than three months but not more than two years. An offender under PS shall submit to supervision; exercise no right to the freedom of speech, press, assembly, association, procession or demonstration without the approval of the organ; report on his or her own activities as required by the organ executing the PS; observe the regulations for receiving visitors as stipulated by the organ executing the PS; and apply to obtain approval from the organ executing the PS for any departure from the city or county in which he or she lives or for any change in residence. An offender under PS shall receive equal pay for their labour.⁴⁴ Upon the expiration of a term of PS, the executing organ shall immediately announce the termination to the offender and to those in his or her workplace and to those in his or her place of residence.⁴⁵

PS was, in part, politically driven during the Mao era. It was primarily imposed on previous class enemies during the class struggle of the Mao era rather than on normal criminals who committed minor offences. ‘The masses’ (qunzhong, 群众)⁴⁶ played a vital role in the class struggle. The reclaimable class enemies were not only supervised by the police but also by the

⁴⁴ Article 39 of the Criminal Law.

⁴⁵ Article 40 of the Criminal Law.

⁴⁶ The term ‘the masses’ is virtually synonymous with ‘the people’ (ren min, 人民). In a socialist society, ‘the masses’ is an important political concept.

masses (their neighbourhoods and colleagues). After the 1990s, both in academic and practical circles, it was widely accepted that the Criminal Law should be de-politicised (Xingliang Chen, 2010; Ouyang, 2013; Weiping Zhang, 2014). This is revealed in the revised Criminal Law in 1997 and its subsequent amendments. Compared with the Criminal Law issued in 1979, many politically driven terms, such as counterrevolutionaries, proletariat dictatorship and socialist revolution, were redacted in the revised Criminal Law and its amendments. However, PS articulated from the Mao era remained political overtones. XIN. The deprivation of some political rights for an offender who commits a minor offence that is unrelated to political rights indicates that offenders under PS are still deemed to be reclaimable enemies. 'Enemy' was the label stuck on all criminals of Mao era, but this label is no longer attached to minor offenders now. The requirement of announcing the termination of the offender's PS to colleagues and neighbours signals that the masses should still be involved in supervising offenders. The mobilization of the masses in supervising offenders was a key attribute of the penal system of Mao era, but this tradition is weakened, and the professionalisation in supervising offenders is stressed now. The emphasis on equal pay for equal work in the provisions on PS was also a trace of the penal system of the Mao era. The most frequently imposed punishment was reform through labour ((lao dong gai zao, 劳动改造) during the Mao era ('reform through labour' was revised into 'imprisonment' under the Prison Law promulgated in 1994). Offenders serving under reform through labour could only receive a very low salary. Equal pay for equal work was a privilege that offenders under PS could enjoy. After the 1997 Criminal Law endorsed *nulla poena sine lege*, most scholars and practitioners insist that there is no justifiable reason to reduce the salaries of offenders under community-based sanctions and in practice, even if the Criminal Law makes no provision against discriminatory payments for the offenders under community-based punishments (Z. Zheng, 2013). The provisions on PS are inconsistent with some principles of the current Criminal Law, and thus becomes impractical and rarely applied.

4.1.2. Suspended sentences

Table 2 shows that more than 72% of the offenders under community corrections programmes were offenders serving suspended sentences between 2007 and 2011. There were 368,129 criminals who were issued suspended sentences, which comprised 31.61 % of all punishments in 2014 (see Table 1). The number of offenders under suspended sentences has been rising since 1999. The obligations of offenders under a suspended sentence and under PS are similar. Compared with PS, a suspended sentence has two additional features: it does not have political overtones and it has the back-up of imprisonment. Therefore, judges

usually prefer to issue a suspended sentence rather than PS when they need to make a choice between the two.

Even though a suspended sentence is the most widely applied community-based sanction, the criteria for determining the suitability of a suspended sentence under the Criminal Law are ambiguous and infeasible.

The Criminal Law, revised in 1997, stipulates that a suspended sentence may be granted to a criminal sentenced to criminal detention or to fixed-term imprisonment of not more than three years if, according to the minor circumstances of the crime and the demonstration of repentance, the criminal poses no threat to society; a suspended sentence shall not be applied to recidivists.⁴⁷ Amendment VIII of the Criminal Law, issued in 2011, deletes the requirement of 'posing no threat to society' and adds two new considerations. One is that 'the criminal has no risk of recidivism' and the other is that 'the suspended sentence will not have any major adverse impact on the community where the criminal lives'. In addition to the stipulation of the circumstances in which the criminal may be granted a suspended sentence, the amendment attaches the circumstances in which a criminal shall be granted a suspended sentence, that is, 'the criminal is under the age of 18, is pregnant or has attained the age of 75'.⁴⁸ The amendment also adds a circumstance in which a suspended sentence shall not be applied. This is where a criminal is the leader of an organised crime group.⁴⁹ In general, there are three factors to consider when a court issues a suspended sentence.

The first factor to consider for a suspended sentence is 'the circumstances of the crime are minor', but there is no definite standard for such a judgment. The vague parameters on the circumstances of the crime inevitably confuse judges.

The second factor to consider for a suspended sentence is 'the demonstration of repentance'. In suspended sentence cases, the judges put more emphasis on the repentance of the criminals or other factors that indicate diminished culpability.

As Ren (1997, p. 6) articulated, social conformity in the Chinese vocabulary is not limited to behavioural conformity with the rule of law but always moralistically identifies with the officially endorsed beliefs of social standards and behavioural norms. Criminal justice work in

⁴⁷ Articles 72 and 74 of the Criminal Law issued in 1997.

⁴⁸ Article 72 of the Criminal Law revised by Amendment VIII of the Criminal Law.

⁴⁹ Article 74 of the Criminal Law revised by Amendment VIII of the Criminal Law.

China is perceived as a didactic interpreter of both social conduct and public morality (Trevaskes, 2007). The demonstration of repentance embodies an achievement in the moral education of criminal justice work. Furthermore, the repentance of the criminals is lively teaching material for shaping citizens' values and understandings of criminal justice.

Nonetheless, there is also no clear criteria for judging a criminal's repentance. Among the statutory mitigating factors, several factors, including desistance from crimes, turning themselves in, providing a confession and assisting in prosecuting other criminals, may indicate the criminal's repentance. Otherwise, the Criminal Law provides no further guidance on how to measure whether and to what degree the criminal demonstrates repentance. The abstract rules on repentance left judges with broad and unstructured discretion. Without any authoritative interpretation, many practitioners and professionals have attempted to interpret the criteria for the demonstration of repentance themselves. A survey on judges' interpretations of the criteria for the demonstration of repentance illustrates that most judges consider whether the criminal pleads guilty, makes a confession, expresses regret about his or her crimes, makes promises for no further offences, apologises to the victims and their relatives, and compensates the victims when deliberating the degree of the criminal's repentance (Lide Wang, Ma, & Ma, 2008; Xuan, 2014; Ying, 2000).

The over-emphasis on repentance and its ambiguous indications have become obstructions to the legal defence. Legal defence is viewed as an important procedural protection for individuals against arbitrary state actions in the West, but a strong legal defence may be confused with insincere confession in China. Legal defence in the communitarian context of traditional China could reflected negatively on an individual as it signified one's refusal to take responsibility (H. Lu & Miethe, 2002, p. 268). This tradition still influences the Chinese legal system. As Bracey (1989, p. 160) points out, Chinese penal system 'rewards confession at all points in the process and regards denial of guilt or insincere confession as resistance to the help that is being offered'. When a defence lawyer makes a plea for his or her client's acquittal or mitigation, the court may judge the plea as a sign of insincere confession and refuse to grant a suspended sentence. H. Lu and Miethe (2002, p. 271) found that the stronger the defence, the greater the likelihood of a more severe punishment.

The problems surrounding 'showing repentance' also result in inequality in punishments (Huaicheng Liu & Liang, 2010). Repentance has nothing to do with the mens rea and actus reus of a crime. It simply reflects the attitude of the criminal on his or her crime after the crime has been committed. Therefore, it is unfair to include repentance as a decisive criterion in deciding whether or not a sentence should be suspended. Under the statutory mitigating factors in the

Criminal Law and the judges' interpretation in the survey, criminals should convey their repentance through remorseful statements and through voluntary assistance and reparations to the victims. This leads to a situation where criminals who have a way with words and who are wealthy are more likely than the rest to be granted a suspended sentence. However, those people may simply take on a new persona and mask their real character behind assumed repentance (Huaicheng Liu & Liang, 2010). Notably, offenders who committed derelictions of duty were granted a suspended sentence three times more often than other crimes.

The third factor to consider for a suspended sentence is that 'the criminal has no risk of recidivism' and 'the suspended sentence has no major adverse impact on the community where the criminal lives'. Obviously, in Amendment VIII of the Criminal Law, the concern for protecting the victim and potential victims was more specifically addressed than before. It is necessary to assess the criminal's risk of recidivism before the court makes a sentencing decision, but it is not possible for judges to predict that certain criminals have no risk of recidivism. As Bracey (1989) argues, China's preoccupation with no recidivism is because of an unrelenting faith in the malleability of human beings. According to Bracey (1989, p. 159), 'no giving up on anyone-regardless of offense or record-is part of the correctional professional's code in China. Even the recidivism figures-low by the standards of most countries-are discussed as failures of the correctional system, not as instances of individual intractability on the part of certain offenders'.

Obviously, the seek for 'no risk of recidivism' is infeasible. Although some factors that are associated with recidivism can be identified, the ability to predict recidivism is limited. In fact, no authority has ever provided a nationwide system to assess the recidivism risk of offenders and the impact of community-based sanctions on a community. Some local bureaus of justice, such as the bureaus of justice in Beijing and Zhejiang, have experimented with assessment systems on recidivism, but they never reported the validity and reliability of their measuring instruments. These assessment systems are far from fully-fledged and none have found general public acceptance (Y. Kong & Huang, 2011; T. Li, Shao, & Yu, 2013; Y. Zeng, 2012).

4.1.3. Parole

The data on parole was not readily available to the public prior to 2014. Two studies supported by the courts released some data on the proportion of offenders on parole of all the offenders under imprisonment around 2003. It was found that the proportion was even lower than before the initiation of the pilot community corrections programme (see Table 3).

Table 3. Ratios of offenders on parole from among all offenders under imprisonment in 1999, 2000, 2001, 2005, 2006 and 2007

	1999	2000	2001	2005	2006	2007
Percentage of offenders on parole from among all offenders under imprisonment	2.13%	1.65%	1.43%	1.18%	1.29%	1.06%

Source: The data on the ratios from 1999 through 2001 are from The Research Group of Superior Court in Shangdong Province (2009) and the data on the ratios from 2005 through 2007 are from (Zhixiang Wang, 2009).

Under the Criminal Law, parole can be issued to an offender who is sentenced to fixed-term imprisonment and has served more than half of the term of the original sentence or an offender who is sentenced to life imprisonment and has served not less than 10 years of the term, if he or she conscientiously observes prison regulations, accepts education and reform through labour, shows true repentance and has no risk of recidivism. Parole shall not be granted to recidivists or criminals who are sentenced to more than 10 years of imprisonment or life imprisonment for crimes of violence such as homicide, illegal use of explosives, robbery, rape and kidnapping.⁵⁰ If the criminal who is granted parole commits another crime during the probation period for parole, is discovered to have committed other crimes for which no punishment is imposed before the judgment is pronounced or violates regulations relating to supervision and control over parole, the parole shall be revoked.⁵¹ If the criminal complies with the obligations during the probation period, the punishment originally decided shall be considered executed upon the expiration of the probation period for parole, which shall be made known publicly.⁵² Similar to the revisions of the provisions on probation, Amendment VIII of the Criminal Law issued in 2011 deletes the requirement of ‘posing no threat to society’ and adds two new considerations. The first is that ‘the criminal has no risk of recidivism’ and the other is that ‘the impact of parole on the community where the criminal lives shall be considered when a parole decision is made’. The amendment also provides a list of the crimes for which a suspended sentence shall not be applied. The crimes are murder, rape, robbery, abduction, arson, illegal use of explosives, dissemination of hazardous substances or organised violent crime. In addition, for an offender who is sentenced to life imprisonment,

⁵⁰ Article 81 of the Criminal Law.

⁵¹ Article 86 of the Criminal Law.

⁵² Article 85 of the Criminal Law.

the minimum term of imprisonment to serve was changed from 10 years to 13 years.⁵³ These modifications in the Criminal Law narrow rather than broaden the scope of cases under which parole can be granted.

Other considerations for parole, including ‘showing repentance’, that ‘the criminal has no risks of recidivism’ and ‘considering the impact on the community where the criminal lives’, are akin to those for granting a suspended sentence. The considerations for parole also have their share of the same problems facing suspended sentences.

While ‘showing repentance’ as a condition for a suspended sentence has become an obstacle to legal defence, ‘showing repentance’ as a condition for parole has become an obstacle in appeal cases for offenders. As mentioned in the previous section, the Chinese legal tradition emphasises defendants’ remorse and confession rather than challenging the state (H. Lu & Miethe, 2002). The traditional ideas may shape the court’s view on an offender’s appeal to some extent. The court may refuse to grant parole for an offender who makes an appeal because making an appeal may be considered an indication of showing no repentance. In 2014, the SPC criticised this common phenomenon and emphasised that the offender’s right of appeal during the sentence should be protected.⁵⁴

While an over-emphasis on repentance results in a higher proportion of suspended sentences for offenders who committed derelictions of duty, an over-emphasis on repentance also results in that former officials and the wealthy have more opportunities for commutation, parole and temporarily serving sentences outside of prison. The Political and Judiciary Commission under the Central Committee of the CCP published the Suggestions on Strictly Regulating Commutation, Parole and Temporarily Serving Sentences Outside Prison and Preventing Corruptions in Practice, which aims to solve the problem. For those who commit derelictions of duty, organised crimes and crimes related to destroying financial management order and financial fraud, the criterion of ‘showing repentance’ should be stricter. The court should not only consider the general criteria of ‘showing repentance’ but also consider whether the offender returns illegal acquisitions him or herself, whether the offender actively assists the authority in recovering illegal acquisitions abroad, whether the offender actively pays compensation, or whether he or she removes the negative impacts of his or her crime

⁵³ Article 81 of the Criminal Law revised by Amendment VIII of the Criminal Law.

⁵⁴ Article 3 of the Regulations on Several Issues Concerning the Specific Application of the Law in the Handling of Commutation and Parole (Guan yu ban li jian xing jia shi an jian ju ti ying yong fa lv ruo gan wen ti de gui ding, issued by the SPC on 19 September 2014).

against society through methods other than the above. The offenders should not be regarded as 'showing repentance' if they attempt to obtain opportunities for commutation and parole through personal influence and social relations.⁵⁵ In addition, the Political and Judiciary Commission under the Central Committee of the CCP requires all courts to hear cases on commutation, parole and temporarily serving sentences outside of prison for those who commit derelictions of duty, organised crimes and crimes related to destroying financial management order and financial fraud in open court and to publish the cases on its website,⁵⁶ and the SPC also requires all courts to invite some deputies to the local People's Congress and members of the Chinese People's Political Consultative Conference (CPPCC) to attend hearings.⁵⁷ Since September 2014, the SPC has published verdicts and other files related to commutation, parole and temporarily serving sentences outside prison for those who commit derelictions of duty, organised crimes and crimes related to destroying financial management order and financial fraud on its website. There were 8127 verdicts converted to parole from September 18, 2014 to February 28, 2017. Among them, 4167 verdicts were handed down in 2015 and 3109 verdicts were issued in 2016. The cases on parole for those who committed derelictions of duty, organised crimes and crimes related to destroying financial management order and financial fraud on the SPC's website were markedly reduced after 2014.

For those eligible for commutation or parole, the prison where the offenders serve their sentences should draft a recommendation letter and send it to the court. The court should make a decision based on the recommendation. Because the Suggestions on Strictly Regulating Commutation, Parole and Temporarily Serving a Sentence Outside Prison and Preventing Corruption in Practice stipulate that prison officials and judges in charge of a case in which an offender is granted commutation, parole or temporarily serving a sentence outside prison should accept blame and responsibility for mistakes in determining facts and

⁵⁵ Article 1 of the Suggestions on Strictly Regulating Commutation, Parole and Temporarily Serving Sentence outside Prison and Preventing Corruptions in Practice (Guan yu yan ge gui fan jian xing, jia shi, zan yu jian wai zhi xing, qie shi fang zhi si fa fu bai de yi jian, issued by the Political and Judiciary Commission under the Central Committee of the CCP on 21 January 2014).

⁵⁶ Articles 6 and 7 of the Suggestions on Strictly Regulating Commutation, Parole and Temporarily Serving Sentence outside Prison and Preventing Corruptions in Practice.

⁵⁷ See <http://jxjs.court.gov.cn/>.

applying law,⁵⁸ prison officials and judges are very cautious in making recommendations and decisions.

For commutation, judges should consider the following: that the offender conscientiously observes prison regulations, accepts education and reform through labour, shows true repentance or makes worthy contributions to society.⁵⁹ There is just one major difference between the considerations for commutation and the considerations for parole, that is, the offender's risk of recidivism. The judges can only assess information about the offender through the recommendation made by the prison officials. It is beyond their ability to judge whether the offender has no risk of recidivism, but they must take responsibility if the offender re-offends in the future. Therefore, many judges prefer to issue commutations rather than parole to avoid the risk of liability. The Research Group on Community Correction of the Ministry of Justice (2003) suggests transferring the power of making decision on parole from the court to a parole board or other committee operated by the bureau of justice. The bureau of justice oversees the prison as well as the community corrections programmes within its jurisdiction. If a parole board operated by the bureau of justice has the power to make parole decisions, the parole board can coordinate the duties of prison officials and in community corrections programmes to comprehensively and continuously evaluate the offender. It can consider both the performance of the offender in prison and the impact of parole on the community and both the capacity of the prison facility and the capacity of the community corrections programmes. The Research Group on Community Correction of the Ministry of Justice (2003) also recommends broadening the scope of parole and changing the phrase 'posing no threat to society' to concrete and feasible requirements. However, none of these suggestions were adopted in Amendment VIII of the Criminal Law or in recent judicial interpretations. The number of offenders who are granted parole has continued to decrease, especially after the 2014 release of the two documents on commutation, parole and temporarily serving a sentence outside of prison. The number of parole cases was only 37,254 nationwide in 2014, which is 23.81% less than the number of cases in 2013 (W. Li, 2015).

4.1.4. Temporarily serving a sentence outside of prison

The data on temporarily serving a sentence outside of prison are also not transparent to the public. Some studies released the statistics of the Bureau of Prison Administration of the MJ

⁵⁸ Article 11 of the Suggestions on Strictly Regulating Commutation, Parole and Temporarily Serving Sentence outside Prison and Preventing Corruptions in Practice.

⁵⁹ Article 78 of the Criminal Law.

on temporarily serving sentences outside of prison from 1996 to 2002. The statistics reveal that the ratio of the offenders temporarily serving sentences outside prison to all offenders under imprisonment and criminal detention is very small and continued to decrease prior to the initiation of the pilot community corrections programmes (see Table 4).

Table 4. The total number and percentage of offenders temporarily serving sentences outside prison from all offenders under imprisonment and criminal detention from 1999 to 2002

	1996	1997	1998	1999	2000	2001	2002
The number of the offenders temporarily serving sentences outside prison	30,178	27,271	24,878	22,513	20,021		
The percentage of the offenders temporarily serving sentences outside prison from all offenders under imprisonment and criminal detention	2.13%	1.89%	1.73%	1.58%	1.40%	1.13%	0.99%

Source: The data from 1996 to 2000 are from Z. Wu et al. (2012) and the data from 2001 and 2002 are from J. Guo and Zheng (2004).

Temporarily serving a sentence outside prison in China is similar to compassionate release or medical parole in some Western countries. Temporary service may be permitted for an offender serving fixed-term imprisonment or criminal detention who is seriously ill, pregnant or breast-feeding her own baby, unable to take care of themselves and poses no threat to society. If an offender poses a threat to the community or themselves, they may not be released.⁶⁰ Compared with the Criminal Procedure Law issued in 1996, the current Criminal Procedure Law issued in 2012 adds a provision that temporarily serving a sentence outside prison may also be permitted for an offender who is sentenced to life imprisonment when the offender is pregnant or breast-feeding her own child.⁶¹ The amended Criminal Procedure Law

⁶⁰ Article 214 of the Criminal Procedure Law issued in 1996 and Article 254 of the current Criminal Procedure Law.

⁶¹ Ibid.

also adds a few provisions on the procedures for determining and executing temporarily serving a sentence outside prison.

Under the Criminal Procedure Law issued in 1996, supporting documents for a serious illness shall be prescribed by the hospital designated by a people's government at the provincial level and under the current Criminal Procedure Law, both the diagnosis and the supporting documents for a serious illness shall be prescribed by the hospital designated by a people's government at the provincial level.⁶² Under the Criminal Procedure Law issued in 1996, it is not clear which agency should determine whether an offender should be granted the right to temporarily serving a sentence outside prison. Under the current Criminal Procedure Law, if the execution of imprisonment has not commenced, temporarily serving a sentence outside prison is decided by the court; if the execution of imprisonment has already commenced, it may be suggested by the prison or the house of detention and approved by the administrative authority of the prison at the provincial level or the public security organ at the municipal level.⁶³ Under the Criminal Procedure Law issued in 1996, the offender should return to prison only if the grounds for temporarily serving a sentence outside prison no longer exist and the sentence continues. Under the current Criminal Procedure Law, the offender should return to prison in three circumstances: when the offender is found to be ineligible to temporarily serve a sentence outside prison; when the offender seriously violates the rules of supervision for temporarily serving a sentence outside prison; and when the grounds for temporarily serving a sentence outside prison no longer exist and the sentence continues.⁶⁴

The term of temporarily serving a sentence outside prison is included in the term of imprisonment. To shorten the imprisonment term, the offenders and their relatives always try their best to obtain the right to temporarily serve a sentence outside prison. Some offenders who are not eligible for temporarily serving a sentence outside prison may attempt to obtain permission through illegal means. Moreover, the final decision on temporarily serving a sentence outside prison can be made by the court, the administrative authority of the prison or the public security organ but their standards may have subtle differences. The prison or the house of detention may not agree with the imprisonment sentence handed down by the court but can make recommendations to the administrative authority of the prison or public security organ to approve temporarily serving a sentence outside the prison. This may result in the

⁶² Ibid.

⁶³ Article 254 of the Criminal Procedure Law.

⁶⁴ Article 216 of the Criminal Procedure Law issued in 1996 and Article 257 of the current Criminal Procedure Law.

executive power meddling in the affairs of the judicial power, and the lack of dimensional homogeneity may bring more opportunities for corruption. The system for temporarily serving a sentence outside prison has been criticised for these reasons (G. Cai & Zhao, 2011; Fan & Liu, 2014; Z. Wu et al., 2012).

In response to the criticisms, the Suggestions on Strictly Regulating Commutation, Parole and Temporarily Serving Sentence Outside Prison and Preventing Corruption in Practice and the Regulations on Temporarily Serving a Sentence Outside Prison stresses that for those who are more likely to pay bribes to temporarily serve a sentence outside prison, including those who commit derelictions of duty, organised crimes and crimes related to destroying financial management order and financial fraud, the examination and approval process for temporarily serving a sentence outside prison shall be stricter. These offenders should not be granted the right to temporarily serve sentences outside prison if their diseases are not life-threatening in the short term according to an official diagnosis, if they do not cooperate with the prison in the diagnosis process, if they may pose a threat to society if they are temporarily serving a sentence outside prison, or if they injure or disable themselves.⁶⁵

4.2. The range of crimes eligible for community corrections under the judicial interpretation on the criminal policy of balancing leniency and severity (kuan yan xiang ji, 宽严相济)

In 2006, balancing leniency and severity became the new mantra under China's criminal policy. On the one hand, this criminal policy requires striking hard against severe crimes, while on the other hand, it requires reforming the legal system on juvenile delinquency and petty offences, and establishing community corrections.⁶⁶

According to this criminal policy, leniency implies that courts throughout the nation should sentence a broader range of criminals who perpetrate minor offences to community corrections.

Subsequently, the SPC published a judicial interpretation to illustrate the types of cases that were applicable to lenient sanctions and severe sanctions respectively under the criminal policy of balancing leniency and severity.

⁶⁵ Article 4 of the Suggestions on Strictly Regulating Commutation, Parole and Temporarily Serving Sentence outside Prison and Preventing Corruptions in Practice. Article 6 of the Regulation on Temporarily Serving a Sentence Outside Prison.

⁶⁶ Article 6.6 of the Resolution on the Major Issues Regarding the Building of a Harmonious Socialist Society (Guan yu gou jian she hui zhu yi he xie she hui ruo gan zhong da wen ti de jue ding, issued by the Central Committee of the CCP on 11 October 2006).

Under the SPC's interpretation, to carry out the 'leniency' in the criminal policy, in cases where a conviction is recorded but where the criminal offense does not automatically incur a custodial sentence, courts can give a suspended sentence or sentence the offender to PS or an independent fine.⁶⁷

Then, the detailed articles explain that for those cases where the harm or the foreseeable intended harm caused by the offender is also insignificant, where the danger manifested by the defendant in perpetrating his or her crime is slight, where the defendant confesses in a manner that indicates considerable remorse, and where the defendant has low criminal tendency, courts can pass a relatively lenient sentence prescribed by the law, and can give a suspended sentence or sentence the offender to PS or an independent fine in some cases.⁶⁸ Notably, for cases in which the defendant is a juvenile or first-time offender or casual offender and where the offence is minor, courts can give a suspended sentence or sentence the offender to PS or an independent fine.⁶⁹

The detailed articles seem to narrow the literal meaning of the corresponding articles on community-based punishments in the Criminal Law. The conditions of the cases for which lenient sentences were eligible were almost identical with the conditions of suspended sentences prescribed by the Criminal Law. But here, the judicial interpretation provides that the cases for which are eligible for a suspended sentence can only be punished by a suspended sentence in some cases. The judicial interpretation additionally restricts the types of cases for which community-based punishments were eligible. It did not live up to what the new criminal policy promised in terms of community corrections.

Some academics have compared this policy to the twin-track approach to sentencing in Western countries, that is, reserving custody for people who commit serious crimes and punishing less serious offenders with non-custodial alternatives (Xiaoming Chen, 2010). Balancing leniency and severity has some similarities to the Western twin-track approach but their differences are very apparent. Severe punishment under this criminal policy does not simply mean giving custodial sentences to criminals who perpetrate serious crimes but denotes that the criminal policy of striking hard against serious crimes will continue. China's

⁶⁷ Article 14 of the Authoritative Opinions on Implementing the Criminal Policy of Balancing Leniency and Severity (Guan yu guan che kuan yan xiang ji de xing shi zheng ce ruo gan wen ti de yi jian, issued by the SPC on 8 February 2010).

⁶⁸ Article 16 of the Authoritative Opinions on Implementing the Criminal Policy of Balancing Leniency and Severity.

⁶⁹ Articles 19 and 20 of the Authoritative Opinions on Implementing the Criminal Policy of Balancing Leniency and Severity.

security and judicial institutions still crack down on crimes that endanger national security, organised crime and severe violent crime but are also more lenient towards less violent crimes, minors and first-time offenders (Ni, Wu, & Zhang, 2007). This was mirrored in the fourth round of the strike-hard campaigns, which only targeted severe violent crime, gun and gang crime, telecom fraud, human trafficking, robbery, prostitution, gambling and drug crimes. Most misdemeanours were excluded. In the same vein, leniency does not automatically bring about non-custodial sentences but simply signifies that criminals who commit minor offences should not be punished swifter and harsher; in other words, they deserve normal punishments. The predominant normal punishment remains imprisonment.

Since the new criminal policy was announced, many scholars have advocated strict and certain punishments rather than harsh and swift punishments for severe crimes and relatively lenient punishments within the statutory sentence rather than only normal punishments for minor offences, especially in cases where the criminals turn themselves in, provide confessions and assist in the prosecution of other criminals (Xingliang Chen, 2010). However, their opinions are not very persuasive for the general public and policy makers in China. The general public is unsympathetic to what leniency in the new criminal policy promises to achieve. In reference to the previous section, a suspended sentence is the only community-based punishment where the proportion in sentencing increased after the new criminal policy was announced. However, even the increase in suspended sentences is probably not in tune with the goals of the general public. The vast majority of the general public in China still embraces heavy penaltyism. If someone feels that a sentencing decision is unfair, he or she typically refers to similar cases where defendants are issued harsher sentences. For example, as noted above, the public has been complaining about the high proportion of suspended sentences for dereliction of duty cases.⁷⁰ It is frequently recommended that the proportion of suspended sentence for derelictions of duty be as low as other crimes, while it is rarely argued

⁷⁰ Authoritative statistics on the suspended sentence rate of derelictions of duty are not available. Most articles on the suspended sentence rate of derelictions of duty refer to an article from the Procuratorate Daily of 19 August 2007, which shows that 66.48% of offenders who committed a derelictions of duty and whose declared main sentence was fixed-term imprisonment less than three years were granted suspended sentences in 2005; among them, 95.6% of the offenders who committed misconduct were granted suspended sentences (J. Wang, 2007). An empirical study randomly selected 210 decisions in 24 provinces between 1 July 2013 and 20 March 2014. The study found that 74.03% of the offenders who committed a dereliction of duty and whose declared main sentence was fixed-term imprisonment less than three years were granted suspended sentences (X. Wang & Li, 2014).

that the ratio of suspended sentences to all crimes should be as high as derelictions of duty (Lan & Zheng, 2011; M. Zhang, 2015). Even for juvenile delinquency cases, a survey shows that 81.5% of the public questions the punitive effects of suspended sentences (Xuan, 2014). In socialist China, the mass line (qun zhong lu xian, 群众路线) is the CCP's fundamental political and organisational method. The mass line means, first of all, having faith in the masses. The party members are supposed to be trained to appreciate the criticism of the masses. In light of the mass line, the CCP urges that judicial decisions be directed not only by their legal effects but also their political and social effects (M. Huang, Zhuang, & Che, 2009; W. Zhang & Li, 2011). Public opinion is a vital part of social effects. Judges must pander to the public but public opinion is typically that criminals deserve harsh punishments.

4.3. The absence of community corrections under the sentencing guidelines

The current Criminal Law is quite indeterminate in sentencing scale and provides little further guidance, thus failing to satisfy sentencing needs (Xiaoming Chen, 2010). Using the same scale in the Criminal Law and the judicial interpretations results in wide sentencing variations in the jurisdictions of different courts. Recently, to ensure that criminal cases from the same regions involving similar circumstances are treated in a consistent manner, the SPC has made another effort to consolidate the judicial standards. In 2010, the SPC floated a trial balloon in the form of sentencing guidelines (the formal sentencing guidelines were not handed down until 2014, but they are almost the same as the trial version). The SPC issued guidelines on 15 types of common crimes that are punishable by fixed-term imprisonment or criminal detention. These crimes are traffic offenses, mayhem, rape, unlawful detention, robbery, larceny, fraud, forcible seizure, embezzlement, extortion, obstructing public functions, provoking violence, concealing illegally acquired goods and income, and smuggling, trafficking and transporting or manufacturing drugs.⁷¹

The sentencing guidelines were devised to make sentencing standards more transparent and credible through the introduction of refining sentencing factors. The guidelines require the judge to determine a sentence in three steps. First, the judge should determine the starting point for a sentence based on the statutory sentencing range of a particular crime; second, the judge should increase the sentence based on the starting point to determine the benchmark sentencing phase after evaluating facts that may affect the sentence, such as the amount of illegal acquisitions, the frequency of the crime and the consequences of the crime;

⁷¹ Article 5.1 of the Notice on Implementing the Standardisation of Sentence (Guan yu shi shi liang xing gui fan hua gong zuo de tong zhi, issued by the SPC on 23 December 2013).

third, the judge should adjust the benchmark sentencing phase based on aggravating and mitigating factors of the crime to determine the final sentence.⁷² The judge should consider statutory mitigating and aggravating factors,⁷³ then, consider the other mitigating and aggravating factors enumerated in the guidelines.⁷⁴ The guidelines list three additional aggravating factors and five mitigating factors. The three aggravating factors are having a criminal record; targeting victims who are aged, juvenile, infirm, pregnant or are members of an otherwise vulnerable population; committing crimes during major natural disasters or during the prevention or control of an epidemic. The five mitigating factors are making a confession, pleading guilty before the court, returning illegal acquisitions, compensating the victims or obtaining their forgiveness, and achieving victim-offender reconciliation.⁷⁵ The aggravating factors place more emphasis on the nature and the severity of the offence, whereas the mitigating factors put more emphasis on the degree of the defendant's confession and repentance. The guidelines detail how these mitigating and aggravating factors are to be weighted or scored on the basis of the benchmark sentencing phase. Take, for example, the mitigating factor of making a confession. In determining the weight of a confession, in regard to the circumstances of the confession, the judge should consider when and to what extent the defendant made the confession, the seriousness of his or her crime and the degree of repentance to decide the degree of mitigation. If the defendant confesses his or her alleged wrongdoings, the sentencing phase could be reduced by up to 20%. If the defendant confesses undiscovered wrongdoings that constitute the same crime as the crime with which the defendant is charged and the confessed crime is more severe than the charged crime, the sentencing phase could be reduced by 10% to 30% and if the defendant's

⁷² Article 2.1 of the Suggestions on the Sentencing Guidelines for Common Crimes (Guan yu chang jian fan zui de liang xing zhi dao yi jian, issued by the SPC on 23 December 2013).

⁷³ The general aggravating factors recognised by the Criminal Law are only instigators and recidivism, while the statutory mitigating factors are more broadly framed. The general mitigating factors involve those that reveal the remoteness of the actual harm including preparatory crimes, attempted crimes and desistance from crimes; those that reflect diminished culpability including young age, old age, mental illness, being deaf or blind; those that indicate a minor role in a criminal group including an accessory, accomplice, and accomplice under duress; factors that demonstrate the criminal's remorse include turning him or herself in and providing a confession; and factors that relate to the criminal's contribution to the smooth and cost-effective running of the criminal justice system, which include assisting in the prosecution of other criminals or making other worthy social contributions.

⁷⁴ Article 2.2 of the Suggestions on the Sentencing Guidelines of Common Crimes.

⁷⁵ Article 3 of the Suggestions on the Sentencing Guidelines of Common Crimes.

confession results in the avoidance of especially serious consequences, the sentencing phase could be reduced by 30% to 50%.⁷⁶

However, the sentencing guidelines only focus on criminal detention and fixed-term imprisonment. For cases in which the criminals may be sentenced to punishments that are at the high or low end of the punishment spectrum, including the death penalty, life imprisonment, suspended sentence, PS, an independent fine or independent deprivation of political rights, the sentencing guidelines are not applicable. If the criminals may be sentenced to life imprisonment or the death penalty, the cases shall be determined by the intermediate courts or superior courts. If the judge in the first instance hands down a two-year suspension of execution, the case shall be subjected to appellate review by the superior court. All decisions imposing immediate death penalty shall be subject to appellate review by the SPC. For cases in which the criminals may be sentenced to a suspended sentence, PS, an independent fine or independent deprivation of political rights, the local judges also retain full discretion. Nonetheless, the sentencing guidelines do not clarify how to link fixed-term imprisonment and criminal detention to a suspended sentence, PS, an independent fine or independent deprivation of political rights. Because the sentencing standards for fixed-term imprisonment and criminal detention are clear but the standards for a suspended sentence, PS, an independent fine and independent deprivation of political rights are obscure, those non-custodial sentences inevitably suffer from a 'lack of credibility' image. To avoid their adjudications being questioned by victims, many judges prefer to impose short-term imprisonment for minor offences, which significantly contributes to the overly liberal use of prison terms (Hao, 2011; Z. Zhang, 2006).

4.4. The narrow targets of community corrections under guiding criminal judgments

Since 2010, the SPC has been working on making court judgments issued at different levels transparent to the public. The bulletin of the SPC published selected judgments every three months in 1985 and changed this policy to publishing selected judgments every month in 2004. Courts at various levels can consult the case examples but they do not have a statutory duty to refer to them. To guide the courts on a case-by-case basis and achieve consistency in national sentencing practices, the SPC began publishing guiding criminal judgments as precedents in 2010. Pursuant to the Regulations on Guiding Judgments, the courts at various

⁷⁶ Article 3.6 of the Suggestions on the Sentencing Guidelines of Common Crimes.

levels have a duty to refer to the guiding judgments for similar cases.⁷⁷ The SPC also began publishing all the judgments from various levels of courts on the website China Judgment Online⁷⁸ in 2013. The Regulations on Publishing Judgments Online require courts of all levels to publish their judgments with seven days after the judgments come into force,⁷⁹ with the exception of cases involving privacy issues, confidential information, or other information that is unfit for publication.⁸⁰ To date, 14 guiding criminal cases have been promulgated,⁸¹ though

⁷⁷ Article 7 of the Regulations on Guiding Judgments (Guan yu an li zhi dao gong zuo de gui ding, issued by the SPC on 26 November 2010).

⁷⁸ See <http://wenshu.court.gov.cn/>.

⁷⁹ Article 7 of the Regulations on Publishing Judgments Online (Guan yu ren min fa yuan zai hu lian wang gong kai fa lv wen shu de gui ding, issued by the SPC on 29 August 2016).

⁸⁰ Article 4 of the Regulations on Publishing Judgments Online.

⁸¹ For details on the No. 3 and the No. 4 case in the first series of guiding criminal judgments, see the Notice on Issuing the First Series of Guiding Criminal Judgments (Guan yu fa bu di yi pi zhi dao xing an li de tong zhi, issued by the SPC on 21 December 2010); for details on the No. 11 case and the No. 12 case of the third series of guiding criminal judgments, see the Notice on Issuing the Third Series of Guiding Criminal Judgments (Guan yu fa bu di san pi zhi dao xing an li de tong zhi, issued by the SPC on 18 September 2012); for details on the No. 13 and the No. 14 case of the fourth series of guiding criminal judgments, see the Notice on Issuing the Fourth Series of Guiding Criminal Judgments (Guan yu fa bu di si pi zhi dao xing an li de tong zhi, issued by the SPC on 31 January 2013); for details on the No. 27 and the No. 28 case of the seventh series of guiding criminal judgments, see the Notice on Issuing the Seventh Series of Guiding Criminal Judgments (Guan yu fa bu di qi pi zhi dao xing an li de tong zhi, issued by the SPC on 26 June 2014); for details on the No. 32 case of the eighth series of guiding criminal judgments, see the Notice on Issuing the Eighth Series of Guiding Criminal Judgments (Guan yu fa bu di ba pi zhi dao xing an li de tong zhi, issued by the SPC on 18 December 2014); for details on the No. 61 case of the thirteenth series of guiding criminal judgments, see the Notice on Issuing the Thirteenth Series of Guiding Criminal Judgments (Guan yu fa bu di shi san pi zhi dao xing an li de tong zhi, issued by the SPC on 30 June 2016); for details on the No. 62 case of the thirteenth series of guiding criminal judgments, see the Notice on Issuing the Thirteenth Series of Guiding Criminal Judgments (Guan yu fa bu di shi san pi zhi dao xing an li de tong zhi, issued by the SPC on 30 June 2016); for details on the No. 63 case of the thirteenth series of guiding criminal judgments, see the Notice on Issuing the Thirteenth Series of Guiding Criminal Judgments (Guan yu fa bu di shi san pi zhi dao xing an li de tong zhi, issued by the SPC on 30 June 2016); for details on the No. 71 case of the fifteenth series of guiding criminal judgments, see the Notice on Issuing the Fifteenth Series of Guiding Criminal Judgments (Guan yu fa bu di shi wu pi zhi dao xing an li de tong zhi, issued by the SPC on 28 December 2016); for details on the No. 87 case of the sixteenth series of guiding criminal judgments, see the Notice on Issuing the Sixteenth Series of Guiding Criminal Judgments (Guan yu fa bu di shi liu pi zhi dao xing an li de tong zhi, issued by the SPC on 6 March 2017).

this is far from sufficient given that 1.16 million criminal cases are heard annually.⁸² In terms of the sentences in the 14 cases, the defendants in four cases were issued suspended sentences (the No. 13 case, the No. 14 case, the No. 32 case, and the No. 87 case) and in four cases were sentenced to immediate fixed-term imprisonment less than three years (the No. 11 case, the No. 27 case, the No. 28 case and the No. 61 case). In the rest of the cases, the criminals were sentenced to either imprisonment of more than three years or the death penalty. Apparently, except for suspended sentences, non-custodial sentences were not the focus of the guiding criminal judgments. Here, I compare the reasons for the verdicts of the six cases in which the criminals were sentenced to a suspended sentence or immediate fixed-term imprisonment of less than three years and try to determine the circumstances in which the defendants are eligible for a suspended sentence.

The four suspended sentence cases involved dangerous driving (the No. 32 case), robbery (the No. 14 case), trading in and storing dangerous materials (the No. 13 case) and using a trademark without permission from the owner of a registered trademark (the No. 87 case). The dangerous driving case involved two defendants. The first defendant turned himself in (a general mitigating factor in the Criminal Law), pleaded guilty (a mitigating factor in the sentencing guidelines) and demonstrated repentance (a condition for a suspended sentence); the other defendant pleaded guilty and demonstrated repentance and neither defendant's dangerous driving resulted in any actual loss or devastation. Both were sentenced to suspended imprisonment with a fine. In the robbery case, the defendants were under 18 and in light of the general mitigating factors, the defendants were given sentences lighter than a normal sentence (general mitigating factors as set forth in the Criminal Law). Pursuant to the criminal policy of balancing leniency and severity, juveniles are of special concern in community corrections. In addition, the defendants were first-time offenders (a mitigating factor in the sentencing guidelines), pleaded guilty (a mitigating factor in the sentencing guideline) and demonstrated repentance (a condition for a suspended sentence and a mitigating factor in the sentencing guidelines). Their illegal acquisitions were just five yuan and a mobile phone. They were sentenced to suspended imprisonment with a fine. In the trading in and storing dangerous materials case, the defendants provided confessions (a general mitigating factor in the Criminal Law), the purpose of purchasing the dangerous materials was to use them in electroplating production rather than for violating any legal interest and their wrongdoings did not result in any actual loss or devastation. The five

⁸² The Annual Report of the People Courts in 2014 (Ren min fa yuan gong zuo nian du bao gao (2014)), issued by the SPC on 18 March 2015).

defendants were all sentenced to suspended imprisonment. In the using a trademark without permission from the owner of a registered trademark case, the principal was sentenced to immediate imprisonment and the two accessories (a general mitigating factor in the Criminal Law) were sentenced to suspended imprisonment with a fine.

In the immediate fixed-term imprisonment less than three years cases, the defendants were offenders of extortion (the No. 27 case), embezzlement (the No. 11 case), malicious back pay (the No. 28 case) and conducting a transaction with insider information on stock or futures transactions (the No. 61 case). In the extortion case, the defendant was sentenced to one year and six months immediate imprisonment with a 5000 yuan fine. The judgment did not provide any mitigating or aggravating factors. In the embezzlement case, an accessory who played a very minor role was sentenced to three years immediate imprisonment. The court explained that the punishment for the accessory had already been mitigated (a general mitigating factor in the Criminal Law). In the malicious back pay case, the statutory sentence of malicious back pay without any specific aggravating factors is fixed-term imprisonment less than three years, criminal detention, and an independent or additional fine. The defendant was a first-time offender, pleaded guilty (a mitigating factor in the sentencing guidelines) and the company where the defendant worked had paid the wages to the workers before the defendant was arrested, but the court still sentenced the defendant to immediate imprisonment with a fine.

In the case of conducting a transaction with insider information about stock or futures transactions, the offender was sentenced to a suspended sentence in the first trial but then the procuratorate appealed the decision twice. Finally, the SPC sentenced the offender to immediate imprisonment. In the first trial, the intermediate court sentenced the offender to suspended imprisonment with a fine. The first judgment stated that the Criminal Law did not provide any specific aggregating factors (the statutory sentencing range is imprisonment less than five years or criminal detention)⁸³ and the defendant turned himself in (a general mitigating factor in the Criminal Law), pleaded guilty (a mitigating factor in the sentencing guidelines), returned all the illegal acquisitions (a mitigating factor in the sentencing guidelines), showed repentance (a condition for a suspended sentence and a mitigating factor in the sentencing guidelines) and did not have any major adverse impact on the community where he lived pursuant to the evaluation conducted by the bureau of justice (a condition for a suspended sentence). The intermediate procuratorate then appealed the decision of the intermediate court because the sentence should have been aggregated regarding the large

⁸³ Article 180A of the Criminal Law.

sum of illegal acquisitions pursuant to the specific aggregating factors in the Criminal Law (the statutory sentencing range should be between five and ten years imprisonment).⁸⁴ The superior court rejected the appeal of the intermediate procuratorate and affirmed the judgment of the first trial. Then the superior procuratorate filed a petition to the SPP and the SPP appealed the second trial for the same reason with the intermediate procuratorate. The SPP stressed that the suspended sentence was obviously improper. The SPC agreed with the SPP's protest and decided to rescind the sentence in the first trial and the second trial and sentenced the offender to immediate imprisonment with a fine.

