Volume 9, Number 2          Winter 2014

LEGITIMACY-BASED DISCRIMINATION AND THE DEVELOPMENT OF THE JUDICIAL POWER IN JAPAN AS SEEN THROUGH TWO SUPREME COURT CASES

Colin P.A. Jones

TRANSITIONAL JUSTICE IN SOUTH KOREA: ONE COUNTRY’S SEARCH FOR TRUTH AND RECONCILIATION

Paul Hanley

THE NEW DRUG DETOXIFICATION SYSTEM IN CHINA: A MISUSED TOOL FOR DRUG REHABILITATION

Enshen Li
The East Asia Law Review is published semi-annually, with an occasional supplemental symposium issue, by the University of Pennsylvania East Asian Legal Studies Association, University of Pennsylvania Law School, 3501 Sansom St., Philadelphia, PA 19104. eISSN 1943-8249.

The East Asia Law Review welcomes the submissions of articles, book reviews, notes, comments, and essays of all kinds. Manuscripts should be double-spaced, preferably in 12-point Courier or Courier New font. Complete details regarding submissions and manuscript guidelines may be found on our website, at http://www.pennealr.com.

Views expressed are those of the authors and do not necessarily reflect those of the Association or of its officers, directors, editors, members, or staff, or of the University of Pennsylvania. All editors are students at the University of Pennsylvania Law School unless otherwise indicated.

Copyright © 2011–2013, all rights reserved. University of Pennsylvania East Asian Legal Studies Association.
UNIVERSITY OF PENNSYLVANIA
EAST ASIA LAW REVIEW
FORMERLY THE CHINESE LAW AND POLICY REVIEW

Editorial Staff 2013-2014

Editor-in-Chief
TRAVIS VAN LIGTEN

Managing Editor
BENJAMIN DRISCOLL

Production Editor
JOSEPH RUBY

Executive Editors
ANGELA WU
YASAMAN RAHMANI
SONYA SHEA

Symposium Editor
JIA XING (JASON) XU

Technology Editor
AMBROGINO GIUSTI

Articles Editor
CHIHARU YUKI

Comments Editor
NATHAN SCHWARZBERG

Senior Editors
ALEXANDRE GAPIHAN

Associate Editors
ALEX GIN
J. JOHN LIM
MITCHELL HEYLAND
ALEXANDRA HAMILTON
JAMES HWANG
NAKUL GOENKA
ALYSSA PEHMOELLER
JING XU
POOJA SUDARSHAN
BIHONG QIU
JOANNA PERKOWSKA
RACHEL S. KWON
CONNOR LYNCH
JONATHAN ELEFF
RAHUL MAGAN
DAN STEPANICICH
KATHERINE STRIKE
SEAN MAHONEY
DAVID YIP
KEVIN LEE
SETH GEE
EMILY YI
MARKUS BRAZILL
STEFAN MORRISSEY
ERIC ROSENBLUM
MAX HULME
TAI-CHEN CHIANG
ESHITA MOHANTY

ASSOCIATE EDITORS

FRANCIS PETRIE
MARKUS BRAZILL
GABRIEL LEE
MAX HULME

Faculty Advisor
JACQUES DE LISLE
STEPHEN A. COZEN PROFESSOR OF LAW

Stephen A. Cozen Professor of Law
LEGITIMACY-BASED DISCRIMINATION AND THE DEVELOPMENT OF THE JUDICIAL POWER IN JAPAN AS SEEN THROUGH TWO SUPREME COURT CASES ........99

Colin P.A. Jones

TRANSITIONAL JUSTICE IN SOUTH KOREA: ONE COUNTRY’S SEARCH FOR TRUTH AND RECONCILIATION .................138

Paul Hanley

THE NEW DRUG DETOXIFICATION SYSTEM IN CHINA: A MISUSED TOOL FOR DRUG REHABILITATION

Enshen Li .................................................................168
Legitimacy-Based Discrimination and the Development of the Judicial Power in Japan as Seen through Two Supreme Court Cases

Colin P.A. Jones*†

Abstract

In September of 2013 the Supreme Court of Japan issued two judgments dealing with the constitutionality of statutory schemes that discriminated based on legitimacy. The first case resulted in the Court finding the provision unconstitutional, a rare occurrence in Japan. The second case found no constitutional problem to exist. This article will compare and contrast the two decisions while explaining the family law context in which they arose. It also offers an explanation of how the Court could arrive at two seemingly contradictory conclusions at almost the same time in its history.

I. INTRODUCTION

II. AN OVERVIEW OF THE SUPREME COURT AND THE JUDICIAL POWER IN JAPAN

III. THE INHERITANCE CASE

   A. The Case within the Context of Japanese Family Law
   B. The Facts, Issues and Rationale
      ii. The Facts
      iii. The Issues

   100

   101

   103

   105

   106
I. INTRODUCTION

In September 2013, Japan’s Supreme Court issued two separate judgments relating to the constitutionality of statutory and regulatory provisions that discriminated based on legitimacy. In both cases, the opinion of the Court was unanimous. The first, decided on September 4, found unconstitutional Article 900(iv) of the Japanese Civil Code, which granted to children born out of wedlock a statutory share of inheritance only half that accorded legitimate children. Such action violated the...
constitutional guarantee of equal treatment under the law and was thus void with respect to the estate at issue. This case will be referred to in this article as the “Inheritance Case.”

The second case, decided on September 26, involved an equal protection challenge to Article 49(2)(i) of the Family Register Act, which requires parents reporting a birth to indicate whether or not the child was born in wedlock. In this case the court found no constitutional violation. It will be referred to as the “Registration Case.”

Both cases arose under Article 14(1) of the Constitution of Japan, which reads as follows: “All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”

II. AN OVERVIEW OF THE SUPREME COURT AND THE JUDICIAL POWER IN JAPAN

Under Article 81 of the Japanese Constitution, “[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.” This has
been interpreted as being an “ancillary” power of constitutional review \(\text{(futaiteki iken shinsaken)}\), meaning that there must be a justiciable case or controversy before the Court in order for it to make a constitutional determination, similar to the US System.\(^6\) Such a requirement necessitates that inferior courts also have the power to rule on constitutional issues, even though the Constitution itself only clearly vests the power in the Supreme Court.\(^7\)

Fifteen justices sit on the Court,\(^8\) which is actually four distinct panels, or benches.\(^9\) There are three Petty Benches comprised of five justices each.\(^10\) These dispose of most of the Court’s docket, which is voluminous, since in theory the Supreme Court has the final word on matters of interpretation involving all areas of Japanese law, not just the Constitution.

In addition to the three Petty Benches, all fifteen justices sometimes sit \textit{en banc} as the Grand Bench. Under the Court Act, only the Grand Bench may issue a ruling of unconstitutionality or overrule a prior Grand Bench interpretation.\(^11\) By contrast, a Petty Bench may resolve the matter if it involves a constitutional ruling consistent with the prior Grand Bench decision.\(^12\)

This brings us to an important difference between the two cases; the Inheritance Case was decided by the Grand Bench. Article 900(iv) of the Civil Code had previously been found \textit{not} to violate Article 14(1) of

---


\(^7\) \textit{Id.} at 120-21.

\(^8\) \textit{See Sai Bansho} [Courts Act], Act No. 59 of 1947, art. 5, para. 1, 3 (stating the Supreme Court is comprised of a Chief Justice and fourteen Justices of the Supreme Court).


\(^10\) \textit{Id.} art. 2.

\(^11\) \textit{See Sai Bansho} [Court Act], Act No. 59 of 1947, art. 10. (providing that “a petty bench may not give a judicial decision” in cases in which involve a determination on the constitutionality of law, cases in which a “law, order, rule or disposition is to be decided as unconstitutional,” and cases in which an interpretation or application of the Constitution is contrary to a “decision previously rendered by the Supreme Court”).

\(^12\) According to Supreme Court rules, a case may also be referred from a Petty Bench to the Grand Bench in the event of a split among the Petty Bench panel or when otherwise deemed appropriate. Supreme Court Trial Rules, art. 9.
the Constitution in a 1995 Grand Bench decision (referred to in this article as the “1995 Decision”). This view was affirmed in subsequent Petty Bench decisions as well. Thus, even before the decision was announced, the mere news that the Inheritance Case was reviewed by the Grand Bench caused speculation that the 1995 Decision would be overturned; only a Petty Bench decision would have been required to reaffirm the constitutionality of Article 900(iv).

Conversely, the Registration Case was heard by a Petty Bench. The decision did not find a statute or government act to be unconstitutional or conflict with a prior Grand Bench precedent on the issue.

III. THE INHERITANCE CASE

A. The Case within the Context of Japanese Family Law

Since its establishment in 1947, Japan’s Supreme Court has only held a provision in a statute to be unconstitutional on nine occasions, most recently the Inheritance Case. The reluctance of the Supreme Court to invalidate legislation on constitutional grounds is one reason why some scholars refer to the Court as being highly “conservative” or describe

16 Sup. Ct. Admin. Rules, supra note 9, art. 9.
17 Registration Case, supra note 3.
18 See David S. Law, The Anatomy of a Conservative Court: Judicial Review in Japan, 87 TEX. L. REV. 1545, 1547 (2009) (noting that in 2009 (before the Inheritance Case) the Supreme Court of Japan ruled eight statutes unconstitutional since the Court’s creation in 1947).
19 Inheritance Case, supra note 1. The Supreme Court has also held the application of statutes and regulations – i.e., government acts – to be unconstitutional on about a dozen other occasions. See Law, supra note 18, at 1547-48 (describing laws and rules found unconstitutional by the Supreme Court of Japan).
judicial constitutional review as having “failed” in Japan. This article will neither seek to endorse nor challenge these characterizations.

Suffice it to say, however, the Inheritance Case is significant. Not only is it one of the Court’s few unconstitutionality rulings, but it is the first instance of the Court invalidating a provision of the Japanese Civil Code. Containing the rules of property, contract, tort, family law and inheritance, the Civil Code is one of the most basic canons of Japanese law. Much of it also predates the current Constitution by half a century, although parts, particularly the sections dealing with family law and inheritance, were substantially rewritten during the American occupation, as is discussed in more detail below.

For this reason alone, the Inheritance Case may prove particularly important. In addition to the discriminatory provisions of Article 900(iv), the Civil Code contains a number of other provisions that would on their face seem suspect under Article 14(1), including: different age thresholds for marriage based upon gender (Article 731), a requirement prohibiting remarriage within six months of divorce applicable only to women (Article 733), a statutory presumption that a child born to a woman within 300 days of her divorce is her ex-husband’s (Article 772), and the default vesting in mothers of sole parental authority over children born out of wedlock (Article 819(4)). Some of these provisions would seem constitutionally problematic, not only under Article 14(1) but also under Article 24. Article 24 of the Constitution requires that all laws pertaining to marriage and the family be “enacted from the standpoint of individual


21 Minpō [Minpō] [Civ. C.] 1896, art. 731 (“A man who has attained 18 years of age, and a woman who has attained 16 years of age may enter into marriage.”), available at http://www.japaneselawtranslation.go.jp/law/detail/?re=02&co=01&ia=03&x=29&y=9&al]=C&ky=civil+code&page=27.

22 Id. art. 733.

23 See id. art. 772 (stating a presumption that the husband is the father of a child conceived during marriage, and that a child born within 300 days after dissolution of the marriage is “presumed to have been conceived during marriage.”).

24 See id. art. 819, para. 4. (“A father shall only exercise parental authority with regard to a child of his that he has affiliated if both parents agree that he shall have parental authority.”).
dignity and the essential equality of the sexes”. This language is even reiterated in Article 2 of the Civil Code. Nonetheless, these discriminatory provisions have been upheld by prior Supreme Court precedents finding them not to violate the constitution.

Therefore, the Inheritance Case might signal the tantalizing possibility of the Court more actively challenging the other inequalities and anachronisms that remain enshrined in the Civil Code, notwithstanding decades of change in Japanese society. As we shall see, however, the Registration Case suggests otherwise.

B. The Facts, Issues and Rationale

i. The Facts

The facts of the Inheritance Case are simple enough. A decedent - “P” - died in July 2001, leaving as heirs his legitimate children (the Appellees) and children born out of wedlock (the Appellants). The Appellees had petitioned the trial court for a declaratory judgment confirming Appellants’ statutory share of P’s estate. Finding no constitutional problems, the trial court ordered that the estate be distributed in accordance with Article 900(iv), that is, with Appellants receiving only half the shares of Appellees. Appeals eventually resulted in the case being heard by the Supreme Court.

---

25 Nihonkoku Kenpō [Kenpō] [Constitution], art. 24.
26 See Minpō [Minpō] [Civ. C.] 1896, art. 2 (“This Code must be construed in accordance with honoring the dignity of individuals and the essential equality of both sexes.”), available at http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=Civil+Code&x=0&y=0&ia=03&ky=&puge=4 (Part I, II and III) [hereinafter Minpō Parts I-III].
28 Inheritance Case, supra note 1, para. 1.
29 Id.
30 Id.
ii. The Issues

In order to arrive at its conclusion that the Civil Code provision violated the constitution, the Grand Bench had to deal with two major issues. The first was justifying the reversal of its own holding in the 1995 Decision.\(^\text{31}\) Eighteen years is not a long time in jurisprudential terms, so the Court had to articulate a reason why what had recently been constitutional no longer was. The second was implementation.\(^\text{32}\) By the time the Court issued its ruling over a decade had passed since P’s death. In order to give relief to the Appellants, it would have to find that Article 900(iv) was unconstitutional at the time of P’s death. If such a ruling had general retroactive effect, it could potentially throw into question the validity of the settlement of thousands of other estates that had been achieved during the interim. How the Court dealt with both of these issues is discussed in more detail below.

iii. The Rationale

On its face, the differing treatment accorded illegitimate children by Article 900(iv) would seem to present a *prima facie* case of discrimination based on “social status or family origin” in violation of Article 14(1).\(^\text{33}\) However, due to the central role of marriage in Japanese family law and the historical context described in Part IV.A.1, the provision survived for over half a century. In the 1995 Decision, the Court devoted several pages of text to explaining why Article 900(iv) *did not* violate the equal protection clause, as encapsulated in a summary paragraph:

> Since the Civil Code has adopted the system of marriage by law, the reason of enactment of the Provision has a reasonable ground. The fact that the Provision set out the statutory inheritance share of an illegitimate child at one-half that of the legitimate child cannot be regarded as excessively unreasonable in relation to the reason of enactment, and exceeded the scope of reasonable discretion granted to the legislature. The Provision cannot

---

31 See *id.* pt. 3 (explaining the Court’s rationale for ruling counter to the 1995 Decision).
32 See *id.* pt. 4.
33 See *NHONKOKU KENPÔ [KENPÔ] [CONSTITUTION]*, art. 14 (“All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”).
be regarded as an unreasonable discrimination and is against Article 14, paragraph 1 of the Constitution.\(^{34}\)

From an institutional perspective, for the Supreme Court the real challenge in the Inheritance Case would seem to have been how to overturn the 1995 Decision without simply declaring it to have been a mistake. This was in fact the view expounded by the five judges who dissented from that holding, as well as subsequent academic criticism.\(^{35}\) Furthermore, the challenge is greater than it first appears. Although 18 years separated the issuance of the two judgments, the Inheritance Case Court had to find Article 2001(iv) unconstitutional as of 2001 (when P died), a mere six years after the 1995 Decision was rendered. In the author’s view, it is hard to describe the Grand Bench as having risen to the challenge, but given these circumstances that is perhaps not unsurprising.