Regarding the defendants' illegal acquisitions and other circumstances in the extortion case, the defendant could only be sentenced to imprisonment less than three years, criminal detention, and an additional or independent fine.⁸⁵ In the malicious back pay case, the defendant could only be sentenced to imprisonment less than three years, criminal detention, PS and an additional or independent fine.⁸⁶ Moreover, in both the extortion and malicious back pay cases, the defendants did not have any aggravating factors or previous criminal record and the defendant in the malicious back pay case even had a mitigating factor, but they were still sentenced to immediate imprisonment.

Regarding the defendants' illegal acquisitions, the defendants in the case of embezzlement and in the case of conducting a transaction with insider information about stock or futures transactions can only be sentenced to immediate imprisonment, but both cases had mitigating factors. In the final judgment of the two cases, their sentences were mitigated concerning their mitigating factors but the sentences were immediate rather than suspended. Comparing

⁸⁴ Article 180 of the Criminal Law.

⁸⁵ Article 266 of the Criminal Law; Article 1 of the Interpretations on Several Issues concerning the Application of Law in the Trial of Criminal Cases on Extortion (Guan yu ban li zha pian zui xing shi an jian shi yong fa lv luo gan wen ti de jie shi issued by the SPC and SPP on 1 March 2011); the Opinions on the Executing Standards of the Amount is Relatively Large, the Amount is Large, and the Amount Is Especially Large in Extortion Criminal Cases (Guan yu wo sheng zhi xing zha pian zui shu e jiao da, shu e ju da, shu e te bie ju da biao zhun de yi jian, issued by the Superior People's Court and Superior People's Procuratorate of Zhejiang Province on 25 November 2013).

⁸⁶ Article 276A of the Criminal Law; Article 3 of the Judicial Interpretations on Several Issues Concerning the Application of Law in the Trial of Criminal Cases on Malicious Back Pay (Guan yu shen li ju bu zhi fu lao dong bao chou zui xing shi an jian shi yong fa lv luo gan wen ti de jie shi, issued by the SPC on 23 January 2013); The Notice on the Executing Standards of the Concrete Amount of Malicious Back Pay in Our Province (guan yu wo sheng ju bu zhi fu lao dong bao chou zui ju ti shu e zhi xing biao zhun de tong zhi, issued by the Superior People's Procuratorate and the Superior People's Court of Sichuan province on 17 April 2014).

the cases where the defendants were sentenced to a suspended sentence with the cases where the defendants were sentenced to immediate fixed-term imprisonment less than three years can shed light on how to interpret, in practice, the three considerations for a suspended sentence, that is, 'the circumstances are minor', 'showing repentance' and 'no risk of recidivism'.

The interpretations of 'the circumstances are minor' are very strict in the judgments. For the crimes in which the statutory sentencing range is less than three years, the courts are inclined to sentence immediate imprisonment rather than suspended imprisonment. When the court sentences suspended imprisonment, it must find extra mitigating factors to support the factor of 'the circumstances are minor'.

It is noteworthy that the original sentence in the case of conducting a transaction with insider information about stocks or futures transactions was suspended but the procuratorate asserted that the original suspended sentence was inappropriate because the illegal acquisition was very large, despite the fact that the case had several mitigating factors. After two rounds of appeal at three procuratorate levels, the suspended three-year imprisonment term was changed to three years immediate imprisonment by the SPC. The point of the dispute between the court and the procuratorate was that the statutory sentencing range for the crime need to consider the significant illegal acquisitions in this case. In the first trial and the second trial, the courts interpreted the statutory sentencing range as less than five years or criminal detention, and the court issued a suspended three-year imprisonment term due to the mitigating factors. The procuratorates and the SPC interpreted the statutory sentencing range as between five years and ten years imprisonment, and the court could reduce the sentence to three years imprisonment because of the mitigating factors, but the court had no reason to suspend the sentence. In accordance with the SPC's interpretation, the defendant's behaviours after committing the crime, including turning himself in, pleading guilty, returning all the illegal acquisitions and showing repentance could result in reducing his sentence to less than three years imprisonment but the court cannot evaluate the circumstances of the crime as less serious due to the mitigating factors. This means that the same mitigating factors cannot be applied twice. The court must use mitigating factors or other reasons to support the consideration for 'the circumstances are minor' and issue a suspended sentence when the corresponding sentence is less than three years.

In the four suspended sentence cases, the statutory sentence for dangerous driving is criminal detention and the court used the fact that 'their dangerous driving did not result in any actual loss or devastation' to support the consideration for 'the circumstances are minor'.

The statutory sentence for trading and storing dangerous materials is three years and the court used 'the purpose of purchasing dangerous materials was using them in electroplating production rather than violating any legal interest and their wrongdoings do not result in any actual loss or devastation' to support the consideration for 'the circumstances are minor' and suspended the three-year imprisonment term. The statutory sentence for using a trademark without permission from the owner of a registered trademark is three years and the court used the factor that the 'sentence on the accessory shall be lighter, mitigated or exempted' to support consideration for 'the circumstances are minor' and suspended the three-year imprisonment term. The shortest statutory sentence for robbery is three years imprisonment but the court mitigated the sentence to two years and six months imprisonment due to the fact that the offenders were juveniles and used the fact that 'their illegal acquisitions were only five yuan and a mobile phone' to support consideration for 'the circumstances are minor' and suspended the two years and six months imprisonment term.

In suspended sentence cases, the judgments always emphasise where the defendant pleaded guilty and demonstrated repentance.

None of the judgments mentioned whether the criminals had 'no risk of recidivism' but most of the judgments provided evidence for the low risk of recidivism of the offenders. In eight of the cases in the guiding criminal judgments where the criminals were issued suspended sentences and immediate imprisonment of less than three years, five defendants were offenders of property crimes; two were offenders of crimes of endangering public security; and only one defendant, a juvenile, part of a special target group of community corrections, was an offender of a violent crime. Judgments on property crime cases highlight whether the offenders actively returned the illegal acquisitions, paid compensation and paid fines or had personal property confiscated; and judgments on cases of endangering public security stress whether the offenders had a low level of intent and awareness. Because there is no assessment system on the risk of recidivism, the courts must determine the offenders' risk of recidivism on their own. Thus, the courts are more inclined to issue a higher number of suspended sentences for certain types of crimes where the offenders are obviously less likely to re-offend, notably, criminally negligent crimes and certain types of property crimes. In the cases of property crimes where offenders obtain illegal gains by virtue of their posts in agencies or through a disregard for commercial integrity, offenders will have few opportunities to re-offend because they will lose their posts in said agencies or will lose their commercial reputations as a result of a criminal record. There is not much data on the ratio of suspended sentences to immediate imprisonment in relation to different types of crimes. An

empirical study conducted by a provincial procuratorate illustrated that from 1998 to 2000, for those who were issued a suspended sentence, 40.72% were of property crimes and 23.76% were of crimes of endangering public security (Ying, 2000).

5. Conclusion

The reform on community corrections was initiated to institutionalise and professionalise the implementation of community-based sanctions with the goal of broadening the scope of the types of criminals who can be sentenced to community-based punishments. At the same time, the Political and Judiciary Commission expects an extremely low recidivism rate for offenders under community corrections. This chapter examined how the executive, legislative and judicial bodies developed their strategies to meet the new challenges. This chapter noted that the reform increased the overall functionality of community corrections but various agencies are still forced to kick the can down the road on some issues. There are disparities between the initial design of the execution of community corrections programmes and the actual rules on the implementation of community corrections pursuant to local regulations as well as disparities between the political rhetoric on promoting community corrections and the actual scope of the types of criminals suitable for community corrections under the principal sentencing sources.

The local bureaus of justice make significant efforts to recruit assistants to community corrections officers and workers in grassroots organisations to serve as social workers and volunteers in order to reinforce routine supervision practices pursuant to the local regulations on community corrections. Yet, the education and assistance measures primarily focus on providing moral and legal education, recommending employment, and providing subsistence allowances. Thus, there remains various degrees of difficulty in recruiting social workers and volunteers with professional skills in carrying out other corrective measures.

Today, the courts hand down more community-based punishments than in the past; however, high expectations for community corrections in reducing re-offending restricts further expansion of community sentences. The legislative and judicial bodies follow a strategy of limiting the offenders sentenced to community corrections to those who commit very petty offenses. The risk of re-offending and the impacts of re-offending by offenders in these categories are low. The conditions for community corrections required by the Criminal Law are either vague or unfeasible; the judicial interpretations of the new criminal policy further narrow the literal meaning of the articles regarding the types of crimes eligible for community corrections under the Criminal Law; the sentencing guidelines exclude community

corrections from its extent of application; and the guiding criminal judgments strictly limit the community corrections target groups. China still uses imprisonment the dominant penal paradigm and community corrections play only a supplementary role in the penal system.

Chapter Three. Coexistence of Semi-formal and Formal Punishments in China

1. Background

1.1. The juxtaposition of the abolition of RTL and the promotion of community corrections

On 12 November 2013, the Central Party Committee of the CCP discussed the ninth question on the Committee's agenda entitled: 'Moving the construction of the rule of law in China'. The Committee proposed measures to deepen judicial structural reforms; to accelerate the construction of a fair, highly efficient, and authoritative socialist judicial system; to safeguard the people's rights and interests; and to afford citizens to experience fairness and justice in every judicial case.⁸⁷ Among the actions promoted by the CCP were the abolition of re-education through labour (RTL, lao dong jiao yang, 劳动教养), measures to perfect the laws on punishment and correction, and the promotion of community corrections programmes. On 28 December, 2013, the Standing Committee of the NPC formally terminated RTL system.

1.2. The administrative punishments and administrative coercive measures beyond the scope of laws

As in many countries around the world, minor legal infractions are regarded as administrative violations in nature in China (M. K. Lewis, 2014). Pursuant to the Law on Public Security Administration of Punishments, the administrative punishments are warning, pecuniary penalty, administrative detention (one to 15 days), and revocation of licenses issued by the police. RTL was not among the list of administrative punishments. The regulations on RTL was issued by the State Council (SC, China's top administrative body) and the Ministry of Public Security (MPS) rather than the NPC. Albeit without firm legal basis, RTL allowed the police to detain people for one to four years without trial in the name of administrative punishment. For those whose administrative violations are very serious, but not serious enough to constitute a crime, the police usually preferred to impose RTL. RTL was much more severe than some minor criminal punishments. The coexistence of RTL and criminal punishments resulted in an unusual phenomenon in China: those who perpetrated administrative violations could be punished harsher than those who committed crimes. To avoid obvious disproportionality, when a crime was punishable by both custodial punishments and non-custodial punishments, the court might prefer to hand out custodial punishments, considering that administrative violations were punished by several years detention. The coexistence of

⁸⁷ Article 34 of the Resolution Concerning Some Major Issues in Comprehensively Deepening Reform (Guan yu quan mian shen hua gai ge ruo gan zhong da wen ti de jue ding, issued by the central committee of the CCP on 15 November 2013).

RTL and criminal punishments was a vital reason why actual scope of criminals who deserved non-custodial sentences was strictly limited.

Although RTL is abolished, there are other mechanisms that permit the extended detention of people whom the public security forces deem as threatening social order (M. K. Lewis, 2014; R. Liu, 2015). Several administrative punishments or coercive measures still allow the police to detain citizens for more than six months. As introduced in the previous section, administrative punishments are the punishments targeted at minor legal violations and decided by the police. Administrative coercive measures, refer to the temporary restriction of the personal freedom of citizens or temporary control of the property of citizens, legal persons or other organizations by administrative agencies in the process of administration.⁸⁸ The current administrative punishments which can detain citizens for more than six months include detention for education (shou rong jiao yu, 收容教育) and detention for training the juvenile offenders (shou rong jiao yang, 收容教养). The coercive administrative measures are compulsory isolation and drug detoxification (qiang zhi ge li jie du, 强制隔离戒毒) and involuntary commitment in mental health facilities (qiang zhi yi liao, 强制医疗).

Detention for education is imposed on those who engaged in the prostitution and the solicitation of prostitution for six months to two years. The NPC never promulgated any laws concerning detention for education. The only regulation on detention for education is the Measures of Detention for Education on Prostitutes and Whoring Goers (Mai yin piao chang ren yuan shou rong jiao yu ban fa, issued by the SC on 4 September 1993, revised on 8 January 2011). In 2014, a famous actor was detained for a half year through detention for education because he engaged in the solicitation of prostitution (Y. Chen, 2014; B. Shen, 2014). This case was highlighted by the media and legal professionals because it signals that some individuals are being held through administrative detention without legal basis after the abolition of RTL.

Detention for training the juvenile offenders is imposed on some juvenile offenders who are not punished by criminal punishment because they are under 16 years old. The detention term is from one to three years. Pursuant to the Criminal law and the Juvenile Protection Law, if a juvenile is not given criminal punishment because he has not reached the age of 16, his parents or his guardians shall be ordered to discipline him. When necessary, he may be detained for training by the government.⁸⁹ The regulation of the MJ also stipulates that the police should strictly control the range of the juveniles who are detained for training by the

⁸⁸ Article 2 of the Law on Administrative Coercion.

⁸⁹ Article 17 of the Criminal Law.

government; if the parents or guardians can discipline the juvenile, he should not be detained for training by the government.⁹⁰ The Criminal law, the Juvenile Protection Law, and the regulations of the MPC do not clarify what ‘when necessary’ means. In practice, whether it is necessary is at the discretion of the police officer who is in charge of the juvenile case.

Compulsory isolation and drug detoxification targets mainly at drug addicts who refuse to receive community detoxification; who re-use drugs during the community treatments; who seriously violate the community detoxification agreement; and who re-use or re-inject drugs after community and compulsory isolation and drug detoxification. The detention term is two to three years. Compulsory isolation and drug detoxification was also just based on the Measures of Compulsory Drug Detoxification which was issued by the SC in 1995. Then the Standing Committee of the NPC issued the Anti-Drug Law to regulate compulsory isolation and drug detoxification in 2007. Even though the Anti-Drug Law clearly directs the police on how to cope with those who re-used or re-injected drugs after compulsory isolation and drug detoxification, before the abolition of RTL, the police could still impose RTL on them on the basis of regulations⁹¹ which conflicted with the Anti-Drug Law. After the abolition of RTL, the bureau of RTL in the MJ is changed into the bureau of compulsory drug detoxification, and the local RTL camps are changed into compulsory isolation and drug detoxification camps. Since then, the police have no excuses to avoid the provisions of the Anti-Drug Law on how to deal with drug abusers.

Involuntary commitment in mental health facilities is imposed on some mental patients who are not punished by criminal punishment and administrative punishment because of their mental problems. Pursuant to the Criminal Law, if a mental patient causes harmful consequences at a time when he is unable to recognize or control his own conduct, upon verification and confirmation through legal procedure, he shall not bear criminal responsibility, but his family members or guardians shall be ordered to keep him under strict watch and control and arrange for his medical treatment. When necessary, the government may compel him to receive involuntary commitment in mental health facilities.⁹² Before the Criminal Procedure Law was revised in 2012, the police exercised their discretion in deciding whether

⁹⁰ Article 28 of the Regulation on Handling Juvenile Delinquencies (Ban li wei cheng nian xing shi an jian de gui ding, issued by the MJ on 27 October 1995).

⁹¹ The Decision on Anti-Drug (Guan yu jin du de jue ding, issued by the Standing Committee of the NPC in 1990); The Regulations on Re-education through Labour for Drug detoxification (Lao dong jiao yang jie du gong zuo gui ding, issued by the MJ on 2 June 2003).

⁹² Article 18 of the Criminal Law.

it is necessary to use involuntary commitment in mental health facilities. Involuntary commitment in mental health facilities was criticized because of some reports on using involuntary commitment in mental health facilities as a way to quiet petitioners (Fang, 2011; M. K. Lewis, 2014). In response to the criticism, the revised Criminal Procedure Law interprets ‘when it is necessary’ as that the mental patient causes harmful consequences in violent way, endangers the public security or seriously endangers personal security, and continues posing risk to the society.⁹³ Moreover, involuntary commitment in mental health facilities should be decided by the court rather than the police.⁹⁴ Involuntary commitment in mental health facilities for some mental patients who are not punished by administrative punishment because of their mental problems was specified by a regulation⁹⁵ rather than any law before 2013. The Mental Health Law issued on 26 October 2012 and put into practice on 1 May 2013 provides that, where a patient with suspected mental disorders has committed any act of harming himself or herself or endangering the safety of others, or has the potential to commit the said act, his or her close relatives, employer or local police shall immediately take measures to stop him or her and send him or her to a medical institution for the diagnosis of mental disorders.⁹⁶

Under the Constitution, the Legislative Law, and the Law on Administrative Punishment, only the NPC and its standing committee have the power to make laws (fa lv, 法律); mandatory measures and penalties involving restrictions on the freedom of persons shall only be governed by law, and unlawful detention or deprivation or restriction of citizens’ freedom is prohibited.⁹⁷ The SC only has the power to make regulations (fa gui, 法规) based on law, and the regulations should not conflict with the laws. The regulations laid down by the SC can only create new administrative punishments except for restricting freedom of person.⁹⁸ Therefore, the regulation made by the SC which involves a new reason for restricting freedom without legal basis is illegal in and of itself. Among the administrative detentions above, detention for education is not on the basis of law, which contradicts the Legislative Law and the Constitution;

⁹³ Article 284 of the Criminal Procedure Law.

⁹⁴ Article 285 of the Criminal Procedure Law.

⁹⁵ The Suggestions on Strengthen the Work on Mental Health (Guan yu jian yi bu jia qiang jing shen wei sheng gong zuo de zhi dao yi jian, issued by the Ministry of Health, the Ministry of Education, the MPS, the Ministry of Civil Affairs, the MJ, the Ministry of Finance, and Chinese Disabled Person Federation in August 2004.

⁹⁶ Article 28 of the Mental Health Law.

⁹⁷ Article 37 of the Constitution, Article 8 of the Legislative Law, and Article 9 of the Law on Administrative Punishment.

⁹⁸ Article 10 of the Law on Administrative Punishment.

compulsory isolation and drug detoxification was not regulated by law before 2007; involuntary commitment in mental health facilities for some mental patients who are not punished by administrative punishment because of their mental problems was also not legalised before 2013; detention for training the juvenile offenders just has very vague legal basis; the provisions on involuntary commitment in mental health facilities for some mental patients who are not punished by criminal punishment because of their mental problems were also not very clear before 2012, but the revised Criminal Procedure Law solves the problems.

In the last decade, China has made remarkable headway on the legality and humanity of its penal system. The Standing Committee of the NPC abolished RTL, enacted the law on compulsory isolation and drug detoxification, revised Criminal Procedure Law which added provisions on procedural and substantive protection for the mental patients who might be sent to involuntary commitment in mental health facilities. However, there is still a long way to go to end the abuse of administrative punishments and administrative coercive measures completely. Detention for education can still detain people for up to two years on the basis of regulations which are unconstitutional. The police can both decide and execute compulsory isolation and drug detoxification and detention for training the juvenile offenders.

The legalisation of administrative punishments and administrative coercive measures is a marked trend in Chinese penal system. As Biddulph (2007, p. 350) illustrates, the power of administrative punishments and administrative coercive punishments are redefined and reorganised in ways that are consistent, or at least not overtly in conflict with the structures and the principles of legal system. The grounds of most administrative punishments and administrative coercive measures are changed from regulations to codified laws. Yet, the administrative laws still favor a very flexible role of the executive (E. Li, 2013; Y. Song, 2016; Wei, 2015).

1.3. Is RTL replaced by community corrections?

RTL was an anomaly in the penal system which contradicted the new efforts to introduce the principle of legality. Community corrections, conversely, ostensibly meet the demands of the reformers and offers more procedural guarantees to individuals. Since CCP's reform agenda juxtaposed the abolition of RTL and the promotion of community corrections, there were concerns that one might replace the other (R. Liu, 2015; Williams, 2014).

The MJ announced that community corrections would not be proposed to replace RTL. At a press conference, the Vice Minister of Justice, Zhao Decheng said, China's community corrections programmes would not turn into a new form of RTL, and the community

corrections programmes were to educate convicts. As such, a convicted person would not be held in a detention center but instead he or she would be required to receive rectification education in the community in which he or she lived (Y. Yang, 2013). Moreover, Jiang Aidong, the director of the Community Corrections Administration Bureau of the MJ, claimed that community corrections and RTL were two different legal systems of a different nature. Community corrections would only be applied to adjudicated criminals rather than to administrative wrongdoers (Cui & Yang, 2014).

Even though RTL is not to be replaced by community corrections, it is worried that community corrections may share similar features with RTL, that is, accommodating expanded execution power unlimited by law. As mentioned in the previous chapter, although community corrections is introduced into the Criminal Law and the Criminal Procedural Law, the NPC has not provided a law on how to implement community corrections in detail, and local regulations on community corrections varies. Under these local regulations, the bureaus of justice heavily rely on the police and assistants to community corrections officers to conduct supervision measures, and the concrete supervision measures of community corrections are very intensive.

These local adoptions are the result of the CCP's decision to 'the integration of strengthening top-down design and crossing the river by feeling the stones' (S. Gu & Chen, 2014). It is not uncommon in China to put a new regulation that has been formulated at the national level to the test at provincial or local level. That way, before national legislation is promulgated, the waters of public opinion can be tested first (S. Trevaskes, 2010). The SC is in the process of drafting up the Law on Community Corrections. The MJ sent a draft of the Law on Community Corrections to the SC for approval in 2013. The draft was criticized because several measures bear some resemblances with RTL, and violate the individual rights of the criminals under community corrections (R. Liu, 2015). Under the draft, the bureaus of justice are in charge of community corrections: the police in the bureaus of justice are responsible for punishing and detaining those who violate the regulations on supervision, and other members in the bureaus of justice are responsible for conducting other measures in community corrections with the assistance of social workers and volunteers. Since there are no police working in the bureaus of justice, these provisions mean that the police in other department need to be drafted to the bureaus of justice. There are fears that the police who were in charge of RTL may be drafted to community corrections, and the supervision measures under RTL may be introduced into community corrections. Two articles in the draft concerning supervision measures enhance these fears, because the draft makes far more restrictions on

the freedom of the criminals under community corrections than the Criminal Law. Pursuant to Article 44, the convicts under community corrections exercise no right of freedom of speech, of the press, of assembly, of association, of procession or of demonstration without the approval of the organ executing the public surveillance. Pursuant to Article 50, the bureau of justice can put the criminal under community corrections into 'centralised administration' (ji zhong guan li, 集中管理) if the police recommend sending the criminal into prison; or there is clue to the reoffending of the criminal; or the criminal is an alcoholic, drug abuser, or gambler, and in need of mental intervention, or the criminal should not be sent to prison pursuant to regulations, but the criminal may endanger the public order in important public places or during important events and important activities; or under other circumstances according to regulations. These articles are deleted in the exposure draft published on 1 December, 2016 by the SC considering the criticisms. The exposure draft also deletes other provisions on the concrete allocation and implementation of different measures under community corrections, without adding any alternative provisions to the deleted ones. The number of articles in the draft is thus reduced from 63 to 36. With only 36 articles, the exposure draft becomes too general to implement. The revisions in the exposure draft are challenged because the SC just evades questions on how to carry out concrete measures.

2. Defining semi-formal punishments

Chinese leadership heavily relied on informal control to maintain social order and settle disputes, and established a powerful, minimalist law enforcement authority which was responsible for only conflicts that could not be solved by informal mechanisms, and for serious crimes (Wei Wu & Vander Beken, 2012).

Formal control and informal control are two basic forms of social and crime control. The coexistence of formal control and informal control in China has attracted many scholars' discussions (Xiaoming Chen, 2004; S. Jiang, 2013; S. Jiang et al., 2007; S. Jiang & Lambert, 2009; S. Jiang et al., 2010; Ren, 1997). The terms *formal control* and *informal control* have different meanings for different scholars. Most scholars gauge whether the control is formal or informal in Chinese parlance in two ways. One way is measured by what the basis of control: if the control is based on law, it is formal; and if the control is on the basis of morality, it is informal. The second way is calibrated by who enforce the control: if the control is enforced by official agencies (such as the court, the police, and the correctional agencies), it is formal; and if the control is conducted by unofficial groups, such as the clan (zong zu, 宗族), the workplaces, and the neighbourhood communities, it is informal. S. Jiang (2013); S. Jiang and Lambert (2009, p. 7); S. Jiang et al. (2010, p. 261) find a third way. Their method is to distinguish formal control

and informal control by punishment: if the sanctions is imposed by law or implemented by official controlling organization, it is formal punishment; if the sanction is carried out by unofficial controlling group on the basis of moral rules, it is informal punishment; formal punishment and informal punishment are indicators of formal control and informal control respectively.

It is difficult to make a clear division between formal control and informal control in China. This is a unique characteristic in Chinese social and crime control system. In the formal-informal control continuum, there are at least four forms of social and legal control. At one side of the spectrum, it is the informal control conducted by the unofficial groups based on morality. At the other side of the spectrum, it is formal control implemented by official agencies based on law. Between the two side, there are some control on the basis of law, but completely or partly conducted by unofficial groups; and there is some control conducted by official agencies, but on the basis of regulations which conflict with law, and the regulations had tacit approval of the authorities.

Many academics recognise that China has a tradition of semi-formal control (Xiaoming Chen, 2004; P. Huang, 2008; S. Jiang, 2013). In most scholars' viewpoints, the semi-formal control is completely or partly conducted by unofficial groups, with the approval of the authority. In contemporary China, neighbourhood committees and village committees are grassroots organisations, yet they are guided and trained by local official agencies. The local official agencies usually ask them to assist in carrying out some administrative tasks. As introduced in the previous chapter, these grassroots organisations play an important role in implementing supervision tasks in community corrections programmes. In imperial China, the magistrates heavily relied on the clan leaders and other people with high public esteem to solve local disputes and conduct administrative tasks. The clan leaders and other people with high public esteem were not officials in the local government, but they are confirmed by the magistrate.

For most scholars, the semi-formal control which are not against law are effective and important in maintaining social order; but the control based on regulations which conflict with law reveal the weak protection of human rights and the weak constraints on the power of official agencies. Albeit problematic, this form of control has existed for a long term. Throughout Chinese history, there are some petty offences which can be punished pursuant to the laws, but they are actually punished according to other basis, and the authorities allow such punishments to replace applicable punishment prescribed by the laws. As mentioned above, in socialist China, the police could decide and execute several administrative punishments and administrative coercive measures which can detain citizens for more than

six months. These administrative punishments and administrative coercive measures were based on regulations which were not empowered by the laws to involve restrictions on freedom. The petty offences punished by these informal administrative punishments and informal administrative coercive measures were within the scope of laws, but the police might choose to impose these informal administrative punishments and informal administrative coercive measures rather than their formal counterparts pursuant to laws. In imperial era, the counterparts of these forms of administrative punishments were the clan punishments. The clan punishments were based on the morality and the clan codes rather than the laws, and were decided and conducted by the clan leaders. The petty offenses punished according to the morality and the clan codes might also fall within the scope of the penal code, but the authorities allowed the clan leaders to deal with them.

This thesis defines semi-formal punishments as the punishments corresponding to the forms of control between formal control and informal control. The semi-formal punishments include the punishments partly or completely conducted by unofficial groups but based on law; and the punishments executed by official agencies on the basis of regulations against law but which had the tacit approval of the authorities. Since the semi-formal punishments are usually implemented instead of applicable minor formal punishments, they have great impact on the scope and the content of formal punishments in practice.

The regular application of severe and excessive semi-formal punishments means that the minor criminal punishments were rarely applied. The formal justice system constitutes a key element of the social control system, but it was more of a last resort (Xiaoming Chen, 2004). In practice, the formal punishments are mainly responsible for punishing gravely immoral offenders who should be seriously blamed, and the authorities incline towards harsh punishments. Therefore, heavy penaltyism is prevalent throughout Chinese history. The harsh punishment tendency is known as heavy penaltyism (*zhong xing zhu yi*, 重刑主义) in China. Under the heavy penaltyism, there has been little room for minor formal punishments.

3. The coexistence of five punishments (wuxing, 五刑) and clan punishment

3.1. The shaper: the confucianisation of law

As Maine (1906) notes, the archaic codes emphasize penal legislations over civil legislations. The penal legislations also predominate the code in imperial China. Although somewhat legalist in spirit, western academics described the penal law of imperial China as legalist in form and predominantly Confucian in spirit (MacCormack, 1996). On the other hand, most Chinese scholars describe it as 'Legalism with a Confucian façade' (Hui, 2008; D. Zhang, 2011).

Obviously, Confucianism and legalism, the two established schools of thought in East Zhou Dynasty (B.C.1046-B.C.771), exerted a major influence on the official ideologies on crime and punishment in imperial China. As two competing schools of thought, there was an endless tug of war regarding how best to punish offenders.

3.1.1. The debate between legalism and Confucianism on the function of punishment and moral instruction in crime control

Legalism

The law in the sense of the legalists did not resemble the law to which Western societies were subject. The legalism has been regarded as Chinese Machiavellism (Lei, 2008; Scharfstein, 1995). Like Machiavelli, the legalism insisted that morality had little sense for sovereignty and the ruler should rule by the fear of punishment.

The legalists denied the usefulness of moral education in crime control. The legalists maintained that moral education was the work of moralists. The moralists might persuade a some people to abstain from the evil, but their work was nothing like enough to prevent the whole population from crime. A great many malefactors were evil by nature; they could not be reformed by moral education at all.

The concern of the legalists was the potential wrongdoings and the wrongdoings. The legalists viewed punishment as the certain and direct methods to prevent crime within the shortest periods of time. They advocated for enacting a uniform law, so that punishments could be determined entirely by objective standards. The function of the law was to deter the potential criminals and to punish the criminals, not to encourage doing good. When the legal mechanism kept the people from committing evil deeds, then the purpose of the law had been accomplished. 'For good man who committed no crime and the bad man who feared punishment so much that he dared commit no crime, their overt behavior was the same, and there was no need to concern oneself with what was in the heart' (Qu, 1947, p. 261).

Legalism emphasized the deterrent effect of punishment (Shi & Li, 2003; Tao & Xiao, 2007). Guan Zhong (720 BC-645 BC), one of the earliest legalists, objected to pardons and argued that if small faults were to be pardoned, crimes would flourish (Guan & Li, 2004). A principle frequently invoked by legalists was that if the smallest offense is met with severe punishment, in the end, the people would cease to offend and recourse to punishment itself would become unnecessary (MacCormack, 1996). Han Fei (280 BC-233 BC), one of the most influential legalists, said: 'Now all of those who do not know how to rule said that heavy punishments were harmful to the populace, and should light punishments be able to prevent evil, there

would be no need to use heavy ones. Such discourse is the result of not knowing how to govern. That which is to be prevented by severe punishment is not always prevented by light ones, but that which is to be prevented by light punishment must also be prevented by heavy ones. Therefore when heavy punishment is applied, all crime will be prevented, and as all crimes are prevented, why will it be harmful to the populace' (Han & Chen, 1972). This is what the legalists called abolishing punishments by punishments (J. Deng, 2011; G. Sun, 1997).

Confucianism

Contrarily, Confucians advocated that rulers should exercise prudence and care in punishment. Coercive punishment, according to the Confucians, could only temporarily keep people from committing crime. 'Whenever the net of legal entanglements could be bypassed, or whenever jurisdictional control could be avoided, or whenever there was no question of intimidation, the individual would still be evil since he had undergone no change of heart' (Qu, 1947, p. 249).

To prevent wrongdoing, Confucians put greater value on moral instruction than punishment. Confucians believed in the malleability of human beings. The wrongdoers should have the chance to correct their mistakes. Confucius (551 BC-479 BC) said, not to mend the fault one has made is to err indeed (Confucius, 1980). Education could enable a person to be consciously aware of shame, and not suffer from evil intentions. To Confucians, this was the most thorough, the most fundamental, and the most successful way to attain their social aims, including crime control (Qu, 1947).

The moral norms in traditional Chinese society were roughly divided into four levels, of which were rites (li, 礼), righteousness (yi, 义), honesty (lian, 廉), and shame (chi, 耻) (Sima, 2011). Rites and shame were the highest and lowest moral norms respectively. M. Guo (1946) found that rites came from the collections of the good manners conducted by the virtuous people in ancient times. 'Rites are the rules of propriety, that furnish the means of determining the relatives, as near and remote; of settling points which may cause suspicion or doubt; of distinguishing where there should be agreement, and where difference; and of making clear what is right and what is wrong' (W. Wang, 2001). 'Punishments prevent what has already happened', while 'the instruction of rites prevent what is going to happen' (Ban, 1962, p. 2252). That is why the moral influence of rites could function as a more effective deterrent factor than punishment. When living among the virtuous, one could become an upstanding person who would never have the desires to perpetrate wrongdoings. If everyone could become a person of integrity, the ruler would not need to use punishment to deter people from

committing crimes any more. A Confucian took an example, 'the fleabane growing in the field of hemp becomes straight itself without support' (Z. Shang, 2002, pp. 57-58).

As a last resort, Confucius accepted that there might be extraordinary circumstances in which a ruler had to apply punishments to irredeemable wrongdoers. But even here, Confucius stressed that the ruler must exercise great moral restraint before punishments imposed. According to Confucius, only if the ruler inculcated his people with a respect for rites first, the punishment on those violated the basic moral norms could have deterrent effects. Otherwise, even though the wrongdoers were punished, the common people still could not know how to become decent people. In Confucian words, 'when rites do not flourish, punishments will not be appropriate; when punishments do not be appropriate, the populace will be puzzled about how to behave acceptably'(Confucius, 1996); and 'to execute capital punishment without having instructed the populace, this is considered cruel' (Confucius, 1980).

3.1.2. The integration of law and rites

It is acknowledged that, legalism put forward heavy penaltyism, but Confucianism proposed to impose lenient punishment as a rule with harsh formal punishment as exceptions; legalists maintained severe punishment in all cases, but Confucians advocated being cautious about formal punishment. Their opinions were divergent in terms of how harsh formal punishments could prevent crimes, and how to execute formal punishment in order to achieve the best deterrent effects. Actually, they aligned with each other with regard to the goal of formal punishment, that is, deterrence. The same opinion on the goal of formal punishment made it possible for the integration of laws and rites.

Confucius himself advocated prioritizing rites over punishment, but he did not deny the deterrent effect of formal punishment, he maintained that punishments were necessary in some circumstances. He held that the rulers should adjust to the attitudes of the populace towards the deterrent effect of formal punishment when considering whether he should use punishment as a ruling apparatus. Confucius took the example of Zi Chan (a ruler of the Zheng Kingdom, died 522 BC). Zi Chan told his successor Da Shu (died 507 BC) that, moral instruction should be the primary strategy in exercising power, and punishment should be the secondary; however, punishment could prevent the populace from committing crimes, but leniency might make the populace disrespect the power and conduct wrongdoings. When Da Shu became the ruler of Zheng Kingdom, he emphasized moral instruction and neglected punishment; but several organised robberies occurred in Zheng Kingdom; then he had to execute the robbers.

Confucius found the lessons drawn from Zi Chan and Da Shu was that, if the ruler was too lenient in exercising power, the populace would neglect the power, then the ruler would need to correct the populace with severe policy; if they ruler were severe in exercising power, the populace would be inflicted, then the ruler would need to implement lenient policies. Leniency was used to adjust severity, and severity was used to adjust leniency, thus the harmonious society could be achieved (Zuo, 2011). He concurred with the criminal policy of the West Zhou Dynasty, which held the position that whether formal punishments were lenient or severe should depend on public order (Ma, 2008; T. Wang & Wang, 2008).

Over time, in opposition to Confucius' original teachings, other Confucians believed that formal punishment played a more significant role in deterring crime. Mencius (372 BC–289 BC) and Xunzi (313 BC-238 BC), two of the best-known Confucians living in the two and a half centuries after Confucius, carried on Confucius's penal ideas in a critical way. They still believed that formal punishment could only play a subsidiary role to moral education, but, unlike Confucius, they regarded formal punishment as an effective tool for crime prevention, without punishment, there would be injustice. Mencius said, 'Virtue alone is not sufficient for the exercise of government; laws alone cannot carry themselves into practice'(Qu, 1947, p. 269). Xunzi said, 'if people are punished without education, penalties will be enormous and evil cannot be overcome; if they are educated without punishment, evil people will not be punished'(Qu, 1947, p. 269). Xunzi had a different explanation on the principle of whether formal punishments were lenient or severe should depend on public order in Zhou Dynasty. For Xunzi (1988), if the formal punishment was proportionate with the crime, the public order would be proper; if the formal punishment was not proportionate with the crime, the public order would be chaotic. Actually, the proportionality in Xunzi's view was quite different from the proportionality in modern sense. Xunzi's understanding of proportionality was in the context of stable public order. As an Confucian, Xunzi also upheld that the severity of punishment in general should change with the public order. However, the correlation between the severity of formal punishment and the public order in Xunzi's discussion was in opposite direction with that of Confucius. According to Xunzi (1988), if the public order was proper, the formal punishment would be harsh; if the public order was chaotic, the formal punishment would be lenient; that is because, for the same crime, when the public order was proper, the crime was serious compared with other crimes in his time; when the public order was chaotic, the crime was minor compared with other crimes in his time. Xunzi's explanations on the relation between moral education and formal punishment, between crime and public order, had great potential to combine the Confucianism façade with legalism spirit.

The emphasis on both moral instruction and formal punishment contributed to the integration of the codes of moral instruction and the codes of formal punishment, that is, rites and law.

It was owed to the legalists who are credited with establishing the law system that ultimately lead to Qin's dominance. Qin set up the first unified empire in China in B.C.221, but the empire lasted for only five years. It is the shortest dynasty in China's history. When the politicians and scholars of ensuing Han dynasty reflected on the lessons of Qin dynasty, they attributed both the swift rise and the rapid fall of Qin Empire to the despotism of legalism. Jia Yi (200 BC-168 BC) was the first advocate of the confucianisation of law. Jia Yi (2000) argued that Qin's penal system brought about effective and efficient crime prevention in a short term: the codified law provided the ruler and his people with rules to follow, and the severe punishments imposed on those who violated the rules had instant deterrent effects. He also warned that it was short sighted in relying the codified law and the severe punishment alone to control crime. As an Confucian scholar, Jia Yi (2000) believed that rites was the panacea to render the society stable and engender the subjects' faith in the rule in the long term, albeit no promise of quick effects. Other Confucian scholars in Han dynasty, such as Dong Zhongshu (179 BC-104BC) and Liu Xiang (77 BC-6 BC) also advocated the ruler combining rites and law. Han Emperor Wu (157 BC-87 BC), who ruled China from B.C.140 to B.C. 87, established Confucianism as official ideology of the state (D. Cao, 2012; Fu, 1972). In the imperial era (B.C. 221- A.D. 1912), the Han Dynasty (B.C. 202 – A.D. 220) and almost all later dynasties adopted Confucianism as the official ideology. But Han and later dynasties all recognized the need for expansive penal code. These leaders learned from the Qin Dynasty's unification of China that a centralised empire requires a uniform penal system to exercise control over its subjects.

The later Confucians and Neo-Confucians⁹⁹ still addressed the value of moral education, but they thought moral education alone was not sufficient for crime prevention, by comparison, punishments were more effective tools. Zhu Xi (1130-1200), a well-known neo-Confucius scholar, even advocated harsh punishment directly: laws should be strict, in essence, with lenient rules as supplements (Jinfan Zhang, 2013).

Laws and rites were coextensive. Both the penal code and clan codes in imperial China were the embodiment of the moral norms of Confucianism. Both penal code and clan codes have

⁹⁹ Neo-Confucians carried forwards the basic ideas of Confucians, borrowed some concepts from Daoist and Buddhism, and made a more logical and rational Confucian ethical and philosophical system. It was prevalent from the Song Dynasty (960-1276) to the Ming Dynasty (1368-1644) .

two principal functions: one was to instruct rites, the other was to punish the behaviours that violate the rites to reinforce Confucian morality.

One of the distinctive characters of Chinese imperial culture is its astonishing consistency throughout two millennia. From the inception of Han Dynasty to the late Qing Dynasty (1644-1911), China possessed a highly developed and sophisticated system of penal code and clan codes, and the system survived many centuries of development with very little change in their essence.

3.1.3. The hierarchical system of moral instruction

For Confucians, moral instruction should be conducted by the leaders in hierarchy and patriarchy.

Confucians showed contempt for selfish interests, and esteem for responsibility. For Confucius (1980), only if one subdued selfish desires and conformed to the rites, he could have the virtue of benevolence (ren, 仁). Benevolence was the highest level of virtue as a human being in Confucian perspective. The essence of benevolence was loving others, and caring about others' interests rather than your own interests. The idealistic harmonious society conceived by Confucians was that everyone had the goodwill to fulfil his responsibility. Therefore, Confucian discourses on moral norms were primarily about how to assume responsibility in accordance with hierarchy and patriarchy.

In hierarchy and patriarchy, rites had analogical function: for the country, rites distinguished the noble from the humble and differentiated the superior from the inferior; for the clan, rites divided close relatives from distant relatives (Dong, 1992; S. Wang & Kramers, 1950). There were gradations of ranks between the ruler and the officers, between the various levels of officers, and between the officer and the subjects. For the same token, there were gradations of ranks between the clan leader and the family leaders, between the father and the sons, between brothers, and between the husband and the wife' (Jinfan Zhang, 2013, p. 64). In Chinese traditional society, 'the family was the miniature of the state, and the state was the amplification of the family' (Jinfan Zhang, 2013, p. 187).

The moral norms in hierarchy and the moral norms in patriarchy were coherent. The cardinal principle of moral norms in hierarchy was 'Zun Zun (尊尊, respect the noble)', and the cardinal principle of moral norms in patriarchy was 'Qin Qin (亲亲, love relatives)' and 'Zhang Zhang (长长, respect the elder)'. For Mencius, love the relatives, and then show benevolence to the populaces (Richards & Mencius, 1964). In the similar vein, respect the relatives, and then respect the noble. The Confucians held that 'filial piety is the initial expression of the rites',

and 'filial piety is the origin of moral instruction' (Rosemont & Ames, 2009; Zuo, 2011, p. 173). To achieve filial piety, one began with attending on parents, then manifested as attending upon ruler, and finally acquired fame (Rosemont & Ames, 2009), so few of those who were filial and fraternal would show disrespect to their rulers (Confucius, 1980).

For Confucians, the higher rank in patriarchal system and hierarchical system, the more responsibility of moral instructions should be taken. A benevolent ruler should love their subjects, and had compassion and kindness towards their subjects, thus he had the responsibility to exemplify moral norms for his subjects, and instruct the populace in moral norms. An officer had the responsibility to observe the ruler's instruction, exemplify moral norms for the people in his administrative area, and instruct the people in his administrative area in moral norms. A clan leader had the responsibility to comply with the ruler's and the magistrate's moral instruction, exemplify moral norms for the people in his clan, and instruct the clan in moral norms; and the common people had the responsibility to obey the moral instructions. The primary value orientation of an individual was the filial piety to his elders, the obedience to his officers, and the loyalty to his ruler.

3.1.4. The clan punishments

With regard to the consistency between the moral norms in hierarchy and the moral norms in patriarchy, Confucians advocated the ruler entrusting the clan to create the first moral boundary, and punish those who cross the boundaries. The ruler should accept the unity of the family and refrain from intruding into the family for matters of law enforcement. A good Confucian family would supervise the behaviour of its own members and punish errant behaviours. A family should enforce punishment privately rather than publicly. Accordingly, moral remediation was the family's collective duty (Mühlhahn, 2009; Jinfan Zhang, 2013). The rulers in imperial China also recognized that the Confucian emphasis on family and communal solidarity benefited society. If conflicts were solved within the family and the community in an amicable way, it would be rewarding to enhance the ties of kinship and reduce the caseload of the magistrates.

Accordingly, those who committed minor offenses were often punished by clan leaders pursuant to their respective clan code rather than by magistrate under the criminal code. Thus, the clan, which is the exogamous patrilineal group of males descended from founding ancestors, could adopt rules for the personal conduct of members, including rules for minor offences. The clan leaders were chosen by inheritance rather than by election. In every clan, several men of integrity and ability were selected by the clan leaders to be the judges (Q. Gao

& Luo, 2006; D. Zheng & Ma, 2002). If a clan member committed a minor offence, the clan would convene in their ancestral hall and deliberate as to the proper recourse. The clan leaders tended to send their clan codes to magistrates for approval. The magistrates encouraged the clan leaders to do so, although it was not an obligation. If a clan found one of its members guilty of a serious and indictable offense, in addition to the punishment awarded by the clan, a charge against this member would also be brought before the magistrate (Q. Gao & Luo, 2006; Van der Sprenkel, 1966). Derk Bodde (1963, p. 172) summarized the longstanding custom of unofficial jurisdiction as follows:

'The clan into which he was born, the guild of which he might become a member, the group of gentry elders holding informal sway in his rural community, these and other extra-legal bodies helped to smooth the inevitable frictions in Chinese society by inculcating moral precepts upon their members, mediating disputes, or, if need arose, imposing disciplinary sanctions and penalties. The workings of such unofficial groups were supplemented by complementary procedures on the part of the government itself which, despite their official inspiration, functioned quite separately from the formal legal system. These extra-legal organs and procedures, then, were what the Chinese everyman normally looked to for guidance and sanction, rather than to the formal judicial system per se. Involvement in the latter was popularly regarded as a road to disaster and therefore to be avoided at all cost.'