As its starting point, the Court noted that in 1947 the Civil Code was amended to provide for an egalitarian system of inheritance in place of the pre-war system of カククソク under which a single heir (typically the eldest son) would inherit the status of head of household together with control of the household’s assets (see discussion at Part IV.A.1).\(^{36}\) Nonetheless, a proviso from the pre-amendment code that accorded illegitimate children an unequal share in certain circumstances was incorporated into the new code. According to the Court, at the time these amendments were made the Japanese people had a discriminatory attitude towards children born out of wedlock.\(^{37}\) Furthermore, the Court noted that during the legislative process frequent reference had been made to various other countries of the world which at the time also had statutory provisions that discriminated against illegitimate children in matters of inheritance.\(^{38}\)

The Court also spent some time discussing social change, a theme that is central to its unconstitutionality ruling.\(^{39}\) Since the current Article 900(iv) was enacted in 1947, Japan experienced rapid economic

\(^{34}\) 1995 Decision, supra note 13 (summarizing the reasoning in the case).
\(^{36}\) Inheritance Case, supra note 1.
\(^{37}\) Id.
\(^{38}\) Id.
\(^{39}\) Id.
development and the decline of extended families. Life expectancy increased, resulting in a greater need to provide for aging parents and spouses (reflected in a 1980 amendment to the Civil Code increasing the size of statutory share of a decedent’s estate accorded to surviving spouses). Japanese people started getting married later in life (or not at all) and had fewer children if they did. As a result, there had developed increasing diversity in the views of Japanese people regarding marriage and how families should be that has been accompanied by growth in the variety of family and marital structures.

The factual rationale – if it may be described in such terms – is actually hard to follow. The Court noted that the number of children born out of wedlock had decreased until the late 1970s, but has increased since. While asserting in one place that Japanese people have come to embrace different and more diverse attitudes towards marriage and family structures compared to days gone by, elsewhere the Court notes that unlike western countries, some in which births out of wedlock account for over 50% of all births, in Japan they accounted for only 2.2% in 2011. The Court takes this as a sign that notwithstanding the diverse attitudes of Japanese towards family, the importance of legal marriage is still deeply rooted in the national consciousness – not so much change after all, it seems.

The Court then turns its eyes again abroad, particularly to European nations (where religion was supposedly the reason for discrimination against the illegitimate) that had phased out legal distinctions between children based on legitimacy. Germany eliminated them in 1998 and France in 2001, leaving Japan one of the few countries in the world still having inheritance rules that discriminated against heirs born out of wedlock.

Also relevant was Japan’s ratification of the International Covenant on Civil and Political Rights in 1979 and the UN Convention on

---

40 Id.
41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
47 See id. (noting that neither the United States nor European countries continue to distinguish between children born in or out of wedlock for inheritance as Japan does).
the Rights of the Child in 1994.\textsuperscript{48} Both instruments prohibit discrimination based on birth. The Court further explained that the respective UN committees overseeing these conventions had issued multiple recommendations that Japan eliminate the discriminatory provisions from its law, the most recent in 2010.\textsuperscript{49} This is noteworthy, since it has been observed that references by the Supreme Court to human rights instruments are rare (although the Court previously made such a reference in the Nationality Act Case discussed below).\textsuperscript{50} It is thus probably even more unusual for the Court to refer to criticism of Japan by UN human rights bodies as part of its rationale. This might be a sign of the Court being progressive, but could as easily be an indicator of a weak rationale being bolstered by whatever was at hand.

The Court also drew on past litigation in related cases. It mentioned changes in regulations relating to the registration of children born out of wedlock as well as several lower cases challenging the discriminatory effect of such registration systems (cases that do not appear to merit mention in the Registration Case).\textsuperscript{51} The Court attached particular attention to the Grand Bench’s own 2008 decision in what is referred to in this article as the Nationality Act Case (discussed below) and which also involved a form of statutory discrimination related to birth status.\textsuperscript{52}

Legislative and regulatory history also features in the rationale of the Inheritance Case, but primarily in the form of descriptions of unsuccessful initiatives. According to the Court, various ministerial and legislative committees had been proposing amendments to Article 900 to remove the discriminatory provisions, the earliest in 1979, the most recent


\textsuperscript{49} Id.


\textsuperscript{51} Inheritance Case, supra note 1.

Yet none of these initiatives ever advanced to the stage of being submitted to the Diet.\footnote{Inheritance Case, supra note 1.}

Yet for all the alleged social change, legal developments, and other factors given by the Court in explanation, the rationale of the decision remains unconvincing. It fails to come even close to identifying anything in the nature of a “tipping point” in Japanese social conditions between the 1995 Decision and the 2013 Inheritance Case. After all, much of the social change and diversification of attitudes cited by the Court were arguably well underway before 1995. Similarly, some of the legislative efforts and both of the international treaties discussed in the case predate the 1995 Decision.

A tipping point would have been difficult to identify anyways, given that Petty Bench decisions subsequent to the 1995 Decision had reconfirmed the constitutionality of Article 900(iv), the most recent in 2009 (referred to below as the “2009 Decision”).\footnote{See 2009 Decision, supra note 14; Saikō Saibansho [Sup. Ct.] (1st Petty Bench) Oct. 4, 2004, 1884 HANJI 40; Saikō Saibansho [Sup. Ct.] (1st Petty Bench) Mar. 31, 2003, 1820 HANREI JIHO [HANJI] 64; Saikō Saibansho [Sup. Ct.] (2nd Petty Bench) Mar. 28, 2003, 1820 HANREI JIHO [HANJI] 62; Saikō Saibansho [Sup. Ct.] (1st Petty Bench) Jan. 27, 2000, 1707 HANREI JIHO [HANJI] 121.} The Court in the Inheritance Case judgment does refer to the 2009 Decision, but only references the dissenting and concurring opinions (discussed in subpart E.1 below), which support the Court’s conclusion in the Inheritance Case.

Commendable as the Court’s holding regarding the unacceptability of discrimination between heirs based on their legitimacy may be, it nonetheless appears to have been arrived at through nothing more than a bundle of assertions leading to a pre-ordained conclusion. Ironically, the somewhat contorted rationale may be due to the comparatively low and amorphous standard of review the Court applied.

C. Standards of Review

\footnote{The use of legislative history even by the US Supreme Court is still a complex and sometimes controversial subject, particularly since the appointment to the Court of Justice Scalia, who has been openly critical of the use of legislative history as an interpretive tool. See, e.g. David Law & David Zaring, Law Versus Ideology: The Supreme Court and the Use of Legislative History, 51 WM. & MARY L. REV. 1653, 1658-59 (2010). References to the history of legislative failures may not be as incongruous as they seem. As noted elsewhere in this article, constitutional claims are sometimes raised in the form of suits for damages against the state due to legislative nonfeasance by the Diet, as was the case in the Registration Case.}
Despite the clear wording of Article 14(1), all that is generally required for a statutory provision having discriminatory effect is for it to have a “rational basis” (gōritekina konkyo), a fairly low threshold that can be traced back to a 1964 Grand Bench decision that is also the starting point for the analysis in the Registration Case.\textsuperscript{56} Constitutional scholars have long argued that at least the categories specifically enumerated in Article 14(1) (race, creed, sex, social status and family origin) should enjoy a higher standard of judicial scrutiny when used as the basis for discriminatory treatment by law or government acts.\textsuperscript{57} The Supreme Court, however, has not attached any special significance to the enumerated categories and for most of its history has uniformly applied an extremely low standard of review in upholding discriminatory legislation of all types. For example, as described by Professor Craig Martin: “The Supreme Court of Japan has almost exclusively, until 2008, employed a rudimentary ‘rationality test’ similar to that initially developed in the early equal protection cases in the United States, and it has applied it universally in respect of all forms of discrimination.”\textsuperscript{58}

In other words, the standard of review in Japanese equal protection cases in Japan has long been comparable to the US “rational basis” standard, the lowest standard of review used by the Supreme Court. Since virtually all government activities are justified based on the public welfare and it is rare for governments to engage in blatantly irrational discrimination, this standard has resulted in most equal protection claims failing, though of course the same could be said for constitutional claims of any other type as well. In the family sphere, other discriminatory


\textsuperscript{57} See, e.g., SHIGENORI MATSUI, THE CONSTITUTION OF JAPAN 176 (2011) (“[W]hile most academics have suggested the courts should distinguish between forms of discrimination and employ a more vigorous standard of review to discrimination based on the grounds enumerated in article 14, the Supreme Court has not shared this view. Rather, it has viewed discrimination based on these enumerated grounds merely as examples of unreasonable discrimination and has thus applied a very lenient standard of review to many forms of discrimination.”).

provisions of the Civil Code have been upheld based on this rational basis standard.\textsuperscript{59}

This being the case, what may be surprising about equal protection jurisprudence in Japan is not that there have been so few successful challenges based on Article 14(1), but that there have been any at all. For many, the surprise is likely to be compounded by reading the very first instance in which the Japanese Supreme Court found a statute unconstitutional, a decision based on the finding of an Article 14(1) violation.

The so-called “Patricide Case” of 1973 resulted in the Court invalidating provisions of the Penal Code that resulted in the punishment for homicide varying depending upon the relationship between the killer and the victim; persons who killed parents or other lineal ascendants were subject to more severe punishments than those who killed strangers or children or descendants.\textsuperscript{60} Although the Court was almost unanimous in finding the provision unconstitutional, there was a significant disparity of rationales as to why. As noted by Professor Martin, the Court never precisely identified the type of discrimination at issue in the case even though that would seem to be the crux of an equal protection case.\textsuperscript{61} The true significance of the Patricide Case is thus best sought in it being the first instance of the Supreme Court invalidating a statute and perhaps as a partial rejection of the feudally-rooted Confucian system of social ordering that had long prevailed in Japan.\textsuperscript{62}

\textsuperscript{59} For example, the women-only six month waiting period for remarriage was upheld because it was intended to serve the rational goal of preventing the occurrence of conflicting presumptions about paternity. Law, supra note 18.


\textsuperscript{61} Martin, supra note 58 at 201. Note that as in the Inheritance Case, the Court in the Patricide Case also had to deal with a prior holding of the Court finding the provision at issue to be constitutional. See id. at 200 \& n.98 (citing Saikō Saibansho [Sup. Ct.] (1st Petty Bench) May 24, 1956, 10 Saikō Saibansho KEIJI HANREISHŪ [KEISHŪ] 734). Note also that the majority of Justices upheld the concept of the moral precepts about respecting elders being incorporated into law, finding the penal code provision to be unconstitutional not because the punishments for elder-slaying were harsher than for other types of homicide, but because they were disproportionately harsher. Id. at 201.

\textsuperscript{62} See id.
Although the Patricide Case may offer little as an example of coherent Article 14(1) jurisprudence, three of the Court’s unconstitutionality rulings preceding the Inheritance Case were also made on equal protection grounds. However, two of these involved malapportionment in Diet seats.\(^\text{63}\) Since those cases also implicated Article 44 of the Constitution, which enunciates a separate equal-protection guarantee in connection with rights of political participation, they are best considered as applying a different standard than was applicable to the Inheritance Case.\(^\text{64}\)

The Nationality Act Case was the next instance of the Court invalidating a law based only on the equal protection guarantee in Article 14.\(^\text{65}\) The Nationality Act Case also involved statutory discrimination related to birth status. Specifically, the Nationality Act contained a provision that made children born out of wedlock to a Japanese father eligible for Japanese citizenship only if the Japanese father had


\(^{64}\) This characterization is an oversimplification intended to avoid being sidetracked by an extremely dense area of constitutional jurisprudence. As noted by one scholar, the fact that courts have treated the enumerated categories of prohibited discrimination in Article 44 the same as those in Article 14(1), that is, as a list of examples rather than categories subject to higher scrutiny, suggests that Article 44 does not establish a higher standard of review. Tomonobu Hayashi, Article 44 in SHINKIHONHŌ KOMENTARU – KENPO 319 (Hitoshi Serizawa, Masato Ichikawa, Shōjirō Sakaguchi eds., 2011). Prevailing academic theory holds that Article 44 should be construed as establishing a higher standard of review. *Id.* It could also be argued that the malapportionment cases can be further distinguished because voting rights also implicate the right to choose public officials under Article 15 and the basic principle of popular sovereignty supposedly underlying the entire Constitution and expressed in its Preamble and in Article 1. Academic theory aside, in its November 2013 rulings on malapportionment, the Grand Bench did not appear to attach any particular significance to Article 44, mentioning it once or twice as a relevant provision and then including it in subsequent references to “Article 14(1) etc. [tō],” Saikō Saibansho [Sup. Ct.] (Grand Bench), Nov. 20, 2013 (Gyo-Tsu) no. 226, available at http://www.courts.go.jp/english/judgments/text/2013.11.20-2013.-Gyo-Tsu-.No..209%2C.210%2C.211.html (English translation).