3.1.5. The five punishments

The clan codes were initiated as the first moral boundary. If someone crossed the first moral boundary, the clan punishment would be imposed on him. The penal code was formed as the second moral boundary for those who violated the moral norms further. If someone seriously broke the social norms, his wrongdoings shall be handled by the magistrate pursuant to the penal code and the imperial decrees, and the magistrate had the power to decide whether the suspect was guilty or not. If the magistrate made a decision that the suspect was guilty, the suspect would be sentenced to one of the five punishments in accordance with the seriousness of his crime.

Symbolically, the five punishments were the standard expression used for the penal system under the penal code in ancient China. The Chinese character of 'xing' (刑), which means 'punishments' in the modern-day Chinese language, meant corporal punishment and capital punishment in the ancient Chinese language. Even though exile, penal servitude, and fines as punishments also existed in ancient China, they were not regarded as types of 'xing'. In ancient times, codified punishments were limited to irreversible punishments (Q. Cai, 2005). Except

for tattooing that was imposed as a shame for offenders, the dominant purposes of other punishments were general deterrence and incapacitation. The five punishments were introduced from the Miao ethnic group. They were tattooing, cutting off the nose, chopping off the feet, castration, and the death penalty (mo, yi, fei, gong, da pi; 墨, 劓, 剕, 宫, 大辟).

The irreversible punishments were against Confucian doctrine. Confucians supposed that, before the 16th century B.C., the rulers in the primitive tribes of the Han nationality (the majority in China) just imposed two kinds of punishments: beating with a stick and exile. Beating with a stick was used to educate criminals rather than punish people, while exile meant the expulsion of criminals from the tribe. The two punishments were enough to prevent crimes, thus the rulers in the primitive tribes were real benevolent rulers. For Confucians, the story of the rulers in the primitive tribes illustrated the feasibility of using beating with a stick and exile as the substitute for corporal punishments. In the era of Emperor Wen (ruling China from B.C. 180 to B.C. 157) in the West Han Dynasty, an incident fulfilled the reform on the five punishments. A renowned doctor named Chunyu Yi was accused of medical malpractice, if he was convicted, he would be punished by cutting off the nose or chopping off the feet. His youngest daughter named Tiying was grieved to hear about that. She did not want his father to suffer perpetual pain. In addition, if his father became handicapped, he would be totally disabled from following his vocation. This could torture him further than physical pain. To rescue her father, she walked thousands of miles to the capital of the Han Dynasty, and addressed a petition to Emperor Wen. In the petition she said, the irreversible punishments were harmful for the repentance of criminals, because they could not have any chances to turn a new leaf. Therefore, she begged Emperor Wen not to punish her father, in return, she was willing to be a slave for life.

The statement of Tiying was not only terrifically moving, but also very convincing. It was fully justified by Confucian doctrine. As a response, Emperor Wen abolished tattooing, cutting off noses, and chopping off feet and introduced beating with a stick as an alternative. He also justified his reforms by referring to Confucian doctrine. In his edict he said that in ancient times the ruler just puts a marker on the clothes of criminals. This would shame them in front of the populace and would, in turn, restrain them from committing other crimes. Moreover, despite the harsh punishments, crime still flourished. The emperor believed that the growing number of crimes was due to his own failure to exert moral influence. The moral education was far from enough before the punishments were imposed on criminals. He therefore promoted moral values and social reforms, and gave criminals opportunities to reintegrate into society (Sima, 2011).

After the Sui Dynasty (581-618), the five punishments was 'beating with a small stick, beating with a large stick, penal servitude, life exile, and the death penalty' (chi, zhang, tu, liu, si; 笞, 杖, 徒, 流, 死). Since the Tang Dynasty (618-907), the content of the five punishments basically remained the same. When comparing The Great Qing Code (the last code in imperial China) with the Tang Code, the section regarding the five punishments is almost identical (Johnson, Wuji, & Gelehrter, 1979; Van der Sprenkel, 1966; Zhangsun, 1983). The recognized punishments are listed in the section on 'General Principles' in the Tang Code. There are five types, prescribed according to a graduated scale of intensity.

The five punishments

1. Beating with a small stick: 10, 20, 30, 40, and 50 blows;
2. Beating with a large stick: 60, 70, 80, 90, and 100 blows;
3. Penal servitude: 1, 1 ½, 2, 2 ½, and 3 years;
4. Life exile: 2000, 2500, and 3000 *li* (1 *li* was roughly equivalent to 520 meters in the Tang Dynasty);
5. Death penalty: strangulation and decapitation.

According to Emperor Wen, the aims of the penal reform were: first, facilitating moral instruction; second, providing the offenders with the chances to live a new life. Mutilations were irreversible damages, but beating with a stick just caused recoverable and bloodless wounds, so the offenders punished by beating with a stick could had a healthy body again and had a new start in the future. However, beating with a stick seemed nothing to do with moral education.

It was recognised that the design of the minor criminal punishments, including beating with a small stick, beating with a large stick and penal servitude, pertained to the lowest moral norm, that is, shame. According to Confucianism, if a person was perceived as having no sense of shame, that person might be thought of as beyond moral reach, and thus was even feared by the devil (J. Li, Wang, & Fischer, 2004). In Chinese traditional context, beating with a stick and penal servitude was devised to correct and educate the criminal through shame (Q. Cai, 2005).

Beating with the smaller stick had the same pronunciation with 'shame'. For Confucians, beating with a stick could shame the criminals, the sense of shame could invite the criminals to repentance; furthermore, the sense of repentance could keep the criminals from reoffending. The relation between beating with a stick and moral education was embodied in penal code. Tang Code, which was promulgated in 653, is the earliest surviving code from

which we can view an accurate picture of the range of laws in imperial China. Almost all penal codes of the subsequent dynasties copied it, in spite of slight changes. In the Tang Code we read, Chi 笞 means ‘to beat’, and is also glossed as meaning chi 耻 ‘to shame’. It means that if a person commits a small offense the law must discipline him. Therefore, beating is used to shame him. The Tang Code quotes a statement of Hanshu 汉书: ‘Beating is employed in teaching persons to behave morally’ (Johnson et al., 1979; Zhangsun, 1983).

Penal servitude, another minor criminal punishment, was also germane to the lowest ethical norm (that is, shame). The rationales of penal servitude on criminals and their relations with shame were also embodied in penal codes. In the Tang Code we read, penal servitude was also designed to shame the criminals. Penal servitude meant slavery (nu, 奴), for such slavery shames one (Johnson et al., 1979; Zhangsun, 1983). It was believed that the sense of shame could invite the criminals to repentance; furthermore, the sense of repentance could keep the criminals from reoffending.

Life exile and death penalty were designed to punish criminals who were deemed to have no sense of shame. The Tang Code explained that, a sentence of strangulation or decapitation was the most extreme of punishments, the emperors could not bear to inflict too many death penalties, and so reduced it to life exile in a distant place (Johnson et al., 1979; Zhangsun, 1983).

3.1.6. The legal mercy

The penal code was both legal boundary and moral boundary. The state not only controlled whether the subjects obeyed legally enforced rules, but also control whether the subjects conformed with socially accepted moral norms (Xiaoming Chen, 2004; Ren, 1997). When deciding a sentence, a magistrate should consider whether a subject might violate the legally enforced rules, but also consider whether the punishment accorded with the vital principles of moral norms. The rulers gave the pivotal values of rites highest priority, so the protections of the fundamental values of Confucian benevolence could buttress exceptions to the general rules in the penal code. For the same token, the precondition of these lenient punishments was that the crimes were not one of the ‘ten abominations’(shi’ e, 十恶)¹⁰⁰, which was the most serious crimes that injured the principles of Confucian rites, especially the rites that involved

¹⁰⁰The ten abominations first appeared in legislation in the Beiqi Dynasty (550-577), then were slightly revised in Sui Dynasty. The substance of the ten abominations had been remained the same since then. They were plotting rebellion (mou fan, 谋反), plotting sedition (mou da ni, 谋大逆), plotting treason (mou pan, 谋叛), contumacy (e’ ni, 恶逆), depravity (budao, 不道), irreverence (da bujing, 大不敬), lack of filial piety (buxiao, 不孝), discord (bu mu, 不睦), unrighteousness (buyi, 不义) and incest (neiluan, 内乱).

the loyalty to the rulers and the filial piety to the parents. Since the Han Dynasty, the benevolent government had become the political creed and all rulers boasted that their government were benevolent. The rulers in imperial China viewed lenient punishments as an effective way to acquire the reputation of Confucian benevolence. For those who were the noble, who were with the virtues of filial piety, who confessed their guilt before the crime was discovered, and who were aged, juvenile, or infirm, the rulers would amnesty or commute their sentence. In some cases, the ruler might provisionally release prisoners for reasons having nothing to do with the seriousness of crime and the culpability of the criminals.

Eight deliberations 八议

The cardinal principle of moral norms in hierarchy was respecting the noble, and this provide excuses for the privilege of the noble in sentences. Pursuant to the Article eight of Tang Code, *Li Ji* 礼记 said that ‘punishments do not extend up to the great officers’; therefore, when the nobles who deserved eight deliberations committed crimes, their sentences were not governed by the penal code (Johnson et al., 1979; Zhangsun, 1983). Those who deserved eight deliberations were eight categories of the noble, that is, the relatives of the emperor, the old retainers of the emperor, those who were morally worthy, those who were with ability, those who had achievement, those who had high position, those were diligence, and the guests of the state. If those deserving of one of the eight deliberations committed a capital crime, a memorial was sent up requesting authorization to consider and fix a penalty, and the officers did not dare to decide the case themselves. If those deserving deliberation committed other crimes, they would be punished by a more lenient scale of five punishment than the normal punishment stipulated by the penal code. Pursuant to the Article 11 of the Tang Code, all cases in which those having the right of deliberation, petition, or reduction of punishment, extending to officials of the ninth rank and above, and including the paternal grandparents, parents, wives, sons or grandsons in the male line of those whose official rank permits them reduction of punishment, commit crimes punishable by life exile or less, permit redemption by payment of copper.

Temporary permission to remain at home and support their paternal grandparents or parents

The cardinal principle of moral norms in patriarchy was loving relatives and respecting the elder. Since the reign of Emperor Xiaowen (467-499) during the North Wei Dynasty (386-534), criminals who were the sole breadwinners in their families could stay at home and look after their parents and grandparents. Their original sentences could be mitigated to beating with a stick or could be fulfilled after their parents and grandparents passed away. Emperor Xiaowen

explained the reason for this move was that ‘among 3000 crimes, the severest crime of them all is lack of filial piety’ (Head & Wang, 2005).

The Tang Code stipulated that all cases involving those who commit crimes punished by death other than the ten abominations, where their paternal grandparents or parents were aged or infirm and require service and the family has no adult relative within the second degree of mourning¹⁰¹, might send up a petition. Those who committed crimes punished by life exile and whose family circumstances were as described above were given temporary permission to remain at home and support their paternal grandparents or parents. All cases where the household had no other adults, the criminal was exempt from penal servitude and was to receive a beating with a large stick instead. If during the years of penal servitude, the household came to have no other adults, blows with the heavy stick are substituted according to a general calculation of the required labour remaining. The remaining sentence was thus cancelled by the administration of blows with the heavy stick and the criminal was released. This article was not applicable to cases of robbery and physically injuring people, except for cases where relatives were old or infirm and require service, which meant paternal grandparents or parents eighty years of age or older, or if they were incapacitated and required special needs and the household had no other adults. This was due to compassion on the one hand that the criminal’s household might have the food supply cut off, but also due to concerns that difficulties might arise within the household due to poverty (Johnson, Wuji, & Gelehrter, 1979; Zhangsun, 1983).

Reduction or remission of punishment because of confession

The *Kang Gao* 康诰 in *Shang Shu* 尚书 set forth an ancient judicial tenet that if someone committed a felony but was a casual or negligent offender or confessed his crime, he should not be executed by capital punishment. This was the acknowledged original discourse on confessions in China. Confucian confidence in the malleability of human beings underpinned the remarkable provision in the Tang Code that a criminal who sincerely confessed guilt to the authorities before the crime is discovered will be eligible for a reduction or remission of punishment (Derk Bodde, 1963). These rules were passed on by the dynasties that followed.

¹⁰¹ The generational differences in imperial China were expressed in terms of the five mourning relationships. ‘The closer the descent from any common male ancestor, the closer the mourning relationship of any two persons’ (Johnson et al., 1979, p. 31). Roughly, the first and second degree of mourning relatives included great-great grandparents, great grandparents, grandparents, parents, step parents, parents in law for married women, husband, wife and brothers.

Article 37 of the Tang Code stipulated that in all cases where there was a confession to crimes that had not yet been discovered, the crimes would be pardoned. Making mistakes but not correcting them is considered to be a mistake. When, however, persons were able to correct their mistakes and confess their crimes, they would be pardoned. Cases where a representative was sent to confess and the person who made the confession was one who was allowed mutual concealment by the law, or where a person who was allowed mutual concealment made an accusation to the court, both were regarded according to the law as having confessed themselves. A representative who was sent to confess did not have to be a relative. Sending a representative to confess was the same as confessing oneself (Johnson et al., 1979; Zhangsun, 1983).

Compassion for those who are aged, juvenile, or infirm

Inspired by Confucian humanitarianism, special legal provisions concerning weaker members of society who were guilty of having committed a crime were prescribed in the Code. These were notably women, the aged, the young, and the infirm (D. Bodde, 1973).

Article 30 of the Tang Code stipulated that according to the Rites of Zhou, those who were seventy years of age or over and those who had not yet shed their milk teeth might not be enslaved. As for exemption from forced labour in a fixed place at the place of exile, the aged and juveniles could not endure physical labour. Therefore, they were exempted from forced labour in a fixed place. The law on life exile is not the same for women and men. Even though an aged or juvenile woman committed an offence punishable by life exile with added labour, redemption by payment of one hundred chin of copper was still allowed (Johnson et al., 1979; Zhangsun, 1983).

Provisional release

Prisoners might also be provisionally released under the amnesty of the emperor or the regional governors during summer, winter, plough season, harvest season, spring festival, or for parents' funerals, but they had to come back at the appointed date and continue their sentences. The most famous case of amnesty involved Emperor Taizong (ruling from 626 to 649) of the Tang Dynasty, who permitted 390 prisoners held on death row to return home and re-join their families during spring festival, and their death penalties would be executed in autumn. When all 390 prisoners returned to prison on time and lived up to their death conventions, Emperor Taizong absolved their death sentences (Sima, 2011).

3.2. Heavy penaltyism

The harmonious society conceived by Confucians was proven to be an utopia. The idealistic society could achieve only if everyone accomplished his responsibility. However, there were no oversight of the performance of the person from the highest strata of the power pyramid. The responsibility-oriented society conceived by Confucians allocated responsibility according to the hierarchy and patriarchy. The higher rank the person belonged to, the more responsibility he borne. The higher rank should assume the duties of his rank, instruct the lower ranker, and supervise the lower rank carrying out their responsibilities. The lower rank could suggest the higher rank performing the responsibility he deserved, but the higher rank could refuse the suggestion. Therefore, if the higher rank did not implement his duties, and rejected the suggestions from the lower rank, there were no way to urge the higher rank. Regarding punishment, it was claimed that the clan code had power on every clan members, including the clan leaders; and the penal code had power on everyone in the country. However, the clan leader's decision prioritized over the clan code in the clan penal system, if it had no clash with the emperor's decree and the penal code; the emperor's decree prioritized over the penal code in the formal penal system, and there were no coercive restrictions on the emperor's decrees. According to Jinfan Zhang (2013, p. 126), 'the emperor's imperial orders could not only overtop the law, but also take the place of some stipulations of the law, and could be added up as the new stipulations of the law'; As a result, 'the rise and the fall of the order of legal system had entirely depended on the virtue and abilities of the emperor. If the emperor was wise and liberal, to some extent, the feudal legal system would be maintained, the society would be stable and the economy would be developed. However, in the feudal times of China, there were few wise and liberal emperors, but many fatuous and dissolute ones' (Jinfan Zhang, 2013, p. 181).

The clan leaders' decision and the emperor's decree usually handled out severer punishments than the penal code prescribed, which were usually bent from the Confucian benevolent values. However, the excuses were also from Confucians. As introduced above, Confucians held that the severity of punishment should depend on the public order, but Confucius and Xunzi provided opposite correlation between punishment and public order. Therefore, the rulers could issue more severe punishments than the penal code prescribed, under the pretext of deteriorating public order or improving public order. The neo-Confucians even tailored the theory of severe punishment with supplementary leniency on the basis of Confucius's discourse to meet the rulers' need in imperial China. The neo-Confucian theory

surrounded the rulers with the aura of Confucian benevolence, and embraced the thoughts of legalists stealthily at the same time.

The loopholes in Confucianism made the imposition of harsher punishment than the penal code stipulated possible, and the one fold understanding of the goal of punishment made heavy penaltyism became the preferred choice of most rulers. As previously mentioned, Confucianism and legalism agreed with each other that the goal of punishment was general deterrence. Although Confucians advocated the ruler minimizing the imposition of punishment, and instructing moral norms before the imposition of punishment, they also regarded general deterrence as the primary goal of punishment when the ruler had to impose punishment. Both legalism and Confucianism overstated the immediate effects of severe punishments on public order. The alleged effectiveness influenced the clear majority subliminally. As a result, the overarching heavy penaltyism was not only embraced by the authorities, but also supported by a high proportion of the population. S. Lin (1975, p. 71) interpreted that general deterrence placed heavy penaltyism firmly in the mainstream of penal policy for thousands of years. Some scholars warned against the single goal of punishment, but these stances were out of tune with the majority. Xu Gan (170-217) in the Wei Dynasty proposed that the fundamental principle of punishment lied in the certainty of the punishment rather than the severity of punishment. Xu Gan (2000) himself also recognised that his viewpoint put forwards some points which were unnoticed by the popular theories, but he also expected the public would challenge his position.

3.2.1. The harsh clan punishments in the imperial era

Albeit all the virtues of the clan punishments, the power of the clan leaders to punish the clan members was generally excessive. The ruler gave the clan leaders almost total and unchecked power. Emperor Daoguang (1782-1850) (ruling China from 1821 to 1850) ordered that 'any affair within a clan, whether serious or trivial, shall be judged by the patriarch' (Jinfan Zhang, 2013, p. 142). This led to no limitations on the severity of the clan punishments. The clan members might be punished by extraordinary harsh clan punishments which were not proportionate with the severity of the crime at all. They could be punished by beating with a stick because of cutting down a branch of a tree near the ancestral grave or cursing their parents; they could be punished by penal servitude due to misbehaviours during offering sacrifice to the ancestors; in extreme cases, they could even be punished by death penalty on account of adultery, theft and digging up the coal miners near the ancestral grave (Tu, 2013; R. Wang, 2007). To make matters worse, the wrongdoers punished within the clan almost had no opportunities to make an appeal to the magistrates. From the old texts of the clan codes,

we find that most of the clan codes forbade members to engage in litigation in the official courts before submitting their cases to the clan leaders, and imposed on clan members the duty of avoiding quarrels. If the clan members violated this stipulation, they would be punished. For example, according to the clan code of *Pi Ling Liu Shi* 毗陵刘氏 in 1900, those who involved in lawsuits without the clan leaders' permission would be punished by slapping in the face for ten times (Tu, 2013).

3.2.2. The harsh formal punishments in the imperial era

As highlighted in the previous section, the penal code was the second moral boundary, and it just handled the serious crimes which could not be solved by the first moral boundary, that is, the clan code. However, the punishable wrongdoings in the clan codes and the penal code overlapped. The old texts of the clan codes inferred that the overlaps were mainly about theft, fraud, gamble, drug problems, adultery and other petty offences within the clans. The minor criminal punishments in the national code, including beating with a stick and penal servitude, were also introduced into the clan codes. Since most petty offences were literally punished by clan punishments, formal punishments primarily dealt with very serious crimes, and the deserved punishments under the penal code were relatively harsh. Most rulers would not amnesty or commute the sentence on these crimes. Because both the ruler and the public preferred heavy penaltyism for serious crimes, and the imperial decrees had higher priority over the laws, the actual punishment was often harsher than the prescribed punishment in the penal code. The formal punishment inevitably presented a harsh and powerful image to the public.

3.2.2.1. The rarity of legal mercy

In practice, the humane and lenient treatments provided in the penal code were rarely implemented, except under the reign of a few benevolent emperors.

In the Tang Code, all cases involving those who commit crimes punished by death penalty or life exile, where their paternal grandparents or parents are aged or infirm and require service and the family has no adult relative within the second degree of mourning, may be given temporary permission to remain at home and support their relatives (Johnson et al., 1979; Zhangsun, 1983). Almost all penal codes of the subsequent dynasties copied these articles, but exceptions to the article continually increased in the subsequent dynasties. In the Tang Code, the exception for those who commit crimes punished by death penalty is the ten abominations, and the exception for those who commit crimes punished by life exile is just life exile despite amnesty. In the last two dynasties, the Ming Dynasty and the Qing Dynasty,

these exceptions covered nearly all types of voluntary crimes, encompassing minor theft, corruption, fraud, and neglect of duties. There was practically no room to exert the provisions of the article. The official annotations on this article even explicated that this article had never been used until the emperor announced a decree to promote the application of the article during a national celebration (J. Wu, 2001).

In the same vein, provisional release under the amnesty of the emperor or the regional governors were few and far between after Emperor Taizong in the Tang Dynasty. Zhao Yi, who lived during the Qing Dynasty, studied cases on provisional release from the Han Dynasty to the Ming Dynasty in Chinese historical records. There were 21 cases prior to Emperor Tai, while the cases in the following millennia totalled merely 5 (Y. Zhao). Before the Wei and Jin Dynasties (220-589), regional governors frequently issued provisional releases; however, as all power was becoming centralised to the emperor from the Sui Dynasty onward, as a consequence, the practice occurred less and less (X. Li, 2006).

3.2.2.2. The cruel punishments

In legislation, only the five punishments mentioned above could be imposed. Imperial China was, however, a society ruled by man and various cruel punishments were executed openly in practice.

In the periods of the Wei, Jin, Northern, and Southern Dynasties (220-589), the penal code gradually reduced mutilations as punishment. During the Tang Dynasty, the penal code completely abolished corporal punishments, and restricted death penalty to strangulation and decapitation.

But for all that, the emperor could issue imperial decree to execute various cruel punishments, such as beating with a stick, tattooing, dismemberment (ling chi, 凌迟), exposure of the head (xiaoshou, 梟首), and desecration of the corpse (lushi, 戮尸). In the Ming Dynasty (1368-1644) and Qing Dynasty, the penal code introduced dismemberment and desecration of the corpse.

Literally, these brutal punishments, which were mainly inflicted on criminals who perpetrated the ten abominations. The ten abominations were the most serious crimes that injured the Confucian rites, especially the rites that involved the loyalty to the rulers and the filial piety to the parents. According to Confucians, these crimes were more serious than homicide (Jiaxi Yu, Zhou, & Yu, 1983). The deserved punishments for those who committed ten abominations were very harsh. In the Tang Code, Article 6 provides that, the ten abominations are specially placed near the head of the penal code in order to serve as a clear

warning. As introduced in the previous section, those who committed ten abominations could not enjoy legal mercy in any cases. Nevertheless, the emperor tended to impose severer punishments on criminals who committed the ten abominations than the penal code prescribed. In fact, the ten abominations included many petty offences which violated the vital rites, for example, wearing an ornament which did not conform to the rites, or attending to fallacious information about the royal families. These offences could result in extremely harsh punishments.

The illegal punishments in imperial China were illustrated by paintings in the West in 1800s. These punishments impressed the West as being horrible and barbaric. There were two collective drawings, *The punishments of China* (Mason & Dadley, 1801), and *The criminal punishments of the Chinese* (Cruikshank & Cruikshank, 1858). In the enlightenment era, Confucian humanity was introduced into Europe. Enlightenment thinkers such as Leibniz, Voltaire, Diefrich and Feuerbach highly appreciated China's imperial regime. However, since 1800s, the assessment of China's imperial regime had turned to be negative. Mason and Dadley (1801, p. 1) was confused by the contradictions between penal law and penal practice in imperial China: 'This instance of justice, moderation, and wisdom, in the Laws of China, receives an unfavorable contrast in the decree, which pronounces the wearing of a particular ornament to be capital crime; and in the custom of attending to the fallacious information, extorted by the Rack'. Cruikshank and Cruikshank (1858, p. 5) even viewed Chinese as Barbarians, and used the crucial punishment to hype up Arrow War. Some Western scholars held that the regime of executions and punishments in imperial China was by no means harsher than that in Europe before 19th century (Bakken, 2005; Mühlhahn, 2009). Nevertheless, in comparison with the Western penal reforms in the 19th century, the cruel punishments during the late Qing Dynasty (1901-1911) appeared to be extremely nasty and brutal.

4. The change and continuity in the late Qing Dynasty and the republic era (1912-1949)

4.1. The legal reform

Since the New Deal of the late Qing Dynasty, China's authorities had made a lot efforts to transplant the Western punishment system.

The direct cause for legal reform was a promise by foreign power that they would relinquish extraterritorial rights if Chinese government reformed its legal system (Dikötter, 2002, p. 46; X. Li & Fang, 2013, p. 6). The cruel punishments in the Qing Code became the excuse of extraterritoriality for both diplomatic personnel and other nationals without reciprocity for

many western countries. Several Western countries had promised to give up extraterritorial rights if the Qing government modernized its legal system. During the late Qing Dynasty, more and more officials supported to introduce Western legal system in order to protect national jurisdiction. Although the extraterritorial rights of western countries were not completely abolished until 1946, the transplantation of western legal system promoted the legal modernization in China.

In the late Qing Dynasty and the republic era, the authorities modelled its legal system after those of the Western countries with civil law tradition. According to Jinfan Zhang (2013, pp. 569-571), there were three main reasons: First, in traditional China, the central authority monopolised legislative power. It was similar to those in European continental countries. Second, there was the tradition of codification in both traditional China and countries with civil law tradition. Third, in the late Qing Dynasty and the republic era, there lacked a team of judicial officials who were familiar with common law systems. Although the central and local governments set up dozens of modern legal schools, it was impossible to train many highly qualified judicial officials who could make use of legal precedents in a very short time. Comparatively, it was more feasible to adopt the continental legal systems. Finally, the success of Japanese Meiji Reform had played an enlightening role. China and Japan had similar origins of legal culture, and similar national situations before legal reform. Hence, the success of Japanese Meiji Reform encourages China to transplant continental legal systems in China.

The authorities during the late Qing Dynasty and the republic era all made their own Six Codes (liufa, 六法). Six Codes referred to the six main legal codes which made up the main body of law in the late Qing Dynasty and the republic era in China in history, and the main body of law in contemporary Japan, South Korea and Taiwan region. They include the Constitution, the Civil Law, the Criminal Law, the Civil Procedure Law, the Criminal Procedure Law and the Administrative Law.

Three criminal laws appeared subsequently in this era. They are the New Qing Penal Law (the draft was promulgated in 1907 and the final version was never officially issued), the Provisional Criminal Law (promulgated in 1912) and the Criminal Law of the Republic of China (promulgated in 1928 and amended in 1935). In all of them, the punishments were divided into principal punishments and supplementary punishments. The principal punishments were the death penalty, life imprisonment, fixed-term imprisonment, criminal detention¹⁰², and

¹⁰² The criminal detention is a form of short-term imprisonment in China. In the New Qing Penal Law, it can range from one day to a month. In the current criminal code in Taiwan region (it is based on the Criminal Law of the Republic of China), it is one day to 60 days. In accordance with the current Chinese criminal law, the criminals

finer. Deprivation of civil rights and confiscation were the supplementary punishments. Suspended sentence and parole were also introduced into the criminal laws (Bourgon, 2003; Lai, 2004).

4.2. The *baojia* 保甲 system

Since Song Dynasty, the rulers had made use of the *baojia* system to tight grips on the clan system. This system was invented by Wang Anshi, who was a prime minister in the Song Dynasty from 1070 to 1076. In Wang's innovation, ten households constituted a *bao* 保, fifty *baos* constituted a *dabao* 大保, and ten *dabao* constituted a *dubao* 都保. The leaders in the *baojia* system were recommended by the heads of the households and confirmed by the magistrate. The heads of the households should recommend the men of wealth and ability. As mentioned before, in traditional China, people from the same community were usually the members of the same clan. The *baojia* system tied up the clan with the local governments. The leaders in *baojia* became the liaison between the magistrate and the clan members. They undertook a lot of administrative tasks allocated by the magistrate, such as informing the clan members of the decisions from the government, managing household registrations, collecting taxes, solving local disputes, organising patrol in the community, reporting suspected criminal activities, and helping the magistrate to capture the suspects (M. Tang, Zhao, & Liu, 2011). The following dynasties almost followed this *baojia* system.

After the New Deal of the late Qing Dynasty, the authorities tried to follow the Western local autonomy. However, the local autonomy did not work well. When deep-seated clan system was suddenly replaced by Western local autonomy, the vast majority felt difficult to credit the reform. Under local autonomy, the ties between the government and the common people actually looser than before, and social and crime control became weaker than before. Nationalist party believed that weakened social control under local autonomy was an underlying cause of the expansion of communist-controlled territories (W. Li, 2002). Therefore, in June 1931, nationalist party (guo min dang, 国民党)¹⁰³ government decided to suspend local

under criminal detention are incarcerated, but they may go home for one to two days each month, and an appropriate remuneration may be given to those who participate in labour during the period of execution, while the criminals sentenced to fixed-term imprisonment do not have these privileges. Sentencing to criminal detention can range from one month to six months (fixed-term imprisonment can range from six months to 15 years). Since the sentence term of criminal detention is relatively short, the criminals under criminal detention shall be detained in the vicinity (traditionally the criminals are detained in detention house where the suspects are temporarily detained) rather than in prison. For a criminal who commits several crimes before a judgment is pronounced, the term of criminal detention may not exceed the maximum of one year.

¹⁰³ The movement of the Chinese Nationalist Party helped overthrow the Qing Dynasty in 1912 and was the ruling party in China from 1927 until it had to retreat to Taiwan in 1949 after being defeated by the CCP during the Chinese Civil War.

autonomy and adopt baojia system again in the counties where had communist-controlled territories. In November 1934, nationalist party decided to combine local autonomy and baojia system nationwide.¹⁰⁴ In the new system, the leaders of baojia were elected in the meeting of the representatives of households (every household has one representative). The leaders of baojia still need to do some administrative tasks allocated by the local government, such as managing household registrations, solving local disputes, and organising patrol in the community. They also took some new tasks, such as establishing modern schools to provide basic education, and promoting cooperation in manufacturing (W. Li, 2002).

The judicial archives of the Republic of China show that the prosecutors explicitly allowed the leaders in baojia to handle petty criminal cases. Moreover, they used to suggest the litigants first look to their baojia leaders to settle their disputes. If the petty criminal case could be solved within the baojia, the procuratorate would decide not to initiate a prosecution after examining the case (M. Hu & Zhang, 2014).

Even though the clan punishments were still heavily utilized, the punishment power of the leaders in baojia in the republic era was no longer as large as the clan leaders in the imperial era. The judicial system subject the semi-formal punishments to rigid judicial scrutiny. In comparison with the clan punishments in the imperial era, the clan punishments in the republic era are much more lenient. Severe punishments such as penal servitude and death penalties were no longer prescribed in any available clan codes. The clan punishments were chiefly pecuniary penalty, beating with stick and expulsion from the clan. In addition, the clan codes specified more cases in which the clan need to be brought accusation against the wrongdoers. These cases included different types of petty offences, such as abuse or abandon a family member, theft, fraud, tax evasion, embezzling the property of the clan, gambling and taking drug. In general, the clan punishments were weakened by the legal reform (L. Liu, 2008).

4.3. The progress and frustration of the reform on penal system

After the legal reform, the criminal laws introduced many Western principles of criminal justice, such as proportionality and penal parsimony, and establish a new penal system modelled after the civil law tradition. In the new penal system, imprisonment became the centrality. The imprisonment sentence could be suspended, and the criminals under imprisonment could be released on parole after serving parts of the sentence. The official

¹⁰⁴ The Principle of the Regulation on Local Autonomy (Di fang zi zhi fa gui yuan ze, issued by the central committee of nationalist party in November 1934).

annotations clarified that the new penal system was designed to assist with the rehabilitation of criminals (J. Liu, 1965).

However, the implementation of the new penal system got off to an inauspicious start. Most practitioners in the late Qing Dynasty and the early republic era doubted its practicability. Notably, Feng Xu argued that, the punishments introduced from the West, especially suspended sentence and parole, were not for the state of China. Traditionally, although the purposes of punishment were primarily retribution and deterrence, rehabilitation was also embodied in some penal systems. For instance, criminals who were the sole breadwinners in the families could stay at home and look after their parents and grandparents. For all that, the majority felt that rehabilitation could not be offered to most criminals. Perhaps it was a fact that Western countries favoured rehabilitation for all types of criminals, but most Chinese could not accept the Western understanding of the function of punishment. Moreover, the construction of procuratorates, courts, police offices and new prisons was still underway, hence it was impossible to put the new penal system into practice in several years (J. Liu, 1965).

Feng Xu's arguments revealed the difficulties in implementing the new penal system in the late Qing Dynasty. To solve the practical problems, the authorities in the early republic era tried to reintroduce beating with stick and exile into penal system. Liang Qichao, the Minister of Justice in the early republic era, had a solid reputation as an enlightened reformer at that time. Nevertheless, his judicial reform programme was uncharacteristic of him. Liang Qichao advocated resuming beating with stick as an alternative to short-term imprisonment to prevent prison overcrowding. The judicial reform programme was passed in 1914, and thus, fine, suspended sentence, or beating with stick could be alternatives to short-term imprisonment would. Later, the Ministry of Justice published a regulation on beating with stick as an alternative to punishments. This regulation elaborated that beating with stick was an alternative to fixed-term imprisonment less than three months, criminal detention, and penalties under 100 yuan for male criminals between 16 and 60 years old. The exception to the regulation was that the criminal was official or retired official. The Ministry of Justice also promulgated another regulation on exile as an alternative to imprisonment. This regulation prescribed that criminals who were sentenced to fixed-term imprisonment more than five years or life imprisonment could be exiled to one of the most undeveloped provinces. Despite the fact that both of the regulations were denounced in 1916, beating with stick as an alternative to punishment was still being used between 1916 and 1919 (J. Jia, 2014; X. Li, 2013; H. Yang, 1995). Between 1912 and 1927, due to warfare and revolutions, the local governments were changed frequently. Many local courts and procuratorates even became

shadows, and their work was taken over by the local magistrates. When the republic government took over the authority from the Qing government in 1912, there was more than 1700 prisons, but most of them were traditional prisons without any reform (F. Zhang, Liu, & Gao, 2004). The republic government decided to transform the old prisons into modern ones.¹⁰⁵ However, in 1926, China only had 63 modern prisons (F. Zhang et al., 2004). The Ministry of Justice reported that, the ministry went to great lengths to promote prison reform. However, the condition of most prisons was so poor and so overcrowding that the accumulated problems were difficult to remove.

The year from 1927 to 1937 was called the Golden Decade in the republic era. The Nationalist Party 1928 ended the tangled warfare among warlords and unified China in form. Despite that there were several revolts within the Nationalist Party and many conflicts between the Nationalist Party and the Communist Party, this decade was more stable than before to allow the reform on criminal justice system. The Criminal Law of the Republic of China was promulgated in 1928, and revised in 1935 to address the problems in judicial and penal practice from 1931 to 1935. The republic government had 398 modern prisons in 1937 (F. Zhang et al., 2004). However, the authorities were still inclined to instruct and intervene the courts and push them to impose harsh penalties in some cases by the reason of troubled times or deteriorating public order. The deep-seated and widely used semi-formal punishment system prevented the enforcement of minor, formal punishments. Before 1935, judges rarely sentenced suspended sentence (Padoux, 1932). It was not until the revised criminal law was published in 1935 that suspended sentence were put into practice. Between 1935 and 1937, the ratio of suspended sentence rose to about 6% (Y. Liu, 2009; Xuan, 2014). It was the highest ratio in the republic era. Subsequently, amidst the chaotic war with Japan (between 1937 and 1945) and the civil war between the Nationalist Party and the Communist Party (between 1945 and 1949), the criminal justice system was greatly hindered by warfare. In the wartime, many special ordinances were substituted for the Criminal Law. The punishments under the special ordinances tended to be harsher than those under the Criminal Law.

¹⁰⁵ The Measures on Reforming Old Prisons (Jiu jian yu gai liang ban fa, issued by the republic government on 3 March 1913).

5. The coexistence of the punishments on the criminals and the punishments on the masses in the Mao era

5.1. The nature of crime

China's approach to crime and punishment in the Mao era differed significantly from traditions it had before Mao (Clarke & Feinerman, 1995; Y. Dai & Liu, 2008). The clan punishment system was rapidly unravelled and the laws made by the Nationalist Party were all abolished by the socialist revolutions. The concept of crime in the People's Republic of China (PRC) was founded on Marx's contradiction and antagonism theories. Yet, like Confucian theory, the socialist theory on crime and punishment also created two moral boundaries for the wrongdoers, and the criminal punishments as the second moral boundary could only be imposed on those who seriously violate the interests of the masses.

The contradiction and antagonism theories are an essential part of dialectical materialism (that is, the official philosophy of socialist countries). Under dialectical materialism, contradiction is the unity of opposites, and it is universal and absolute. The interdependence of the contradictory aspects presents in all things and the struggle between these aspects determine the life of all things and push their development forward. There is nothing that does not contain contradiction; without contradiction, nothing would exist. For example, in mathematics, there are + and - ; in mechanics, there are action and reaction; in physics, there are positive and negative electricity; and in chemistry, there are the combination and dissociation of atoms (Mao, 1937). Mao believed that opposition and struggle between ideas of different kinds constantly occurred within the Communist Party. If there were no contradictions in the Party and no ideological struggles to resolve them, the Party's life would come to an end (Mao, 1937).

It is noteworthy that antagonism and contradiction are by no means the same. Antagonism is one form, but not the only form of contradiction. It is not until the contradiction between the two opposites develop to a certain stage that it assumes the form of antagonism. For instance, a bomb is a single entity in which opposites coexist in given conditions before it explode; but when it is ignited, the opposites turn into antagonistic contradictions and the explosion takes place. When the correct and incorrect thinking and behaviours do not manifest themselves in an antagonistic form, and if those who have committed mistakes can correct them, the incorrect thinking and behaviours will not develop into components of antagonistic contradictions. Therefore, the Party must on the one hand wage a serious struggle against erroneous thinking and behaviours, on the other hand give the wrongdoers ample opportunity to wake up. But if the people who have committed errors persist in them

and aggravate them, there is the possibility that non-antagonistic contradictions will develop into antagonistic contradictions (Mao, 1937).

In a socialist society, the masses and the enemies are the two opposites in an antagonistic contradiction. Mao asserted that the antagonistic contradiction between the bourgeois and proletarian class had almost been resolved through peaceful socialist revolution in 1956. The revolution was in peaceful means because only the reactionaries from the overthrown bourgeois class were punished, but the skills, talents, and cadres from the overthrown bourgeois class were re-educated, remoulded and utilized (Mao, 1949, 1957). Then he further elaborated the two principal social contradictions in the new era in his 'On the Correct Handling of Contradictions among the People' in 1957. According to Mao, there were two types of contradictions facing us, one was the contradictions between ourselves and the enemies, the other was the contradictions within the people. They were contradictions of a completely different nature. The contradictions between ourselves and the enemies were antagonistic. Within the people, the contradiction among the working people were non-antagonistic. The dictatorial methods should be used to resolve the contradictions between ourselves and the enemies (Mao, 1957).

Mao regarded a criminal as a part of the enemies in a socialist society, because Marx and Engels (1846) stated that crime was the struggle of the isolated individual against the predominant relations between state and power. The dominant will of the state is reflected in laws and is opposed to one's own will; one's own will and the state are considered powers that are mortal enemies, between whom eternal peace is impossible. On that account, the will of the criminals and the dominant will of the state are the two opposites of an antagonistic contradiction.

In order to protect social order and people's interest, 'dictatorship must be implemented for the larceners, the swindlers, the murders, the arsonists, the rogue groups, and others who seriously destroy social order' (Mao, 1977, pp. 363-364).

5.2. The punishments on the criminals

In Mao's perspective, the criminal represented the antithesis of the vast majority. They should not be forgiven and deserved harsh punishments. Only by this means, the further harm they would cause could be avoided and the means of the masses to have a good existence could be maintained. This view reinforced the powerful image of the punishments on criminals.

In the Mao era, there were no criminal law and criminal procedure law. Except for several regulations on only a few crimes, how to punish criminals was on the basis of the decisions made by the CCP. For Mao, 'our society can exist without laws, and we have our own methods to govern the society... We cannot rely on the laws to rule the majority, but we should help the majority to cultivate good custom ...The articles of civil law and criminal law were so many that nobody can remember them. I participated in drafting the Constitution, but now I cannot remember the articles of the Constitution. In history, the legalists supported rule by law, then the Confucians buttressed rule by man. Our decisions are laws, and our conferences are laws as well. Only if the regulations on public security can become custom, they can be obeyed. When the regulations become widely recognised opinions, and the regulations are obeyed by the people conscientiously, the communism can be achieved. Most of the regulations were made by the Ministry of Justice, but we do not rely on them to rule the country. We primarily rely on decisions and conferences. We depend on conferences four times a year rather than regulations to maintain social order (Mao, 1958, p. 102).'¹⁰⁶

Mao proposed four methods to deal with the enemies: executing capital punishment, imposing reform through labour, supervising them in the community by the masses, and pardoning them. The reactionary capitalists could also be punishment by confiscation of property or pecuniary penalties (G. Gao, 1995).

Among the four methods, capital punishment was only imposed on the enemy who committed extraordinarily serious crime, and pardon was only granted to the enemy who perpetrated extremely petty offence. Financial punishments should not be applied to all types of crime, because financial punishments were deemed to embody the inequalities between the bourgeoisie and the proletariat. For Marxists, fine is usually criticized through citing the last chapter of Engels (1943, pp. 281-282)'s *The Condition of the Working-Class in England* in 1844 titled 'The attitude of the bourgeoisie towards the proletariat'. 'If a rich man is brought up, or rather summoned, to appear before the court, the judge regrets that he is obliged to impose so much trouble, treats the matter as favourably as possible, and, if he is forced to condemn the accused, does so with extreme regret, etc. etc., and the end of it all is a miserable fine, which the bourgeois throws upon the table with contempt and then departs. But if a poor devil gets into such a position as involves appearing before the Justice of the Peace—he has almost always spent the night in the station-house with a crowd of his peers—he is regarded from the beginning as guilty; his defence is set aside with a contemptuous, oh! we

¹⁰⁶ The speech in the enlarged meeting of the central political bureau in Beidaihe on 21 August 1958.

know the excuse, and a fine imposed which he cannot pay and must work out with several months on the treadmill’.

The most widely used criminal punishments were reform through labour. According to the Regulations on Reform Through Labour, one of the tools of people’s democratic dictatorship was reform through labour organs. The reform through labour organs oversaw punishing all the counterrevolutionaries and other criminals, and reforming them into becoming members of the masses through forced labour.¹⁰⁷ The forced labour could be conducted both within and outside prison. In the Mao era, only the criminals who perpetrated very serious crimes were put into prisons. The prisoners were kept in tight guard and could be imprisoned separately. Most criminals were organised and supervised by the disciplining teams of reform through labour (lao dong gai zao guan jiao dui, 劳动改造管教队) to do collective labour in production teams (sheng chan dui, 生产队)¹⁰⁸, but their freedoms were also strictly restricted. In socialist orthodox penology, doing collective labour has a double meaning: on the one hand, it is to punish the criminals; on the other hand, it promises to reform them. The reform process takes place through two ways: doing collective labour and having political and ideological education. Mao regarded labour, especially manual labour, as a matter of right and honour. This has been written into China’s Constitution¹⁰⁹. Through collective manual labour, the people could have an ethos of socialist revolution. That was, the officials would not be influenced by bureaucracy, the intellectuals would do away with petty-bourgeois individualism, and even the criminals would be accustomed to work hard and socialist ethical concepts (Q. Shang & Zhang, 2011).

The criminals who committed minor crimes could also be sentenced to suspended sentence or PS subject to certain conditions. In suspended sentence and PS cases, the criminals could do their former jobs rather than work in the production teams.

Between 1949 to 1978, there was only one legal stipulation on suspended sentence. The Anti-Graft Regulation specified four circumstances under which the embezzlers could be given lighter sentences, mitigated sentences, suspended sentence or even be granted disciplinary sanctions instead of criminal penalties. The four circumstances were as follows: the embezzler

¹⁰⁷ Article 1 and 2 of the Regulations on Reform Through Labour (Lao dong gai zao tiao li, issued by the SC on 2 August 1954).

¹⁰⁸ Production teams were divided by the disciplining teams of reform through labour.

¹⁰⁹ Article 91 of the Constitution issued on 20 September 1954, Article 27 of the Constitution issued on 17 January 1975, Article 48 of the Constitution issued on 5 March 1978, and Article 42 of the Constitution issued on 4 December 1982.

made confession to crimes that had not yet been discovered; the embezzler made confession thoroughly and demonstrated repentance sincerely to crimes that had already been discovered; the embezzler informed against other embezzlers; the embezzler was young or consistently incorruptible but committed a casual offence, and the embezzler was ready to demonstrate repentance sincerely.¹¹⁰

There were no laws on whether the suspended sentence was applicable for criminals who committed crimes besides embezzlement. Some explanations of the SPC and the MJ demonstrated that suspended sentence could also be applied for crimes other than embezzlement, but the standards of application were very obscure.¹¹¹ In accordance with the explanations, the application conditions of suspended sentence were: The crime was minor, and it should depend on circumstances. These explanations almost equalled to no explanations. Thus, suspended sentence was rarely used in the Mao era.