\(^{65}\) See Nationality Act Case, supra note 52.
acknowledged paternity before birth.\textsuperscript{66} Even if a Japanese father acknowledged paternity after birth, a child born out of wedlock could only be eligible for Japanese nationality if the parents subsequently married.\textsuperscript{67} The Grand Bench found this form of discrimination to be unconstitutional.\textsuperscript{68}

One of the reasons the Nationality Act accorded disparate treatment to children born out of wedlock depending upon when paternity was acknowledged was to prevent fraudulent acknowledgments being used for the purpose of conferring nationality.\textsuperscript{69} In theory, it would be possible for unscrupulous Japanese men to “sell” Japanese nationality to the children of foreigners by acknowledging paternity for a fee. In a world of simple rational basis scrutiny, this might have been enough for the provision to pass muster. In its opinion, the Court noted that preventing fraudulent acknowledgements of paternity was a rational policy goal, yet concluded there was not a rational connection between that goal and the distinction imposed by the law:

\begin{quote}
[We] should conclude that although the legislative purpose itself from which the Distinction is derived has a reasonable basis, reasonable relevance between the Distinction and the legislative purpose no longer exists due to the changes in social and other circumstances at home and abroad, and today, the provision of . . . the Nationality Act imposes an unreasonable and excessive requirement for acquiring Japanese nationality. Moreover, since the Distinction involves another distinction . . . we must say that it causes a child born out of wedlock who satisfies only the requirement of being acknowledged by a Japanese father after birth to suffer considerably disadvantageous discriminatory treatment in acquiring Japanese nationality, and even if we take into consideration the discretionary power vested in the legislative body when specifying requirements for acquisition of Japanese nationality, we can no longer find
\end{quote}

\begin{footnotes}
\item[66] Nationality Act, Act No. 147 of 1950, art. 3, para. 1 (Japan).
\item[67] Id.
\item[68] Nationality Act Case, supra note 52.
\item[69] See id. (’’If Japanese nationality is to be granted to a child by reason of acknowledgment by a Japanese father before legitimation takes place, fictitious acknowledgement is likely to occur in an attempt to acquire Japanese nationality.’’).
\end{footnotes}
any reasonable relevance between the consequence arising from the Distinction and the aforementioned legislative purpose.\textsuperscript{70}

The Court thus seemed to be applying a new standard of review in a discrimination case, one that despite continuing to be framed in terms of “rationality,” went further to look at the balance of interests at stake. As characterized by Professor Martin, the majority opinion contains all the elements of the framework of a Canadian-style “proportionality analysis”.\textsuperscript{71} For this reason, Martin characterizes the Nationality Act Case as a possible turning point, a “glimmer of hope” that the Court might be moving in the direction of a more nuanced and, perhaps more importantly, a \textit{higher} standard of review in discrimination cases.\textsuperscript{72}

\textbf{D. The Inheritance Case: Another Glimmer of Hope?}

Despite the new direction suggested by the Nationality Act Case, the 2013 Inheritance Case displays few signs of this higher standard being applied. Even using the rational basis standard, the Court had to articulate why a statutory provision that had been found to have a rational basis not only in 1995 but in 2009 as well no longer did. As discussed above, it is questionable whether the Court presented a convincing argument even with this low standard, so perhaps applying a higher standard would have required more specificity and, paradoxically, been more difficult.

Yet perhaps the Court did not need to do more in this respect if its goal was to challenge a form of discrimination that most rational people would find difficult to justify, particularly since the discrimination is based on an attribute that victims have no control over – the marital status

\textsuperscript{70} Id.
\textsuperscript{71} Martin, \textit{supra} note 58, at 235.
\textsuperscript{72} The Nationality Act Case is generally regarded as an example of “progressive” or “successful” judicial review in Japan and has been widely praised by Japanese and foreign scholars alike. While not objecting to the substantive result, the author actually found the case to be disturbing. Despite being a highly fractious judgment with a majority opinion, two separate dissenting opinions and several concurring opinions, the one point on which virtually all of the justices seemed to be able to agree was that “Japanese nationality… [is] an important legal status that means a lot to people in order to enjoy the guarantee of fundamental human rights, obtain public positions or receive public benefits in Japan.” \textit{Nationality Act Case, supra} note 52 (emphasis added). Similar language to this taken from the majority opinion appears in the dissenting and concurring opinions as well. \textit{See id.} What that language implies regarding the \textit{fundamental human rights} of non-citizens in Japan is a subject that will have to be left for another day.
of their parents.\textsuperscript{73} If one assumes that the Court decided to overturn the 1995 Decision first and developed the rationale later, the explanation given in the Inheritance Case may be as much as one can expect.

The preceding is likely a very “American” view of the rationale given in the Inheritance Case. Constant disappointment with the lack of apparent depth of analysis is the likely fate of most American lawyers reading Japanese Supreme Court judgments. Starting with the deep continental roots in Japanese law and jurisprudence, there are some very basic differences in approach to constitutional cases between the courts of Japan and the United States, differences that have both been explained at great length elsewhere but that also render expectations of American-style analysis unrealistic.\textsuperscript{74} Still, it is hard to find a further “glimmer of hope” in the Inheritance Case, at least with respect to the manner in which the Court reached its conclusion.\textsuperscript{75}

E. Implementation

i. The Significance

Insofar as in the Inheritance Case the Supreme Court arrived at a decision that many people probably agree with, albeit a decade or two late, the rationale by which it did so may not be particularly important.\textsuperscript{76}

\textsuperscript{73} See 1995 Decision, supra note 13 (dissenting Toshijiro et al.) (“Discriminating by law against an illegitimate child, who is by no means responsible for the birth, on the ground of birth is in excess of the purpose of legislation [Article 900(iv)], i.e. the respect for and protection of marriage; there is no substantial relationship between the purpose of the law and the means of achieving it, and therefore, it cannot be found to be reasonable.”).

\textsuperscript{74} See, for example, 88 WASH. U. L. REV. 1601 (2011), the entire issue of which is devoted to subjects discussed at a symposium on the subject of “Decision Making of the Japanese Supreme Court.”

\textsuperscript{75} In part to draw attention to another difference between the constitutional jurisprudence of the Japanese Supreme Court and constitutional courts such as the US Supreme Court, it should be noted that, due to timing, this article was written without the benefit of reference to the commentary typically published by the lead research judge who helped the Justices with researching and writing the opinion. See Masako Kamiya, “Chōsakan”: Research Judges Toiling at the Stone Fortress, 88 WASH. U. L. REV. 1601 (2011).

\textsuperscript{76} Even significant Japanese Supreme Court cases seem to be fated to be reduced to a one or two sentence proposition, usually expressing a general principle, which is then reproduced in annotations and is what students have to remember in tests. The Supreme Court helps this process along by underlining those parts of its judgments that it considers particularly significant. With respect to the portion of the Inheritance Case describing the rational the Court used to arrive at is finding
However, from the standpoint of the evolution of the judicial power in Japan, the case may prove to be highly significant for a different reason: the manner in which it dealt with the tricky problem of the potential impact of its unconstitutionality ruling.

To understand the significance of the Inheritance Case in this light, it may help to look more closely at the 2009 Decision – the most recent prior instance in which the Court had reaffirmed the constitutionality of Article 900(iv). Since the majority opinion merely followed the holding of the 1995 Decision, it did not need to do anything more than declare the provision to be constitutional and reject the appeal. A strong dissent by Justice Imai, who had also been on the court in the Nationality Act Case, argued that the Court should have applied the higher standard of review from the Nationality Act Case to find Article 900(iv) to be unconstitutional.\(^77\)

In the author’s opinion, however, the most instructive part of the 2009 Decision is the concurrence of Justice Takeuchi Yukio, the only member of the Court who was still on the bench when the Inheritance Case was decided. Prophetically, Justice Takeuchi starts with the proposition that the majority opinion was only confirming that Article 900(iv) did not lack a rational basis for Article 14(1) purposes as of the year 2000 (when the estate at issue went into probate), and that it was still possible for changes in social circumstances to render the provision unconstitutional in the future.\(^78\) This is the conclusion the Court reached a mere four years later in the 2013 Inheritance Case.\(^79\)

Despite concurring in the majority opinion, Justice Takeuchi nonetheless expressed the view that as of 2009, there was a “strong possibility” that the provision was now unconstitutional.\(^80\) However, he continued, nine years had passed since the estate at issue was probated, of unconstitutionality, the only part the Court deemed worth underling was the conclusion itself: “The provisions [Article 900(iv)] should be considered to contravene Article 14(1) at least by the time of July 2001.” See Inheritance Case, supra note 1 (underlining is absent in English translation).

\(^77\) For a discussion of the 2009 Decision, see Martin, supra note 58, at 239-242. Professor Martin describes the 2009 Decision as appearing to run counter to the “glimmer of hope” presented by the Nationality Act Case.

\(^78\) 2009 Decision, supra note 14 (Takeuchi, J. concurring).

\(^79\) Knowing this arguably renders the holding of the Inheritance Case even more incoherent, since in the 2009 Decision Justice Takeuchi is acknowledging that Article 900(iv) might still have a rational basis as of 2000, while in the Inheritance Case he and the rest of the Court find that it no longer does as of 2001.

\(^80\) Id.
and if the Court were to declare Article 900(iv) to be void on constitutional grounds effective as of 2000, the validity of countless estate settlements during that period would be thrown into uncertainty. Additionally, cases might be reopened and the law would be thrown into confusion.

ii. The Dilemma

This view that “the law is unconstitutional but if we invalidate it a lot of people would be inconvenienced” may well express the dilemma faced repeatedly by the Supreme Court in the development of its constitutional jurisprudence. Certainly this view has played a key role in the long succession of malapportionment cases. What should the Court do and what can the Court do are two very different questions and, in the author’s opinion, the Court’s resolutions can often be understood as an exercise in paying lip service to the former question while substantively addressing the latter. This is typically done in a way that is non-disruptive and involves essentially ratifying the status quo. In this sense, Justice Takeuchi’s concurrence in the 2009 Decision is noteworthy because it is unusual for the dilemma to be expressed so openly.

Furthermore, “what if we issue a ruling but everyone ignores us” is likely a dilemma for constitutional courts everywhere, but perhaps particularly so for Japanese courts. This is suggested by the fact that within a few weeks of the historic ruling having been issued, the Justice System Committee of the ruling Liberal Democratic Party (LDP) initially refused to amend the Civil Code to remove the discriminatory provision from Article 900(iv). They subsequently relented and by the time this article was ready for publication an amendment to the Civil Code excising the discriminatory provision had been passed and taken effect.

Nonetheless, conservative LDP committee members were apparently unconvinced by the Grand Bench’s arguments about changing times and international treaty obligations. Some expressed concern that

---

81 Id.
82 See supra note 64.
83 Jimin hōmu bukai minpō kaiseian no ryōshō miokuri [LDP Legal Working Group Defers Approval of Proposed Amendment], NHK NEWSWEB (Oct. 29, 2013), http://www3.nhk.or.jp/news/html/20131029/k10015646411000.html (article has since been deleted by the news agency) (copy on file with author).
changing the law would destroy the “traditional family system.” 85 One parliamentarian went so far as to assert “if we change the law in accordance with this absurd [hijōshiki] Supreme Court decision, there will be more and more children born out of wedlock and the family system will collapse.”86 Granted, some of this may have been mere posturing for conservative voters. Nonetheless, it is worth noting that over two decades passed before the provisions found unconstitutional in the Patricide Case were removed from the Penal Code.87

Whether the legislative branch respects the judgments of the judicial branch to the extent of reflecting them in statutes is a question that has obvious implications for the status of the Supreme Court and the judiciary as a whole. A similar question is raised by considering the possible effect on how the Court would be perceived if it issued a judgment that reopened countless disputes over inherited property that all the heirs involved thought had been settled. In a way, the issue of implementation and effect discussed by Justice Takeuchi in his concurrence in the 2009 Decision is one that goes to the heart of the Supreme Court’s judicial power.

iii. The Solution

In the Inheritance Case, the Grand Bench confronted the issue of implementation head on. It did so by declaring that its finding that Article

85 See, e.g., Don’t Undermine the Inheritance Bill, THE JAPAN TIMES (Nov. 6, 2013), http://www.japantimes.co.jp/opinion/2013/11/06/editorials/dont-undermine-inheritance-bill/#.Ut4_i7RUvIU (“Some lawmakers quoted in the media even suggested that they might defy the ruling by the nation’s top judicial authority if it appeared to conflict with their own values.”).
86 LDP Legal Working Group Defers Approval of Proposed Amendment, supra note 83. Having spent a significant amount of time talking to Japanese people in various walks of law about family law issues, the author can attest that a common theme in many of these discussions (particularly with people in leadership positions) is the assertion that some sort of “traditional family values” exist, though they rarely seem to date further back than the Tokyo Olympics of 1964, the golden age of Japanese history, which Japanese baby-boomers seem to use as the gold-standard. In reality, “traditional” family values were much more complicated. Among other things, those who complain about children being born out of wedlock ignore the important role they have played in the most central of Japanese political institutions: the imperial household. Among other things, both the Meiji and Taisho emperors were born to concubines.
87 During this period, the problem of subsequent constitutional challenges was avoided through the simple expedient of prosecutors never pressing charges under the offending provision. Regarding the legislative change to implement the Patricide Case, see SHIBUTANI, supra note 35, at 198-98.
900(iv) was void on constitutional grounds did not have any legal effect on any estates the settlement of which had already been conclusively settled during the period since P’s death. Structuring the effects of its judgments is a new thing for the Court. As noted in the concurrence of Justice Seishi Kanetsuki, there are no prior instances of the Court ruling in such a way regarding the binding nature of its own judgments. In principle a holding of unconstitutionality should have a general retroactive effect. 88

The Court has long had a practice of underlining what it considers to be the important parts of its rulings, presumably so lazy law students and annotators will be sure to remember and excerpt the correct parts. 89 In the Inheritance Case two sections are underlined in this manner: (i) the comparatively short sentence declaring Article 900(iv) to be void on Article 14(1) grounds, and (ii) the longer sentence restricting the impact of the holding to the estate of P and other estates the settlement of which has not been concluded. 90 A further indicator of the importance of the latter part of the ruling is suggested by the fact that two separate concurring opinions discussed its significance. 91

This latter aspect of the case may prove to be far more significant in the development of the Court’s jurisprudence than the unconstitutionality ruling itself. By essentially empowering itself to structure unconstitutionality rulings that have only limited effect, the Court may be laying the groundwork for playing a more assertive role. Somewhat paradoxically, in the Japanese context it is likely easier for the Court to be assertive if it can do so without being overly disruptive. The decision could thus come to be seen as a milestone on the Court’s path to achieving greater recognition and acceptance in the eyes of Japanese people.

Or perhaps it won’t. On that note let us turn now to the Registration Case, the judgment of which was rendered just a few weeks after that of the Inheritance Case.

IV. THE REGISTRATION CASE

F. Background

88 See Inheritance Case, supra note 1 (Kanetsuki, J. concurring).
89 Although on its English website the Supreme Court provides translations of some of its judgments, this underlining is not replicated in the English versions.
90 See id. (underlining is absent in English translation).
91 See id. (Kanetsuki, J. concurring); id. (Chiba, J. concurring).
As a judgment, the Registration Case is simpler and shorter. However, particularly for the non-Japanese reader the contextual background required to understand it may be more complex. Indeed, the issue that was the crux of the case – the requirement that parents indicate whether a child is legitimate or not when reporting the birth to family register authorities – may be difficult to understand for Western readers unfamiliar with Japan’s system of family law. Indeed, the need to “register” a family may itself seem unusual not only to non-Japanese people but to at least some Japanese people as well. The challenge in the Registration Case was, after all, brought by a Japanese family. Accordingly, before discussing the case itself this article will take a contextual detour through the family register system and the current and past system of family law upon which it is based.

iv. The Family Register and Family Law

In Japan the family is tied to two registration systems, the family register (koseki) and the residence register (jūminkihondaichō). Such registration systems have a long history in Japan, which had highly developed systems of household and tax registration as far back as the eighth century. Both systems were implicated in the Registration Case but the discussion that follows deal mainly with the family.