Nevertheless, guided by the mass line (qun zhong lu xian, 群众路线), PS as a community penalty was invented. The mass line is the CCP's fundamental political and organizational method, and forging close ties with the masses is one of the CCP's most important working styles (X. Deng, 1981, 1990; S. Liu, 1945). The mass line requires the members of the CCP to rely on the masses of people in the struggle. For criminals who committed petty offences and other reclaimable enemies, Mao said putting criminals in the masses was better than restraining them in prisons (X. Sun, 1994). It was deemed to be an innovation in executing punishments, since the criminals were not only supervised by the police but also by their neighbourhoods and colleagues.

In accordance with the governmental documents in the early 1950s, PS was primarily imposed on the criminals who committed minor offences. Under the Decisions on Organising Criminals Nationwide to Reform through Labour, PS could be an alternative to prison sentences up to one year; the conditions were that the victims and the masses should consent and the criminal should do collective labour.¹¹² Subsequently, the Anti-Graft Regulation

¹¹⁰ Article 5 of the Anti-Graft Regulation (Chen zhi tan wu tiao li, issued by the SC on 21 April 1952).

¹¹¹ The Explanations on Parole, Suspended sentence, Disfranchisement and Other Problems (Guan yu jia shi, huan xing, chi duo gong quan deng wen ti de jie shi, issued by the MJ on 20 May 1950); The Reply to the Report of Shanghai Municipal People's court on the Application of Fines (Dui shang hai shi ren min fa yuan guan yu cai chan xing fa shi yong de jian cha bao gao de hui fu, issued by the MJ on 12 May 1951); The Reply to Huadong Branch Court on Its Consultations and Suggestions of Several Problems (Dui hua dong fen yuan guan yu ruo gan wen ti de qing shi ji yi jian de pi fu, issued by the SPC on 28 July 1953).

¹¹² Article 2 of the Decisions on Organising Criminals Nationwide to Reform through Labour (Guan yu zu zhi quan guo fan ren lao dong gai zao wen ti de jue yi, issued by the Central Committee of the CCP on 22 May 1951).

stipulated that PS could be imposed on criminals who committed economic crimes especially embezzlement and whose illegal gain was relatively small.¹¹³ Then the Provisional Measures of Imposing PS on Counterrevolutionaries prescribed that PS could also be imposed on members of the Nationalist Party and other malefactors who were counterrevolutionaries for less than three years, and everyone had the right to supervise and inform against the convicts under PS.¹¹⁴

The criminals under PS should report to the police regularly on their own activities, but in their daily life, they were supervised by the masses where they resided and worked. The Public Security Committee (PSC, zhi an bao wei yuan hui, 治安保卫委员会)¹¹⁵ played a vital role in implementing PS. The committee was based on different units such as companies, schools, streets and villages. To lead the masses and assist the local government and police, the committee was obligated to monitor and supervise those counterrevolutionary malefactors. Normally, the term of PS would be no more than three years, but it could be prolonged (Z. Cao, 1990; S. Yan & Yang, 2003).

PS as a community penalty was invented to punish criminals who committed minor offences and other reclaimable enemies. Pragmatically though, PS was with powerful political overtones. It was primarily imposed on previous class enemies rather than the normal criminals who committed minor offences, especially after 1959. According to the Provisional Measures of Imposing PS on Counterrevolutionaries, PS should be imposed on the counterrevolutionaries who had ever practiced iniquities before the founding of PRC and showed no sign of repentance, but was not engaged in any active counter revolution¹¹⁶. Punishing individuals for their political beliefs was an unreasonable penalty. Later, the National Political Working Conference in 1959 stated that PS should also be ambitiously used on all types of previous class enemies, including 'landlords, rich peasants, counter-revolutionaries, and malefactors' (di, fu, fan, huai fen zi, 地富反坏分子) (S. Yan & Yang, 2003).¹¹⁷

¹¹³ Article 4 of the Anti-Graft Regulation.

¹¹⁴ Article 3 and 10 of the Provisional Measures of Imposing PS on Counterrevolutionaries (Guan zhi fan ge ming fen zi zan xing ban fa, approved by the SC on 27 June 1952, issued by the MPS on 17 July 1952).

¹¹⁵ This was the public security organization of the masses under the guidance of the government and the police.

¹¹⁶ Article 3 of the Provisional Measures of Imposing PS on Counterrevolutionaries.

¹¹⁷ The 'landlords, rich peasants, counter-revolutionaries, and malefactors', also called 'the four black categories' (hei si lei fen zi, 黑四类分子), were labels for different types of class enemies in various political movements during the Mao era. They were politically examined and denounced, some were even physically tortured, especially during the Cultural Revolution era. In fact, a significant number of them were simply rich or they were dissidents. Most of them were restored and redressed after 1979.

In the Mao era, the whole society just had two communities, one was the community of the masses, the other was the community of the enemies. Every citizen fell under either of the two communities. Counterrevolutionaries were required to show loyalty to the Communist Party, as well as sincere repentance for their previous affiliations, to join the categorical masses.

5.3. The masses in crime control

As introduced in the previous section, for Mao, the society should rely on conference decisions rather than laws to maintain social orders. Those who attended the conferences were the representatives from different masses organizations. Each major social group had its own masses organisation in socialist China. The mass organisations had always been the gears and bonds between the masses and the CCP (Z. Huang, 1992). These organizations not only had an interest-articulation and representative function, but also ‘penetrated society, brought vast sections of the population further into the party’s net, acted as another means of bringing the CCP’s message to the grass roots, functioned more as a Stalinist “transmission belt” in laying down the party line and extending the reach of the state’ (Teiwes, 2000, pp. 128-129). Xie Juezai, the former President of the SPC, asserted that ‘the peasants, the workers, the soldiers, the business people, the freelancers, the youth, the children, and the women all have their especial appeal, hence their own organizations should be established to discuss and solve their own issues. The leaders of these organizations could be members of governmental committees and give the opinions of the represented groups to the government’ (D. Wang, 1996, p. 40). Although the public could only participate in decision-making through their representatives, everyone could play the role of public servant directly. For instance, everyone could play the role of prosecutor in an open trial (*gong shen da hui*, 公审大会). After a prosecution was instituted, everyone could claim to be a victim and could lodge complaints against the defendants at trial, without obtaining the consent of the judicial committee beforehand.

The public could also play the role of police officer. The work of the PSC was prominent in supervising criminals under PS as well as in preventing crime. The innovation of the PSC was inspired by spontaneously organized anti-theft teams and other crime prevention teams in cities and villages. From 1952, the PSCs were organized nationwide and were led by the police and governments at a grass-roots level. It was the PSC’s duty to organize the masses to have their eyes on suspicious behaviours, to blow the whistle on suspects, and to pay special attention to criminals under PS, the residents with criminal records, and those from the four black categories. The police relied heavily on the PSCs to exercise power, but there were no

detailed regulations on the remit of the PSC. Only a few articles on the operation of PSCs from the Mao era can be found now, R. Li (2006) and Lebin Yan (2012) searches out a memoir from a retired policeman and some local judicial annuals on how the PSCs were in action. The PSCs were going over well-trodden paths, but these paths were different from company to company, village to village. In general, the PSCs treated the criminals under PS, the residents with criminal records, and those from the four black categories in a similar way. All of them were required to do collective labour and to periodically report on their studying, working, thinking, and political slants. Since those with previous convictions were labelled as malefactors, criminals under PS could be supervised for indeterminate terms. As a result, every citizen was being supervised by the police as well as the mass organisations. 'Everyone is the policeman of himself, simultaneously, he is the policeman of others' (Shigong Jiang, 2003, p. 164). The tight social control system had a significant effect on preventing crime. 'The communities project an atmosphere of security and order, you can walk alone without worrying about your safety' (Q. Liu, 2014, p. 58).

Yet for all that, every member of the masses shared the power of the police, while every member's civil rights and freedoms could also be circumscribed by others. During the Cultural Revolution era, the power of the masses was totally out of legal control. Not only criminals, but also members of the masses could be injured by other members of the masses in the name of revolution.

5.4. The punishments on the masses: administrative punishments and RTL

Beyond the criminal punishment system, administrative punishments were designed as punishments to handle the non-antagonistic contradictions within the people. Theoretically, criminals who seriously endanger the social order were considered to be an extremely small subset of Chinese citizens (Z. Cao, 1997; T. Zhao & Mo, 2003). 'In ordinary circumstances, contradictions among the people are not antagonistic. But if they are not handled properly, or if we relax our vigilance and lower our guard, antagonism may arise' (Mao, 1977, p. 363). To prevent the contradictions which had the tendency to become antagonistic ones, administrative punishments and RTL were applied to those who could not be convicted and sentenced but remained politically unreliable.

While most deviant behaviours are punishable in China, the vast majority are not labelled as crimes but as public order violations. Correspondingly, the reach of administrative punishments is much broader than that of criminal punishments. Theft, for example, is always punishable, but most thieves are punished by administrative punishments instead of by

criminal punishments. Only those who steal a very large amount of property, commit theft repeatedly, steal from a special institution such as a bank, or steal cultural relics receive criminal punishments. Under *the Regulation on Public Security Administration of Punishments*, the three public security administrative punishments were: warning, pecuniary penalty and administrative detention (half day to 15 days)¹¹⁸. The indolence and the repeated administrative offenders were punishable by RTL administrative punishments were meted out¹¹⁹. *The Decision on Re-education through Labour* provided that RTL was a compulsory reform programme and employment arrangement. Four categories of people were subject to RTL: those who were indolent, and violated the Regulation on Public Security Administration of Punishments repeatedly; those who perpetrated wrongdoings which were so minor that could not be deemed as crimes, but they were expelled by their workplaces because of the wrongdoings; those who had the ability to do labour, but refuse to do labour, and they were expelled by their workplaces because of that; and those who refuse the allocation of jobs unreasonably and repeatedly¹²⁰. In a word, RTL were imposed on the indolence who committed wrongdoings. RTL was not only a compulsory education and reform measure, but also a kind of employment arrangement¹²¹. The state gathered indolent individuals to work, and even paid them for their work. Thus, these individuals were not unemployed and did not burden society. The CCP's Directive clearly limited the application of RTL to those people not convicted of a criminal offense, because their offense was so minor that it did not warrant a criminal penalty¹²². They were wrongdoers, but not regarded as criminals. Therefore, unlike reform through labour, wrongdoers in RTL institutions had a certain freedom of action. They could come home during national festivals. Individual wrongdoer labourers could also receive a seventy percent reduced salary from the state (The Research Group on Reforming and Perfecting RTL of the Ministry of Justice, 2004). RTL institution could reserve part of the salary as the fund for the subsistence of the relatives of the wrongdoer¹²³. Following their release, they should not be subsequently discriminated against in their communities (S. Yu, 2013).

¹¹⁸ Article 3 of the Regulation on Public Security Administration of Punishments (Zhi an guan li chu fa tiao li, issued by the Standing Committee of NPC on 22 August 1957).

¹¹⁹ Article 30 of the Regulation on Public Security Administration of Punishments.

¹²⁰ Article 1 of the Decision on Re-education through Labour (Guan yu lao dong jiao yang wen ti de jue ding, approved by the Standing Committee of the NPC, and issued by the SC on 3 August 1957).

¹²¹ Article 2 of the Decision on Re-education through Labour.

¹²² Article 6 of the Directive on Purging the hidden Counterrevolutionaries (Guan yu su qing an cang fan ge ming fen zi de zhi shi, issued by the Central Committee of CCP on 25 August 1955).

¹²³ Article 2 of the Decision on Re-education through Labour.

6. The coexistence of criminal punishments, RTL and administrative punishments in the post-Mao era

6.1. The legal reform

Since 1979, prominent progress has been made in formulating robust legal system. Legal reform became a hot issue when China emerged from the Cultural Revolution in the late 1970s and when Deng Xiaoping publicised his ambitious platform to modernise China (Peerenboom, 2002). Deng, the new leader of the CCP after the Cultural Revolution, was a publisher of utilitarian ideas. He rejected class struggle, law nihilism, and rule by men, legacies from the Mao era. He argued that in order to assess whether or not a system was useful and feasible for socialist China, ideology should not be the standard. Instead, he advanced the ‘three beneficial’ (san ge you li yu, 三个有利于) principles. The three beneficial principles can be reduced to the following: whether it is beneficial to develop socialist productive forces, whether it is beneficial to enhance overall socialist national strengths, and whether it is beneficial to raise people’s living standards. Any Western legal system justified by the three beneficial principles could be used or even imported (D. Gu, 2000). In 1978, the Third Plenum of the 11th Central Committee of the CCP declared that strengthening the socialist legal system with Chinese characteristics would be a touchstone of the reform era, which indicated that the government realized that economic development needed a solid legal infrastructure.

However, China did not have a legal system at all in 1978. Deng realised the heavy workload of legislation, and set the guideline of legislation. He asserted that the legal provisions should be simple now, then the NPC could perfect them gradually. When the time was ripe for revising or supplementing an article, the NPC could revise or supplement the article immediately¹²⁴ (X. Deng, 1993a, pp. 1928,1929). The Standing Committee of the NPC also upheld that the NPC made the legal provisions clear and concise, and the SC, the ministries, the local congresses and local government could draft up detailed regulations pursuant to the legal provisions (P. Chen, 1988).

Under the guideline, the NPC published the first Criminal Law in 1979. From 1979 to 1997, the Standing Committee of the NPC enacted 22 separate criminal provisions, and added nearly 220 offenses as part of civil laws which contained criminal provisions. This created a total of approximately 300 offenses. The principal punishments are public surveillance, criminal detention, fixed-term imprisonment, life imprisonment, and the death penalty. The supplementary punishments are fines, deprivation of political rights, and confiscation of

¹²⁴ A speech by Deng on 13 December 1978.

property. The supplementary punishments may be imposed independently. Deportation may be imposed independently or supplementary to a foreigner who commits a crime.

6.2. *The comprehensive management strategy (zong he zhi li, 综合治理) in crime control*

In the reform era, the old crime control system set up under Mao started fading, and China began to experience rapid changes fraught with uncertainty and insecurity (Y. Chen, 2010; X. Zhang, 2009).

Faced with this problem, the CCP endorsed the comprehensive management strategy to improve the social order in 1981 and 1982. To maintain good social order, the comprehensive management strategy requires the participation of various agencies, with comprehensive measures such as educational, political, economic, administrative, and legal measures¹²⁵.

The CCP also asserted that it was necessary to establish responsibility system in maintaining public order¹²⁶. Although the CCP still called for mobilizing and relying on the masses in crime control, the role of the masses was no longer that eminent as before. Between 1979 and 1990s, the responsibility units of crime prevention were still based on companies, schools, streets and villages, yet for a change, the liability of the leaders of these units rather than all the members of these units were stressed. At that time, almost all the businesses were still owned by the state, hence the local governments had the power to decide the promotion and pay rise of the leaders in local businesses. If they failed to achieve the goals of crime prevention, they would have little opportunities to be promoted or receive bonuses. This method was very effective. It was easier for the authorities to manage the tractable leaders than all the members of the masses.

6.3. *The strike-hard (yan da, 严打) criminal policy*

In the comprehensive management strategy, the principle in punishing the public order violator was striking the minority, and persuading, separating and reforming the majority. In a word, ‘combining punishment with leniency’ (cheng ban yu kuan da xiang jie he, 惩办与宽大相结合)¹²⁷. The CCP declared that, those who seriously endangered the public order should be punished seriously and swiftly, among them, those who committed crimes with extremely serious circumstances or extremely serious consequences should be punished by capital

¹²⁵ Article 2 of the Directive on Strengthening Political and Legal Work (Guan yu jia qiang zheng fa gong zuo de zhi shi, issued by the central committee of CCP on 13 January 1982).

¹²⁶ Article 2 and 5 of the Directive on Strengthening Political and Legal Work.

¹²⁷ Article 4 of the Directive on Strengthening Political and Legal Work.

punishment; and most other criminals should be punished by reform through labour. The CCP also recognized that, the target of reform through labour had already changed. The vast majority of the criminals were juveniles and young people who were the children of the masses. The principle of reform through labour should be education, reclaim and rescue¹²⁸.

From 1979 to 1983, China suffered from steadily increasing crime rates. In 1983, it was criticized that the emphasis on education, reclaim and rescue led to loosed control on crime (Li Yan, 2004). Deng asserted that, serious crimes should be treated as antagonistic contradictions; when the serious crimes were punished harshly, the juvenile and young people could learn lessons from the harsh punishments imposed on those who committed serious crimes (F. Liu, 1992). From Deng's words we can see, Deng's utilitarian legal philosophy also meant that, 'the greatest good for the greatest number represents the supreme value, and that the individual counts only for one: it may therefore be justifiable to punish one person severely in order to deter others effectively, thereby overriding the claims of proportionality' (Ashworth & Roberts, 2012, p. 868).

After 1983, Chinese government adopted a strike-hard policy and carried out strike-hard campaigns to curb the ascending crime rates. The strike-hard criminal policy had been the dominant feature of the harsh punishment landscape in the post-Mao era (Susan Trevaskes, 2010). Deng stated that several anti-crime campaigns needed to be initiated to punish wrongdoers swifter and harsher (Wen, 2012). During the strike-hard campaigns, although the enforced punishment should be within what was statutorily allowable, like cases are often treated harsher than usual. Some local authorities even lay down a set of minimum targets for strike-hard campaigns, for example, certain proportion of sentences should be harsher than the usual, and the sentences on certain crimes should above the midline of the statutory sentences (X. Jiang, 2007).

The first round of strike-hard campaigns was launched in 1983, followed by three other rounds of nationwide strike-hard campaigns in 1996, 2001, and 2010. In the short run, the campaigns seemed successful. For example, in the 1983 anti-crime campaigns, the national crime rate decreased 44.7% during the last four months of 1983 compared with the first eight months¹²⁹. However, despite Deng's repeated calls to abide by the rule of law, expedient convictions meant that certain procedural protections were discarded (Liang, 2005; Li Yan,

¹²⁸Ibid.

¹²⁹ The data is from The Report on the Situation of the First Fight of the First Round of Anti-crime Campaigns during the Strike Hard Campaigns (Guan yu yan li da ji xing shi fan zui huo dong di yi zhan yi di yi zhang de qing kuang tong bao, issued by the MPS in 1983).

2004). In the long run, the strike-hard criminal policy did not prove to decrease the crime rates. On the contrary, it only deepened social conflicts.

6.4. RTL under the strike-hard criminal policy

RTL was considered to be an effective instrument to achieve the goal of punishing wrongdoings swiftly and harshly. The number of people subjected to RTL had increased dramatically under the strike-hard criminal policy. In 1983, more than 220,000 persons were punished by RTL, whereas there were only 36,983 persons in RTL camps throughout the country in 1957 (The Research Group on Reforming and Perfecting RTL of the Ministry of Justice, 2004; B. Zhao & Yang, 2008).

The Decision on RTL and *The Supplementary Decision on RTL* was made by the SC and approved by the Standing Committee of the NPC in 1957 and 1979 respectively. The NPC never promulgated any specific laws concerning RTL. The regulations on RTL were issued by the SC and the MPS, yet they are not categorized as laws in China. Without the authorization of NPC, these regulations changed the function of RTL, broadened the reach of the criminals who could be subjected to RTL, and empowered itself to decide RTL cases.

Under the *Trial Measures on Re-education through Labour*, RTL was still a compulsory education and reform measure to deal with the contradictions within people, but it was no longer an employment arrangement measure¹³⁰. RTL could not only be imposed on the idlers who perpetrated wrongdoings, but also the various wrongdoers whose wrongdoings were so minor that could not be punished pursuant to the Criminal Law¹³¹. The leaders in the agency of civil affairs, the agency of public security, and the agency of labour and social security in province, or municipality directly under the central government, or large and medium size municipality formed the Management Committee of Re-education through Labour¹³². Nominally, the committee was in charge of approving RTL. Yet, under another regulation issued by the SPC and the MJ, the committee authorized the agency of public security to

¹³⁰ Article 2 of the Trial Measures on Re-education through Labour (Lao dong jiao yang shi xing ban fa, issued by the MPS on 21 January 1982).

¹³¹ Article 10 of the Trial Measures on Re-education through Labour.

¹³² Article 1 of the Supplementary Provisions for Re-education through Labour (Guan yu lao dong jiao yang de bu chong gui ding, issued by the SC on 29 November 1979); Article 4 of the Trial Measures on Re-education through Labour.

investigate and approve RTL¹³³. Therefore, in practice, the police investigated, decided and enforced RTL cases. Undisputedly, RTL system punished the wrongdoers swiftly. Its procedure was much more efficient and less time consuming than criminal procedure.

Obviously, despite being widely applied, RTL did not have a solid legal basis. In fact, it contradicted the Legislative Law and the Constitution. Article 8 of the Legislative Law prescribes that mandatory measures and penalties involving restrictions on the freedom of persons shall only be governed by law. Article 37 of the Constitution prohibits unlawful detention or deprivation or restriction of citizens' freedom.

Since no provision in any laws was about RTL, there had been debate on whether RTL was an administrative punishment or an administrative coercive measure. The SC tended to label RTL as an administrative punishment. The White Paper on China's Human Rights Situation¹³⁴ the Notice on Further Strengthening the Management of Prison and RTL¹³⁵ all referred RTL to the administrative punishments. RTL used to appear as a sanction in the now abolished Regulation on Public Security Administration of Punishments (issued by the Standing Committee of NPC on 22 August 1957). The revised Regulation on Public Security Administration of Punishments promulgated by the Standing Committee of the NPC was issued on 5 September 1986 and came into operation on 1 January 1987, then it was replaced by the Law on Public Security Administration of Punishments (the law was published by the Standing Committee of the NPC on 28 August 2005 and took effect on 1 March 2006). Under both, RTL was not among the listed forms of administrative punishments¹³⁶. The NPC passed the Administrative Punishment Law on 17 March 1996. RTL was also not on the list of administrative punishments. According to the Articles 67, 68, 70, and 76 of the Law on Public Security Administration of Punishments, when a person commits prostitution, dissemination of pornography, and profitable gambling and refuses to make corrections despite repeated warnings, s/he may be subject to a mandatory education measure. If RTL was the mandatory

¹³³ Article 1.2 of the Notice on Re-education through Labour and Cancellation of the Registered City Residence for the Wrongdoers under Re-education through Labour (Guan yu lao dong jiao yang he zhu xiao lao dong jiao yang ren yuan cheng shi hu kou de tong zhi, issued by the MJ and the MPS on 26 March 1984).

¹³⁴ Article 4.7 of the White Paper on China's Human Rights Situation (Zhong guo de ren quan zhuang kuang, issued by the SC in November 1991).

¹³⁵ Article 1.2. of the Notice on Further Strengthening the Management of Prison and RTL (Guan yu jin yi bu jia qiang jian yu guan li he lao dong jiao yang gong zuo de tong zhi, issued by the SC on 8 February 1995).

¹³⁶ Although the implementation of the Law on Public Security Administration of Punishments issued in 2006 means that the previous Regulation on Public Security Administration of Punishments issued in 1986 is automatically repealed, the four public security administrative punishments remain the same. They are warning, pecuniary penalty, administrative detention (one to 15 days), and revocation of licenses issued by the police.

educational measure, it could only be imposed on those who committed the three types of wrongdoings. Many scholars considered RTL as an administrative coercive measure (Pi & Feng, 1995; F. Shen, 1999). The NPC promulgated the Administrative Coercion Law on 30 June 2011. Yet, RTL was not on the lists of administrative coercive measures.

The application of RTL touched upon the issue of the police power. As mentioned before, most deviant behaviours are labelled as public order violations rather than crimes. Thus, criminal punishments play a much smaller part than the administrative punishments in China's punitive institutions. *The China Law Yearbook* of 2012 shows that the police instituted 13,165,583 administrative proceedings and resolved 12,563,823 of them, whereas only 6,005,037 criminal cases were filed for investigation of which 2,312,832 were resolved by the police and 700,660 criminal cases were heard by the court in 2011. Administrative punishments outnumber criminal punishments 17 to 1 (The Editing Committee of the Law Yearbook of China, 2012). The Law on Public Security Administration of Punishments conferred great power on the police to decide administrative punishments, but the police actually wielded much wider power than the authorization of law in the name of RTL.

There is also the issue of RTL being an administrative punishment with a far-reaching impact on individual civil freedoms and rights. RTL was imposed on persons whose acts were so minor that it did not constitute a criminal offense. RTL, however, could be much more severe than some criminal punishments, such as PS, criminal detention, and suspended sentence. In the Mao era, the period of RTL was uncertain. In 1979, *The Supplementary Decision on Re-education through Labour* ostensibly tried to refine the system by confining the period during which people could be subjected to RTL.¹³⁷ The time period ran from one to three years, with a one-year extension whenever it is necessary (before the decision was published, the time period was indeterminate). The period of RTL could be up to four years, while the term of criminal detention and PS was one to six months and three months to two years separately. Albeit that the Law on Public Security Administration of Punishments prescribes that the mandatory educational measures could only be imposed on those who commit prostitution, dissemination of pornography, and profitable gambling and refuses to make corrections despite repeated warnings, the Administrative Regulations on RTL published by the Ministry of Public Security specified that ten categories of anti-social behaviours, which covered almost all types of common minor offences, fell within the scope of RTL. As such, it violated Article

¹³⁷ Article 3 of the Supplementary Decision on Re-education through Labour.

79 of the Legislative Law stating that the effect of laws shall be higher than that of administrative regulations, local regulations, and rules.

The broad application of RTL meant that minor, criminal penalties were rarely enforced. *The China Law Yearbook* only published the statistics on the number of prisoners in prison and the number of wrongdoers under RTL from 1988 to 1995. After 1995, *The China Law Yearbook* ceased the report on the data of RTL. The data on the numbers of criminals under PS and suspended sentence and the number of criminals under different intervals of sentencing term were not available until 2002 in the *China Law Yearbook*, but some data between 1999 to 2001 can be found from the MJ's research reports (The Research Group on Community Correction of the Ministry of Justice, 2003). Anyhow, there are no data on RTL and different punishments in sentences during the same period in *The China Law Yearbook*. Table 3 shows that the ratios of wrongdoers under RTL to prisoners in prison were between 10.36% to 15.66%. A report in the official magazine of the Bureau of RTL reveals that there were about 310 000 persons under RTL while about 500 000 persons were sentenced to imprisonment in 1999 (R. Liu, 2001; D. Sun, 2013; The Bureau of the RTL of the Ministry of Justice, 1999). As Table 1 in the previous chapter lists, among the 608 269 convicts, only 7515 of them were sentenced to PS, and 90 387 of them were sentenced to suspended sentence.

Table 5 The number of wrongdoers under RTL, the number of criminals in prison, and the ratio of wrongdoers under RTL to prisoners in prison from 1988 to 1995

	The number of wrongdoers under RTL	The number of criminals in prison	The ratio of wrongdoers under RTL to prisoners in prison
1988	152939	1052743	0,1453
1989	165071	1123973	0,1469
1990	165070	1251481	0,1319
1991	144584	1206795	0,1198
1992	132209	1276517	0,1036
1993	132209	1244285	0,1063
1994	178377	1285948	0,1387
1995	206888	1320947	0,1566

Source—The *Law Yearbooks of China* (The Editing Committee of the *Law Yearbook of China*, 1989, p. 768; 1990, p. 781; 1991, p. 798; 1992, p. 815; 1993, p. 831; 1994, p. 845; 1995, p. 858; 1996, p. 872).

7. The abolition of RTL and the promotion of community corrections

7.1. The shift of criminal policy

7.1.1. Comprehensive management of public order (*She hui zhi an zong he zhi li*, 社会治安综合治理)

After the first round of strike-hard campaigns, the crime rate increased again. Many scholars and practitioners questioned about the effectiveness of strike-hard policy, because it could not address the comprehensive causes of crime, and it could not solve the social conflicts caused by the economic and political reform in 1980s (Biddulph, 2007; Guomin Xu, 1987).

In 1991, both the NPC and the SC reverted to comprehensive management strategy. Both made decisions on ‘strengthening the comprehensive management of public order’. The two decisions asserted that crime control could not be achieved with nothing more than strike-hard, and therefore, emphasis should be increasingly put on crime prevention. To prevent crime, the force of the entire society should be mobilized and comprehensive measures such as political, legal, administrative, economic, cultural, and educational measures should be introduced.¹³⁸ The SC’s decision summed up the comprehensive treatment of social security as ‘strike, prevent, educate, administrate, construct and reform’. Strike serious crimes swiftly and harshly; prevent crime through better safety precautions and dispute mediation mechanisms; educate citizens, especially the ex-convicts to obey the law; administrate criminally disposed groups (e.g., migrants and ex-convicts) and black spots (e.g., entertainment venues and warehouses with expensive stock); construct grass-roots organizations, responsibility systems, and legal systems on implementing the comprehensive treatment of social security; and reform criminals by means of ‘education, reclaim, and rescue’.¹³⁹

¹³⁸ Article 2 of the Decisions on Strengthening the Comprehensive Treatment of Social Security (*Guan yu jia qiang she hui zhi an zong he zhi li de jue ding*, issued by the CCP and SC on 19 February 1991); Article 1 of the Decisions on Strengthening the Comprehensive Treatment of Social Security (*Guan yu jia qiang she hui zhi an zong he zhi li de jue ding*, issued by the NPC on 2 March 1991).

¹³⁹ Article 3 of Decisions on Strengthening the Comprehensive Treatment of Social Security (*Guan yu jia qiang she hui zhi an zong he zhi li de jue ding*, issued by the NPC on 2 March 1991).

Of the six tasks of the comprehensive treatment of social security, 'strike' was the primary task, while 'reform' was at the back of the queue. The strike-hard campaigns continued. Two rounds of nationwide strike-hard campaigns were initiated in 1996 and 2001.

7.1.2. Socialist rule of law

The 12th Central Committee of the CCP in 1992 announced that China would develop a socialist market economy. The shift from a planned economy to a market economy was seen as a vital driving force behind the legal reform.

Chinese criminal law was marred with political baggage. Criminal punishments were viewed as a tool to struggle with the enemies in antagonistic contractions. To punish the enemies and maintain public order, the state power could be unrestrictedly expanded, and the civil rights of the enemies might not be violated for the interest of the state. Yet the market economy requires that the government should not take a too strong role, and the basic human rights of every citizen should be protected. H. Yu, You, and Sun (1999, p. 32) pointed out that the shift from a planned economy to a market economy engendered ideological revolution in criminal law.

In 1996, Jiang Zemin, the General Secretary of the CCP, adopted the new official policy to rule the country in accordance with the law and to establish a state with a socialist rule of law, which was subsequently endorsed by the CCP in 1997. Jiang later expanded on this formulation by stating: [That] to safeguard the dignity of the Constitution and other laws, we must see to it that all people are equal before the law and no individual or organization shall have the privilege to overstep it. All government organs are needed to perform their official duties according to the law and guarantee the citizens' rights in real earnest by instituting a system of responsibility for law enforcement and a system of assessment and examination (D. Yang).

In 1997, the revised Criminal Law heralded the beginning of a new era in China's criminal justice system. The number of articles increased from 192 in the 1979 Criminal Law to 452 in the 1997 Criminal Law. With the exception of the now abolished counterrevolutionary crimes, all previous offense articles were retained, subject to expansion and amendment, and approximately 200 new articles were added. The 1997 Criminal Law modified politically driven terms such as 'counterrevolution crimes' into 'crimes endangering national security'. The basic principles of the rule of law, such as *nulla poena sine lege* (which means equality before the law and that the degree of punishment should be commensurate with the crime), were

introduced, while the practice of analogical interpretation was abolished (Qi & Oberwittler, 2009).

In 1999, the Constitution was amended to expressly provide for the establishment of a socialist rule-of-law state¹⁴⁰. Since then, although the CCP's decision may greatly influence law-making, the CCP should not interfere with judicial proceedings directly.

In 2004, 'respecting and protecting human rights' was written into China's Constitution¹⁴¹. It was significant progress for a state that embodied the orthodoxy of prioritizing the interest of the state over that of the individual.

7.1.3. *Harmonious society (he xie she hui, 和谐社会)*

In 2000s, the CCP put forwards the concept of a harmonious society. This concept reflects 'China's latest version of socialist transformation rhetoric' and 'has risen to rhetorical prominence as a blanket catchphrase that purports to deal head-on with the rapid and dramatic rise in social contradictions triggered by unprecedented economic growth and social transformation over the last decade or more' (Susan Trevaskes, 2009, p. 77). 'Harmony' (he xie, 和谐) used to be a tool to symbolize social harmony, stability, and order for ancient thinkers and politicians who regarded the establishment of harmonious societies as the goal of their endeavours. Literally, 'he xie' stemmed from Confucian classics. 'he 和' was a name of ancient musical instrument. *Shi Yue* 释乐 of *Er Ya* 尔雅 (the classic Confucian dictionary) said that, the large wooden pipe is called 'chao 巢' while the small one is called 'he'; and 'xie' meant harmonization. *Shun Dian* 舜典 of *Shang Shu* 尚书 (one of Confucian Five Classics) explained that, 'the eight different kinds of musical instruments could be adjusted so that none of them will interfere with each other and the harmonious tune is not violated'. The combined meaning of 'he' and 'xie' was the harmonious status and concordant coordination. For Confucius, *Zhou Li* 周礼 said that the ruler should use rites to achieve harmonious society. For the CCP, a harmonious society is a society that is 'democratic and ruled by law, fair and just, trustworthy and fraternal, full of vitality, stable and orderly, and maintains harmony between man and nature'¹⁴².

¹⁴⁰ Article 5 of the Constitution.

¹⁴¹ Article 33 of the Constitution.

¹⁴² Article 2 of the Resolution on the Major Issues Regarding the Building of a Harmonious Socialist Society (Guan yu gou jian she hui zhu yi he xie she hui ruo gan zhong da wen ti de jue ding, issued by the central committee of CCP in the 6th Plenary Session of the CCP on 11 October 2006).

Confucian harmony theory is the cultural root of harmonious society, and Marxism contradiction theory is its philosophical root (Yejun Chen, 2008; J. Zhang, 2006). In Marxism materialist dialectics, struggle and identity are the two aspects of a contradiction. Struggle refers to that contradictory aspects in every process exclude each other, struggle with each other and are in opposition to each other. Identity refers to the following two points: first, the existence of each of the two aspects of a contradiction in the process of the development of a thing presupposes the existence of the other aspect, and both aspects coexist in a single entity; second, in given conditions, each of the two contradictory aspects transforms itself into its opposite.

In harmonious socialist society, harmony denotes the identity in contradictions. The emphasis on harmony has three meaning: First, the CCP should primarily use peaceful means to solve contradictions. Second, identity becomes the dominant aspect of contradiction, and harmony becomes the principal dynamic in social development. Third, in a society where the major contradiction is antagonistic, identity is the means and struggle is the end; but in the harmonious socialist society, struggle is the means and identity is the end (J. Zhang, 2006).

The Resolution on the Major Issues Regarding the Building of a Harmonious Socialist Society considers harmonious society as a constant process of resolving contradictions. The CCP should maximize the harmonious elements in the society, and minimize the inharmonious elements in the society¹⁴³. The discourse on contradictions under harmonious socialist society is subtly different from what it had been. Contradictions were bound up to the division between antagonistic contradictions and non-antagonistic contradictions, and the elimination of antagonistic contradictions was always underlined in the past. For a change, the priority became the solvation of the non-antagonistic contradictions within the people in the harmonious socialist society, and the elimination of antagonistic contradictions was deemphasized (J. Zhang, 2006).

7.1.4. Balancing leniency and severity

The adoption of the concept of a harmonious society also had repercussions on China's criminal policy, which up until then had been characterized by a prevailing culture of hard penaltyism also known as strike-hard (Susan Trevaskes, 2009). The CCP adopted a new concept of a harmonious society, strike-hard on all criminal offenses no longer seemed appropriate. Even in the field of criminal policy, harmony should be the key word.

¹⁴³ Article 1 of the Resolution on the Major Issues Regarding the Building of a Harmonious Socialist Society.

Traditionally China's criminal policy has prescribed that changes in the concrete circumstances of social development be reflected in CCP's norms (Tifft, 1985). The recent criminal policy reflects China's latest version of socialist transformation rhetoric, harmonious society. By dint of building harmony society, balancing leniency and severity became the new mantra in China's criminal policy and should reflect the harmony that is sought by China's political leaders.

Balancing leniency and severity is rooted in China's legal tradition. Since Confucian discussions on harmony provide cultural roots for harmonious society. The maxim 'leniency is used to adjust severity, and severity is used to adjust leniency, thus harmony can be achieved', is greatly valued again. Balancing leniency and severity also has its roots in previous criminal policy in socialist China, although the wording was more nuanced. In *On Policy* (论政策, *lun zheng ce*), Mao (1940) proposed the criminal policy of combining suppression and leniency (zhen ya yu kuan da xiang jie he, 镇压与宽大相结合). He said suppression should be imposed on traitors and anti-Communist actors, but vacillating elements and reluctant followers among the reactionaries should be dealt with leniently. In 1950, the report of the 3rd Plenary Session of the 7th Central Committee of the CCP suggested that the lead criminals shall be punished without leniency, those who are accomplices under duress shall go unpunished, and those who perform deeds of merit shall be rewarded. From then on, this criminal policy appeared repeatedly in the CCP's documents. Afterwards, the phrase changed subtly to combining punishment with leniency (cheng ban yu kuan da xiang jie he, 惩办与宽大相结合) in the report of the 8th National Congress of the CCP in 1956 (Ma, 2008). Combining punishment with leniency as a principle was also enshrined in Article 1 of the Criminal Law in 1979.

In comparison with previous criminal policy, the queue of severity and leniency reverses. The changes in the rhetoric embodies a shift in the focus of criminal policy. In previous socialist theory on the nature of crime, criminals were enemies in antagonistic contradictions, and thus only the juvenile delinquents and a very limited part of petty offenders deserved leniency. In harmonious socialist theory, both antagonistic contradictions and non-antagonistic contradictions can be the triggers of crimes, and most of the crimes are the results of non-antagonistic contradictions (G. Chen, 2007; Hua Liu, 2007). Therefore, lenient punishment can be imposed on most criminals, except for those who commit very serious crimes.

The Resolution on the Major Issues Regarding the Building of a Harmonious Socialist Society insisted on strengthening comprehensive management of public security, and improving the

sense of security of the masses¹⁴⁴. Moreover, the Resolution articulated imposing severe penalties to deter serious crimes, as well as establishing positive community corrections¹⁴⁵. After which, the National Working Conference for Politics and Law held on 27-28 November 2006 proposed once more that, in order to build a harmonious society, all levels of political and legislative institutions should be capable of preventing and reducing crime using the criminal policy of balancing leniency and severity at all times.

7.2. The abolition of RTL

7.2.1. The official research on reforming and perfecting RTL

In 2004, the MJ formed a research group to study the reform on RTL, concerning that RTL was obviously inconsistent with rule of law. The Research Group on Reforming and Perfecting RTL of the Ministry of Justice (2004, p. 30) reported several defects of RTL system: First, the two Decisions on RTL issued in 1957 and in 1979 respectively clashed with the current political, economic and social contexts, and the several regulations on RTL conflicted with each other. Second, the regulations on RTL contradicted the Legislation law and the Administrative Punishment Law. Third, the targets of those who were punishable by RTL was so general that the police might abuse its power and violate the civil rights of citizens in practice. Fourth, the regulations on RTL lacked procedural protections on those who were under RTL. Fifth, the regulations on RTL contravened the International Covenant on Civil and Political Rights. Article 9 provided that 'no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law... Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court'. China signed the covenant, but did not conform to the obligations. This inevitably tarnished national reputation and provoked a backlash.

The report identified the biggest problem of RTL system as its absence of legal basis. Therefore, the research group recommended drafting up a law on RTL to specify the target of RTL and the procedure of deciding RTL.

The target of RTL should consist of five categories of wrongdoers: First, those who committed crime but the criminal punishments were exempted because the crime were so minor, and the criminal might reoffend. Second, those whose wrongdoings did not constitute crime, but seriously or repeatedly violated the Law on Public Security Administration of

¹⁴⁴ Article 6.6 of the Resolution on the Major Issues Regarding the Building of a Harmonious Socialist Society.

¹⁴⁵ Ibid.

Punishments. Third, the drug addicts, prostitutes and whoring goers who posed potential danger to society. Fourth, those who used superstition, weird religious organisation or other means to disturb public orders. Fifth, the juveniles who were under detention for training juvenile offenders in accordance with the Criminal Law (The Research Group on Reforming and Perfecting RTL of the Ministry of Justice, 2004, p. 27).

RTL cases should be decided by the court, and the procedure should refer to summary procedure in Criminal Procedure Law. Although the target of RTL included those who committed petty crimes, and the procedure of RTL was summary procedure in cases of petty crimes, The Research Group on Reforming and Perfecting RTL of the Ministry of Justice (2004, p. 27) stressed that the wrongdoings under RTL should not be categorized as petty crimes. If RTL was labelled as criminal punishment, the target of criminal punishments would be broadened, and the crime rate would be increased. For the CCP, Crime data are directly related to China's 'face' as a socialist country, and a high crime rate can damage the nation's image and become a source of international embarrassment (L. Zhang et al., 2013, p. 172).

For the same token, The Research Group on Reforming and Perfecting RTL of the Ministry of Justice (2004, p. 26) advocated renaming RTL into 'Coercive Reform' to avoid international censure. RTL was misnamed, and therefore misunderstood by the international community. Both 'Reform through Labour' and 'Re-education through Labour' were political driven terms. With the word 'Labour' in the names, both 'Reform through Labour' and 'Re-education through Labour' were criticized because of involving forced labour in punishment. Under the Prison Law issued in 1994, 'Reform through Labour' became 'Imprisonment'. RTL should also have a name with weakened political tone.

Avoiding misunderstanding the connotation of RTL was not the only reason for renaming RTL. In propounding the concept of Coercive Reform, The Research Group on Reforming and Perfecting RTL of the Ministry of Justice (2004, p. 26) expected the Law on Coercive Reform to provide legal basis for RTL, detention for education, detention for training the juvenile offenders and compulsory isolation and drug detoxification.

7.2.2. From reforming RTL to abolishing RTL

The Research Group on Reforming and Perfecting RTL of the Ministry of Justice (2004, pp. 26,27) postulated that RTL system should accord with the requirements of the rule of law, including the principle of non bis in idem, and the principle of nulla poena sine lege. The official research proposed two major reforms on RTL to, that is, transferring the power of deciding RTL from the police to the court, and narrowing the target of RTL. In 2011, four cities started pilot

programmes on reforming RTL programme. The Commission on RTL was renamed into the Commission on Education and Correction (S. Song, 2012).

However, the police would not like to give up their power of deciding RTL. Based on the official research, the Standing Committee of the NPC included the Law on RTL in legislation plan in 2005 and in 2010, but the NPC did not enact the plan into law. It was largely because the MPC fought encroachment on their power (R. Liu, 2015; S. Yu, 2013). In the pilot programme, the Commission on Education and Correction still located in the police office (S. Song, 2012).

In the report, the target of RTL actually denoted the target of Coercive Reform. Only the first, the second and the fourth categories of wrongdoers were the target of RTL in the narrow sense. The target of RTL was much narrower than that in the previous regulations, but most of the listed target of RTL should not be punished by RTL in accordance with legal principles.

Imposing RTL on the first categories of wrongdoers obviously violates the principle of non bis in idem. The first category is punished again for an offence for which they have already been finally convicted. Imposing RTL on the first category of wrongdoers also contradicts the principle of nulla poena sine lege. This principle requires that the punishable conducts should be clearly defined in unambiguous terms. In the report, whether a convict who committed petty crime should be punished by RTL depends on whether he is a possible reoffender, but everyone is a possible offender in strict sense. The wording is so vague that the authority can arbitrarily interpret it.

Imposing RTL on the fourth category inevitably draws criticism as well. There were clear provisions on how to punish those who used superstition and weird religious organisation to disturb public orders. Pursuant to the Regulations on Public Security Administration of Punishments and the Criminal Law, whoever disturbs public order, endangers public interests, impairs another person's health or swindling money by way of weird religious organisations and superstition, when the circumstances are not serious enough for criminal punishment, shall be detained for a maximum of fifteen days, fined a maximum of two hundred yuan or given a warning¹⁴⁶; Whoever forms or uses weird religious organizations or superstition to undermine the implementation of the laws and regulations shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years, if the circumstances

¹⁴⁶ Article 24 of the Regulations on Public Security Administration of Punishments (issued by the Standing Committee of the NPC on 5 September 1986, amended on 12 May 1994, replaced by the Regulations on Public Security Administration of Punishments on 1 March 2006).

are especially serious, he shall be sentenced to fixed-term imprisonment of not less than seven years.¹⁴⁷ Therefore, Imposing RTL on the fourth category also meant twice punishing a wrongdoer for the same fact.