As the name suggests, the family register is a registry of family units. Shortly after the Meiji Restoration Japan’s national government introduced a national system of family registers modeled on earlier systems that had been used on a regional basis. It was based on the system of extended families that prevailed at the time. However, these structures may be best thought of as “households” rather than families. The traditional family unit that this system of registration system sought to

92 See generally KOSEKIHÔ [Family Register Act], Act No. 224 of 1947; JŪMIN KIHONDAICHÔHÔ [Basic Resident Register Act], Act No. 81 of 1967.
93 See CARL STEENSTRUP, A HISTORY OF LAW IN JAPAN UNTIL 1868 44 (1991) (noting the existence of household registers and tax registers in discussing the Taika Administrative reforms of that period).
95 See, e.g., STEENSTRUP, supra note 93, at 130-33 (discussing the ie system during the Tokugawa Period).
96 The “ko” in koseki originally meant “house” rather than “family” (“seki” means “registration” or “document evidencing registration”) and is still used in Japanese when counting houses.
reflect was the “ie”, a Japanese term that also means “house” but might also be translated “extended family” or again “household”.

The ieseido or “household system” was codified in the family law provisions of the Civil Code adopted in 1898, which defined the “house” as being comprised of such relatives of the head of the house as are in his house, and the husbands and wives of such relatives. A Family Register Act was passed at the same time in order to reflect the contents of this law. Although largely a system of record-keeping administration, the family register is inextricably tied to the Civil Code, which defines the types of relationships subject to registration.

The traditional “household” system was inherently feudal and patriarchal in that it organized families around a koshu, or head of household. “Head of household” was a legally-recognized status generally accorded to the senior legitimate male member of the household. By law the head had had significant powers over junior members and family property. For example, a junior member could not choose a residence,

97 See MINPO [MINPO] [Civ. C.], Act No. 9 of 1898, art. 732 [hereinafter Old Civil Code]; ALFRED C. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK 111-120 (1976) (describing the old family law system and the significant amendments made to the provisions of Part IV during the post-war American occupation).

98 KOSEKIHO [(Old) Family Register Act], Act No. 12 of 1898, available at http://hourei.ndl.go.jp/SearchSys/viewEnkaku.do?i=yxoUt4k1zZocXPbcmtZE2Q%3d%3d [hereinafter Old Family Register Act]. This Family Register Act was completely modified again in 1914. KOSEKIHO [Revised (Old) Family Register Act], Act No. 26 of 1914, available at http://hourei.ndl.go.jp/SearchSys/viewEnkaku.do?i=yxoUt4k1zZocXPbcmtZE2Q%3d%3d.

99 See Old Civil Code, supra note 97, art. 748 (assigning all family property as property of the head of the household unless specifically acquired in the name of the junior member). As noted by Professor Michihiko Wada, the formal structure anticipated by the pre-war family system did not necessarily reflect the realities of family life:

A legal house was generally a group of persons comprising of three-to-four generations, which could normally include several married couples with their children (or grandchildren), with one househead. In social reality, however, such members of a house did not necessarily live in the same place. Many, especially the second and younger sons with their families, lived and worked in cities as a result of industrialization, away from their rural (in many cases, farming) househeads, who no longer exercised any effective control over these members and their families.

marry, or enter into an adoptive relationship against the will of the head of the household.\textsuperscript{100} The head also had duties, including the duty to support other members of the household.\textsuperscript{101} The head of household was also a heritable status, one that was transmitted not only upon the death of an existing head, but upon their formal retirement or loss of Japanese nationality.\textsuperscript{102} The rules of succession relating to this status essentially favored the oldest legitimate son of the prior head.\textsuperscript{103}

Although these rules no longer applied in postwar Japan, for purposes of understanding the historical background to the Registration Case it should also be noted that the old Civil Code also had specific rules dealing with children born out of wedlock. If the father acknowledged paternity the child could enter the household as a *shoshi* (an acknowledged illegitimate child whose status within the household was legally inferior to that of legitimate children), but only with the consent of the head.\textsuperscript{104} Otherwise such children entered the mother’s household.\textsuperscript{105}

It is important to understand that the *ie* system was also part of a system of public administration, since it allowed the government to implement policy through the head of the household.\textsuperscript{106} The family register facilitated (and still facilitates) this governance system by both serving as a source of information about families and an instrument for administrative intervention in them.\textsuperscript{107} Under the *ie* system the family register system would identify the head of a household and thus allow the government to know who was responsible for the household’s members and property.

The *koseki* system initially established in 1872 was used to implement basic government functions such as taxation and conscription.\textsuperscript{108} Although the initial register system was public, its utility

\textsuperscript{100} Id. arts. 749-50.
\textsuperscript{101} Id. art. 747. See also id. arts. 954-63 (setting forth more detailed rules as to the duties of support that existed within the household unit).
\textsuperscript{102} Id. arts. 964-85. See also id. art. 752 (prohibiting the head of household from resigning this status unless he reached the age of sixty, at which point he could formally transfer the status to the next in line, typically the eldest legitimate son).
\textsuperscript{103} Id. art. 970.
\textsuperscript{104} Id. arts. 735, 827-36.
\textsuperscript{105} Id. art. 735.
\textsuperscript{106} OPPLER, supra note 97, at 120.
\textsuperscript{107} Wada, supra note 99, at 106-08; MIKIHIKO WADA, IESEIDO NO HAISHI [The Abolition of the *Ie* System] 214 (2010).
\textsuperscript{108} See WADA, IESEIDO NO HAISHI, supra note 107, at 418 (acknowledging the family register’s easily overlooked value as a source of statistical information
in commerce led to a person’s family register details being a matter of public record, since it could be used to confirm creditworthiness. Given the nature of the *ie* system, the head of the household or his eldest legitimate son would be far better credit risks than any other member since they would either have or could be expected to inherit the power to dispose of the household’s property. Its status as a public record remained a feature of the family register system until increased concerns over the protection of privacy led to 1976 amendments that limited access generally to members of the applicable family.\(^{109}\)

While the above description is largely of historical interest, it is important to understand that from its inception in the system described above, the family register system in Japan still exists primarily to define a limited range of legally significant family relationships or statuses for purposes of interactions with the rest of society and the government. Though not a perfect analogy, it may be helpful for western readers to think of the family registry as something akin to a real estate title registry, which enables government agencies and potential purchasers or mortgagors to confirm the legal status of a particular piece of land.\(^{110}\) The family register is no longer a public document, but its role as part of a system of governance remains, even today. And although the *ie* system is also now a matter of historical interest, as we shall see it has cast a long shadow over both family attitudes and the way the family register system operates in 21st century Japan.

---

\(^{109}\) *Id.* at 239. But see Kosekihō [Family Register Act], Act No. 224 of 1947, art. 10-2 (maintaining even today a wide range of exceptions to the privacy of family register information, including for lawyers and other licensed professionals requiring such information in connection with legal cases).