Imposing RTL on those who disturb public orders by other means left RTL system wide open to abuse. Some petitioners were punished by RTL because they disturb public order by the means of petition. Many controversial cases attracted various social media, including China's official media. Zhou Wei, who were punished by RTL for two years in 1999 because he repeatedly petitioned the authority for reporting corrupt officials. Zhou Wei was released when several officials who had been reported by Zhou Wei were charged with corruption. The official media called Zhou Wei anti-corruption fighter (R. Yang, 2001). In 2012 and 2013, Tang Hui's RTL case led to the public outrage over RTL system. Tang Hui were punished by RTL in 2012 because she repeatedly appealed her daughter's case. In the case of Tang Hui's daughter, the 11 years old girl was raped and forced into prostitution. Tang Hui did not satisfy with the verdict of her daughter's case, because in the verdict only two criminals were sentenced to death penalty, and others were sentenced to life imprisonment or fixed-term imprisonment, but Tang Hui petitioned that all of them should be sentenced to death penalty. Tang Hui cried and screamed in the court, the standing committee of the congress, the bureau of public security and the party congress of various levels. The Commission on RTL at the municipal level decided to impose RTL on Tang Hui for 18 months because she disturbed the public order and work order of various agencies. Tang Hui complained to the Commission on RTL at the provincial level about her RTL case, and the commission revoked the decision in three days. Tang Hui claimed state compensation for the wrong decision, but her petition was rejected. Tang Hui then filed a lawsuit against the commission on RTL at the municipal level in 2013. She lost the suit in the first trial, but won the suit in the final trial. Many common people sympathized with Tang Hui in her daughter's misfortune. This case sparked public backlash on RTL system, and fuelled the support on abolishing RTL by both scholars and practitioners.

Tang Hui's RTL cases was a catalyst to abolish RTL. In the CCP's meeting on politics and law held on 7 January 2013, the Secretary of the Central Political and legal Committee asserted the CCP's intention to abolish RTL in a year, and exhorted the police of various levels to stop imposing RTL on petitioners (R. Liu, 2015).

There were no grounds for the retention of RTL. RTL was initiated to distinguish the wrongdoers in non-antagonistic contradictions from the criminals in antagonistic

¹⁴⁷ Article 300 of the Criminal Law.

contradictions, then was used to punish wrongdoers swiftly and harshly under the criminal policy of strike-hard. Under the political catchword of harmonious socialist society and the criminal policy of balancing leniency and severity, the CCP highlighted that most crimes were occasioned by non-antagonistic contradictions rather than antagonistic contradictions, and most criminals who committed petty crimes deserved lenient punishments with appropriate legal procedure.

Before 2005, it was widely recognised that, albeit overlapped with administrative punishments and criminal punishments, RTL had an exclusive category of target. This was the second category of target in the report conducted by the official research group. Yet, the newly enacted Law on Public Security Administration of Punishments and the Amendments to the Criminal Law solved this problem. The Standing Committee of the NPC issued the Law on Public Security Administration of Punishments on 28 August 2005 to replace the Regulation on Public Security Administration of Punishments. For 12 types of wrongdoings fallen under the scope of administrative punishments, the Law on Public Security Administration of Punishments provided aggravated administrative punishments if the circumstance of the wrongdoing was serious. Among them, the aggravated administrative punishments of 11 types of wrongdoings included administrative detention, but the maximum term was 15 days¹⁴⁸. The Amendment VIII to the Criminal Law criminalized committing thefts or extortions repeatedly, but every single theft or extortion was so minor that could not constitute crime¹⁴⁹.

The socialist rule of law calls for less political driven terms in laws, harmonious society accepts non-antagonistic contradictions as the causes of crime, and balancing leniency and severity demands promoting community corrections. Within the political contexts, RTL becomes more and more irrelevant. At the end of 2012, there was only about 50000 to 60000 people under RTL (R. Liu, 2015). The number of people under RTL was much less than that in a decade ago (see Table 3 in page 49). Regarding the small number of people under RTL, The concern by The Research Group on Reforming and Perfecting RTL of the Ministry of Justice (2004) worried about the increased crime rates after the abolition of RTL becomes not necessary in 2012.

¹⁴⁸ Article 24, 28, 37, 50, 53, 56, 57, 59, 64, 65, and 70 of the Law on Public Security Administration of Punishments.

¹⁴⁹ Article 39 and 40 of the Amendment VIII to the Criminal Law.

7.3. The promotion of community corrections programmes

7.3.1. The changed role of the community in supervising offenders

The abolition of RTL challenges the traditional division between semi-formal punishment and formal punishments based on whether the wrongdoing violates the interests within the community or without the community. However, by dint of community corrections, the traditional idea of relying on the community to supervise petty offenders revives.

Under communitarian culture, every member of the community is motivated to supervise the offenders under community-based punishment, and the leaders of companies, schools, streets and villages in the community are responsible for the effectiveness of the supervision. Nevertheless, this policy became impractical when China underwent a switch to market economy in 1990s. After the economy reform, social bonds between the neighbourhoods and colleagues are much looser. The neighbourhoods and colleagues do not work and reside in the same street or village as before, and the turnover of people is much higher than before. Therefore, loosely-knit communities could no longer effectively self-regulate themselves. It becomes more and more unworkable for the masses to have eyes on their neighbourhoods and colleagues. Moreover, under a market economy, the government has had less intervention in the businesses. Most businesses turned into private sectors, and the promotion and pay rise is no longer decided by the government. The leaders of companies in the community lose incentives to be responsible for the supervision of offenders under community-based punishment.

Ruan (2011) pointed out that the criminals in the Mao era tended to regard community-based punishments as harsher punishments than short-term imprisonment, because they were discriminated and supervised as second-class citizens. But when the social bonds in the workplace and neighbourhoods were gradually loosened, the punitive effects of community-based punishments became very remote.

As a response to the social changes, the 1997 Criminal Law weakens the role of the masses and strengthens the role of the police in supervising the offenders under community-based punishments. In the 1979 Criminal Law, where a criminal is sentenced to PS, the sentence shall be executed by the police; at the same time, the criminal under PS should observe the supervision of the masses, and actively participated in collective labour¹⁵⁰. In the 1997 Criminal Law, there is no provision on the right of the masses to supervise the criminals under

¹⁵⁰ Article 34 of the Criminal Law issued in 1979.

PS, and the obligation of the criminals to participate in collective labour. Yet, the revised provision on PS clarified how the criminals should submit to the supervision of the police¹⁵¹. In the 1979 Criminal Law, a criminal under suspended sentence shall be turned over by the police to the workplace or the grassroots organisation which he belongs to for supervision during the probation period for suspension¹⁵². In the 1997 Criminal Law, the criminals under suspended sentence is supervised by the police¹⁵³.

Subsequently, the supervision and examination authority was changed from the police to 'the executive agency' in the Amendment VIII of the Criminal Law. The Amendment VIII of the Criminal Law does not clarify what the executive agency is. Under community corrections programmes, the bureaus of justice are in charge of the supervision and examination of the convicts; in the event of the supervisory violations, the police are obliged to investigate the case. As discussed in the previous chapter, the workload of the bureaus of justice suddenly increases because of community corrections programmes.

7.3.2. The signs of semi-formal punishments

Pursuant to the general measures on how to implement the programmes stipulated by the announcements and opinions issued by the SPC, the SPP, the MPS, and the MJ, the programmes are designed to be enforced by the bureaus of justice rather than any unofficial controlling individuals or groups. The community corrections institutions should preside over the supervision measures and provide facilities for the correction and assistance measures. Meanwhile, despite the fact that the social workers and volunteers are still motivated to involve in community corrections programmes, they should provide services for the offenders under community corrections.

However, as introduced in the previous chapter, the local practices deviate from the designed division of functions among various government agencies, social workers and volunteers to some degree. The actual function of social workers is different from what it is supposed to be. In most regions, the social workers are primarily the assistants to community corrections officers. They conduct various supervision, education and assistance tasks under the direct instruction of community corrections officers. In the Shanghai model, the bureau of justice invents new relation between community corrections officers and social workers. The

¹⁵¹ Article 39 of the Criminal Law issued in 1997.

¹⁵² Article 70 of the Criminal Law issued in 1979.

¹⁵³ Article 75 of the Criminal Law issued in 1997.

bureau of justice should not directly instruct social workers, but contract out some services on education and assistance to Xinhang community corrections service centers. Yet, the bureau of justice actually allocates some tasks which ought to be taken by the officers. There is an interview with 358 social workers in Xinhang community correction service center about what their role ought to be and what their role actually is. The interview shows that 278 social workers consider their supposed role as public servants, 49 social workers deem their supposed role as officers, and 11 social workers view their supposed role as assistants; but 168 social workers hold their actual role as assistants, 151 social workers see their actual role as public servants, and 33 social workers regard their actual role as officers (H. Hu, 2013).

In practice, social workers perform some functions of the government agencies. They shoulder some duties of the routine supervision, but these duties ought to be taken up by the bureaus of justice. They may also undertake the tasks of helping the offenders to apply subsistence allowance and to find job. Although social workers and volunteers should take part in assistance tasks, but the assistance tasks related to social welfare ought to be assumed by the bureaus of civil affairs, the bureaus of social security and the bureaus of labour.

From this perspective, in many ways, community corrections programmes resemble semi-formal punishment in some ways. The implementation of the programmes bend the rules under laws to some extents. The social workers who are not the employees of the state perform some tasks of the executive branches of the government in practice.

8. Conclusion

The coexistence of formal punishment and semi-formal punishment was a distinctive feature of Chinese penal system. This system was closely related to the Chinese communitarian tradition. This tradition provided grounds for which offences deserved semi-formal punishments, and which offences required formal punishments. There were two types of offence. Those of the first type violate the interests of one or more of the community's members, and so the offences can be addressed within the community. Such offences can be punished by informal or semi-formal punishments. Informal punishments are administered by unofficial groups, based on morality or informal regulations. By contrast, semi-formal punishments include those partly or completely administered by unofficial groups but on the basis of law, and those executed by official agencies based on regulations contrary to the law but tacitly approved by the authorities. Offences of the second type infringe the interests of the whole community, or those beyond the community. Such offences require formal punishments, decided and enforced by official agencies pursuant to the law. In imperial China,

the clan served as a concrete community for dividing the two types of offences; by contrast, in socialist China, the community is an abstract concept, meaning the people. If someone perpetrated a petty offence, he was more likely to be punished by a semi-formal punishment rather than a formal one. In traditional China, the semi-formal punishments were mainly the clan punishments; in socialist China, the most widely applied semi-formal punishment was RTL. Targeting at different types of wrongdoings, semi-formal punishments and formal punishments set different goals. Semi-formal punishments were more oriented towards reform than punishment, while formal punishments were more oriented towards punishment than reform. However, the Chinese semi-formal punishments are a system without firm legal basis and without checks and balances, thus usually resulted in violation of the rights of the wrongdoers in the name of reform. Moreover, the severe semi-formal punishments left little room for minor formal punishments, and rendered the image of formal punishments very harsh and powerful.

When the CCP devotes extensive resources to construct a robust legal system, and Chinese are gradually awakening to their legal rights, semi-formal punishments certainly face abolition. At the same time, community corrections are promoted to accommodate a large part of offenses which fell into the scope of semi-formal punishments. Compared to the now abolished RTL system, community corrections have much more solid legal basis. To prevent crime and enforce social control, RTL system deprived the liberty of wrongdoers who did not even constitute a criminal act. To reform and rehabilitate criminals, community corrections allow criminals to serve their sentences in their community without strictly restraining their freedom. Meanwhile, community corrections carry on the reform orientation of semi-formal punishment, and takes advantage of Chinese communitarian traditions to involve the community in the programmes.

Nevertheless, the involvement of the community becomes an excuse of the law enforcement officers for inaction. The provisions on community corrections programmes are still very general. With very broad and flexible discretion, the officers in the local bureaus of justice may employ the social workers who are not the employee of the state to perform some tasks which should be conducted by themselves, albeit without legal authorization.

This phenomenon reflects that, the Chinese legal system is still used as mechanism to facilitate governance, rather than constrain governance. The tension between state power and individual rights is clear and present in today's China. The inadequate constraints on state power still lead to concerns that the rights set forth in the revised laws might not be fully implemented. Constructing a more humane and more lenient punishment system not only

requires more clauses on individual rights and freedoms in the criminal laws and criminal procedure laws, but also stricter constraints on state power. If the executive agencies still abuse their power, it will be difficult to implement in full the lenient punishments set forth in the Criminal Law and the Criminal Procedural Law.

Chapter Four. A review of legal philosophy relating to CSMs under European instruments

1. Introduction

Throughout Europe, there are various definitions, forms, and configurations of community sanctions. However, there are also some common trends. In many European countries, the number of persons under CSMs continues to increase. Furthermore, the range of these sanctions is broadening, and their intensity is increasing (Graebisch & Burkhardt, 2014; McNeill, 2013a; McNeill & Beyens, 2013; Stefani, 2016). The SPACE I and SPACE II Reports present the annual penal statistics of the CoE member states. These reports show that, in many European countries in 2012, more people were under the supervision or care of probationary services than in prison (Aebi & Chopin, 2013; Aebi & Delgrande, 2013). Some scholars label this phenomenon ‘mass supervision’ (McNeill, 2013a; McNeill & Beyens, 2013; Phelps, 2013).

Mass supervision reflects the commitment of European instruments to increasingly impose CSMs. Recommendation No. R(92)16 ‘On the European Rules on Community Sanctions and Measures’ has very recently been replaced and updated by Recommendation CM/Rec(2017)3 ‘On the European Rules on Community Sanctions and Measures’ issued by the CoE. The CoE has also published several other recommendations on CSMs. Albeit not legally binding, these recommendations can greatly influence member states. Two measures that are binding for EU member states, through transposition into national law, are (1) Council Framework Decision 2008/947/JHA of 27 November 2008 ‘On the Application of the Principle of Mutual Recognition to Judgments and Probation Decisions with a View to the Supervision of Probation Measures and Alternative Sanctions’; and (2) Council Framework Decision 2009/829/JHA of 23 October 2009 ‘On the Application of the Principle of Mutual Recognition to Decisions on Supervision Measures as an Alternative to Provisional Detention’.

This chapter reviews the penal policy of CSMs under these European instruments, referring also to the related literature. There have been subtle changes in the rhetoric of these European instruments. These reflect shifts and reconciliations in CSMs objectives and effectiveness criteria. This chapter examines the general legal philosophies of European instruments on how to resist punitiveness but maintain the punitive character of CSMs, how to balance protecting society and rehabilitating offenders, how to correlate short-term offender compliance with the long-term aim of desistance, and how to apply human rights standards with CSMs.

2. The objectives of community sanctions under European instruments

2.1. The objectives under the CoE's recommendations

2.1.1. Reducing the use of imprisonment

The CoE has issued several recommendations on reducing imprisonment and promoting CSMs. These recommendations support a reductionist policy. According to Rutherford (1984, pp. 145-147), there are two general conditions of a reductionist policy: first, key decision-makers share profound scepticism about the benefits of imprisonment; second, they have profound intolerance of overcrowding in prisons.

The recommendations convey doubts about the effect of imprisonment. Resolution (76)10 'On Certain Alternative Penal Measures to Imprisonment' recognises that prison sentences have many drawbacks. It also states that alternative sentences can 'serve the object of rehabilitating offenders and are less costly than imprisonment'.¹⁵⁴ Subsequent recommendations on community sanctions and measures¹⁵⁵, including Recommendation No. R(92)16 and Recommendation CM/Rec(2017)3, reinforce Resolution (76)10 on the negative effects of imprisonment and the potential for CSMs to avoid these problems.¹⁵⁶ Except for recommendations on community sanctions and measures, Commentary on Recommendation Rec (2006)2 'On the European Prison Rules' also acknowledges the negative consequences of loss of liberty, and commits to take some steps to reduce them within prisons. It states that, 'prisoners suffer should not lead to the assumption that prisoners automatically lose their political, civil, social, economic and cultural rights'.¹⁵⁷ However, it also recognises that, whatever efforts prisons make to protect rights of prisoners, 'inevitably, rights of prisoners are restricted by their loss of liberty'.¹⁵⁸

The recommendations also commit to tackle prison population inflation. Recommendation No. R(99)22 'Concerning Prison Overcrowding and Prison Population Inflation' regards the deprivation of liberty as a last resort. It states that 'prison overcrowding and prison population growth represent a major challenge to prison administrations and the criminal justice system

¹⁵⁴ Preamble, Resolution (76)10.

¹⁵⁵ These recommendations include Recommendation No. R(92)16, Recommendation Rec(2003)22 'On Conditional Release (Parole)', Recommendation CM/Rec(2010)1, and Recommendation CM/Rec(2017)3.

¹⁵⁶ Preamble, Recommendation No. R(92)16; Preamble, Recommendation CM/Rec(2017)3.

¹⁵⁷ Rule 2, Commentary on Recommendation Rec (2006)2.

¹⁵⁸ Ibid.

as a whole, both in terms of human rights and of the efficient management of penal institutions'.¹⁵⁹ Recommendation Rec(2006)2 reiterates that liberty should be deprived only as a last resort. It also stipulates that minimum accommodation requirements must not be breached by prison overcrowding.¹⁶⁰

The recommendations use both 'front-door strategies' and 'back-door strategies' to reduce the prison population. The front-door strategies involve imprisoning fewer people, while the back-door strategies focus on shortening prison sentences on conviction (De Vos, Gilbert, & Aertsen, 2014; Snacken, 2006; Tonry, 2006). Resolution (76)10 aims to expand alternatives to imprisonment. It calls on member states to develop both existing and new alternatives. Besides CSMs, it also requires member states to use fines 'as sanctions on a broad basis',¹⁶¹ and semi-detention 'as a milder form of punishment than total imprisonment'.¹⁶² However, Recommendation No. R(99)22 omits fines from its list of sanctions to solve prison overcrowding.¹⁶³ This recommendation requires member states to provide an appropriate array of CSMs, possibly graded in terms of relative severity.¹⁶⁴ It also requires member states to combine custodial and non-custodial sanctions and measures;¹⁶⁵ and use specific approaches in enforcing custodial sentences. These include, for example semi-liberty, open regimes, prison leave, or extra-mural placements.¹⁶⁶

The CoE's recommendations require wide use of CSMs. In replacing Recommendation Rec (2000)22, Recommendation CM/Rec (2017)3 restates its key principles on this topic. The new recommendation expects member states to provide for non-custodial sanctions or measures instead of imprisonment as the appropriate response for certain offences in national laws.¹⁶⁷ Member states are also expected to review and reduce formal provisions preventing CSMs

¹⁵⁹ Preamble and Rule 1, Recommendation No. R(99)22.

¹⁶⁰ Preamble and Rule 18.4, Recommendation Rec(2006)2.

¹⁶¹ Rule 2b, Resolution (76)10.

¹⁶² Rule 3d, Resolution (76)10.

¹⁶³ Recommendation No. R(99)22 should not devalue the role of fines in reducing prison population. In Scandinavia and Germany, fines serves as a dominant alternative, and contributes effectively to low short-term imprisonment rates (Dünkel, 2017; Lappi-Seppälä, 2008).

¹⁶⁴ Rules 3, 14, and 15, Recommendation No. R(99)22.

¹⁶⁵ Rule 17, Recommendation No. R(99)22.

¹⁶⁶ Rule 9, Recommendation No. R(99)22.

¹⁶⁷ Rule 2, Recommendation Rec (2000)22; Rule 18, Recommendation CM/Rec (2017)3.

use for serious and repeat offenders.¹⁶⁸ Many European jurisdictions have responded by broadening the scope of offenders eligible for CSM.

Snacken (2006) maintains that ‘imprisonment as a last resort’ is the guiding principle in European penal policies. Snacken’s (2006, p. 145) spatial comparative study shows that European prison populations are modest and the level of punitiveness is low compared with the dramatical increase in the US prison population in the US over the last 20 years.¹⁶⁹ However, Aebi, Delgrande, and Marguet’s (2015) temporal comparative study finds that the increase of CSMs in Europe has no visible effect on prison population rates from 1991 to 2010 in European countries.

2.1.2. Balancing protecting society and rehabilitating offenders

Under Resolution (76)10, CSMs are promoted because they overcome the problems of imprisonment. CSMs are ‘only one of the items in a more comprehensive toolbox’ for alternatives to imprisonment (Martufi & Slingeneuer, 2017, p. 8). Under subsequent recommendations, the ‘inherent value’ of CSMs beyond a simple means to reduce imprisonment has been increasingly recognised (van Zyl Smit, Snacken, & Hayes, 2015, p. 14).

Under Recommendation No. R(92)16, pursuing an alternative to imprisonment does not justify recourse to any kind of sanction or measure:¹⁷⁰

*‘the application of community sanctions and measures must maintain a necessary and desirable balance between, on the one hand, the need to protect society both in the sense of the maintenance of legal order as well as the application of norms providing for reparation for the harm caused to victims, and, on the other hand, the essential recognition of the needs of the offender having regard to his social adjustment’.*¹⁷¹

¹⁶⁸ Rule 3, Recommendation Rec (2000)22; Rule 19, Recommendation CM/Rec (2017)3.

¹⁶⁹ The imprisonment rates have declined recently. According to Dünkel (2017), it is somewhat due to decriminalising minor property offences and declining in registered crimes and convictions in Eastern European countries, and partly because of the decreasing seriousness of registered crimes in the Netherlands, Germany and Spain.

¹⁷⁰ Preamble b, Recommendation No. R(92)16.

¹⁷¹ Preamble a, Recommendation No. R(92)16.

*‘the implementation of penal sanctions within the community itself rather than through a process of isolation from it may well offer in the long term better protection for society including, of course, the safeguarding of the interests of the victim or victims’.*¹⁷²

The following European instruments on community sanctions and measures also aim to balance protecting society with rehabilitating offenders, asserting that social inclusion can enhance community safety.

Recommendation Rec(2003)22 stipulates that:

*‘conditional release should aim at assisting prisoners to make a transition from life in prison to a law-abiding life in the community through post-release conditions and supervision that promote this end and contribute to public safety and the reduction of crime in the community’.*¹⁷³

The more recent Recommendation CM/Rec(2010)1 provides that:

*‘probation agencies shall aim to reduce reoffending by establishing positive relationships with offenders in order to supervise (including control where necessary), guide and assist them and to promote their successful social inclusion; probation thus contributes to community safety and the fair administration of justice’.*¹⁷⁴

The Commentary to Recommendation CM/Rec(2017)3 reiterates the value of CSMs for suspects, offenders and the *community*.¹⁷⁵

As Snacken and McNeill (2012, p. 562) observe, ‘it seems that there is an emerging consensus at European level that, whereas all penal sanctions, including deprivation of liberty, aim at reducing reoffending and protecting victims and the general public, a particular characteristic of probation measures is their emphasis on working with offenders in the community and fostering their social rehabilitation and inclusion’.

¹⁷² Preamble c, Recommendation No. R(92)16.

¹⁷³ Rule 3, the Recommendation Rec(2003)22.

¹⁷⁴ Rule 1, Recommendation CM/Rec(2010)1.

¹⁷⁵ Scope and Purpose of the Commentary to Recommendation CM/Rec(2017)3.

2.2. The Objectives under Council of the EU framework decisions: facilitating CSMs for foreigners

Council Framework Decisions 2008/947/JHA and 2009/829/JHA reinforces the CoE's recommendations regarding the objectives of CSMs. These decisions also aim to facilitate the social rehabilitation of sentenced persons, improve protection of victims and the general public and ensure the due course of justice.¹⁷⁶ They also seek to facilitate applying suitable probation measures and alternative sanctions for offenders who live outside the state of trial or conviction.¹⁷⁷

As the EU develops its competence in 'freedom, security and justice'¹⁷⁸, it grows increasingly dominant in encouraging the free movement of criminal justice (Baker, 2013). Judicial cooperation in criminal matters is fundamentally founded on mutual recognition (Vermeulen & De Bondt, 2014). The two aforementioned Council framework decisions are both based on this core principle. They aim to promote effective and efficient judicial cooperation between member states regarding community sanctions and measures.

States are more likely to impose custodial sanctions and measures on foreigners than on nationals. This reflects the strong possibility of noncompliance with community sanctions and measures among foreign suspects and offenders, due to the risk of absconding and language problems, for example (De Wree, Vander Beken, & Vermeulen, 2009; Morgenstern, 2009; Ruggiero, South, & Taylor, 1998).

The mutual recognition of judgements and decisions enables foreign suspects or offenders, regardless of where they are sentenced, to serve community sentences in the EU member state in which they reside. This policy potentially increases the application of non-custodial sanctions and measures to foreigners, though neither Council framework decisions directly calls for this. Like the recent recommendations issued by the CoE, the two Council framework decisions are designed to increase CSMs use on their own merits, rather than simply to replace custodial sanctions and measures (van Zyl Smit et al., 2015, p. 17).

Mutual recognition of judgements and decisions on CSMs is understood to benefit both offender reintegration and crime control. Transferring offenders to their home states may

¹⁷⁶ Article 1 (1), Council Framework Decision 2008/947/JHA; Article 2(1), Council Framework Decision 2009/829/JHA.

¹⁷⁷ Ibid.

¹⁷⁸ Article 1, Treaty of Amsterdam amending the Treaty on European Union.

facilitate their reintegration. This is because it avoids linguistic and cultural barriers, as well as provides better access to services and social ties (De Wree et al., 2009; Morgenstern, 2009). Meanwhile, to ensure effective crime control, transferring sentenced persons at least partly upholds the issuing states' sentences. The framework decisions generally prohibit converting imprisonment into an alternative sentence (De Wree et al., 2009). Unless one of the grounds for refusal in the framework decisions applies, executing states should recognise issuing states' judgements and decisions.¹⁷⁹ Executing states must also enforce judgements and decisions exactly as issued except where the nature or duration of the sanctions or measures are incompatible with domestic law.¹⁸⁰ Where sanctions and measures are adapted, they must correspond as far as possible to those imposed in the issuing state¹⁸¹. When the duration of the measure in the issuing state exceeds the maximum duration under domestic law, the adapted period shall not be below the maximum duration provided for equivalent offences under domestic law¹⁸². It means that the executing state must fully exploit its domestic sentencing framework (Morgenstern & Larrauri, 2013).

3. The effectiveness criteria of community sanctions and measures

3.1. The punitive shift

The punitive character of CSMs is uncertain when they are viewed as measures of clemency. Snacken (2010) states that punitiveness is 'a complex, not always clearly defined concept'. Robinson (2016) and Sonja Snacken (2010) find that the prevalence of rehabilitative ideals, imprisonment rates and prison conditions are often referred to as the parameters of punitiveness. CSMs are traditionally the key domain for rehabilitative interventions, and enjoy the status of an alternative to imprisonment (Robinson, 2008, 2016). Therefore, the expansion of CSMs seems to run counter to the trend of punitiveness. The public's perception of CSMs has been shaped by this traditional understanding of punitiveness (Beyens, 2016; Morris & Tonry, 1991; Robinson, 2016; Robinson & McNeill, 2015). As Morris and Tonry (1991) observe, in the minds of most, CSMs are seen as lenient treatment or a 'let off'.

In the post-1990s European instruments on CSMs, two key aspects have served to change public perceptions of impunity. These are the broadened scope of criminals eligible for such

¹⁷⁹ Article 11, Council Framework Decision 2008/947/JHA.

¹⁸⁰ Article 9 (1), Council Framework Decision 2008/947/JHA.

¹⁸¹ Ibid.

¹⁸² Article 9 (2) of the Council Framework Decision 2008/947/JHA.

sentences and the increasing emphasis on public protection. The punitive weights have been increasing, as reflected by various demanding conditions and obligations attached to CSMs. There has also been increasing use of some pure controlling methods to facilitate offender supervision, such as electronic monitoring.

3.2. The shift in focus of effectiveness criteria

Under Resolution (76)10, the utilitarian basis for using alternatives to imprisonment is their greater cost effectiveness.¹⁸³ In this sense, two approaches best accommodate cost reduction: first, ordering payment of a fine without attaching conditions or obligations; second, imposing collective CSMs, such as suspended sentences and early release, with no conditions other than avoiding reoffending. Under Recommendation No. R (92)16, the effectiveness criteria for CSMs shifted from cost effectiveness to public protection and offender rehabilitation. At that point, effective control of offenders become a crucial indicator. Under Recommendation No. R (99)22 and Recommendation Rec2000(22), the credibility of CSMs depends on their effective supervision and control of offenders.¹⁸⁴

Recommendation No. R (92)16 particularly emphasises individualised CSMs programmes. It requires the implementation of community sanctions and measures to be individually adapted to the particular circumstances of each case.¹⁸⁵ These stipulations are retained in Recommendation CM/Rec (2017) 3.¹⁸⁶

Collective measures do not usually involve much control, beyond the single condition of avoiding reoffending. They mostly result in forms of unconditional release. By contrast, individualised programmes usually attach different conditions and obligations to different offenders according to their circumstances. This allows close oversight of their conduct in the community (Martufi & Slingeneyer, 2017, p. 10; van Zyl Smit et al., 2015, p. 16).

Recommendation No. R (99)22 and Recommendation Rec(2003)22 also stress the individualisation of sanctions, deemed by the former to be part of a 'coherent and rational criminal policy'.¹⁸⁷

¹⁸³ Preamble, the Resolution (76)10.

¹⁸⁴ Rule 22, Recommendation No. R (99)22; Rule 15, Recommendation Rec(2000)22.

¹⁸⁵ Rule 70 and 71, Recommendation No. R (92)16.

¹⁸⁶ Rule 32 and 33, Recommendation CM/Rec (2017) 3.

¹⁸⁷ Preamble, Recommendation No. R (99)22.

*‘The development of measures should be promoted which reduce the actual length of the sentence served, by giving preference to individualised measures, such as conditional release (parole), over collective measures for the management of prison overcrowding (amnesties, collective pardons)’.*¹⁸⁸

Recommendation Rec(2003)22 defines conditional release as ‘the early release of sentenced prisoners under individualised post-release conditions’.¹⁸⁹ According to van Zyl Smit et al. (2015, p. 16), ‘by its narrow definition of conditional, the recommendation may inadvertently encourage the setting of conditions’.

3.3. The construction of compliance

For offenders subject to individualised CSMs programmes, their effective supervision and control are closely linked with the offenders’ subsequent compliance with the criminal law. As Mair and Canton (2007, p. 270) identify, CSMs are distinguished from imprisonment and other punishments, as their objectives can only be achieved if offenders actively comply with the conditions and obligations; if offenders do not comply, ‘an unenforced community penalty is indistinguishable from impunity’.

It is widely recognised that compliance is an elastic concept with different dimensions. A. Bottoms (2001, p. 89) proposes two dimensions of compliance with community sanctions. First, ‘short-term requirement compliance’ concerns the specific legal requirements of CSMs. Second, ‘long-term legal compliance’ means no reoffending. Robinson (2013) deems long-term legal compliance as equivalent to desistance. Within Bottoms’ short-term category, Robinson (2013, p. 28); Robinson and McNeill (2008) distinguish between behaviour that technically conforms to rules and that which reflects genuine engagement with a particular sanction and its purposes. The former only reflects the behavioural dimension of compliance, labelled formal compliance. Conversely, the latter adds the attitudinal dimension, and so is regarded as substantive compliance. Robinson and McNeill (2008) formulated a dynamic model of compliance. They advocate supervisors moving beyond formal compliance into substantive compliance. They also note that, the signs of substantive compliance increase the likelihood of achieving long-term compliance. According to Robinson (2013, pp. 40-41), the definition of compliance is shaped by how the purposes of CSMs are understood. Concerned only with their punitive character or managerial justice, we would prioritise the easily

¹⁸⁸ Rule 23, Recommendation No. R (99)22.

¹⁸⁹ Rule 1, Recommendation Rec (2003)22.

auditable formal compliance. Conversely, if we emphasise rehabilitation or managing risk and long-term public protection, we need to value both formal and substantive compliance. A. Bottoms (2001) finds that long-term compliance could be achieved through cognitive-behavioural programmes. Such programmes seek to alter an offender's ways of thinking (disposition). This is linked, in a two-way process, to altered behavioural routines. Such changes seem particularly likely to have lasting effects (A. Bottoms, 2001, p. 94). During the 1980s, the cognitive-behavioural theory was applied to explain offender behaviours. This led to the development of the risk-need-responsivity model of rehabilitation programmes. These programmes became a main source of momentum for reviving rehabilitative optimism (McGuire, 2004; Robinson & Crow, 2009).

Changes over time in the CoE's recommendations on implementing CSMs reflect shifting concerns on the different compliance dimensions. Recommendation No. R (92)16 is designed to establish common CSMs ensure standards to provide just and effective application.¹⁹⁰ Concerning the mechanisms of compliance, the recommendation's Chapter X merely provides the procedure for dealing with non-compliance or inadequate compliance.¹⁹¹ Recommendation No. R(92)16 does not address how to develop comprehensive strategies for long-term desistance. Compared with Recommendation No. R(92)16, Recommendation Rec2000(22) subtly changes the rhetoric by committing to achieve more effective use of CSMs.¹⁹² According to the European Committee on Crime Problems (2014), Recommendation Rec2000(22) aims to interpret and improve the implementation of Recommendation No. R(92)16. As Morgenstern (2016, p. 2) states, this reflects a subtle shift of emphasis from justice to effectiveness. For guidance on setting up effective programmes and intervention, Recommendation Rec (2000)22 directly refers to the risk-need-responsivity model. This model provides the criteria to guide offenders' allocation to specific programmes and interventions.¹⁹³ The recommendation also refers to cognitive behavioural methods as widely accepted recent research findings to develop programmes and interventions for offenders who have relapsed into serious crime or are likely to do so.¹⁹⁴

¹⁹⁰ Preamble, Recommendation No. R (92)16.

¹⁹¹ Rule 76 to Rule 88, Recommendation No. R (92)16.

¹⁹² Preamble, Recommendation Rec (2000)22.

¹⁹³ Rule 22, Recommendation Rec (2000)22.

¹⁹⁴ Rule 23, Recommendation Rec (2000)22.

Subsequent recommendations on CSMs all underline the importance of adopting strategies based on established theory to improve effectiveness. Recommendation No. R (99)22 particularly advocates the development and use of reliable risk-prediction and risk assessment techniques, as well as supervision strategies.¹⁹⁵ Recommendation CM/Rec(2010)1 provides guidance on the establishment and proper functioning of probation agencies.¹⁹⁶ Its commentary stresses that supervision should target rehabilitation and desistance¹⁹⁷. To achieve the latter, it endorses the good lives model of offender rehabilitation.¹⁹⁸ The recommendation seeks to establish a positive and professional relationship between the probation officer and offenders. This should enable offenders to play an active role in the supervision process.¹⁹⁹ When pure controlling measures like electronic monitoring form part of probation supervision, this should facilitate the effectiveness of rehabilitative programmes.²⁰⁰ Recommendation CM/Rec (2014)4 'On Electronic Monitoring' clarifies the limited effectiveness of formal compliance. As a pure controlling measure, electronic monitoring can only ensure supervision and reduce crime while in force. To seek longer term desistance from crime, it should be combined with other professional interventions and supportive measures targeting offenders' social reintegration.²⁰¹ Even for dangerous offenders, Recommendation CM/Rec (2014)3 'Concerning Dangerous Offenders' requires their risk management to have the long-term aim of safe reintegration into the community.²⁰²

As the combination and entrenchment of Recommendation No. R (92)16 and Recommendation Rec 2000(22), Recommendation CM/Rec (2017)3 preserves the former's stipulations on noncompliance.²⁰³ Meanwhile, the Commentary to Recommendation CM/Rec (2017)3 reiterates the following provisions of Recommendation Rec 2000(22). In determining any CSMs conditions or obligations, the individual's needs and risks must be considered to support desistance. The principle is applied even for measures involving high levels of

¹⁹⁵ Rule 22, Recommendation No. R (99)22.

¹⁹⁶ Scope and Application of Recommendation CM/Rec (2010)1.

¹⁹⁷ Rule 76, Commentary to Recommendation CM/Rec (2010)1.

¹⁹⁸ Rules 66 and 67, Commentary to Recommendation CM/Rec (2010)1.

¹⁹⁹ Rule 1, Recommendation CM/Rec (2010)1.

²⁰⁰ Rule 57, Commentary to Recommendation CM/Rec (2010)1.

²⁰¹ Rule 8, Recommendation CM/Rec (2014)4.

²⁰² Rule 6, Recommendation CM/Rec (2014)3.

²⁰³ Rule 62 to Rule 72, Recommendation CM/Rec (2017)3.

surveillance or control.²⁰⁴ Like Recommendation CM/Rec (2010)1, the new recommendation recognises the effectiveness of sound professional relationships in engendering attitudinal and behavioural changes. Likewise, it also recommends a package of sanctions and measures to accommodate the different dimensions of compliance.²⁰⁵ The list of effectiveness criteria in the Commentary to Recommendation CM/Rec (2017)3 includes most of the targets in Recommendation No. R(92)16. These include fulfilling public expectations of law and policy, reducing imprisonment, meeting offenders' offence-related needs, and improving cost-effectiveness.²⁰⁶ Yet, the top three listed criteria are the reconviction rate, the process of desistance, and formal desistance.²⁰⁷ The recommendation identifies the reconviction rate as 'one significant measure of effectiveness'.²⁰⁸ However, it does not recommend absolute (low) targets for the reconviction rate to prove the effects of CSMs. Instead, it suggests the comparative assessment of effectiveness. The effect of a particular CSM 'should be carefully compared with the reconvictions of comparable offenders receiving imprisonment as well as other sanctions and measures'.²⁰⁹

There are, thus, strong signs of two recent trends in the recommendations. First, they increasingly favour both the behavioural and attitudinal dimensions of compliance. Second, they place high value on desistance. Effective implementation methods are being stimulated by the research findings of 'what works', which primarily originate in Canada, the USA, and England and Wales.²¹⁰ The Commentary to Recommendation CM/Rec(2010)1 states that 'countries can and should use evidence from other countries to develop their own practices'.²¹¹ However, the recommended cognitive behavioural methods are questioned by scholars from countries not schooled in Anglo-Saxon traditions (Herzog-Evans, 2013; van Zyl Smit et al., 2015). With a subtle change from the Commentary to Recommendation CM/Rec (2010)1, the Commentary to Recommendation CM/Rec (2017)3 states that 'Practices that have proved to be successful in one country may be a promising idea to introduce

²⁰⁴ Rule 23, Recommendation Rec (2000)22; Rule 37, Commentary to Recommendation CM/Rec (2017)3.

²⁰⁵ Rule 1, Recommendation CM/Rec(2010)1; Rule 31, Commentary to Recommendation CM/Rec (2017)3.

²⁰⁶ Rule 90, Recommendation No. R (92)16.

²⁰⁷ Rule 99, Commentary to Recommendation CM/Rec (2017)3.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Rule 104, Commentary to Recommendation CM/Rec (2010)1.

²¹¹ Ibid.

elsewhere’.²¹² The new Commentary uses ‘may’ rather than ‘can and should’. However, it lists no promising ideas other than cognitive behavioural methods.

4. Human rights standards in the context of community sanctions and measures

4.1. The rise of human rights issues

McNeill (2013a, p. 5) contends that, when the punitive character of CSMs was uncertain, it resulted in ‘the slower progress of human rights discourses in the field of community sanctions and measures than in relation to imprisonment’. Those subjected to community sanctions and measures were regarded as recipients of mercy. Therefore, they were deprived of the moral basis for legitimate claims to any entitlements to CSMs and to fair treatment in the punishment’s execution (McNeill, 2013a, p. 6). To reinforce UN Resolution 663 C (XXIV) ‘Standard Minimum Rules for the Treatment of Prisoners’, the CoE issued Resolution (73) 5 ‘European Standard Minimum Rules for the Treatment of Prisoners’. Subsequently, the CoE’s Committee of Ministers adopted Recommendation No. R (87) 3 ‘On European Prison Rules’ (Coyle, 2005). This renews emphasis on the precepts of human dignity and the commitment of prison administrations to humane and positive treatment. In contrast, Resolution (76)10 gives alternatives to imprisonment a semblance of beneficence, and completely overlooks human rights problems.

In the 1990s, the intrusive dimensions of CSMs attracted increasing attention. As Snacken (2006, p. 160) observes, though CSMs are typically less interfering than imprisonment, they nonetheless restrict freedom of movement. They may also hamper the enjoyment of other rights and freedoms. From the offender’s perspective, particularly demanding forms of CSMs are not always more lenient and less intrusive than imprisonment. Some CSMs, especially those imposed on high-risk offenders, are very intensive and feature many punitive aspects. To control high-risk offenders, Recommendation Rec (2000)22 even allows the possibility of indeterminate CSMs. This conflicts with the earlier Recommendation No. R (92)16: ‘no community sanction or measure shall be of indeterminate duration’.²¹³ Recommendation Rec (2000)22 stipulates that:

‘exceptionally, an indeterminate community sanction or measure may be imposed on offenders who, by reason of a serious prior or current offence in combination with a specific

²¹² Rule 98, Commentary to Recommendation CM/Rec (2017)3.

²¹³ Rule 5, Recommendation No. R (92)16.

*personal characteristic manifestly pose a continuing grave threat to life, health or safety in the community’.*²¹⁴

Recommendation Rec (2017)3 continues to allow indeterminate community sanctions or measures.²¹⁵ Durnescu, Enengl, and Grafl (2013); Graebisch and Burkhardt (2014) find that some offenders under community sanctions perceive those sanctions to be excessively punitive. Consequently, they can be anxious about the intrusion into their private life.

Accordingly, on CSMs, the CoE’s instruments require member states to refer to other European human rights instruments and standards. Recommendation No. R (92)16 offers basic criteria for combining the creation and use of CSMs with guarantees against curtailing offenders’ fundamental human rights.²¹⁶ Chapter 3 of Recommendation No. R(92)16, titled ‘respect for fundamental rights’, prescribes that:

*‘no community sanction or measure restricting the civil or political rights of an offender shall be created or imposed if it is contrary to the norms accepted by the international community concerning human rights and fundamental freedoms’.*²¹⁷

Recommendation Rec (2000)22 states that:

*‘the recourse to, and the implementation of, community sanctions and measures should always be guided by respect for fundamental legal safeguards as enshrined in the European Convention on Human Rights, and by the principles laid down in the European Rules’.*²¹⁸

Recommendation Rec (2017)3 preserves and strengthens the human rights protections under these two earlier recommendations.²¹⁹ Other CoE instruments on CSMs,²²⁰ also set human rights principles as basic values, and refer to other European human rights instruments and standards.²²¹

²¹⁴ Appendix 1, Recommendation Rec (2000)22.

²¹⁵ Rule 23, Recommendation Rec (2017)3.

²¹⁶ Preamble b, Recommendation No. R (92)16.

²¹⁷ Rule 21, Recommendation No. R (92)16.

²¹⁸ Preamble, Recommendation Rec (2000)22.

²¹⁹ Preamble b and Rule 4, Recommendation Rec (2017)3.

²²⁰ These instruments include Recommendation Rec (2003)22, Recommendation CM/Rec(2010)1, and Recommendation CM/Rec (2014)4.

²²¹ Rule 36, Recommendation Rec (2003)22; Scope and Application, and Rule 2, Recommendation CM/Rec (2010)1; Preamble, Recommendation CM/Rec(2014)4.

‘Respect for human rights’ is among the EU’s baseline values. In the context of criminal law, the mutual recognition principle of EU legal instruments is based on mutual trust between member states’ criminal justice authorities. This is derived from the consensus that ‘all can be relied upon to respect fundamental rights and the other fundamental principles of Union law’ (Baker, 2013, p. 90). Council Framework Decisions 2008/947/JHA and 2009/829/JHA also endorse respect for fundamental rights and legal principles, as enshrined in Article 6 of the Treaty on European Union.²²²

Under both the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the EU (CFR), ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’.²²³ The ECHR labels this right as non-derogative (Ashworth & Horder, 2013). According to Morgenstern and Larrauri (2013); van Zyl Smit and Ashworth (2004), ‘inhuman or degrading treatment or punishment’ can be interpreted in one or both of two ways. One interpretation concerns the nature of the treatment or punishment. Particular type of punishment should be outlawed because of their intrinsically ‘cruel and unusual’ or ‘inhuman and degrading’ character. The other interpretation concerns, in this context, the intensity of community sanctions and measures. If the severity of a punishment is grossly disproportionate to the seriousness of the crime(s), that punishment is also ‘inhuman and degrading’.

4.2. Outlawing particular types of sanctions and measures

Concerning the nature of CSMs, under Recommendation No. R (92)16,

*‘the nature of all community sanctions and measures and the manner of their implementation shall be in line with any internationally guaranteed human rights of the offender. The nature, content and methods of implementation of community sanctions and measures shall not jeopardise the privacy or the dignity of the offenders or their families, nor lead to their harassment. Nor shall self-respect, family relationships, links with the community and ability to function in society be jeopardised. Safeguards shall be adopted to protect the offender from insult and improper curiosity or publicity’.*²²⁴

²²² Article 1(4), Framework Decision 2008/947/JHA; Article 5, Framework Decision 2009/829/JHA.

²²³ Article 3, European Convention on Human Rights; Article 4, Charter of Fundamental Rights of the European Union.

²²⁴ Rules 21 and 22, Recommendation No. R (92)16.

These rules are preserved in Recommendation CM/Rec (2017)3.²²⁵

The European Court of Human Rights (ECtHR) gives no clear guidance on what types of CSMs are considered torture or inhuman or degrading treatment and punishment. The court refrains from expressly listing prohibited acts (Long & Association for the Prevention of Torture, 2002). The ECtHR believes that human rights protection standards should be interpreted with reference to present-day conditions. Also, as standards become increasingly high, great firmness is required in assessing what constitutes a breach of fundamental values (Long & Association for the Prevention of Torture, 2002).

Although the ECtHR does not specify what forms of CSMs should be precluded, many scholars contend that certain CSMs may violate human rights by their very nature. To judge whether a particular CSM is inhuman or degrading, Morgenstern and Larrauri (2013); Snacken and McNeill (2012) suggest consulting the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). It should be noted, though, that the CPT focuses on persons deprived of their liberty. The authors give the example of surgical castration in the Czech Republic, considered by the CPT to amount to degrading treatment. In its report to the Czech Government, the CPT cited the ethical problems of serious physical and mental harm inflicted on an offender.²²⁶ The ethical issues in using electronic monitoring, which manages risks through techno-correctional innovation, have received considerable academic attention. Some studies show that electronic monitoring may reinforce patterns of gender inequality, cause stigma and embarrassment for suspects or offenders, and place stress on members of their households (Holdsworth & Hucklesby, 2014; Jones, 2014; Mike Nellis, 2015). Recommendation CM/Rec (2014)4 sets basic principles on ethical use of electronic monitoring. First, it emphasises that any decisions to implement electronic monitoring should consider each suspect's or offender's specific conditions and personal circumstances. Second, such monitoring should eschew inflicting intentional physical or mental harm or suffering on a suspect or offender. Third, undue intrusiveness into the private and family life of suspects, offenders, and other affected persons should be avoided.²²⁷

²²⁵ Rule 8, Recommendation CM/Rec (2017)3.

²²⁶ Article 44, the Report to the Czech Government on the visit to the Czech Republic carried out by the CPT from 25 March to 2 April 2008 (CPT/Inf (2009) 8).

²²⁷ Articles 26, 27 and 28, Recommendation CM/Rec (2014)4.

4.3. The legality principle

Concerning the intensity of community sanctions, the CFR sets clear legality and proportionality principles to limit such penalties.²²⁸ The legality principle promotes predictability in judging the legal consequences of one's actions. It also protects individuals against arbitrary political, prosecutorial, or judicial power, prohibiting punishment through retrospective application of substantive new crimes or increased punishments (Gallant, 2009, pp. 20-21). Recommendation No. R (92)16 also prescribes the legality principle, making the credibility of CSMs dependent on clear rules of conduct.²²⁹

Recommendation No. R (92)16 requires clear and explicit legal provisions on the conditions and obligations of CSMs, and the consequences of non-observance. It also prohibits indeterminate CSMs.²³⁰ As van Zyl Smit (1993, p. 322) interprets, this requirement sets a clear limit on the sentence length, precluding sentences that, cumulatively, are unacceptably harsh. However, Recommendation Rec (2000)22 permits indeterminate CSMs in exceptional cases. If offenders must 'manifestly pose a continuing grave threat to life, health or safety in the community'.²³¹ The subsequent Recommendation Rec (2003)22 also allows indeterminate conditional release 'when this is absolutely necessary for the protection of society'.²³² Most recently, Recommendation CM/Rec (2017)3 continues to permit extended CSMs 'in exceptional circumstances'.²³³ These changes demonstrate increasing attention upon the risk management of dangerous offenders. The Commentary to Recommendation CM/Rec (2017)3 accepts that permitting indeterminate CSMs undermines legal prediction and, thus, 'is contrary to the purpose of developing the offender's autonomy in society'.²³⁴ However, the recommendation does not challenge the legality of indeterminate CSMs. Under Recommendation CM/Rec (2014)3, the legality of extended CSMs for dangerous offenders is secured 'by means of regular and independent monitoring'.²³⁵

²²⁸ Article 49, Charter of Fundamental Rights of the EU.

²²⁹ Preamble c and Rule 3, Recommendation No. R (92)16.

²³⁰ Rules 4 and 5, Recommendation No. R (92)16.

²³¹ Appendix 1, Recommendation Rec (2000)22.

²³² Rule 11, Recommendation Rec (2003)22.

²³³ Rule 23, Recommendation CM/Rec (2017)3.

²³⁴ Rule 23, Commentary to Recommendation CM/Rec (2017)3.

²³⁵ Rule 8, Recommendation CM/Rec (2014)3.

4.4. The proportionality principle

Although the CFR prohibits disproportionate penalties, the ECtHR does not clearly explain the meaning of ‘disproportionate’. Morgenstern and Larrauri (2013, p. 142); Snacken (2006, p. 158) note that the ECtHR loosely interpret ‘proportionality’. In its only case involving a choice between incarceration and an alternative measure, the ECtHR did not interfere with the state’s decision to impose remand custody.²³⁶ As this case demonstrates, state authorities are not required to impose only the least-interfering sentence (Snacken, 2006, p. 162).

The proportionality principle is also weakened by the considerations of risk management. Under Recommendation No. R (92)16,

*‘the nature and the duration of community sanctions and measures shall both be in proportion to the seriousness of the offence for which an offender has been sentenced or of which a person is accused and take into account his personal circumstances’*²³⁷.

However, under subsequent European instruments, the seriousness of the offence and the offender’s culpability are not the only considerations for determining the severity of CSMs. The sentencer should combine the proportionality principle with other factors, including ‘the properly assessed risks of reoffending’ (Recommendation CM/Rec (2010)1).²³⁸ Recommendation CM/Rec(2017)3 also stipulates that risks must be assessed as well as the individual’s needs.²³⁹

Since the severity of CSMs is determined by multiple factors, sentencers need guidance on the weight to apportion to each in deciding punishment intensity. Recommendation No. R (92)17 ‘Concerning Consistency in Sentencing’ clearly designates the seriousness of the offence as the primary consideration for sentence severity, ‘whatever rationales for sentencing are declared’.²⁴⁰ As interpreted by van Zyl Smit and Ashworth (2004, p. 560), this provision means that ‘even if the relevant legal framework permits the sentencer to impose a particular sentence for reasons of rehabilitation, deterrence or incapacitation, that sentence must comply with the requirement that it should not be disproportionate’. This interpretation corresponds with the reading of proportionality under the European Commission’s

²³⁶ Bouchet v. France (2001).

²³⁷ Rule 6, Recommendation No. R (92)16.

²³⁸ Rule 5, Recommendation CM/Rec (2010)1.

²³⁹ Rule 22, Recommendation CM/Rec (2017)3.

²⁴⁰ Rule 4, Recommendation No. R (92)17.

Communication (COM/2011/0573) 'Towards an EU Criminal Policy'. The communication calls for applying the explicit requirement of proportionality under the CFR Rights. It also advocates adopting the 'necessity test' with regard to the type and level of sanctions. To be considered proportionate, 'the sanction must be commensurate with the gravity of the conduct and its effects and must not exceed what is necessary to achieve the aim'.²⁴¹ Therefore, for CSMs and for other sentences, the punishment should not be more severe than is necessary, though it is not mandated to be the least interfering. This applies regardless of whether a CSM, based on assessed risks and individual needs, has restrictive or rehabilitative purposes.

5. Conclusion

CSMs were initially advanced as alternatives to imprisonment, aiming at overcoming its shortcomings, show respect for individual liberty, and save costs. However, under more recent related instruments, CSMs are promoted due to their particular characteristics. Traditionally, CSMs are the key domain of rehabilitation. As an integral part of the penal system, they also share the common goal of penal sanctions in seeking to protect the public. European instruments assert interdependence between the two objectives of offender rehabilitation and public protection. They consider the indicators related to both objectives as the criteria for effective supervision and control. They also identify the role of cognitive behavioural methods in connecting reducing risk with promoting rehabilitation. However, preoccupations with assessing and managing risk have the potential to increase the punitiveness of CSMs. This risks jeopardising offenders' human rights, especially for those labelled as high risk.

Under European instruments, CSMs are understood to be efficiency-oriented and based on Europe's human rights framework (Morgenstern, 2009). Increasing emphasis on offenders' human rights and dignity is recognised to reflect growing resistance to punitiveness in Western Europe (Tonry, 2006; Whitman, 2003). The European instruments on CSMs require member states to conform with the general legal norms under human rights instruments. The underdevelopment of legal principles in the context of CSMs has been widely recognized. van Zyl Smit (1993, p. 330) observed, just after promulgation of the first CoE recommendation on CSMs, 'It is at the level of an analysis which attempts to derive standards from general legal norms that the various international instruments are most useful'. However, as the specific rules on CSMs are more detailed, particular concern over the risk management of dangerous offenders includes looser interpretations of the legality and proportionality principles. The recommendations on CSMs permit indeterminate sentence duration and include perceived

²⁴¹ Article 2.2, Communication (COM/2011/0573).

risks and individual needs in the assessment of proportionality. These provisions seem to encourage greater intervention than is strictly necessary (van Zyl Smit et al., 2015). There are two widespread beliefs among European scholars on this topic. First, to retain the European image of resisting punitiveness, the European instruments on CSMs can moderate their penal content by reference to the legal principles of human rights (Morgenstern, 2009; Morgenstern & Larrauri, 2013; Snacken & McNeill, 2012). Second, the instruments can promote firmer and stricter interpretation of legal principles under human rights instruments (Snacken, 2006; van Zyl Smit & Ashworth, 2004; van Zyl Smit et al., 2015). Interpretations of the legal principles of human rights need to handle the conflict between risk management and protection of offenders' rights.

Chapter Five. Evolution of the Penal Philosophies underlying Community Sanctions in the West

1. Introduction

The previous chapter introduced the subtle shifts of contemporary legal philosophies under the European instruments on community sanctions. Different penal philosophies, based on different broader theories of political obligation, imply different penal strategies, although no simple equation between penal philosophies and penal strategies exists (Cavadino & Dignan, 2007; Hudson, 2003). The penal system always needs to consider various penal philosophies and balance them. Meanwhile, different schools of penal thought offer different eclectic penal justifications. They have their advocates at many stages of social development. However, only at certain times, a designated school of penal thought fit the government policy (Cavadino & Dignan, 2007, p. 57). The penal trend in a particular period depends on the complicated configuration of factors, such as social and economic development, political climate, and cultural environment. Nevertheless, once a synthesis of penal justifications appeals to the penal tempt, it shapes the way in which punishment are implemented to a great extent.

This chapter sketches the history of community sanctions under different penal strategies in the West, and reviews how the evolution of penal justifications shapes the scope and function of community sanctions. It charts how different schools of penal thought correspond to different penal philosophies, why different penal justifications wax and wane, how these changes influence the shifts of penal strategies, and what the roles of community sanctions are under different penal strategies.

2. Classicism, Religious inclined understanding of reform and the development of imprisonment

2.1. Classicism: Deterrence

Among the classical theorists, 'It was Cesare Beccaria in Italy and Jeremy Bentham in Britain writing in the late eighteenth century who established the essential components' (Burke, 2013, p. 27).

Beccaria is father of the classical criminology. Influenced by enlightenment philosophy, he strongly supported social contract theory and interpreted crime in a political fashion. The rational citizens freely chose to enter into a certain version of social contract and submitted parts of their rights to state powers, including the powers to punishment, in exchange for their physical safety and property security would be protected from crime. In Beccaria's assertion,

the purpose of punishment was to achieve deterrence, 'to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise' (Beccaria, 1764, p. xxi). The deterrence philosophy premised that the rational and calculating citizens would not commit crime when punishment would become certain and its severity would just exceed the benefit the offender received from the crime. He argued against the overly severe punishment as a spectacle, which could only produce callousness; and also argued against capital punishment, because no one had ever willingly given up to others the authority to kill oneself in a social contract, and it was against the requirement of the minimum sacrifice of each individual's freedom in a social contract. He advocated that the degree of excess in punishment must be calculated precisely according to the damage caused by crime, in other words, there should be a fixed and certain proportion between crimes and punishments. Every punishment 'must be essentially public, prompt, necessary, the minimum possible in the given circumstances, proportionate to the crimes, and dictated by the laws' (Beccaria, 1764, p. 99). Moreover, the implementation of punishment should follow due process.

Beccaria was not directly concerned with the reform of offenders (Raynor, Robinson, & Campling, 2009, p. 36), and offered little insight into what punishments ought to replace the older forms (Meskell, 1999, p. 845). Bentham, another main contributor of utilitarian philosophy, was committed to design a prison to reflect on his ideas on punishment.

Bentham also interpreted crime as improper calculation. As a hedonistic utilitarian, Bentham (1879, p. 1) expounded that 'nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do'. Since people all tried to seek pleasure and avoid pain, punishment should be the pain which just outweighed the pleasure derived from crime. Like Beccaria, Bentham also held that punishment should not be too harsh. The fundamental axiom of hedonistic utilitarian was the greatest happiness for the greatest number. Too harsh and severe punishment would reduce the greatest happiness, and thus it would be against the axiom. Bentham was similar with Beccaria in dividing prevention of offences into particular prevention and general prevention. Bentham (1830, p. 20) stated that 'with respect to a given individual, the recurrence of an offence may be provided against in three ways: 1. By taking from him the physical power of offending. 2. By taking away the desire of offending. 3. By making him afraid of offending. In the first case, the offender can no more commit the offence; in the second, he no longer desires to commit it; in the third, he may still wish to commit it, but he no longer desires to commit it. In the first case, there is a physical incapacity; in the second, a moral reformation; in the third, there is intimidation or terror of the law. General

prevention is affected by the denunciation of punishment, and by its application, which, according to the common expression, serves for an example. The punishment suffered by the offender presents to everyone an example of what he himself will have to suffer if he is guilty of the same offense'. For Bentham, general prevention ought to be the chief justification and particular prevention ought to be the auxiliary justification. The meaning of particular prevention elaborated by Bentham was quite different from the individual deterrence in the modern sense. It included the meanings of incapacitation, reformation, and individual deterrence (in Bentham's words, intimidation).

After proposing his rationale of punishment, he figured out the idea of Panopticon, which was expected to achieve all the goals he argued in a cost-effective way. A Panopticon was designed to be in the city centre so that it would present to every citizen an example and would deter them from committing crime. It would be a circular building with cells ranged around a central inspection tower. The guards in the tower could see every cell clearly from the tower, but the tower was opaque to the prisoners, so that the prisoners could feel constant surveillance no matter whether the guards were in the tower. This technique made the Panopticon more cost-effective than physical incapacitation in constraining the prisoners. The prisoners would work in their cells for up to sixteen hours a day as machines, and their associations were controlled over. The Panopticon was never built in its strict interpretation, although its elements, especially elements of surveillance, influenced many prison designs (Morris & Rothman, 1997).

2.2. Religiously inclined understanding of reform

Raynor et al. (2009, p. 32) found that the period of 1775 and 1850 witnessed the reform or correction of offenders as a legitimate and practical penal objective. He also noticed that reform should be distinguished from rehabilitation. Although the coupling of reform and rehabilitation was not uncommon, they were two particular styles of correctional intervention and two products or correlates of their particular historical contexts (Raynor et al., 2009, pp. 6-7). He agreed with Hudson's (2003, p. 27) distinctions between reform and rehabilitation: 'my own preference is to use reform for the nineteenth-century development of regimes designed to effect changes in individuals through educative and contemplative techniques, and to use rehabilitation to signify the more individualistic treatment programmes that became established during the twentieth century'. Hudson's definitions implied two contrasts between the two words: reform and rehabilitation employed different methods, and the methods was employed in different historical phase. In the 19th century, reform could logically stand alongside of deterrence, because unlike the treatment model of rehabilitation that did

not regard the criminals as completely rational people, reform operated through the will of the individuals (Hudson, 2003).

The foregoing discourse on Bentham's penal thought shows that the methods of particular prevention espoused by Bentham also included moral reformation. Bentham believed that a disciplinary regime applied to the body would initially become a habit and then gradually be assimilated as moral duties through routinisation and repetition (Ignatieff, 1978; Raynor et al., 2009). Similar with Bentham, some religiously inclined reformers also believed in the corrigibility of criminals; but different with Bentham, they were more focus on religious instruction. They advocated the authorities taking more care of the bodies as well as the souls of prisoners. For them, punishment should no longer be physical suffering as spectacle, but be religious conversion and individual soul isolation (Ignatieff, 1978; Morris & Rothman, 1997; Raynor et al., 2009).

In the spirit of monastery discipline, the religiously inclined reformers in the 18th and the 19th centuries made great efforts towards offender reform. John Howard, the most famous English religiously inclined reformers, proposed the notion of penitentiary discipline. 'His concern was to establish a new organization of the prison, one grounded on principles of rationality, health and a warm sense of religious purpose' (Morris & Rothman, 1997, p. 88). He emphasised the positive function of religion in correcting the morals of offenders and thus advocated a central role for prison chaplains. He believed in the effect of solitude and silence in avoiding moral contamination and promoting reflection and thus proposed solitary or silent incarceration. Echoed with the utilitarianists, he was also convinced of the reformatory effect of enforced labour and thus advocated habits of industry 'in order to correct the faults of prisoners, and make them for the future more useful to society' (Howard, 1780, p. 40).

Howard's important work 'State of the Prisons' was strongly supported by Quakers. Meanwhile, Quakers' propaganda also drew to Howard. Howard 'conceived of a convict's progress of reformation in terms similar to the spiritual awakening of a believer at a Quaker meeting' (Ignatieff, 1978, p. 58).

From the 17th to the 19th century, many Quakers, such as William Penn, John Bellers, and Elizabeth Fry, were very active in advocating establishing prison as the centre of the penal system, especially in the UK and the US. It was acknowledged that the real beginning of prison movement came 'was mainly, but not exclusively, through the efforts of Quakers' (Stanko, Gillespie, & Crews, 2004). For Quakers, criminals were the creation of disordered community. They believed in reform as the only real task of punishment, and tried to proof that not only that religion could reform but that it produced the only true alteration in character (Morris &

Rothman, 1997, pp. 95, 96). The early Quakers believed that reform could be achieved through personal contact to produce a consciousness of true religious principles. They set up committees to produce regular schedules for visiting prisoners, preaching them, and providing them with necessities. Subsequently, Quakers founded the Philadelphia Society for Alleviating the Miseries of Public Prisons in 1787, the first of such societies in the world. This model of society spread to other areas and became the connections between Quakers. Elizabeth Fry, a prestigious English Quaker, created the Association for the Improvement of Women Prisoners in Newgate in 1817. Under the programmes of the Association, 'classification (by character rather than magnitude of offense), inspection, productive labour, education, religion, and general healthfulness stood at the heart of her system' (Cooper, 1981, p. 685). Her association for women prisoners became templates for prison reform and spread to Italy, Russia, the US, and France (Cooper, 1981). Fry also influenced the foundation of the Society for the Improvement of Prison Discipline in 1816 and the Society for the Reformation of Juvenile Offenders in 1818. The societies became connections between English and Philadelphia Quakers (Cooper, 1981). The societies demonstrated a commitment to establish therapeutic prisons, where the prisoners were isolated from the moral depravity in their previous disorganised communities, and indoctrinated the values of religion, hard work, and discipline in the exquisitely designed, purifying, quiet, and orderly institutional community (Ignatieff, 1978; Morris & Rothman, 1997; Petersilia, 1998). The societies were supported by both prominent philanthropists and powerful politicians. They were very instrumental in the UK and the US concerning prison matters. Compared with the early Quakers, the societies focused more attention on the practical arrangements of institutions than the needs of prisoners and made more compromises with utilitarian ideas. For instance, Fry opposed to solitary confinement and recommended hard labour only for the most hardened criminals, but the later Quakers departed from her compassion to some extent. To win over those who felt that the punishment was not terrifying enough to deter crime and the prisoners were excessively coddled, the Society shifted in favour of a regimen of hard labour, seclusion and minimal diet (Cooper, 1981).

2.3. The development of imprisonment as the predominant mode of punishment

2.3.1. The origins of imprisonment

Beccaria's idea had a profound influence on the establishment of modern criminal law with a rigid and specific tariff of punishments. As Foucault (1977) indicated, the classical reformers rested the art of punishment on a whole technology of representation. 'It is the a matter of establishing the representation of pairs of opposing values, of establishing quantitative

difference between the opposing forces, of setting up a complex of obstacle-signs' (Foucault, 1977, p. 104). In the penalties, the link between the idea of crime and the idea of punishment set up by law was reinforced and thus the legible lesson was repeated as often as possible. Those obstacle-signs could prevent both the guilty and the spectators from committing crime by the calculated fear of punishment. To set up a rigid and specific tariff of punishments, imprisonment advocated by Bentham and religiously inclined reformers became the dominant warning signs.

In the early modern Europe, imprisonment was not central to the penal system. The secular prison was employed to confine those who were awaiting for trial or execution of a sentence, or was employed to coerce the debtors (Ignatieff, 1978; Morris & Rothman, 1997; Raynor et al., 2009). The ancient dictum of imprisonment of Rome law was that 'the prison is meant for the detention of men, not their punishment' (Geltner, 2008, p. 45; Morris & Rothman, 1997, p. 21). On rare occasions, imprisonment could be an alternative to capital punishment or fines (Geltner, 2008; Morris & Rothman, 1997); however, 'when used as a punishment, imprisonment was solely retributive and deterrent, had no discernible reformative aspect' (Raynor et al., 2009, p. 34). Brutality and corruption were endemic in prisons (Cooper, 1981; Johnston, 2009). The penal options in preindustrial era primarily ranged from capital punishment, exile, corporal punishment, forms of bondage, public shaming and fines (Hong Lu & Miethe, 2005; Morris & Rothman, 1997; Petersilia, 1998).

Prior to the 16th century, imprisonment was only deployed in ecclesiastical discipline (Geltner, 2008; McConville, 2015; Morris & Rothman, 1997; Raynor et al., 2009). Served as a process of spiritual growth, prison was associated with purgatory in the context of monastery under the canon law (Geltner, 2008; Morris & Rothman, 1997, p. 27). The monastic prison corrected the offender through isolated incarceration, limited access to books, limited conversation with their abbot or some designated elder brother, forced labour, and disciplinary measures including restricted diet and beating with rods (Geltner, 2008; McConville, 2015; Morris & Rothman, 1997). It is recognized that monastic discipline was the prototype of later forms of discipline (Spierenburg, 2007).

In secular justice, penal bondage reflected the renewed interests in changing the bad habits of people. It served as a disciplinary institution for idle or immoral people originally (Ignatieff, 1978; Morris & Rothman, 1997; Spierenburg, 2007). In few cases, imprisonment served the purpose of punishment (Ignatieff, 1978; Spierenburg, 2007). It was not until the 16th century that penal bondages, including the galley sentences, the prison workhouse, and transportation, were used more and more frequently as penal sanctions (McConville, 2015;

Morris & Rothman, 1997; Raynor et al., 2009). 'Penal bondage suggests this period marks a decisive break in penal thought and practice. A sentence of hard labour already had a double meaning, promising both suffering and reform' (Morris & Rothman, 1997, p. 84).

The end of the 18th century and the whole 19th century witnessed the decisive transformations in the strategy of punishment in the West. The punishments directed at the mind finally replaced a cluster of punishments directed at the body (Ignatieff, 1978). Influenced by the methods of discipline proposed by Bentham and religiously inclined reformer, the US set out models of prison system. Two prominent prison systems were established: The system of separate confinement came to be called the Pennsylvania System or Separate System; while a rival system, the system of working in silence was known as the Auburn or Silent system (Johnston, 2009). Both systems emphasised isolation, obedience, and a steady routine of labour; both believed that the routines imposed on an inmate would transfer him or her into a law-abiding citizen (Morris & Rothman, 1997, p. 117). The two systems spread all over the US and abroad. In the US, the Auburn system became the more popular, whereas the Europeans favoured the Pennsylvania system (Smith, 2006). Between 1830 and 1870, several hundred European jails and prisons based on the Pennsylvania system were constructed or modernized in European countries, including Belgium, Denmark, France, Germany, Holland, Norway, Portugal, Sweden, and the UK (Smith, 2006).

Nonetheless, the efficacy of the two models of prison was called into question in the middle of the 19th century in both America and Europe. Firstly, the effects of solitary confinement on prisoner were questioned, when reports of insanity, suicide, and health problems among prisoner under solitary confinement began to arise (Henriques, 1972; Smith, 2006). Moreover, the criminals kept increasing, but the budgets on prison were limited. These problems led to prisons-overcrowding and made solitary confinement and silence impossible (Morris & Rothman, 1997). Secondly, the rehabilitative value of labour was doubted as well. The prisoners were supposed to be reformed through being fully occupied with labour under harsh discipline and strict surveillance. However, convict labour soon became less of a tool of improvement than a work system oriented to markets (Meskell, 1999; Morris & Rothman, 1997). The work system was not only protested by workers and manufacturers because it denied employment to workers in free society and brought unfair competition, but also criticised by academics and politicians because it was detrimental to the reform goal (Greenberg, 1985; Meskell, 1999; Morris & Rothman, 1997).

In the 20th century, the prison system had changed in many aspects: the prisoners could have relatively free association with each other; their work was no longer that arduous and

their food was no longer that atrocious; they could have access to books and social media and several forms of recreation (Morris & Rothman, 1997). As Durkheim expounded that, 'deprivations of liberty, and of liberty alone, varying in time according to the seriousness of the crime, tend to become more and more the normal means of social control' (Durkheim, 1973, p. 114).

2.3.2. Disillusionment with imprisonment

However, the image of prison has gradually become not that positive as Bentham and religiously inclined reformers supposed since the late 19th century. There was considerable disenchantment with the effects of prison on prisoners in both Europe and America (Harris, Hough, Hamai, Vile, & Zvekic, 1997; Morris & Rothman, 1997; Petersilia, 1998). Crime statistics in many countries showed that the changes in punishment policies, which were advocated by the classical school, did not result in obvious reduction in crime (Burke, 2013). The prison system was intended to prevent the criminals from committing crimes again and to transfer them into decent citizens, but insulating the prisoners from the normal society might run counter to the goal. First, there was increasing perceptions of the contaminating potential of imprisonment. The prisons incarcerated habitual criminals as well as first offenders and petty offenders. The sentence term of criminals who committed severe crime were longer than that of first offenders and petty offenders. As a result, 'the prison became the holding ground for the toughest of criminals' (Morris & Rothman, 1997, p. 125), and those toughest criminals were less malleable than the prison designers had anticipated (Petersilia, 1998). Furthermore, surrounded by the toughest criminals, the comparatively innocent first offenders and petty offenders might be permanently contaminated rather than be reformed. It was pervasively feared that 'the criminals could only acquire in association increased proficiency in fighting, picking locks or imposing the tender mercies of mankind; but no sooner was the discipline brought into operation, than this difficult condition had to be dealt with' (Jebb, 1844, p. 8). Second, when the separation among prisoners broke down, the opportunities for prisoner unrest increased. With relatively more time and room at their own disposal, the prisoners seemed to have more needs to adjust their lives to prison subcultures. The prison subcultures tended to use violence to solve frustrations and conflicts (Bowker, 1985). The prison environment exposed the weak and unpopular to bullying and extortion, and prompted wardens and guards to become harsh in their discipline of the prisoners (Morris & Rothman, 1997). The use of excessive violence by correctional officials existed and persisted (Gross, 2008; Vaughan, 2000). Consequently, the prison system was characterised by brutality and turmoil. Moreover, the general public were more, rather than less anxious about the prisoners

after they became apart from the normal society (Morris & Rothman, 1997; Petersilia, 1998). 'Thus, the prison, far from curing crime, created a uniform criminality whose taint clung to anyone who had been confined. Prisons were supposed to civilize their occupants, but it was difficult for most in society to admit that the institution or its residents belonged to the civilized world' (Morris & Rothman, 1997, p. 108). The prisoners became difficult to reintegrate the society after they were released.

3. Neo-classicism, positivism and the initial development of community sanctions

3.1. Neo-classicism: a compromise between rational choice and determinism

The doctrines of classical school were doubted since the effects of the punishment policies they advocated were overrated. It is recognised that the central problem of classicism is its ignorance of individual differences of criminals (Burke, 2013; Taylor, Walton, & Young, 2013; Walklate, 2007). Classicism insisted the doctrine of free will, accommodated little room for judicial discretion, and required strict proportionality principle between crimes and penal measures. These requirements were impractical, and could engender actual inequality. The neo-classicists still deemed rational choice as the foundation of human motivations for sane adults. However, they found some criminals, notably the children, the insane, and the feeble-minded, were less capable of rational choice and thus were less responsible for their crimes. Neo-classicism allowed considerations of individual characteristics as mitigating circumstances.

It was the neo-classical lines that criminal justice systems were moving towards in the 19th century (Cavadino & Dignan, 2007). Burke (2013); Taylor et al. (2013) and Walklate (2007) found that these revisions of the penal code permitted non-legal experts including doctors, psychiatrists and, later, social workers, to identify the determinants of criminal actions and these determinants could be the basis of the courts for exemptions and mitigations. The mitigations included suspended sentence. According to Radzinowicz (1966), the rigidity of the classical school made it almost impossible to develop constructive and imaginative penal measures. The neo-classicists recognised the sentence would have different effects on different offenders, and imprisonment could affect the future propensity of some offenders to commit crime. Therefore, 'the criminal had to be punished in an environment conducive to his making the correct moral decisions' (Taylor et al., 2013, p. 9).

3.2. Positivism: an individualised treatment model of rehabilitation

The neo-classicalists held that the extent to which the offenders were responsible for their criminal action should be different. Meanwhile, based on scientific study of criminal behaviours, positivism denied the classical school's doctrine of free will.

The positivists, who tried to offer scientific explanations for the causes of crime, provided theory supports for an individualised treatment model of rehabilitation. They 'absolved the prison of responsibility for prisoners' (Morris & Rothman, 1997, p. 210). They advocated scientific and purposeful understanding of criminal behaviours. For the positivists, an explanation of human behaviour was an explanation of crime. Positivism was the doctrine that the methods of natural science provided the only means of obtaining knowledge of human nature and society. In a word, knowledge had to be constructed out of evidence obtained from empirical data (Burke, 2013, p. 64). There were biological, psychological and sociological determinants of criminal behaviours. The biological positivists were influenced by eugenic discourses. A person's level of moral responsibility might vary according to his or her state of health, pathology, and mental disorder (Raynor & Vanstone, 2002). The criminals were viewed as defective mechanisms, who had little or even no control of their own behaviours (Burke, 2013; Jeffery, 1959). If crime was innate and untreatable, the criminals would be incorrigible. However, the deterministic edge was softened later, because 'closer investigation of individual cases nevertheless demonstrates the social and environmental factors have been equally important, and it is important to note that most of the researchers, from Lombroso on onward, came to increasingly recognised that reality' (Burke, 2013, p. 88). The new associationists psychology illustrated that 'the crime career could be initiated by bad social associations and economic misfortune' (Ignatieff, 1978, p. 210). When heredity and environment were given equal status, crime was made an analogy with curable disease. Since the symptoms of criminals were different from each other, no simple panacea for crimes existed and imprisonment as a general prescription could not fit all cases. The positivists advocated the individualised treatment rather than punishment. For positivists, 'punishment should be replaced by a scientific treatment of criminals calculated to protect society' (Jeffery, 1959, p. 4).

The individualised treatment required a maximum of flexibility and discretion for courts and penal administrators to use penal measures that would fit individuals to enter normal civil life. Medical, psychological, and social sciences were supplemented to legal arguments in deciding upon dispositions (Messinger & Weston, 1987, p. 793). It completely overturned the

orthodoxy of classical school that a maximum of objectivity and certainty of sentencing arrangements was required to legislate against the abuse of state power.

3.3. The initial development of community sanctions

3.3.1. *The historical roots of probation and suspended sentence*

Influenced by neo-classicism and positivism, the severity of crime was no longer the only dimension to decide the seriousness of punishment. The criminal's individual personality and circumstance also became critical dimensions. The system of assessing and classifying offenders emerged in both countries with common-law traditions and countries with civil-law traditions. Some offenders were selected as those who were eligible for a relatively lenient community sanction rather than imprisonment. The community sanction was probation in countries with common-law traditions and suspended sentence in countries with civil-law traditions.

3.3.1.1. Probation in the common law tradition

The term probation came from the Latin term *probare*, meaning 'to prove' (Stohr & Walsh, 2015). The origins of probation in the common law tradition derived from the recognizance system, which allowed deferring trial and releasing offenders on condition of good behaviour (Harris et al., 1997; Lindner, 2007). What made it different from current probation was that the recognizance system in the past did not involve any official supervision and assistance.

Like prison, probation service in the modern sense was also initiated by religiously inclined reformers. It was first conducted by individuals rather than by any official bodies. It is widely acknowledged that John Augustus is the father of probation. He was a shoemaker in Massachusetts in the US and was unattached to any official agency. Out of religious and humanitarian considerations, he had been voluntary to bail low-risk and reclaimable offenders out and then to supervise and to help them since 1841 (Harris et al., 1997; Lindner & Jay, 2006). In England, Matthew Davenport Hill, a recorder of Birmingham between 1839 and 1865, was also credited for introducing some components of modern probation. He released juvenile offenders who committed petty offences with the guardianship in the community. Special court-appointed police officers would enquire the guardians periodically to make records of the offenders' behaviours (Harris et al., 1997; Lindner, 2007). Massachusetts, the home of probation in the US, also experienced services resembling probation but only for children in 1869; subsequently, similar juvenile probation systems spread to other states (Hurl & Tucker, 1997; Petersilia, 1997). The probation system for adults was generally accepted as beginning

in 1876, when Church of England Temperance Society maintained an active presence in some city police courts and offered help to alcoholic offenders (Harris et al., 1997; Raynor, 2012a). In following decades, the number of missionaries in the Church of England Temperance Society which presented in city police courts kept increasing (Timasheff, 1941).

Later, the positions of those reformers and police court missionaries were replaced by probation officers (Raynor & Robinson, 2009; Raynor & Vanstone, 2002). Massachusetts enacted the first Probation Act in 1878. Under the Probation Act, the mayor of Boston should appoint a probation officer as a part of police force within the county of Suffolk to investigate the cases of crimes and misdemeanors, to recommend the courts to place the offenders who were expected to be reformed on probation, to visit the offenders placed on probation, to provide assistance and encouragement for the offenders, and to report to the chief of police for the approval of re-arrests of any offenders offended again (Grinnell, 1941; McCarthy et al., 2001; Timasheff, 1941). The statute extended right to appoint probation officers from Suffolk to all the cities and towns in the state in 1880. Subsequently, the power of appointing probation officers was changed into a duty and the duty was transformed from the municipality to the all the lower courts. The Superior Court was also authorised to appoint their own probation officers in 1898 (Grinnell, 1941; Harris et al., 1997; Timasheff, 1941). The first English act on probation titled 'an act to amend the law relating to summary jurisdiction of magistrates' was passed in 1879. Even though only summary offences were within the scope of the act, under the common-law practice, judges could be more flexible in applying probation (Timasheff, 1941). Probation was formalised into the Probation of Offender Act in England and Wales in 1907 (Raynor, 2012a). Although bills which attempted to adapt the American pattern of supervising probationers by officers existed (Timasheff, 1941), after the 1907 Act, 'several more decades were to elapse before probation service everywhere in Britain were provided by salaried public officials rather than by a mixed workforce of professionals and missionaries' (Raynor, 2012a, p. 931).

3.3.1.2. Suspended sentence in the civil law tradition

Suspended sentence, or *sursis*, was first drafted by Belgian Minister of Justice, Jules Lejeune, and introduced into the Belgian Acts of 1888. Subsequently, it was also introduced into the French Acts of 1891. The civil-law tradition had no suspension of imposition of sentence in its penal system. Like probation in common law countries, the doubt about the usefulness of imprisonment and the quest of effective methods of preventing recidivism also served as a background of the emergence of suspended sentence. However, unlike probation, the suspension was the execution of sentence rather than the pronouncement of sentence. The

actual execution of the penalty could be suppressed, but the declaration of the penalty was necessary. The civil-law tradition held that an offence had been committed a penalty was due (Ancel, 1971, p. 12). In addition, the suspension itself rather than guidance and supervision constituted the essential feature of suspended sentence. Around the turn of the century, simple suspended sentence without supervision was adopted by many continental European countries (Ancel, 1971; Harris et al., 1997; Vanstone, 2008).

According to Enrico Ferri, suspended sentence remained somewhere between the classicism and the positivism (Ancel, 1971, p. 18). The suspended sentence 'marked an important and humane innovation, for the first time weakening, if not breaking the iron equation of crime and punishment affirmed by the classical codes' (Ancel, 1971, p. vii). The judge would be able to consider not only the severity of offence, but also the moral character of the offender in deciding punishment. Suspended sentence was viewed as 'a special treatment for the man who has not previously be prosecuted and whose moral character, despite his offence, has remained sufficiently intact for society to have nothing to fear from his liberty' (Ancel, 1971, p. 18). However, suspended sentence was not as individualised as the treatment under probation in common law, although suspended sentence was 'the highest degree of individualisation' in countries with civil-law traditions (Ancel, 1971, p. 12). The offenders under suspended sentence were regarded as abstract, average and depersonalised beings (Ancel, 1971, p. 18). They were respected to reform by themselves without assistance. However, the system was not meant to leave the offenders to their own devices. Since the offenders were conceived as rational beings with free choice, the intimidation of the consequences of further offence alone would prevent them from re-offending (Ancel, 1971; Harris et al., 1997).

3.3.2. The widespread application of community sanctions

3.3.2.1. The new penal complex

Probation and suspended sentence were regarded as the exercise of mercy in their initial development. As Raynor and Robinson (2009, p. 6) indicated, mercy assumed that severity was the norm, since mercy did not consisted in exacting the usual rigorous penalty.

Garland (1985) conceived that, a new penal complex, which was described as 'penal-welfare complex', emerged in the UK between 1895 and 1914. His stance echoed with Rothman's (1980) analysis of the progressive era of criminal justice between 1900 and 1920 in the US. During this period, the UK and the US set out to revise the contents of imprisonment, widely implement probation, parole and other new community sanctions for adult offenders,

established juvenile courts and borstals for juvenile delinquents, and founded reformatories for the inebriate and the feeble-minded (Garland, 1985; Rothman, 1980, pp. 143-144). The new penal complex changed the contours of the penal system: 'from a central feature, imprisonment was to become one among many specialised institutional programmes, and alternatives to institutionalization (probation, after-care) were to be added or enlarged' (Messinger & Weston, 1987, p. 792).

The punishment goal was no longer confined to deterrence, but was also committed to rehabilitation (Garland, 1985, p. 234; Rothman, 1980, p. 59). Since the punishment goal was with such a humanitarian quality, it was proper to grant vast authority to the state (Rothman, 1980, p. 60). The state assumed the responsibility for reform and applied curative knowledge and techniques (Raynor & Vanstone, 2002, p. 19). The relationship between offender and state was no longer to be an instance in a contractual obligation to punish as the classicists advocated, but a positive attempt to reform and assist for the benefit of all (Messinger & Weston, 1987, p. 793).

As the main source for the emergence of the individualised treatment model of rehabilitation, probation service in the common-law tradition became a process of therapeutic work in which the offender's needs and motivations could be revealed through a relationship with a probation officer (Raynor, 2012a, p. 931). There was a belief that 'with proper supervision by a state official who could be both caring and stern when necessary, many offenders might be taught to confirm within the confines of their local environment' (Petersilia, 1998, p. 14).

Garland (1985) and Rothman (1980) considered that this distinctive transformation influenced and survived into the mid-1960s in the whole of the industrialised Western world. The penal system in the West trended towards reducing imprisonment, widening various community sanctions, and expanding social control in the name of rehabilitation. Countries with civil-law traditions were attracted by the treatment ideas in the probation system and countries with common-law traditions were favorable to the diversification strategy implied in the suspended sentence. Most western countries also introduced new measures so as to make it possible for courts to choose from amongst several forms of sanctions that suited to the individual case (Rentzmann & Robert, 1986).

3.3.2.2. The introduction of probation in countries with civil-law tradition

The strengths of personal care and supervision in the probation system were gradually realised by continental countries. Many elements of probation were incorporated into the

suspended sentence system in continental countries after the first world war (Grünhut, 1958). Influenced by the treatment idea of probation in common-law tradition, the conception of suspended sentence was changing. In the original conception, suspended sentence was a penalty which consisted of the threat of execution and the admonition which was a moral punishment; but later, the conception was that, 'none of the consequences of the sentence should take effect' because 'the idea of a fresh start and another chance for the convicted man' (Ancel, 1971, p. 34). The strictness of the pure state of suspended sentence was tempered, and it began to combine with supervision and certain conditions (Ancel, 1971; Grünhut, 1958; Harris et al., 1997).

At the same time, suspended sentence also became a channel for the introduction of probation in continental countries (Grünhut, 1958). Many civil-law countries established their new regime of probation. The coexistence of suspending imposition of the sentence and suspending execution of the sentence was introduced into many continental countries (Ancel, 1971; Harris et al., 1997). Suspended sentence and probation became two differentiated systems with their respective roles and features, which provided judges with more flexible range of sanctions at their disposals (Ancel, 1971; Grünhut, 1958; Harris et al., 1997). At the European Seminar on Probation, organised by the UN in London in 1952, promoting the use of probation for adult offenders was unanimously accepted (Ancel, 1971; Harris et al., 1997; MacRae, 1955). *The Practical Results and Financial Aspects of Adult Probation in Selected Countries* initiated by the UN in 1954 concluded that adult probation had been acknowledged, at least in principles, as a constructive method of treatment (MacRae, 1955).

3.3.2.3. The introduction of suspended sentence in countries with common-law tradition

In common-law countries, suspended sentence was introduced as a sanction somewhere in between imprisonment and other non-custodial sentences to reduce prison population (A. Bottoms, 1981; Brignell & Poletti, 2003; Tait, 1995). In the US, although probation was just in the form of suspended imposition of sentence initially, probation was also used in the form of suspended execution of sentence at the end of the 19th century. 'Some courts, particularly those up-state, understood the term suspended sentence as an authorization to suspend the execution as well as the imposition of sentence' (Timasheff, 1941, p. 20). The practice of suspending sentence was known as 'laying the case on file', 'placing on probation after verdict or plea of guilty but before sentence', or 'sentencing deferred until further order of the court', in the name of the precedent of judicial reprieves at common law (Chappell, 1939; Grinnell, 1941). However, the decision of the Supreme Court in *United State v. Killets* ([1916] 242 U.S.

27) held that it was inconsistent with the Constitution to suspend sentence indefinitely, because the judicial power of suspending sentence indefinitely without express statutory authority interfered both the legislative and executive authorities fixed by the Constitution. It was also pointed out that legislature could devise a remedy for the situation. This decision led to the passing of the Federal Probation Act of 1925. The Act allowed courts to suspend the imposition or execution of sentence.

In other countries with common-law traditions, the suspended execution of imprisonment did not become available until the 1960s. It was introduced into English law by the Criminal Justice Act 1967. Subsequently, the suspended sentence was also introduced to other countries with common-law traditions (Brignell & Poletti, 2003; Tait, 1995). The main reason for the introduction of suspended sentence was to divert those served short-term imprisonments (A. Bottoms, 1979, 1981; Tait, 1995). The suspended sentence could be used where immediate imprisonment would otherwise result in (A. Bottoms, 1981). Roy Jenkins, the Home Secretary in 1976, said that 'if no further offence is committed, the deterrent has worked, the prison space has been saved and the offender has not been made used to prison condition' (A. Bottoms, 1981, p. 20). In *R. v. O'Keefe* ([1969] 2 Q.B. 29), the Court of Appeal held that 'before a suspended sentence under Part II of the Criminal Justice Act, 1967, is passed a court must go through the process of eliminating other possible courses such as absolute discharge, conditional discharge, probation order and fine, decide on imprisonment and then decide whether immediate imprisonment is required or whether a suspended sentence can be given'. The suspended sentence also had its psychological attractions to judges in that 'they can feel they are being punitive and passing a severe sentence, while at the same time allowing themselves the warmth of recognising the humanity of their leniency' (A. Bottoms, 1981, p. 20).

3.3.2.4. The development of new community sanctions

It was recognised that various countries in western Europe started to lay down proper new alternatives to custodial sentences in their penal legislation in the early 1970s (Rentzmann & Robert, 1986; Tak, 1986).

Tak (1986, p. 3) found that the Report of the Advisory Council on the Penal System on Non-custodial and Semi-custodial Penalties (the Report) and the Resolution (76)10 'On Certain Alternative Penal Measures to Imprisonment' issued by the CoE gave a substantial boost to the development of alternative sanctions. The Advisory Council on the Penal System (1970, p. 196) considered that 'new or modified forms of non-custodial treatment are required to

enable some offenders dealt with non-custodially to be given a more appropriate sentence'. The Resolution (76)10 first drew up an inventory of alternative penal measures to imprisonment in member states. The Resolution not only recommended promoting alternative sanctions and measures which had existed for a long time (including suspended sentences and probation), but also advocated introducing new alternatives. As to new measures, penal measures which simply marked a finding of guilt but imposed no substantive penalty on the offender, deferment of sentence, community service, and semi-detention were noted in particular. The Resolution (76)10 changed the trend of alternatives to imprisonment. Before the publication of the Resolution, member states made great efforts to develop traditional alternatives; yet after that, they committed to evaluate the new alternatives that focus on rehabilitative elements (Rentzmann & Robert, 1986, p. 32).

Notably, most countries in Western Europe applied community service as a new alternative on a large scale in a short period, even though their application varied enormously (Rentzmann & Robert, 1986; Tak, 1986). Under the Resolution (76)10, both community and offender were the beneficiaries of community service. Community service was deemed to have the special advantages of giving offender an opportunity to make amends and encouraging community to actively rehabilitate offender.²⁴² According to Rentzmann and Robert (1986), the great originality of community service was its involvement of community in both executing sentence and rehabilitating offender. However, Tak (1986, p. 3) argued it was pragmatic considerations rather than theoretical advantages that tipped the balance of community service. The financial issues and the capacity problems in the prison system made governments search for new alternatives and community service was an appropriate option at the middle punishment spectrum.

4. Modern retributivism and the development of intermediate sanctions

4.1. The back to a justice deserts model movement

4.1.1. The fall of the treatment model of rehabilitation

After flourishing, the treatment model of rehabilitation reached a low point in the 1970s (F. A. Allen, 1981). The American Friends Service Committee (1971)'s *Struggle for Justice* is recognised to be the first book that provided theoretical critique on the treatment model of rehabilitation and made lengthy statement of the back to a justice deserts model (A. Bottoms & McWilliams, 1979; Cavadino & Dignan, 2007). The American Friends Service Committee

²⁴² Rule 2c, Resolution (76)10.

(1971, p. 12) criticised that the treatment model of rehabilitation was 'theoretically faulty, systematically discriminatory in administration, and inconsistent with some of our basic concepts of justice'. The theoretical fault and the injustice problems of the treatment model of rehabilitation were also emphasised by the subsequent scholars who advocated a back to justice deserts model (A. Bottoms & McWilliams, 1979; Von Hirsch, 1993; Von Hirsch & Gaylin, 1976).

Ethically, the treatment model was under attack because of the disease analogy. The disease analogy deemed offenders as less than morally rational citizens, who were predestined to be offenders, due to the factors internal or external to them. The modern retributivists criticised the disease analogy, because it objectified offenders and denied their moral integrity, which meant a diminution of respect for the human dignity of offenders (A. Bottoms & McWilliams, 1979; Duff, 1986; Von Hirsch & Gaylin, 1976).

The treatment model was also questioned because it disguised the coercive manipulation of offenders in the name of treatment. It was recognised that intervention must lean towards a degree of coercion to make change (A. Bottoms & McWilliams, 1979; C. S. Lewis, 1972). The coercive power under the disguise of treatment raised the problem of injustice (A. Bottoms & McWilliams, 1979; Celnick, 1991). The executive agencies could intervene an offender's life additional to what was justified by his or her offence, and extend the duration of penal control through an additional period of treatment. Although the intervention was supposedly for the offender's good, it ignored the offender's view and experience about the intervention (A. Bottoms & McWilliams, 1979; Celnick, 1991; Hudson, 2003). The intervention might not be defined as punishment at all, but could be experienced by the offender as very intrusive. As Hudson (2003, p. 30) pointed out, 'such practices are more properly deterrent than rehabilitative: compliance is being induced through fear of the sentence being longer, fear of being subject to even more invasive therapies, and fear of the length or content of punishment'. The treatment model advocated professionalising criminal justice. However, professionalisation of criminal justice resulted in the extensive power of justice institutions, the capricious discretion of administrators and experts, the impairment of the legal rights of offenders, and the decrease of public review.

Empirically, the studies on the effectiveness of the treatment model produced discouraging results. Martinson's (1974) paper titled 'what works? questions and answers about prison reform' became a watershed for the treatment idea. The research team of the New York State Governor's Special Committee on Criminal Offender undertook a comprehensive survey of 231 studies on what was known about rehabilitation between 1945 and 1967 and concluded

that 'with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effects on recidivism' (Martinson, 1974). Other studies reinforced the 'nothing works' image of the treatment model. The IMPACT study (Intensive Matched Probation After-Care and Treatment) randomly allocated experimental and control groups to the probationers supervised on intensive caseloads and the probationers supervised on normal caseloads between 1971 and 1972, and demonstrated small non-significant differences in reconviction rates between the different groups (Folkard, Smith, Her Majesty's Stationery, & United, 1976). A study on sentencing policy reinforced 'nothing works' in the rehabilitation of offender (Brody, 1976). The study showed that 'longer sentences are no more effective than short sentences, different types of institutions work about equally as well, probationers on the whole do no better than if they were sent to prison, and rehabilitation programmes—whether involving psychiatric treatment, counseling, casework or intensive contact and special attention, in custodial or non-custodial settings—have no predictably beneficial effects' (Brody, 1976, p. 37). Raynor (2004, p. 310) revealed that 'such conclusions, though in some cases exaggerated, simplified or simply not a fully accurate summary of the research they reviewed, nevertheless resulted in a belief that further research on the effectiveness of probation would not be a good investment'.

4.1.2. The rise of the modern retributivism

As mentioned before, the desire to do good underlying rehabilitation could lead to an escalation of the severity of punishments. Von Hirsch and Gaylin (1976) argued that 'once criminal sanctions are given a semblance of beneficence, they have a tendency to escalate: if, in punishing, one is (supposedly) doing good, why not do more' (Von Hirsch & Gaylin, 1976, p. 121). This problem was not confined to rehabilitation. Other utilitarian theories of punishment, including deterrence and incapacitation, also had the potential to lead to more severe sentencing for less serious offences (Hudson, 2003). Compared with the utilitarian theories, retribution used guilty in and of itself rather than other considerations to justify punishment. It offered more secure protection from punishment for the innocent (Hudson, 2003). After the fall of rehabilitation, many academics argued for getting back to a just deserts model that looked backward to assess what the offence deserved, rather than maintaining the individualised treatment that looked forward to unreliably predict the future behaviours (A. Bottoms & McWilliams, 1979; Hood, 1974; Raynor, 2012a; Raynor & Robinson, 2009; Von Hirsch & Gaylin, 1976).

The modern retributivists reasserted the principle of due process and proportionality advocated by the classicists. However, the proportionality principle had different meanings

for deterrence theory and retribution theory: for deterrence theory, punishments should be proportionate to what was required to deter potential criminals; but for retribution theory, proportionality was 'a relation between certain aspects of respectively the punishment and the crime, namely, the severity of the former and the seriousness of the latter' (Ryberg, 2007, p. 12). 'The proportionality principle can be put as the view that a criminal should be punished such that the severity of the punishment is proportionate to the seriousness of the crime of, oppositely, that it is morally prohibited not to treat criminals punitively in a way that is warranted by the gravity of their conduct' (Ryberg, 2007, p. 12). The retributivists focused on the moral justification of punishment. Censure was deemed to be the fundamental function of punishment. The pronouncement of a sentence was to denounce the crime, and the degree of severity of the sentence depended on the degree of disapproval of the crime.

Like classicists, retributivists also employed social contract as the political basis of punishment theory. Kant (1797), the forerunner of retributivism in the 18th century, maintained that the moral law should not be based on any utilitarian grounds. For Kant (1797), every moral person was a rational being under moral law, and thus the principles applicable to all members of society should base on rationality. The only universal principle of right was the freedom of choice of each that coexisted with everyone's freedom. It was also the basis for principles underlying the state. The other important principle that based on the freedom principle was the equality of each with every other as a subject. Regarding what kind and what degree of punishment that public legal justice should adopt, 'nor other than the principle of equality should be the principle and standard' (Kant, 1797, p. 101). In the 1970s, Rawls's (2009) modern version of social contract theory became a firmer basis of equal treatment in criminal justice. Rawls (2009) held that social institution should be assessed by the rule that people picked when they were in the hypothetical position of choice behind a veil of ignorance. The rational individuals behind the veil of ignorance would not allow disadvantaging one for the good of the many, because he could be the disadvantaged. The rational individuals would prefer to distribute the advantage and the disadvantage as fair as possible. Therefore, fairness rather than any utilitarian considerations should be the basis of social institutions. For many modern retributivists, punishment was the moral duty of the authority to inflict evil on the criminal and restore the equilibrium, so that the criminal ceased to gain unfair advantage over the non-criminal fellows (Murphy, 1979; Von Hirsch & Gaylin, 1976; Wood, 1938).

4.2. The development of intermediate sanctions

The modern retributivists argued for seriousness of offence as the overriding ground for arraying punishment scale. They held that retribution should set the limits on punishment.

Within the limits, they also accepted utilitarian considerations, such as rehabilitation, but these grounds should not materially change the severity of the punishment (Morris, 1992; Von Hirsch, Committee for the Study of Incarceration, & Gaylin, 1976). The modern retributivism typically combined with utilitarianism in a hybrid justification for punishment (Cavadino & Dignan, 2007; Hudson, 2003). All the punishments, including community sanctions, were deliberate infliction of unpleasantness above all (Von Hirsch & Gaylin, 1976). In the punishment scale, community sanctions should locate between imprisonment and financial penalties. For the offenders whose committed offenses of medium-level seriousness, A. Bottoms and McWilliams (1979) believed that their social needs played a great part in deciding custodial or non-custodial sentences for offences in the heyday of rehabilitation. 'The logic within the medium range of offence seriousness is that social and treatment needs led to non-custodial possibilities, but ordinary offenders with few social needs went to prison' (A. Bottoms & McWilliams, 1979, p. 181). However, after the assumptions of treatment effect were abandoned, this logic also lost plausibility. A. Bottoms and McWilliams (1979) advocated imposing probation services 'irrespective of offenders' suitability for treatment and irrespective of social need' (A. Bottoms & McWilliams, 1979, p. 182). Von Hirsch and Gaylin (1976) found that intermittent confinement particularly suited to intermediate-level offences. Intermittent confinement 'would require the offender to attend a state-run (or a state-designated) facility at specified times outside his regular working hours' (Von Hirsch & Gaylin, 1976, p. 119). The deprivation of valued leisure time and the interruption of regular social life under intermittent confinement were unpleasant. The penalty could be made commensurate with a wide variety of middle-range offences because the amounts of time could be varied in the prescription of sentences and loss of time was equal for everyone (Von Hirsch & Gaylin, 1976, p. 120). For the same token, Morris and Tonry (1991, p. 5) advocated imposing intensive probation programmes more extensively and determinedly, and enriching the range of punishments to suit to the diversity of crime and criminals.

In most continental countries, penal policies and practices remained considerably neo-classical even in the heyday of rehabilitation (Bauwens, 2011; Fragoso, 1968). As Fragoso (1968, p. 37) commented, 'continental criminal law theory has always considered criminal law as essentially based on ethical principles, in particular on the concept of retributive justice'. Meanwhile, Fragoso (1968, p. 40) also found that the theory of retribution had made many concessions. It was generally accepted that sentences should not be determined merely by offender's guilt and his or her legal responsibility. All modern penal codes attempted to serve rehabilitation, individualise punishment and develop community sanctions including probation, parole, suspended sentences, and intermediate sentences (Fragoso, 1968).

However, in common with the modern retributivists, Frago (1968, p. 40) believed that retributive principles should set limits on punishments: the social condemnation expressed in punishment, and the concern with human dignity embodied in punishment, should not be changed by rehabilitation.

Justice deserts as a generalised policy goal was also emphasised in countries with common-law traditions in the 1980s. Community sanctions were less described as 'alternatives to imprisonment', which implied that community sanctions and prison were in competitive relationship. The competitive relationship was replaced by a cooperative one: community sanctions and prison were targeting at different levels of seriousness (Raynor, 2012a, p. 935). In the UK, community penalties became parts of sentencing tariff rather than alternatives to custody. The UK Home Office (1990) stated that community sentence would be imposed if the offence was serious enough, but not so serious that only a custodial sentence could be justified. The 1991 Criminal Justice Act stipulated that the restrictions on liberty imposed by a community order or community orders shall be commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it. In the North America, intermediate sanctions became a new generation of community corrections. Intermediate punishments referred to penal options that in severity fall between traditional custody and probation. Intermediate sanctions emphasised closer monitoring and supervision than routine probation. They were considered to be intermediate because they were seen as more punitive than straight probation but less punitive than custody (Stohr & Walsh, 2015). These new generation of sanctions were called for an increased use as strategies of penal reform throughout the US, and to a much lesser extent, within Canada (Gendreau, Goggin, Cullen, & Andrews, 2000; Marinos, 1998). A number of innovative alternative sentences were proliferated, such as intensive supervision, intermittent confinement²⁴³, boot camps, home arrest, day reporting center, community service, victim-offender reconciliation, and electronic monitoring (Lilly & Ball, 1986; Morris & Tonry, 1991). The use of intermediate punishments provided a more graduated punishment system with a wider range of punishments in harshness than the twofold dichotomy of custody and probation, and therefore facilitate proportionality in punishment.

²⁴³ Intermittent confinement as a sentencing option under the guidelines manual of sentencing commission in the US is different from intermittent confinement in Von Hirsch and Gaylin (1976)'s book. Intermittent confinement as a sentencing option means remaining in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totalling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release. See 18 U.S.C. § 3563(b) (10).

5. Community sanctions under the new penal trends and the new rehabilitationism

5.1. New penal trends

It has been noticed that two penal trends have developed side by side in many Western countries since the 1980s. One penal trend is punitiveness, and the other is managerialism (A. Bottoms, Clarkson, & Morgan, 1995; Cavadino & Dignan, 2007; Matthews, 2005).

5.1.1. Punitiveness

Although the academics who advocated just deserts expected that the harshness of punishment would be mitigated, the general penal trend is towards increased punitiveness in Western countries, in particular, most of the main English-speaking countries (Cesaroni & Doob, 2003; Garland, 2000, 2001; Pratt, Brown, Brown, Wallsworth, & Morrison, 2005). The rhetoric of just deserts gives way to expressivity, punitiveness, victim-centredness, and public protection strategies (Cesaroni & Doob, 2003, p. 435; Raynor et al., 2009, p. 85). The new penal strategy prefers a harsh interpretation of just deserts, advocates more severe fixed-term sentences punishments, and also endorses deterrence and incapacitation (Cavadino & Dignan, 2007, pp. 54,56). One common explanation of the new penal strategy often points to the political influence of hard-line officials and legislatures (Garland, 2000, 2001; Raynor & Vanstone, 2002; Robinson & Crow, 2009). As Garland (2001, p. 74) comments, 'over time, the liberal concern with just deserts, proportionality and minimizing penal coercion gave way to more hardline policies of deterrence, predictive restraint and incapacitation, and eventually to expressive, exemplary sentencing and mass imprisonment'. Politicians adopt hard-line policies because they believe that punitiveness can reduce crime and strengthen moral condemnation towards certain crime. Moreover, hard-line policies appeal to a particular electoral constituency (A. Bottoms et al., 1995). Garland (2000) suggests that the middle-class experience of crime is transformed by the high crime rates of the 1960s. The social distance between the middle-classes and crime is greatly diminished, and the posture of understanding offenders gives way to condemning them (Garland, 2000, pp. 359,368). The adoption of a populist punitive stance satisfies the sentiments of the middle-class towards crime (Garland, 1997, 2000).

However, the impact of penal trend is very uneven in different Western countries. Pratt et al. (2005) find that this penal trend particularly affects the penal terrain across the US, most of the English-speaking countries to a degree, and to a very limited extent other European countries. There are many counter-examples that do not fit with the punitive trend in Europe (Bondeson, 2013; Cavadino & Dignan, 2007; Nelken, 2010; Snacken, 2010). Some comparative

studies on the level of punitiveness have discovered that the European resistance to populist punitiveness is correlated with Europe's emphasis on human rights in criminal justice (Rotman, 1990; Snacken, 2006, 2010; Whitman, 2003) and its stronger welfare policy and consensus-based democracies (Bondeson, 2013; A. Bottoms et al., 1995; Cavadino & Dignan, 2007; Snacken, 2010).

5.1.2. Managerialism

The other transformation of the penal system is towards managerialism. The understanding of crime shifts from seeing it as a sign of abnormality to seeing it as a normal social fact (Cohen, 1985; Feeley & Simon, 1992; Garland, 2001; Raynor et al., 2009; Reichman, 1986). As Garland (2001, p. 16) stated, 'criminal actions will routinely occur if controls are absent and attractive targets are available, whether or not the individuals have a criminal disposition'. As a result, the concern of the penal system has shifted from treating criminal individuals to managing criminal events.

Cohen (1985) finds that the back-to-justice, neo-classical movement looks forward to a return to behaviourism. For Cohen (1985), behavioural modification is simply the better technology. It used to link with the history of total institutions, but reappeared in both prison and community context. Cohen (1985, p. 154) calls the changes in criminal control 'the new behaviourism', which is 'an uneven move away from internal states to external behaviours, from causes to consequences, from individuals to categories or environments'.

Feeley and Simon (1992) further elucidate actuarial justice as a modality of the managerialism. They find that the shift of the concern of criminal law and criminology from the individual to the actuarial consideration of aggregates is embodied in both the new discourses and new objectives of penal policy. In terms of the new discourse, the language of probability and risk increasingly replaces earlier discourses of clinical diagnosis and retributive judgement; in terms of the new objectives, systemic and formal rationality is emphasised, while any external social referent like reducing recidivism is attenuated (Feeley & Simon, 1992, p. 450). The expectations about criminal sanctions are lowered under the new penology. The goal of criminal sanctions is 'not to eliminate crime but to make it tolerable through systemic coordination' (Feeley & Simon, 1992, p. 455). Actuarial justice targets categories and subpopulations, and is concerned with managerial techniques to identify, classify, and manage groupings sorted by dangerousness through cost-effective ways. The cost-effective forms of control in innovative technologies, such as various forms of electronic monitoring systems, developed rapidly. Consequently, the correctional continuum

'sorts individuals into groups according to the degree of control warranted by their risk profiles. At one extreme the prison provides maximum security at a high cost for those who pose the greatest risks, and at the other probation provides low cost surveillance for low-risk offenders. In between stretches a growing range of intermediate supervisory and surveillance techniques. The management concerns of the new penology-in contrast to the transformative concerns of the old-are displayed especially clearly in justifications for various new intermediate sanctions' (Feeley & Simon, 1992, p. 459).

According to Feeley and Simon (1992), although the official rhetoric still cloaks the intermediate sanctions with new technologies, such as electronic monitoring and drug-testing programmes, in the language of individuals and rehabilitation, they actually evolve in ways quite different from their original aims, and are recast as actuarial justice.

5.2. New rehabilitationism under the new penal trends

5.2.1. The reconstruction of the theory and practice of rehabilitation

The new penal trends appear to deepen the crisis of legitimacy faced by rehabilitation. Ostensibly, rehabilitation is in some tension with the new penal trends. Managerialism gives primacy to the efficient control of internal system processes in place of the traditional objectives of rehabilitation (Feeley & Simon, 1992). Punitiveness seems to indicate a decline of the rehabilitative idea (Brown, 2013; Snacken, 2010).

Many scholars reconstruct the theory of rehabilitation. They continue the concern with offenders' needs and interests in penal welfare strategies, but advocate moving away from the treatment model and directing offenders towards the reintegrative and reparative dimensions of rehabilitation. Cook and Carlen (1989); Cullen, Gilbert, and Cressey (1982); Hudson (2003); and Rotman (1990) expound rights-oriented and state-obliged rehabilitation. They think that rehabilitation is most effective when the rights of offenders are respected. Right-oriented rehabilitation is also based on social contract theory. Like other citizens, the offenders also have rights to enjoy social welfare and rights to re-entry the society and become better citizens. Under rights-oriented rehabilitation, rehabilitation is not correlated with indeterminate sentences. Rehabilitation should embrace the proportionality principle in sentence and thus inflict no more harm than the punishment of the sentence. The state should be obliged to undo the extra harm created by punishment and provide rehabilitative elements to help the offenders to prevent future crime (Cullen et al., 1982; Gallo & Ruggiero, 1991; Hudson, 2003; Morgenstern, 2015; Raynor et al., 2009). Restorative justice also provides a possible route to offender rehabilitation. The advocates of restorative justice believe that

punishment should nurture the social integration of offenders as well (Braithwaite, 1989, p. 179). Offenders still belong to society after they have offended, and 'their memberships and afflictions need to continue, or to be repaired' (Raynor & Robinson, 2009, p. 13). Advocates of restorative justice seek to repair the damage to victims and the community ravaged by crimes and to coordinate the interests of victims, offenders, and community members. Programmes associated with restorative justice, such as victim-offender mediation programmes, victim-offender conferencing programmes, and victim-offender panels, provide interactive processes which brought together victims, offenders, and practitioners; made it possible for all the participants to choose forgiveness and reconciliation; and even let all the participants learn something of each other (Zehr, 2003). Restorative justice seeks to develop a 'make amends' model of punishment, so that offenders could be redeemed by paying their debts, and victims and the communities receive compensation. The reparative function can leave victims and communities satisfied even if they fail to achieve crime-reduction effects (Robinson, 2008, p. 441).

However, as Robinson (1999, p. 424) argues, 'despite the rise of this theoretical strand of new rehabilitation, the greatest inroads have arguably been forged by the empirically-minded'. It is the practical evidence of effective rehabilitative programmes that creates a momentum for the revival of rehabilitative optimism (McGuire, 2004; Robinson & Crow, 2009).

Before the generation of managerial theory, Cohen (1985) posited that new behaviouralism could facilitate the reformulation of rehabilitation. According to Cohen (1985, p. 144), the practice of rehabilitation is to be given another chance – not to change offenders through correcting their internal perspectives but to change them through encouraging their external compliance. Mike Nellis (1995) and Robinson (2013) corroborate that the regulatory ethos of managerialism, which emphasises obedience to policy and procedure rather than internal changes by individuals, greatly influenced the official construction of compliance with community corrections in England and Wales during the 1990s.

In the 1990s, many psychologists proved that cognitive-behavioural therapy could reliably reduce reoffending (Andrews & Bonta, 2010; Bakker & Riley, 1993; Izzo & Ross, 1990; Lipsey, 1992). The pioneers of cognitive-behavioural programmes are intolerant of metaphysical or theoretical speculation, because the speculation is beyond the ability of evidence to prove (Raynor & Robinson, 2009). Cognitive-behavioural programmes merge cognitive methods and behavioural methods; restructure antisocial cognitions, beliefs, and attitudes that contribute to offending; and design a series of well-sequenced activities or learning opportunities in which offenders are empowered to actively rehabilitate (Andrews & Bonta, 2010; Robinson,

2008; Robinson & Crow, 2009). Subsequently, the systematic reviews and evaluations in many countries provide strong evidence of the feasibility of this new model of rehabilitation (L. C. Allen, MacKenzie, & Hickman, 2001; Lipsey & Cullen, 2007; Usher & Stewart, 2014).

5.2.2. The compatibility of new rehabilitationism and new penal trends

As Robinson (1999) and Matthews (2005) argue, it is clear that the concepts of risk management and rehabilitation were incompatible under Feeley and Simon's (1992) actuarial justice. Risk management focuses on impersonal administration, but rehabilitation concentrates on individual reform.

However, many scholars criticise Feeley and Simon's (1992) arguments about the conflicts between the old and the new penal strategies (Garland, 1997; Kemshall, Parton, Walsh, & Waterson, 1997; Robinson, 1999, 2008). They find that rehabilitation can be compatible with the managerial narrative. Garland (1997, p. 203) propounds that, despite the well-documented differences, rehabilitationism and managerialism have a number of important similarities, and are in many respects continuous and mutually supportive rather than in conflict. Both of them offer rational and technical solutions to the problem of punishment in the tradition of instrumental rationality. Managerialism is deemed to be morally neutral (A. Bottoms et al., 1995; Matthews, 2005). The innovative technical controls grounded in managerialism have the potential to serve different aims in different situations (M. Nellis, Beyens, & Kaminski, 2013).

Under the managerial penal trend, rehabilitation is re-inscribed into the risk management regime and reinforces a penal discourse saturated by risk classification (Kemshall et al., 1997; Robinson, 2008). As Robinson (1999) indicates, risk reduction becomes the primary concept, while rehabilitation is the secondary one: a means to the end of risk reduction for some offenders. Robinson (1999) argues that the practical integration of risk management and rehabilitation is exemplified by the risks and needs assessment in the cognitive behavioural method of rehabilitation. In the risk and needs assessment, the dimension of need is still very critical, but 'it is those needs which reflect risk which are prioritised as targets for intervention' (Robinson, 1999, p. 429).

For Garland (1997) and Robinson (2008), while both rehabilitationism and managerialism represent instrumental rationality, expressive punitiveness embodies non-instrumental rationality. Expressive punitiveness stands for the symbolic meaning of punishment grounded in values, from a Durkheimian or a Weberian perspective of punishment. However, it does not meant that instrumental rationality and expressive rationality cannot coexist with each other.

Some commentators observe that rehabilitation accommodates expressive rationality in many jurisdictions, particularly in most English-speaking countries (Hannah-Moffat, 2005; Robinson, 2008; Steen & Bandy, 2007). They find that rehabilitation is aligned with punitiveness. The rehabilitative components tend to exist in the context of or alongside punitive elements. In the penal narratives, rehabilitation is juxtaposed with retribution, and the concept of need is fused with risk (Hannah-Moffat, 2005; Robinson, 2008; Steen & Bandy, 2007). Moreover, Robinson (2008, p. 435) argues that the new versions of rehabilitation are characterised by a concern with the moral consequences of offending. The new versions of rehabilitation (the cognitive-behavioural methods of rehabilitation and the integrative or restorative dimensions of rehabilitation) revive a neo-classical perspective which treats the offender as an active actor and emphasises personal responsibility for wrongdoing. Unlike in most English-speaking countries, continental legislation and practice remain neoclassical. As previously mentioned, most countries in Western Europe tend to resist punitiveness. Even so, as the previous chapter indicates, rehabilitation is also allied with public protection in penal rhetoric.

5.3. The adaptation of community sanctions to the new penal trends and the new rehabilitationism

The new rehabilitationism metamorphoses into the new penal trends (Raynor et al., 2009; Robinson, 1999). As the key means of rehabilitation, community sanctions adapt to the new penal trends and the new rehabilitationism. McNeill and Beyens (2013) and Robinson and McNeill (2015) argue that community sanctions adapt to punitive, managerial, rehabilitative and reparative narratives in most jurisdictions in Europe. These adaptations are also reflected in the rhetorical shifts of European instruments on community sanctions, which are discussed in the previous chapters.

First, community sanctions adapt to the punitive narrative. In different jurisdictions, the increasing emphasis on public protection reinforces the punitive elements of community sanctions, serving to change public perceptions of their impunity and boost public confidence about them. Community sanctions become accompanied by onerous controlling strategies and stringent management procedures.

Second, community sanctions adapt to the managerial narrative. In different jurisdictions, the search for efficient management of penal institutions leads to a reductionist policy. Community sanctions are less costly than imprisonment and can avoid many social problems of imprisonment. Under managerialism, the scope of the offenders eligible for community

sanctions is broadened. In addition, since surveillance is integral to the operation of managerialism, electronic monitoring that originated in the US extends along a considerable scale at a range of points in the penal process in Western Europe (Mike Nellis, 2013, 2014; M. Nellis et al., 2013). Electronic monitoring is used in many ways: often as an additional control over probation measures and alternative sanctions, sometimes as a stand-alone sanction, and sometimes as an alternative to remand custody or as an execution modality of imprisonment (Flore, Bosly, Honhon, & Maggio, 2012, p. 569).

Third, community sanctions adapt to the correctional, reintegrative, and reparative dimensions of rehabilitation. Robinson and McNeill (2015, pp. 233,234) maintain that research evidence about the effectiveness of rehabilitative interventions only finds an interested political and policy audience in jurisdictions where rehabilitation is understood as correction. This is an important reason why cognitive behavioural methods that originated in Canada, the USA, and England and Wales are questioned by scholars from countries not schooled in Anglo-Saxon traditions (Herzog-Evans, 2013; van Zyl Smit et al., 2015). However, Robinson and McNeill (2015, pp. 233,234) also find some signs that the more correctional form of rehabilitation is becoming more significant in some continental jurisdictions, and rehabilitation as correction is often interwoven with (and even subordinate to) legal principles and arguments about rehabilitation as a right in most of the codified legal jurisdictions in Europe. Moreover, in most jurisdictions, reintegration and reparation are also included in the objectives of community sanctions, notably community service and other restitution programmes. As mentioned before, the reintegrative and reparative functions of community service were proposed in the 1970s. However, it is not until a decade later that these dimensions rather than pragmatic considerations attracted more and more attention in various jurisdictions (Bazemore & Maloney, 1994; Tak, 1986). Reintegration and reparation are found to play a vital role in mitigating against the punitive tendency in the implementation of community service (Bazemore & Maloney, 1994).

6. Conclusion

The evolution of community sanctions is associated with the controversies between utilitarianism and retributivism as the goals of punishment. The classical theorists were advocates of utilitarian philosophy. Their deterrence theory had a profound influence on the establishment of modern criminal law with a rigid and specific tariff of punishments. Moreover, Bentham and religiously inclined reformers argued that imprisonment provided the ideal form of punishment. Imprisonment became central to the penal system at the end of the 18th century. However, disillusionment with the deterrence and reform effect of imprisonment set

in the late 19th century. The disillusionment with imprisonment led to criticism of classical doctrines. Both neo-classicism and positivism criticised classical theorists' ignorance of individual differences. Neo-classicism continued the classical doctrine of rational choice for sane adults, but allowed considerations of individual characteristics as mitigating circumstances. Positivism denied the classical doctrine of free will directly and advocated an individualised treatment model of rehabilitation. Neo-classicism and positivism contributed to diverting some offenders to community sanctions. The community sanction was probation in countries with common-law traditions and suspended sentence in countries with civil-law traditions. Subsequently, the penal welfare strategies, which emphasised individualised rehabilitation in the penal system, influenced the whole of the industrialised Western world. Consequently, the penal system in the West trended towards reducing imprisonment, developing new community sanctions, and widening various community sanctions. However, after flourishing, the treatment model of rehabilitation was called into question in the 1970s, especially in respect of its inconsistency with some of our basic concepts of justice. Thereafter, just deserts theory had a powerful influence on penal policy.

Contemporary utilitarianism and retributivism are inclined to include the strengths of their antitheses and remedy their own deficits. Just deserts theory was the forerunner of the theory of human rights, the underpinning concept of which was fairness (A. Bottoms et al., 1995; Cavadino & Dignan, 2007). Under just deserts theory, proportionality should be the primary principle in the distribution of punishment (Morris, 1992; Von Hirsch, 1993). Within the limits of proportionality, just deserts theory could tolerate utilitarianism, but overly severe intervention in the name of utilitarianism should be prohibited. When rehabilitationism re-emerges, it also incorporates just deserts theory to avoid additional punishment. Under the new rehabilitationism, crime should have consequences, but the consequences should make positive contributions (Rotman, 1990; Rutherford, 1998). The positive contributions include concern for the welfare of the offenders. Rehabilitation requires getting to know offenders, showing sympathy to them, and believing in their potential for positive change. The commitment to rehabilitation as an original and lasting feature of community sanctions can resist inhuman or degrading treatment (Raynor, 2012b; Raynor et al., 2009). In this respect, as Cavadino and Dignan (2007, p. 58) state, 'right theory provides a basis for a principled compromise between utilitarianism and retributivism'. The human rights theory becomes a promising basis for the general political-legal theory and moral philosophy underlying penal purposes (Delaney, 1977; Hudson, 2003; Walker, 1991). It allows the adaptation of community sanctions to both moral claims and utilitarian purposes (including managerialism and rehabilitationism), and has the potential to contribute to a reduced punitiveness.

Chapter Six. Punishment and Reform in the context of community sanctions: A Comparative Perspective

1. The role of community sanctions under different definitions of crime

1.1. The comparability of the concept of community sanctions

The concept of community sanctions is contextually conditioned. A comparative study of community sanctions first needs to consider how comparable the concept of community sanctions is.

The concept is not defined definitely in various Western countries, but all definitions share some common features. First of all, community sanctions are court-ordered criminal punishments pursuant to the relative laws. Second, they are structurally situated between custodial punishment and financial or other nominal punishments (A. E. Bottoms, 2002; Petersilia, 1998).

The salient feature of traditional Chinese community-based sanctions, conversely, is that they are *not* court-ordered, and *not* on the basis of law. They are *not* regarded as criminal punishments. As De Cruz (1999, pp. 203-212) points out, regarding the meaning of law, the unique points of Eastern law need to be highlighted. In the traditional East, law plays a minor role. The first recourse following a conflict is usually the community, and the recourse of last resort is to the courts (or the magistrates).

In traditional China, crimes defined by law constituted only a very small subset of wrongdoings, and criminal punishment pursuant to legal codes consisted primarily of harsh punishments. Most wrongdoings were deliberated and then punished in the community, but the wrongdoings were not labelled as crimes, and the punishments were not categorized as criminal punishments. This thesis classifies these punishments as initial semi-formal punishments. In modern China, the conversion to socialism and legal reform does not completely change Chinese legal traditions. China's contemporary legal system is a blend of traditional Eastern legal traditions, socialist legal systems, and Western legal conceptions. The minor criminal punishments include semi-formal punishments. However, new semi-formal punishments, usually in the name of administrative punishments but lacking a legal basis pursuant to administrative law, could replace minor criminal punishments in practice. Abolition of the most widely used semi-formal punishment, that is, RTL, paved the way for developing community corrections. However, the influence of semi-formal punishments has

not been waned. Some semi-formal punishments remain, and community corrections also have some features of semi-formal punishments.

Thus, differences between the West and China in the role of community sanctions largely reflect their distinct definitions of crime and criminal punishment. Community sanctions in the West and China are located in different frames of reference. In both the West and China, criminal law states what constitutes a crime and criminal punishments, and delineates the borders between criminal violations and other violations. However, understanding in the West and China diverge significantly regarding what the border literally is and how severe administrative punishments²⁴⁴ can be. Because of this basic difference, other differences occur. Community sanctions are of medium-level severity in terms of the tariff for criminal punishments in the West, but they are minor criminal punishments that may be more lenient than some semi-formal punishments in China. Therefore, the development of community sanctions in the West arises from the move to reduce imprisonment, while the promotion of community corrections in China is preconditioned by the reform of semi-formal punishments.

1.2. The role of community sanctions under Western definition of crime and criminal punishments

The orthodox definition of crime is a violation of criminal law (Ashworth & Horder, 2013). However, this definition neither elucidates the reasons why the state criminalises certain conducts, nor the qualitative and quantitative aspects that distinguish crimes from administrative violations. In many jurisdictions, academic discourse distinguishes between a formal and a substantive concept of crime (Sieber, Susanne, & Javers, 2011a). The orthodox definition provides a formal notion of crime, but it is the substantive concept of crime that clarifies the criteria of criminalisation.

Substantively, crime is widely understood as a violation of legally protected interests in the West, especially in countries with civil-law traditions (Alexander & Ferzan, 2009; Sieber et al., 2011a; Von Hirsch & Jareborg, 1991). Under this concept, the justification for criminalisation rests on the substantial harm inflicted by certain conducts on individual and/or public interests. The criminal code is an enumeration of the interests it seeks to protect.

The substantive concept of crime reflects that the breadth of criminal sanctions varies. The scope of legally protected interests and the criteria of substantial harm to the legally protected

²⁴⁴ As introduced in Chapter Three, albeit with a lack of legal basis, the semi-formal punishments in socialist China are usually imposed in the name of administrative punishments.

interests vary widely, depending on social and political contexts (Sieber, Susanne, & Javers, 2011b). The scope of legally protected interests is related to the factual interests of society legally recognised by the state (Eser, 1965). The complexities of factual societal interests represent the contingent nature of legally protected interests. Moreover, crime involves a serious intrusion into legally protected interests (Von Hirsch & Jareborg, 1991). Minor violations of legally protected interests should be handled by civil or administrative sanctions. However, the line between criminal sanctions and administrative sanctions may be not that clear. There is a strong conceptual continuity between criminal and administrative systems. Jansen (2013) analyses the differences between administrative sanctions and criminal sanctions in various European countries, and finds their differences are primarily formal and rational, rather than structural and functional. In the depenalisation process that occurred in many European countries, the punishment for a violation can be converted from a criminal sanction to an administrative sanction (Jansen, 2013; Sieber et al., 2011b). As Ashworth and Horder (2013, p. 2) state, 'there is no general dividing line between criminal and non-criminal conduct which corresponds to a distinction between immoral and moral conduct, or between seriously wrongful and other conduct. The boundaries of the criminal law are explicable largely as the result of exercises of political power at particular points in history'.

Although differences between administrative sanctions and criminal sanctions can be primarily quantitative rather than qualitative, they involve different procedures (Jansen, 2013; Sieber et al., 2011b). Legal safeguards under the criminal law do not apply to all administrative sanctions. These legal safeguards include the subsidiary principle, the legality principles, the strict rules of evidence and standards of proof, and the separation of judicial and executive functions. The protection of fundamental human rights under Articles 5, 6, and 7 of the European Convention for the ECHR are only applied in criminal proceedings.

Therefore, criminal sanctions are distinguished from administrative sanctions not only by harsher sanctions, but also by stricter legal safeguards. The ECtHR ruled that, albeit autonomous, the domestic definition of a criminal charge is not conclusive. From the ECtHR cases, Jacobs and White (1996, p. 134) inferred that, the considerations in determining a criminal charge included the nature of the offence charged, the severity of the sanction imposed, having regard in particular to any loss of liberty that was characteristic of criminal liability, and the group to whom the offence applied. If an allegation is qualified as a criminal charge under the standards of the ECtHR, the basic guarantees of the ECHR should apply, even though the allegation is defined as being a domestic administrative matter.

Among criminal sanctions, 'imprisonment as a last resort' is the guiding principle in European penal policies (Snacken, 2006). In many Western European countries, more people were under supervision in the community than in prison (Aebi & Chopin, 2013; Aebi & Delgrande, 2013). Chapter Four has shown that community sanctions are promoted due to their particular characteristics. They can overcome the shortcomings of imprisonment, and are the main sources of rehabilitation. Meanwhile, as an integral part of the penal system, community sanctions share the common goal of penal sanctions in seeking to protect the public. Though community sanctions are typically less interfering than imprisonment, they nonetheless restrict offenders' liberty (Snacken, 2006). Accordingly, European instruments of community sanctions require member states to conform to the legal safeguards under human rights' instruments and standards.

1.3. The role of community sanctions under the Chinese definition of crime and criminal punishment

1.3.1. The rise of semi-formal punishments under the narrow interpretation of crime in the Mao era

As mentioned in Chapter Three, the concept of crime in the PRC was founded on Marx's theories on class conflicts and struggles in the Mao era. This highly politicized concept emerged under the influence of the former Soviet Russia, where commentators criticised both the substantive and formal concepts of crime in capitalist societies.

First, they asserted that the legally protected interests referred to in Marx's discourses were nothing but the interests of the ruling classes, and proposed a substantive concept of crime with class attributes.

According to Marx, both law and punishment were intended to maintain the status quo and the position of the ruling classes. For Marx and Engels (1846), law was an expression of the content of the will of the state, which was always determined by the ruling classes, crime was a struggle by an isolated individual against the prevailing conditions, and punishment was nothing but a means by which society defended itself against the infraction of its vital conditions. Marx maintained that criminal law and punishment primarily functioned to reinforce the power of the bourgeois against the proletariat in a capitalist society. Marx used the historical materialist method to study social phenomena, including the penalties. Marx (1859) argued that, the sum of these relations of production constituted the economic structure of society, and the real foundation, on which a legal and political superstructure arose that corresponded to definite forms of social consciousness. As part of these forms of

social consciousness, penal theories reflected the economic and political status of the ruling class. For Marx, the evolution of penal justifications can also be explained by the changing economic and political status of the bourgeois in Europe: classicism in the Enlightenment was linked to bourgeois class interests that were gaining in economic and political power at the time, but still needed legal protection against the corrupt control of the landowning aristocracy; and positivism was functional to reinforcing the ideological domination of the bourgeois at a later stage, when it had become the ruling class in Europe (Cavadino & Dignan, 2007, p. 62). Marx (1853) disagreed with both deterrence and rehabilitation as justifications for punishment, because these utilitarian justifications failed to elucidate the right of the state to punish criminals. For Marx (1853), the retributivism proposed by Kant and Hegel was the most defensible penal justification, because retributivism regarded the criminal as a free and self-determined being, and recognised human dignity as an abstract right. However, the picture of individuals exercising free will fit uneasily with the alienation of a modern capitalist society (Easton & Piper, 2007, p. 103). The proletariat were alienated under social and economic pressures in the capitalist mode of production, and thus could not determine their destiny (Marx, 1844).

The commentators in the former Soviet Russia interpreted Marx's discourses on crime and punishment as a renunciation of the penal explanations and justifications in a capitalist society. They introduced the class attributes of crime into its substantive definition, and defined crime as detriments to social relations under the regime of proletariat (Xingliang Chen, 2000).²⁴⁵

Second, a formal concept was subordinate to a substantive concept. Early Soviet legislations made no mention of the formal dimension of crime.²⁴⁶ Some radical scholars even completely denied the appropriateness of legal authority. For instance, Pashukanis (1924) argued that law was a product of the commodity-exchange system, but the commodity-exchange system would wither away in a socialist society, and thus law would also wither away. Later the penal code was revised to accommodate both substantive and formal dimensions²⁴⁷. However, the mainstream of politics in the former Soviet Union prioritized the substantive dimension over the formal dimension (Xingliang Chen, 2000). Albeit never really phased out, the Soviet legislation was void of absolute commitments. When a conduct was detrimental to social relations under the regime of the proletariat, but did not violate criminal law, it could still be

²⁴⁵ Article 6 of the Guiding Principle of the Penal Code of Soviet Russia issued in 1919; Article 6 of the Penal Code of Soviet Russia issued in 1922.

²⁴⁶ Ibid.

²⁴⁷ Article 7 of the Penal Code of Soviet Russia.

labeled as a crime. The Soviet concept of crime thus inevitably led to the expansion of criminal punishments.

This Soviet concept of crime influenced Mao's interpretation of crime. Mao's definition of crime also stressed the class attributes of the substantive dimension and negated the formal dimension. However, as Chapter Three introduced, Mao's explanation of the class attributes was quite different. Notably, compared with the Soviet system, Mao's (1937, 1949, 1957) theory constrained the scope of criminals within much tighter bounds. Mao (1957) proposed the idea of uniting everyone who can be united. All the classes, strata, and social groups, including the national bourgeois, could be included in the category of the people, as long as they favoured, supported, and worked for the socialist structure. By the same token, since a criminal was one of the enemies, crime was an extremely small subset of socially disruptive conduct. In Mao's (1957) words, only the socially disruptive conduct that 'seriously disrupts public order' could form antagonistic contractions between the people and the enemies, and thus constituted crime. Most socially disruptive conduct just represented contradictions within people. They should not be treated as crimes but as public order violations. Meanwhile, antagonistic and non-antagonistic contradictions could transform themselves into opposites. Therefore, those who committed petty socially disruptive conducts could develop into criminals if they were not handled properly. Conversely, criminals could be forged into a member of the people, if they were punished and reformed with suitable methods.

According to Mao (1957), to handle people's socially disruptive conduct, the democratic method, the method of discussion, criticism, persuasion and education should predominate, and administrative punishments should be complementary. In a similar vein, to manage crimes, the dictatorship method, that is the method of coercion or repression should predominate, and persuasion and education should be complementary. Although most Western studies on communist penal systems during the Cold War tended to describe them as monolithic and totalitarian (Bakken, 2005), a comparative study of Chinese methods and Soviet methods of indoctrination conducted by Hinkle and Wolff (1956) corroborated the assertion that despite the formative influence of Soviet model, Chinese methods were not carbon copies of Soviet methods such as those of the Communist dominated countries of Eastern Europe. Hinkle and Wolff (1956, pp. 34,35) found that the Chinese interrogation procedure was distinct from its Soviet counterparts in terms of developing long-lasting changes in prisoners' attitudes and behaviours, making extensive use of group interactions, and extending the Communists' ritual of self-criticism to the non-Party population, which included the prison population.

Under Mao's (1937, 1949, 1957) interpretation, the reach of crime was narrow, but the boundaries of crime were fluid. Due to the flexible definition of crime, collective discipline mechanisms could extend from the Communists to the people, and to prisoners; but by the same token, coercive strategies could also extend from the prisoners who committed crimes to those who perpetrated other socially disruptive conduct. When Hinkle and Wolff (1956) conducted their research, the boundaries between reform through labour and RTL were blurred and muddled. They seemed to confuse the two systems of punishment, and thus referred punishments to both of them. The NPC clarified the differences between reform through labour, RTL, and administrative sanctions in 1957.²⁴⁸ Reform through labour and administrative sanctions were designed to tackle socially disruptive conduct of different severities: reform through labour was imposed on criminals, and administrative sanctions were imposed on those who committed other socially disruptive conduct. RTL was a compulsory reform programme and employment arrangement that was primarily imposed on those who committed serious administrative or disciplinary violations. Despite their different natures in rhetoric, the difference between reform through labour and RTL in practice were represented by the different intensities in the restrictions of liberty. That is why observers in and outside China preferred to label it as a punishment rather than merely a reform programme as it was claimed (Biddulph, 2015; R. Liu, 2001; Jianrong Yu, 2009).

Bakken (2005) argued that China's distinctive penal system showed its specific economy of power by virtue of collectivism. In some respects, this system resembled the European disciplinary regime scrutinized by Foucault (1977). Foucault (1977) compared the function of punishing the greatest crime and the function of curing the least irregularity, and found normalizing people was a generality. According to Foucault (1977, p. 299), the carceral archipelago transformed the penitentiary technique from the penal institution to the entire social body. In a similar vein, for Bakken (2005, p. 352), the technologies of classification, surveillance, and reform, which were used to transform criminals using reform based on labour, were also used to transfer them to the society at large. The technologies of power in both Europe and China were dispersed through society, but in different ways. The technologies of power were dispersed by knowledge in Europe, but by the network of mutuality in China. Unlike its European counterparts, the disciplinary subject in China's regime was not the individual subject but rather the collective subject. The Chinese concept of the

²⁴⁸ The Regulation on Public Security Administration of Punishments (Zhi an guan li chu fa tiao li, issued by the Standing Committee of NPC on 22 August 1957). The Decision on Re-education through Labour (Guan yu lao dong jiao yang wen ti de jue ding, approved by the Standing Committee of the NPC and issued by the SC on 3 August 1957).

individual did not operate in an isolated and universally constituted form, but rather in a whole series of different subject positions. Chinese collective tradition was rooted in Confucianism and fostered by socialism. In both systems, the rights and responsibilities of an individual were contingent on his subject position. In the imperial era, the subject position was determined by the position in hierarchy and patriarchy. In the Mao era, it was first determined by the demarcation between people and enemies, and then by their positions in various mass organizations and communities. Under the guidance of the authority, the collectivities in various forms constituted the agents of semi-formal control. With a blend of official control and popular control, semi-formal control affected the behaviours of Chinese citizens intensely and persistently (Troyer, 1989b).

1.3.2. The fall of semi-formal punishments, the rise of community corrections, and a new concept of crime in a time of reform

The fluid concept of crime had the inherent potential to induce penal system expansion and human rights violations, and the lessons of legal nihilism led to China's gradual movement towards the rule of law in the field of criminal punishment. To recap China's legal progress chronologically, the NPC issued the first Criminal Law in 1979, revised 'reform through labour' into 'imprisonment' under the Prison Law promulgated in 1994, and published the current Criminal Law in 1997.

China's notion of crime is moving closer to the Western concept. First, China accepts the formal dimension in a Western sense. The 1997 Criminal Law endorsed *nulla poena sine lege* and phased out an analogical interpretation. Second, the substantive dimension of crime is widely recognised as 'the serious detriments to society'. This term continued the socialist tradition, but weakened the political overtone. The 1997 Criminal Law no longer regarded criminals as enemies under Mao's (1957) interpretation, nor as 'counterrevolutionaries' under the 1979 Criminal Law²⁴⁹.

What is distinctive about China is the range of conduct that has fallen under the scope of criminal punishments. Only if the detriment to society caused by a socially disruptive conduct reaches a high level of seriousness, can the conduct constitute a crime. The seriousness of the detriment to society generally depends on 'the circumstances of the crime' and 'the amount of illegal acquisitions', but the Criminal Law does not clarify the standard for such a judgment. The SPP's judicial interpretations provides some guidance, yet as M. K. Lewis (2014) indicates,

²⁴⁹ Article 2 of the Criminal Law.

the SPP's guidance does not fully alleviate the concerns raised by the vague terms in the Criminal Law itself. Deng is an advocate of empiricism. He agreed with the reform strategy of 'crossing the river by feeling the stones', and required that decisions should be informed by contextual facts (1993c). This strategy affected the legal reform in its initial stage. In law making, X. Deng (1993a) recommended drafting concise legal provisions first, then revising or supplementing them gradually. In law enforcement, the contextual decision making allowed for substantial discretion.

The initial legal reform creates a considerable number of grey areas, where the semi-formal punishments could survive. X. Deng (1993b) stressed that the preservation of social order should be the CCP's preoccupation. It was believed that the grey areas of the penal system could strengthen the state's capability to flexibly tackle any conduct that disturbs the social order. However, the flexible handling resulted in expanding power of the police. Many cases that resembled criminal cases were thus diverted to semi-formal punishments, which could be stricter than some criminal punishments, but with fewer legal safeguards. They created more social disruption than they resolved, and flagrantly violated the intentions behind separating criminal punishments and non-criminal punishments, both in the Western sense and in the Chinese sense.

In the 2000s, China continues to stress the imperative of the preservation of social order. Under the political catchword 'a harmonious society', a new political interpretation of social contradictions emerges. In socialist China, contradiction theory is bound up with the division between antagonistic contradictions and non-antagonistic contradictions. In the new era, both antagonistic contradictions and non-antagonistic contradictions can be the triggers of crimes, and most of the crimes are the results of non-antagonistic contradictions (G. Chen, 2007; Hua Liu, 2007). This interpretation undermines the basis of the theory of semi-formal punishments, and paves the way for reframing the strategy to preserve social order.

Many observers both in and outside China have criticised legal empiricism (P. Jiang, 2015; B. Li, 2006; Wong, 1998, p. 2015), and advocated consolidating long-term social stability by building up a robust legal system that respects and protects individual rights (Biddulph, 2015; S. Trevaskes, Nesossi, Sapio, & Biddulph, 2014; Jianrong Yu, 2009). The CCP is gradually becoming aware of the value of this voice. Its new strategy is to align itself with this idea, on paper at least. The decision of the Third Plenary Session of the Eighteenth Central Committee of the CCP proposes a reform strategy of 'the integration of strengthening top-down design and crossing the river by feeling the stones' in the first chapter, which is titled 'the

significances and the principles of the comprehensively deepening reform'.²⁵⁰ It implies that the empirical approach should be subordinated to the CCP's blueprint for future development. Many Chinese commentators argue that only the rule of law can provide such a blueprint (P. Jiang, 2015; L. Li, 2014). The Central Committee of the CCP's Working Conference for Politics and Law held on 7—8 January 2014 made it very clear that the preservation of social order is underpinned by properly responding to the reasonable and legal demands of the masses (The People's Daily, 2014). Moreover, the Conference stressed the sovereignty of law over solving various social contradictions (The People's Daily, 2014).

The new reform strategy initiates abolition of RTL and the promotion of community corrections in the ninth chapter titled 'moving the construction of the rule of law'.²⁵¹ The new strategy points the way forwards to penal reform. The extra-legal administrative punishments and measures are expected to come to an end gradually, and the scope of criminals eligible for minor formal punishments is expected to be broadened. This means that, after the penal reform cuts across traditional boundaries between semi-formal punishments and formal punishments, China's concept of crime will more closely approximate the Western notion, on paper at least.

China's new leadership resolves to legalize and professionalize the penal system. Meanwhile, it also states that legal control alone is not able to maintain social order, and continues to stress the comprehensive management of public order. The comprehensive management strategy emphasizes combining professional management and community involvement, and the collaboration of different agencies, various grassroots organisations, and community volunteers. Although China is gradually abandoning the semi-formal punishments unconstrained by law, the methods of semi-formal control still play a vital role in the crime control system.

2. Thinking about offender reform in community sanctions: ongoing policy directions

2.1. The different dimensions of offender reform

In executing community-based punishments, both the West and China put much emphasis on reform or rehabilitation or re-education (The three words are used in different contexts at

²⁵⁰ Article 1 of the Resolution Concerning Some Major Issues in Comprehensively Deepening Reform (Guan yu quan mian shen hua gai ge ruo gan zhong da wen ti de jue ding, issued by the central committee of the CCP on 15 November 2013).

²⁵¹ Article 34 of the Resolution Concerning Some Major Issues in Comprehensively Deepening Reform.

different places, but we can use them more or less interchangeably, because they all mean to reduce crime through improving offenders' characters and behaviours).

The methods of reform are shaped by understandings about the causes of crime. Assumptions about crime are deeply embedded in culture. In the West, theories about causes of crime are of different levels and for different aims, with elements of different disciplines. Under the strong cultural emphasis on individualism, Western methods of rehabilitation primarily address individual problems (L. Cao & Cullen, 2001; Raynor et al., 2009). According to Raynor and Vanstone (2002), methods of community-based punishments focused on individualism in its orthodox form, and then individualism was supplanted by individualisation in its revisionist form. In China, because of an unrelenting optimism about human nature and the malleability of human actions, explanations of crime located the primary causes in the negative social influences that fostered incorrect values (Bracey, 1989; L. Cao & Cullen, 2001; Xiaoming Chen, 2004; Troyer, 1989a). Under a collective culture, China's universal methods of reform was multi-layered education, instructed by both officers and all those close to offender, including offender's relatives, friends, colleagues and classmates.

However, in both the West and China, some reform initiatives do not fit within the traditional mould. Reintegrative and restorative understandings of rehabilitation emerge as new rehabilitative strategies in the West. The new strategies emphasize the role of external factors in crime causation or correlation. In the opposite direction, correctional interventions are introduced in Chinese community corrections programmes. The correctional interventions aim to solve offenders' individual problems in crime causation or correlation. Reform methods that address external factors and internal factors can and should work side by side. They are not coterminous (Raynor et al., 2009, p. 143). Where reform or rehabilitation or re-education is going, in both the West and China, is towards a holistic understanding, namely the coordination of individual and professional approaches with social and relational supports. However, a reform approach that is not rooted in the culture, in both the West and China, may not fare well in practice.

2.2. The reconstruction of rehabilitation in the West

Early modern Western criminologists explained crime in terms of the offending individual. Classicists deemed offenses as an offender's rational choice. They were supporters of the free will doctrine and social contract theory. Social contract theory provided that rational citizens submitted parts of their freedom to the state power governed by the binding rule of law, and expected minimum sacrifice of their freedom in exchange for the security for all. Under social

contract theory, punishments should be certain, proportionate, parsimonious, dictated by laws, and following due process. The positivists denied the free will doctrine and assumed offenders' predestination. They attempted to offer scientific explanations for the causes of crime. The determinants they found were diverse, either internal or external to the individual offender. Explanations in terms of internal factors contributed to the correctional model of rehabilitation, which indicated addressing the causes of offences through individualised treatment.

As Raynor et al. (2009, p. 6) argues,

'a correctional model is principally associated with criminology which locates the causes of offending in individual offenders, rather than in external factors.... Reflecting these assumptions about the causes of offending, it is principally concerned with effecting change in offenders themselves, rather than in their social, economic or physical situation (the latter may be seen as desirable, but more difficult to achieve, or requiring large-scale social action beyond the scope of correctional agencies).'

The correctional model of rehabilitation was suggestive of the initial development of community sanctions. The eligibility of community sanctions was limited to corrigible offenders. They were usually first-time offenders and petty offenders. The corrigible offenders were expected to undergo positive changes under a variety of interventions targeted at their individual problems in the community. With the emergence of a penal welfare complex, the breadth of those who were eligible for community sanctions was enlarged, and new forms of non-custodial treatment were added (Garland, 1985; Rothman, 1980). The relationship between offender and state was no longer to be an instance in a contractual obligation, but a positive attempt to rehabilitate and assist the offender for the benefit of all (Messinger & Weston, 1987, p. 793).

However, after flourishing, the correctional model of rehabilitation reached a low point in the 1970s. Subsequent scholars who advocated the back to justice model argued that the disease analogy diminished respect for human dignity, and treatment disguised coercive manipulation (A. Bottoms & McWilliams, 1979; Duff, 1986; C. S. Lewis, 1972; Von Hirsch & Gaylin, 1976). They argued for getting back to a just deserts model to assess what the offence deserved, rather than maintaining individual treatment (A. Bottoms & McWilliams, 1979; Hood, 1974; Von Hirsch & Gaylin, 1976). They held that retribution should set limits on punishment; other utilitarian considerations, such as rehabilitation, could only exist within these limits (Morris, 1992; Von Hirsch et al., 1976).

The back to a justice deserts model movement arose out of liberal concerns, but the new penal trends in Western countries, in particular most of the main English-speaking countries, are managerialism and punitiveness. Some crime control systems call for a return to the new behaviourism by virtue of the back to justice campaign (Cohen, 1985). New behaviourism shows shifts in the concerns of criminal law and criminology from causes to consequences, from internal states to external behaviours, and from individual diagnosis to risk management (Cohen, 1985; Feeley & Simon, 1992). Many Western jurisdictions prefer a harsh interpretation of the just deserts model (Cavadino & Dignan, 2007), which thus gives way to expressivity, punitiveness, victim-centeredness, and public protection strategies (Cesaroni & Doob, 2003; Garland, 2000, 2001; Pratt et al., 2005).

The reconstruction of rehabilitation takes place in the context of managerialism and punitiveness. Under the managerial penal trend, rehabilitation is re-inscribed into the risk management regime (Kemshall et al., 1997; Robinson, 2008). It is exemplified by risk assessment in the cognitive behavioural programmes of rehabilitation (Robinson, 1999). Cognitive behavioural programmes become the new version of correctional rehabilitation. It was put forwards by psychologists, and proved to be a reliable correction model in many countries (Andrews & Bonta, 2010; Bakker & Riley, 1993; Izzo & Ross, 1990; Lipsey, 1992). Under the punitive penal trend, the rehabilitative components have to be in the context of or alongside punitive elements, but they also contribute to some counter examples that do not fit with the punitive trend. It is recognised that resistance to punitiveness is closely related to endeavours to protect an offender's human rights (Rotman, 1990; Snacken, 2006, 2010; Whitman, 2003). Except for the just deserts model, a new rehabilitation theory is also a family of human rights developments. Many scholars expound right-oriented and state-obliged rehabilitation, and direct rehabilitation towards reintegrative and reparative dimensions (Braithwaite, 1989; Cook & Carlen, 1989; Cullen et al., 1982; Rotman, 1990).

The advocates of cognitive-behaviour programmes consider crime as at least in part a social construct (McNeill, 2013b, p. 5). They assume that offenders are shaped by their environment and have failed to acquire certain social learning skills (Lipton, Pearson, Cleland, & Yee, 2002). Their methods are not about altering an offender's environment, but about building an offender's own skills for being able to respond to environmental problems.

Some exponents of reintegrative and restorative models of rehabilitation criticised cognitive-behavioural interventions because of their preoccupation with 'human capital' (skills, knowledge, etc.), and ignorance of 'social capital' (the productive interpersonal social relationships that facilitate social integration (Farrall, 2013). Reintegrative and reparative

models of rehabilitation specifically refer to external causes or correlates of crime, and their solutions are intended to address these external factors. As Raynor et al. (2009) argues,

‘although understandings of rehabilitation as social inclusion or reintegration do not necessitate specific criminologies, or theories about why people offend, they do tend to favour sociological theories about crime causation. That is, they tend to emphasise the social and/or economic causes or correlates with offending. As such they are sometimes understood as representing a departure from the correctional model of rehabilitation which, it will be recalled, tends to emphasise the endogenous (internal/personal/individual) rather than exogenous causes of crime’.

However, rehabilitation’s greatest inroad was forged by the new model of correctional rehabilitation, rather than the theoretical strand of reintegrative and reparative rehabilitation (Robinson, 1999). As McNeill (2013b, p. 14) argues, the informal social recognition and acceptance of the reformed ex-offender, rather than the advancement of the ‘science’ of correctional rehabilitation, is perhaps the ultimate problem for rehabilitation today in practice.

2.3. The reconstruction of the re-education mechanism in China

The wrongdoers under semi-formal punishments in China were also selected because of their corrigibility. Both Confucianism and Chinese Socialism created two boundaries for offenders. The first boundary was the informal regulations with the tacit approval of the authorities (To reiterate briefly, they were the clan codes in traditional China and the administrative regulations without firm legal basis in Socialist China), and the second boundary was the penal code. Those subjected to semi-formal punishments merely crossed the first boundary but did not violate the penal code further. However, Chinese explanations for crime diverged from the view of classism that crime was a result of independent choice, and the idea of positivism that crime was due to predestined factors. Chinese explanations tended to cite the social environment as the primary factor (L. Cao & Cullen, 2001; Xiaoming Chen, 2004; Troyer, 1989a).

This view was derived from the traditions of both Confucianism and Chinese Socialism. Confucians argued that human beings had a good nature and were malleable. When living among the virtuous, one could become an upstanding person who would never have the desire to perpetrate wrongdoings. It was like ‘fleabane in hemp being straight with no holding’ (Xunzi, 1988), and ‘entering a room full of fragrant orchids and getting used to the sweet smell’ (S. Wang & Kramers, 1950). On the contrary, when living among villains, one would learn bad behaviours from them. It was like ‘white sand in mud being all dark with it’ (Xunzi, 1988), and

‘staying in a fish market and getting used to the stink’ (S. Wang & Kramers, 1950). For Confucians, both the offender and the community where the offender was living had responsibility for the offence. People close to the offender, especially leaders of the offender in terms of hierarchy and patriarchy, should conduct moral instruction on the offender until he was consciously aware of the instruction. The offender should listen to the instruction, reflect on his mistakes, and strive to be virtuous. Moral education could enable a person to be consciously aware of his mistakes, and not suffer from evil intentions. To Confucians, this was the most thorough, the most fundamental, and the most successful way to prevent crimes in the long term.

Like Confucians, early Chinese socialists also held that criminal tendencies arose primarily from social experience. Marx (1844) argued that the capacity of the ruled class for exercising free will was undermined under social and economic pressure. In a similar vein, Mao (1926) regarded the exploitation of the ruling class as an important cause of crime among the ruled class. According to Mao (1957), after the abolition of the system of exploitation, the counterrevolutionaries and remnants of past ruling classes could still commit crimes, and their wrong ideas could influence some people to perpetrate socially disruptive conduct. Although early Chinese socialists considered the Confucian system as a feudal remnant, Confucian moral education was the springboard for a re-education mechanism among Chinese socialists (Bakken, 2005; Rojek, 1989). As Bakken (2005) argued, both Confucians and Chinese socialists seek to construct ethical subjects on the collective terrain. This was the reason traditional technologies and mechanisms could be redeployed and extended in socialist China. Chinese socialists still emphasized the role of family in moral influence. Furthermore, the modes of collectivity were extended to schools, work places, streets, villages, and various mass organisations. Those close to the offender—teachers, colleagues, neighbours, and members of the same mass organisations—are all expected to supervise and educate him, under the guidance of the authority. For Mao (1958), re-educating petty offenders should primarily rely on the masses rather than the authority. The masses could help offenders cultivate good customs, and recognise the correct ideas conscientiously. In addition to the masses’ indoctrination, the Chinese socialists introduced collective manual labour to re-educate offenders. According to Mao (1957), through collective manual labour, all social members could be assimilated into the collective culture: the officials would not be influenced by bureaucracy, the intellectuals would do away with petty-bourgeois individualism, and even the criminals would be accustomed to working hard and adopting socialist ethical concepts. The names of the most widely used semi-formal criminal punishments and criminal punishments, that is, RTL (re-education through labour) and reform through labour

respectively, demonstrated how important the role of labour was in the Chinese penal system. The notion of treating labour as discipline seemed to resemble the utilitarianism schemes of the 18th century Europe. However, as Bakken (2005) pointed out, 'in China, the difference lies in the product. Here, we see no individualised form of proletariat produced but, rather, a class of proletarians. It is, then, the mutuality of the past put to work in a transformative environment reminiscent of the utopian schemes of Europe that signals the distinctiveness'.

After the 1980s, the economic and legal system was changed dramatically, but most scholars and practitioners still related the causes of crime to defective surroundings, including influences of foreign decadence, domestic reactionaries and feudal remnants, problematic family or friends, and the lack of moral and ideological education from families, schools, workplaces and communities (Shao, 1989; Xiao, Gu, & Xu, 1985; Q. Zeng, 1984). Meanwhile, more and more scholars related the causes of crime to the social problems engendered by economic reform, such as economic dislocation, unemployment, and unequal social welfare (B. Dai, 1984; Shao, 1989; M. Sun, 1996). Some studies were conducted on the correlation of crimes and psychological problems (Yuhui Chen, Han, & Wang, 1996; Y. Li, 1989; Hanyun Liu, 1987), but few studies examined other biological factors (Yu Jia, Mo, & Kang, 1995). Troyer (1989a) surveyed Chinese officials about the causes of crime from 1982 to 1987, and found that almost all explanations related to environmental influences on a person's thoughts. The reasons offered (56 in total) were bad outside influences (cited 10 times), the influence of the Cultural Revolution (cited 9 times), other bad attitudes or ideas (cited 9 times), bad family influences (cited 10 times), bad friend's influences (cited twice), ignorance or improper education (cited 6 times) and economic factors (cited once). According to Troyer (1989a, p. 54), 'there was no reference to innate evil tendencies or biological predispositions'.

The re-education mechanism continued to be used through the 1980s and beyond. The CCP still called for mobilising persons and agencies around the petty offenders and ex-offenders to educate and help them. After switching to a market economy in the 1990s, the turnover of people was much higher, and the social bonds between the neighbourhoods and colleagues were much looser. Loosely-knit communities could no longer effectively self-regulate themselves. Collective labour was still a crucial method for re-educating wrongdoers in RTL, and reforming offenders by imprisonment, but under the new economic and legal system with weaker political overtones, the function of collective labour was widely questioned. Under RTL, coercive collective labour involved conditioning wrongdoers to love labour and have

labour skills²⁵²; under imprisonment, coercive collective labour was intended to correct offenders' bad habits and make them learn labour habits and labour skills²⁵³. The product of the penal mechanism was no longer a class of proletarians, but a class of the diligent. However, according to prevalent explanations for criminal conduct in the 1980s and the 1990s, it was due to various negative social influences, rather than just because of indolence. The uniform re-education or reform mechanism could not be a panacea for all socially disruptive conduct (Xihui Li, 1987).

The coexistence of the re-education and reform mechanisms was used to provide intense and persistent effects on wrongdoers and offenders (Troyer, 1989b), but this system gradually became infeasible in the new social and economic context. Many practitioners argued for prioritising punishment over re-education and reform intentions in the 1980s (Li Yan, 2004). Correspondingly, a bump in RTL cases went hand in hand with a strike-hard criminal policy. The advantage of RTL over other punishments was no longer its function of educating wrongdoers among the masses by the masses, but its function of punishing wrongdoers more swiftly and harshly for minor crimes.

The failure of the strike-hard criminal policy demonstrated the ineffectiveness of harsh punishments in preventing further criminal behaviour. Subsequently, calls for reducing crime by improving re-education mechanisms went up (Xihui Li, 1987; R. Liu, 2001). Under CCP's resolution for the rule of law and protection of human rights, it was difficult to justify the use of RTL, considering the absence of a legal basis for it, the abuse of police power, and the violation of individual rights. However, for most Chinese commentators, some methods of the re-education mechanism, notably its social mobilization and flexible education, might have a place in the implementation of a reformed penal system (Chu, 2009; B. Li, 2011). This is one reason the MJ attempted to develop community-based punishments as optimal minor criminal punishments prior to the abolition of RTL. Community-based punishments, rooted in the Chinese collective culture, were expected to continue the ethos of social mobilisation and flexible education (Research Group on Community Corrections of the Ministry of Justice, 2003).

When the MJ initiated the reform of community-based punishments, its goals still included, but were not limited to, constructing ethical subjects on the collective terrain. Comparing Chinese community-based punishments with those of developed countries, the MJ (2003)

²⁵² Article 3 of the Trial Measures on Re-education through Labour (*Lao dong jiao yang shi xing ban fa*, issued by the MPS on 21 January 1982).

²⁵³ Article 70 of the Prison Law (issued by the Standing Committee of NPC on 29 December 1994).

found a lack of correction programmes and professional management in Chinese community-based punishments. Subsequently, community corrections programmes are attached to existing community-based punishments. The goals of community-based punishments are no longer limited to education, supervision, and assistance, but also include correction and management. Correction becomes an auxiliary to education. Community corrections institutions instruct moral, political, and legal education²⁵⁴, and organise compulsive community service to cultivate a sense of collective responsibility²⁵⁵. In addition, community corrections institutions should also devise an individualised corrections plan for each offender, based on a comprehensive evaluation of the offense, the culprit's display of remorse, personality traits, and daily life environment, and provide counselling, especially psychological counselling²⁵⁶. Management becomes an auxiliary to supervision. Community corrections institutions should have the offenders under surveillance and should investigate whether they observe the rules. In addition, community corrections institutions should formulate a scientific management system, utilise technology such as electronic monitoring, and maintain different surveillance intensities with regard to the sanctions imposed on the offender and the offender's risk level²⁵⁷.

The new goals of community-based punishments show China's attempts to approach a Western understanding of rehabilitation for guidance. The foreign word 'corrections' has been taken into Chinese legislation and points the way forwards for penal reform. Corrections denotes a process of diagnostic social work in which the offender's needs and motivations could be revealed (Petersilia, 1998; Raynor, 2012a). The underlying theory of this professional work is primarily psychosocial (Raynor, 2012a).

²⁵⁴ Article 2.2.1 of the Announcements on the Development of Pilot Locations for Community Corrections (Guan yu kai zhan she qu jiao zheng shi dian gong zuo de tong zhi, issued by the SPC, the SPP, the MPC, and the MJ on 10 July 2003). Article 28 of the Provisional Implementing Measures of Community Corrections (the Provisional Implementing Measures, She qu jiao zheng zan xing ban fa, issued by the MJ on 1 July 2004). Article 3.1 of the Suggestions on Enforcing the Pilot Community Corrections Nationwide (the Suggestions, Guan yu zai quan guo shi xing she qu jiao zheng gong zuo de yi jian, issued by the SPC, the SPP, the MPC, and the MJ on 2 September 2009). Article 15 of the Implementing Measures of Community Corrections (the Implementing Measures, She ju jiao zheng shi shi ban fa, issued by the SPC, the SPP, the MPC, and the MJ on 10 January 2012).

²⁵⁵ Community corrections require much shorter labour hours than RTL. There were no regulations on the requirement of labour hours for wrongdoers under RTL. Some studies showed that the compulsory labour was six hours per day (W. Lin, 1997). The regulations on community corrections provide that offenders under community corrections should participate in no less than eight hours of community service each month (Article 3.1 of the Suggestions, and Article 16 of the Implementing Measures).

²⁵⁶ Articles 23 and 29 of the Provisional Implementing Measures. Article 3.1 of the Suggestions.

²⁵⁷ Article 34 of the Provisional Implementing Measures. Article 21 of the Implementing Measures.

Corrections demands a professional group with social work skills, but this professional group has not been established in China. The officers who are responsible for community corrections programmes are the judicial officers in the affiliates of the bureau of justice. For judicial officers, undertaking community corrections are only one of their many well-defined jobs. Other jobs include legal education, legal consultation, mediation participation, dispute resolution on behalf of the township government, community security management, cooperation with the police station and local court to maintain public order and control crime, and the implementation of other legal services delegated by the bureau of justice (Research Department of the Ministry of Justice, 2012). It sounds like many responsibilities, but the semi-formal social control system can assist in completing many of these tasks, under the guidance of the affiliates of the bureau of justice. When community corrections are added to their list of responsibilities, the bureau of justice in many regions still thinks of relying on the semi-formal social control system to recruit social workers and volunteers. Some elders in the community who are employed as assistants to community corrections officers are regarded as a type of social worker²⁵⁸. Those close to offenders and members of grassroots organizations are employed as volunteers (N. Chen, 2011; H. Wang, 2007). Therefore, E. Li (2016) refers to Chinese community corrections as a mutated form of a traditional mechanism. Although more and more bureaus of justice began to employ those who have professional certificates or professional backgrounds as social workers in community corrections, in practice, the re-education mechanism still plays a more important role than social work methods (S. Jiang et al., 2014; E. Li, 2016). Some commentators put it down to a lack of understanding of social work (He, 2012; Luo, 2014). Social work did not appear as a profession in China until about 2000 (X. Liu, 2014). For many Chinese, it is still a novelty. Others attribute it to inadequate financing and insufficient staffing of community corrections programmes (C. Kong, 2010; E. Li, 2016; W. Tang, 2014; S. Xu, 2015). Some corrections and management measures—such as comprehensive evaluations of the offenders, individual correction plans, and psychological counselling—lack funding and staff to get off the ground. Except for these arguments, He (2012) holds that the deeper reason lies in the Chinese notion of how to implement punishment. The re-education mechanism remains the orthodox model, and social work is considered simply as a complement to the re-education mechanism.

²⁵⁸ The Suggestions on Recruiting Assistants to Community Corrections Officers (Guan yu zhao pin she qu jiao zheng xie guan yuan gong zuo de yi jian, issued by Beijing Bureau of Justice and Beijing Bureau of Labour and Social Security in 2007).

3. Thinking about the relationship between punishment and reform

The different definitions of reform or rehabilitation or re-education in both the West and China show that the relationship between punishment and reform is conditioned. Under the Western correctional model of rehabilitation, rehabilitation is closely linked with punishment, but it is not synonymous with punishment (Raynor et al., 2009, p. 6). Rehabilitation occurs during or alongside punishment, but is not part of the punishment (Duff, 2001, p. 18). Under the Western reintegrative model of rehabilitation, punishment and rehabilitation occur independently (Raynor et al., 2009, p. 9), but punishment creates a need for rehabilitation (Rotman, 1990), and rehabilitation implies the objective of punishment (McNeill, 2013b, p. 3).

Duff (2001) proposes moral rehabilitation as a possible model of rehabilitation, though it is not operating now. According to Duff (2001), punishment is considered as rehabilitation. Punishment coincides with rehabilitation as a purposive communication between the offender and society. For Duff (2005, p. 19), 'moral rehabilitation aims to restore a wrongdoer to the moral relationships and community that were threatened by her wrongdoing'. Moral rehabilitation should begin with a sincere apology. When the wrong is serious and lasting, and especially if we do not know each other very well, an oral apology is not enough. Offenders should actively undertake some burdensome tasks to show their sincere apologetic repentance to their victims and to the wider community (Duff, 2005). In this way, the censure function of punishment does not conflict with rehabilitation. Punishment can both look backwards to a past crime, and look forwards to some future good. Moral rehabilitation also requires that offenders seek help to address the causes of their crime. The state should offer to help those in serious need of moral rehabilitation, but should not force offenders to accept it (Duff, 2001, 2005). Offenders should be internally rather than merely instrumentally related (Duff, 2001, p. 88).

Duff's (2001, 2005) theory of moral rehabilitation requires offenders to undertake some burden as their punishment. Compared with moral rehabilitation, the more common correctional rehabilitation also brings burdens to offenders, but the incidental burden of rehabilitation is not regarded as punishment. Moreover, treatment model of rehabilitation took a paternalistic view of offenders (Duff, 2001; Hudson, 2003; McNeill, 2013b). The treatment of offenders was claimed to be for offenders' own good, but could be experienced by them as very intrusive. In Western post-war years, some serious interventions that were inadmissible as criminal punishments, such as indeterminate sentences and some unusual techniques, were readily defended in the name of treatment (Hudson, 2003, pp. 29-30).

The two problems of treatment model of rehabilitation that Duff (2001, 2005) pointed out also exist in the Chinese re-education mechanism in the context of semi-formal punishments. Like the treatment model of rehabilitation, the Chinese re-education mechanism was also not claimed to be part of the punishment. The re-education mechanism required wrongdoers to complete labour tasks and attend education programmes, by which wrongdoers were expected to show repentance and share a moral consensus with the masses. Nonetheless, the labour tasks and education programmes could be more intrusive than minor criminal punishments, but lacked the procedural guarantees of criminal punishments. In addition, no matter how positive the commitments to re-education were claimed to be, they were imposed on wrongdoers rather than offered to them. Those who were subjected to re-education were treated as objects to be remoulded, rather than as autonomous, responsible agents.

In both the West and China, these problems were dealt with by focusing more attention on an offender's autonomy and rights, placing more emphasis on proportionality, and making more attempts to improve the effectiveness of the correction or re-education. Both the West and China developed new programmes. Correctional rehabilitation shifted from a treatment version towards a social learning version in the West (McNeill, 2013b). A correctional understanding of rehabilitation complements the traditional re-education mechanism in Chinese community corrections. However, it is probably ineluctable that rehabilitation involves the pains of offenders. According to McNeill (2013b), pains are associated with the cognitive-behavioural methods of rehabilitation in the West in its current risk-focused guise. Offenders have to 'persuade a probation officer, a psychologist, or some other professional that one's riskiness can be and is being properly addressed and managed' (McNeill, 2013b, p. 12). From an offender's perspective, during this process they still need to change, or contort their perceptions to act as if they have been changed. Their compliance may still be due to their fear of lengthy programmes rather than due to making sincere changes. Although the advance of Chinese community corrections accelerates the abolition of semi-formal punishments, it is an attachment to exiting community-based punishments rather than a substitute for semi-formal punishments in the first place. Community corrections programmes charge offenders under community-based punishments with more burdens than before. The programmes continue the tradition of mobilising various agencies and those all-round offenders in educating and assisting offenders. They build offenders' senses of belonging, but also put many pressures on offenders to change. The programmes also introduce new correction programmes. They convey a correctional understanding of rehabilitation, but also pose a head-on challenge to the legality of the social workers' role in intensified routine

supervision. Albeit its good intents, community corrections can be experienced by offenders as ubiquitous control.

The offenders under community sanctions are selected because of their corrigibility, but they become vulnerable to injustice. This observation seems to be central to problems in the relationship between punishment and reform in the context of community sanctions. Reform or rehabilitation or re-education, in both the West and China, has a constructive purpose. It aims to address offenders' internal or external problems, or encourage their resettlement and restoration, or counteract the unwarranted consequences of punishments. As Rotman (1990, pp. 183-184) argues, it enriches the state's reaction to crime with a higher notion of justice, and thus should maintain punishments within the limits of a pre-existing law, and increase the protection of those fundamental values guaranteed by law. These requirements, in both the West and China, need to be a necessary precondition for offender reform today.

Chapter Seven. Overarching Conclusions

1. The progress of Chinese community corrections reform and its future challenges

China initiated its reform of community corrections in 2003. The project set two goals for community corrections: first, their expansion as an alternative to imprisonment; and second, the improvement of their effectiveness by developing new offender management and correction programmes. In the reform project's official rhetoric, Chinese community corrections share similar goals with those in the West.

However, the detailed rules on Chinese community corrections do not correspond with the reform project's goals.

Although the official statistics show that a rise in community-based punishments in courts of all levels since the project's launch, the principal sentencing sources simply do not widen the scope of the types of criminals suitable for community-based punishments. The provisions of community-based punishments are ambiguous and impractical, while judicial interpretations of community corrections are also narrow. The only offenders eligible for community-based punishments are those who commit very petty offences. Under the principal sentencing sources, imprisonment is the dominant penal paradigm, and community corrections play only a supplementary role in the penal system.

Although government publications consider both education and correction as the primary mission of community corrections, in practice, the traditional education mechanism is functioning more effectively than the new correction methods. The traditional education mechanism is multi-layered and based on collective culture. It requires mobilising members of grassroots organisations and all those close to offenders – including their relatives, friends, colleagues, and classmates – to provide flexible education. The declared correction mission includes conducting comprehensive evaluations of offenders, devising individualised correction plans, and providing individualised counselling. It requires employing professional social workers to provide individualised corrections. For the local bureaus of justice, it is easy to continue delivering the traditional methods of social mobilisation and flexible education, but very challenging to fully operationalise the correction methods. In the local practices of community corrections, education mechanism remains the orthodox means of reform or rehabilitation, and correction methods is only a complement to the orthodox mechanism.

A review of the Chinese legal framework on community corrections indicates that, to understand Chinese community corrections, research must extend beyond legal provisions.

China has an underlying legal culture, passed down from the imperial era to the socialist era. The formal justice system is a function of last resort in the social control system (Xiaoming Chen, 2004). In sociological studies on the history of criminal justice, law enforcement and punishment are identified as parts of a complex set of strategies for ordering society and exercising power (Foucault, 1977; Mühlhahn, 2009). The technologies of power in both Europe and China are dispersed through society, but in different ways: by professional knowledge in Europe, but by the network of mutuality inherent in collectivism, in China (Bakken, 2005). Under a strong collective tradition, the community becomes the boundary to distinguish two types of offences. Those of the first type violate the interests of one or more of the community's members, and so the offences can be addressed within the community. Such offences can be punished by informal or semi-formal punishments. Informal punishments are administered by unofficial groups, based on morality or informal regulations. By contrast, semi-formal punishments include those partly or completely administered by unofficial groups but on the basis of law, and those executed by official agencies based on regulations contrary to the law but tacitly approved by the authorities. Offences of the second type infringe the interests of the whole community, or those beyond the community. Such offences require formal punishments, decided and enforced by official agencies pursuant to the law. In imperial China, the clan served as a concrete community for dividing the two types of offences; by contrast, in socialist China, the community is an abstract concept, meaning the people.

The greatest problem of informal punishments and semi-formal punishments lies in their basis. Some are based on regulations that conflict with the law. Albeit without a firm legal basis, the semi-formal punishments can be implemented instead of applicable minor formal punishments. These semi-formal punishments reveal weaknesses in the protection of human rights and the constraints of official agencies' power.

In the last decade, China has made remarkable headway on the legality of its penal system. The new political interpretations indicate that all types of offences can and should fall within the scope of formal punishment. All types of punishments are being reformed in ways consistent, or at least not overtly in conflict, with the structures and principles of the legal system (Biddulph, 2007). The most notorious semi-formal punishment, that is, RTL, has been abolished, while many others have been formalised. Community corrections are promoted in the context of legal reform of semi-formal punishment. Since some severe forms of the latter have already been abolished, minor criminal punishments may serve as alternatives to semi-formal punishments in practice.

Semi-formal punishments are criticised for lacking legal basis, but their methods of social mobilisation and flexible education are still favoured, which explains why community-based punishments rather than other minor criminal punishments are promoted. Community-based punishments, rooted in Chinese collective culture, were expected to continue the ethos of social mobilisation and flexible education (Research Group on Community Corrections of the Ministry of Justice, 2003).

Community corrections call for the involvement of grassroots organisation members and those close to the offenders as social workers and volunteers. In many regions, the members of grassroots organisations and those close to the offenders constitute the majority of social workers and volunteers, but there are not enough with social work skills. The regulations on community corrections provide for the role of social workers and volunteers in conducting some correction, education and assistance tasks, under the guidance of community corrections officers. However, while accustomed to the traditional mechanisms of education and assistance, the members of grassroots organisations, those close to the offenders, and even community corrections officers experience various difficulties in carrying out correction tasks.

Another problem with community corrections is the local deviation from the prescribed division of functions among community corrections officers and social workers. In practice, social workers perform many tasks of community corrections officers, especially some duties of routine supervision, without legal authority. From this perspective, community corrections show signs of semi-formal punishment. Thus, the implementation of community corrections can still bend the law, albeit to a lesser degree than the practice of semi-formal punishment. This phenomenon reflects the persisting inadequacy of constraints on executive agencies' power in the Chinese penal system.

2. The conflict between risk management and protection of offenders' rights in European community sanctions

In Europe, mass supervision is a general trend. In many European countries, the number of persons under CSMs is rising, the range of these sanctions is broadening, and their intensity is increasing (Graebisch & Burkhardt, 2014; McNeill, 2013a; McNeill & Beyens, 2013; Stefani, 2016).

CSMs were initially advanced as alternatives to imprisonment. 'Imprisonment as a last resort' is the guiding principle in European penal policies (Snacken, 2006). Resolution (76)10 of the CoE recommends developing non-custodial sanctions to solve prison overcrowding,

show respect for individual liberty, and save costs. However, Recommendation No. R(92)16 later clarified that pursuing an alternative to imprisonment cannot justify recourse to any kind of sanction or measure.²⁵⁹ In the CoE's subsequent recommendations, the 'inherent value' of CSMs, beyond a simple means to reduce imprisonment, has been increasingly recognised (van Zyl Smit et al., 2015, p. 14). CSMs share the common goal of penal sanctions to protect the public, and their particular characteristic is emphasising offender rehabilitation.

CSMs' effectiveness criteria follow their objectives. Under Resolution (76)10, the utilitarian basis for using alternatives to imprisonment is their greater cost-effectiveness.²⁶⁰ In this sense, collective CSMs, such as suspended sentences and early release, best accommodate cost reduction. However, under Recommendation No. R(92)16 and subsequent recommendations, the effectiveness criteria for CSMs shifted from cost-effectiveness to public protection and offender rehabilitation. At that point, effective control of offenders become a crucial indicator of effectiveness. Collective measures do not usually involve much control, beyond the single condition of avoiding reoffending. By contrast, individualised programmes usually attach different conditions and obligations. This allows close oversight of their conduct in the community (Martufi & Slingeneyer, 2017, p. 10; van Zyl Smit et al., 2015, p. 16). Recommendation No. R(99)22 and subsequent recommendations all stress the individualisation of sanctions.

For offenders subject to individualised CSMs programmes, effective control is closely linked with their subsequent compliance with the criminal law. Recent studies show that cognitive behavioural methods can facilitate long-term compliance (Andrews & Bonta, 2010; Bakker & Riley, 1993; Izzo & Ross, 1990; Lipsey, 1992). Thus, the CoE's recent recommendations suggest using risk-need-responsivity assessments and cognitive behavioural methods to develop programmes and interventions for offenders who have relapsed into serious crime or are likely to do so.

The demand to attach conditions and obligations, and the preoccupation with assessing and managing risk, increase the punitive weight of CSMs, especially those for high-risk offenders. The increasing punitiveness of CSMs raises concerns over human rights. The CoE's instruments require member states to refer to other European human rights instruments and standards, but there is a particular concern that in managing the risk of dangerous offenders, the legal principles of human rights are more loosely interpreted. The legality principle is undermined

²⁵⁹ Preamble b, Recommendation No. R(92)16.

²⁶⁰ Preamble, the Resolution (76)10.

by indeterminate CSMs for dangerous offenders, while the proportionality principle is weakened by the considering assessed risks to determine CSM severity.

The conflict between risk management and protection of offenders' rights corresponds with the new penal trends and the new rehabilitationism in many Western countries.

Since the 1980s, punitiveness and managerialism have been the two penal trends in many Western countries. Community sanctions adapt to punitive and managerial narratives. The emphasis on public protection reinforces the punitive elements of community sanctions, while the adoption of a reductionist policy and the increase in community sanctions facilitate the efficient management of penal institutions.

Community sanctions were the key focus of the treatment model of rehabilitation, but this model became subject to criticism after the 1970s. Contemporary rehabilitationism responds to these criticisms and reconciles with the new penal trends. Moreover, community sanctions adapt to the new rehabilitative narrative. The reconstruction of rehabilitation theory emphasises offenders' rights, incorporates the value of just deserts theory to avoid extra punishments, and compromises on the censure function of punishment. Cognitive-behavioural programmes fuse needs with risks, re-inscribe rehabilitation into risk management, and revive rehabilitative optimism. The legal principles about rehabilitation as a right play a vital role in Europe. Meanwhile, cognitive behavioural methods originated in Canada, the USA, and England and Wales are being introduced in continental jurisdictions.

The differences between the new theoretical strand and the empirical strand of rehabilitation underline the conflict between risk management and protection of offenders' rights. Resolving this conflict is an objective for the European instruments, which can present the European conception of resisting punitiveness, and balance protection of offenders' rights against risk management.

3. Thinking about reform and punishment in the context of community sanctions: the divergence and convergence between the West and China

Differences between the West and China in the role of community sanctions largely reflect their distinct definitions of crime and criminal punishment. As Xiaoming Chen (2004, p. 523) argues, 'Chinese society and Western societies may represent two different extremes with respect to the nature of social and legal control'. Compared with Western societies, Chinese society prioritises social control over legal control. In traditional China, crime defined by law constituted only a very small subset of wrongdoings. Most wrongdoings were deliberated and then punished in the community, but the sanctions were not categorized as criminal

punishments. China's modern penal system shows some cultural continuities. Although minor criminal punishments include some community-based punishments, the former can be replaced in practice by semi-formal punishments, which lack legal basis.

In recent decades, China has especially emphasised legal control, and resolved to legalise and professionalise the penal system. In this context, abolishing RTL, the most widely used semi-formal punishment, paves the way for broadening the scope of criminals eligible for community corrections. Thus, China's notion of crime and concept of community-based punishment are moving closer to their Western equivalents.

Nevertheless, the influence of semi-formal punishment has not been extinguished. Community corrections have some features of semi-formal punishment. Whereas community sanctions in the West are initiated as alternatives to imprisonment, community corrections in China are developed as alternatives to both imprisonment and semi-formal punishment.

Despite their different scope, community-based punishments in both the West and China are considered to be key mechanisms of reform. However, different understandings of the causes of crime engender different approaches to reform in executing community-based punishments.

Western correctional methods of rehabilitation have primarily been concerned with offenders' individual problems, and thus individualised. By contrast, Chinese re-educational methods of reform were primarily concerned with the negative social influences on offenders, and were, thus, roughly universal. All offenders should be subjected to multi-layered education, instructed by both their supervising officers and all those close to them.

However, the current trends of reform in both the West and China seem to be converging towards a holistic understanding, with the coordination of individual and professional approaches with social and relational supports.

Despite their different reform methods, both the West and China have viewed the offenders under community-based punishments as the corrigible, and expected them to undergo positive changes. Though well-intentioned, the traditional views of reform seem to have two similar problems. First, both Western correctional rehabilitation and Chinese re-education may neglect the incidental burden of reform on offenders. Second, both approaches may infantilise offenders. These two problems may raise injustice problems in practice. No matter how intrusive the reform methods, they are not part of punishment at all. This seems central to problems in the relationship between punishment and reform in the context of community sanctions. In both the West and China, reform and punishment in the

context of community sanctions are now more concerned with the autonomy and rights of offenders and proportionality. Reform enriches the state's reaction to crime with a higher notion of justice (Rotman, 1990, p. 183), but its precondition is insistence on the basic notion of justice. Reform should enhance, rather than derogate from, the values guaranteed by law.

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