\(^{110}\) For example, under Articles 818 and 819 of the present Civil Code, parental authority is exercised (i) by both parents during marriage, (ii) by the mother if the child is born out of marriage and (iii) only by one parent after divorce, either by agreement or judicial determination. *See* Minpō [Minpō] [Civ. C.] arts. 818-19. Since marriage and divorce are reflected in the family register, who is entitled to exercise parental authority on behalf of a particular (Japanese) child can be ascertained merely by looking at the family register (or an official extract), obviating the need to submit custody decrees or separation agreements as is often the case in the United States, for example.
The story of the creation of the current Japanese Constitution and the complex demands, interactions and compromises between American occupiers and Japanese government actors has been told in great detail elsewhere. The part of the story relevant to this article is the American insistence on the inclusion of Article 24, which had profound implications on the system of family law just described. Article 24 reads:

Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.

With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

Historical analysis of the process by which the Constitution was adopted suggests that when the Diet approved the Constitution containing this provision there were differing views as to what it meant for the ie system. Some legislators apparently believed the system could be retained, while others thought the new Constitution mandated abolition of the ie system. Additionally, some Japanese scholars in the drafting committee, such as Takeyoshi Kawashima, saw this as an opportunity to amend a system of family law they already considered outdated and moribund.

112 Nihonkoku Kenpō [Kenpō] [Constitution], art. 24. This is not the exact provision originally proposed by the American drafters. During the course of its drafting and approval by the Diet various changes were made to Article 24, but the Americans were insistent upon the inclusion of the concepts of gender equality and respect for individual freedom. See, e.g., Moore & Robinson, supra note 109 at 131.
113 The views of the various participants in the process of drafting and adopting Article 24 and revising the Civil Code are discussed in great detail in WADA, IESEIDO NO HAISHI, supra note 107, at 25-166.
114 WADA, IESEIDO NO HAISHI, supra note 107, at 25-166. Oppler similarly describes the old family system as “moribund even without the pressures accompanying the making of the Constitution: it would only have died a slower death.” OPPLER, supra note 97, at 115.
For their part, to the extent the Americans thought about family law their principal concerns were with gender equality and elimination of the “head of household.” This institution was inconsistent with principles of equality and also was regarded as a component of the Japanese feudal system, the dismantling of which was a core objective of the occupation. Beyond elimination of the head of the household system, the Americans did not initially press for the elimination of the ie system itself, leaving the details of reform up to the Japanese, though free of course to veto anything they disliked.

Thus it fell to the Japanese scholars and officials charged with amending the Civil Code to ensure the Code’s consistency with the egalitarian new Constitution. Amendments to the Family Register Act would naturally spring from these changes, though this was complicated by a factor to be discussed shortly.

Some of the Japanese participants advocated the complete elimination of the ie system, while others insisted it be retained in some form even if only as a set of moral precepts. While some American officials expressed the “private” view that elimination was desirable, it was decided that completely eliminating the ie system from the Civil Code would likely to trigger the veto powers implicitly retained by the occupiers over the drafting process. To assuage the conservative members of the Japanese committee, a minor form of conspiracy was proposed: the drafters would retain enough elements of the ie system in the new laws so that it could be revived after the occupation if desirable.

115 Id. at 94, 107, 131 (including on page 94 the full text of the Supreme Commander Allied Powers General Douglas MacArthur’s memo setting forth guidelines for the new Constitution, one of which was “the feudal system of Japan will cease.”); see also Oppler, supra note 97, at 116-17 (regarding family law reform).
116 Oppler, supra note 97, at 116-17 (“While we never urged the complete abolition of the house system, we watched with interest how the Japanese would adjust it to the principles of the [c]onstitution. They did a more thorough job than we had expected.”) (citation omitted).
117 Wada, Ieseido no Haishi, supra note 107, at 133-45.
118 Id.
119 This compromise is also reflected in Article 730 of the current Civil Code which contains a vague statement about relatives having to help each other. See Minpō [Minpō] [Civ. C.] art. 730. This provision is understood by scholars to have no legal effect, having been inserted as a sop to the people who objected to the elimination of the ie system and its defined duties of support among family members. See, e.g., Yoshiro Miyazaki, Dai 730 Jō [Article 730], in Hanrei Minpō 9 – Shinzoku [Civil Code Annotated with Precedents, Vol. 9 –
The primary vehicle for doing this was to be the Family Register Act, which was amended so that it was based not on individuals (which arguably would have been more consistent with Article 24 of the Constitution) but primarily on marriages and surnames.120

The continuing significance of surnames in Japanese family law – Article 750 of the Civil Code still contains the anachronistic requirement that one spouse adopt the other’s surname upon marriage121 – can be understood in this context. Under the pre-war Civil Code, members of a household all bore the same family surname.122 The surname was thus considered a possible replacement, or a foundation on which to rebuild the ie system, though that ultimately did not happen.123

A surprising amount of debate thus went into the Family Register Act amendments that followed the Civil Code amendments, since it was in the latter act that some remnants of the ie system could be preserved, even though the register system was originally intended as an administrative tool rather than a locus of substantive family law.124 Furthermore, the American participants in the process were quick to appreciate the intent behind the initial drafts. Having not insisted on eradicating the ie system from the Civil Code, once the decision had been made to do so the Americans overseeing the process objected strongly to efforts to keep elements of it alive through the family register system.

For example, Oppler and his colleagues successfully blocked early draft amendments to the Family Register Act on the grounds that certain features, such as provisions that would allow three generations to be registered as a single family in certain circumstances, were reminiscent

RELATIVES] 8-9 (Yoshihisa Nomi & Shintaro Kato eds., 2d. ed. 2009). A remnant of the ie system can also be seen in Article 897 which creates an exception to the general egalitarian rules of inheritance for “rights to ownership of a genealogy, equipment used in rituals, and any grave”, which pass according to “who custom dictates shall preside over rituals for ancestors” or testamentary designation. MINPO [MINPO] [Civ. C.] art. 897, para. 1.

120 Note that some of the participants in the process advocated a registration system based solely on individuals. WADA, IESEIDO NO HAISHI, supra note 107 at 292-297.

121 See MINPO [MINPO] [Civ. C.] art. 750.

122 Old Civil Code, supra note 97, art. 746.

123 Wada, supra note 99, at 118-120.

124 This doubtless explains why Article 6 of the Family Register Act requires a family register to be organized around married couples and “children thereof with the same surname” or an unmarried parent and “children thereof with the same surname.” See KOSEKIHŌ [Family Register Act], Act No. 224 of 1947, art. 6.
of the old *ie* system. The Americans also pushed the Japanese to consider a system of registration based on individuals rather than families. The Japanese succeeded in resisting this demand, in part by arguing about how much extra work and recordkeeping would be required to do so.

In fact, the accounts of the negotiations between the American and Japanese sides over the Family Register Act are an example of the clash of American-style individualism and the Japanese family-based collectivism. The resulting system that remains in force today is a compromise, a system of registering families based on a two-generation nuclear family that would have been familiar to Americans. Yet, at the same time, it was not a system based on *individuals*. For this reason, it is also a system in which the matter of whether a child is born in or out of wedlock is of fundamental importance. Children born to a married couple are registered in the new register created at the time of the marriage and share the couple’s surname. Children born out of wedlock are registered in a new family register created for the mother and share her surname.

The *ie* system was never revived, but the family register system, which reflected at least the hope that it might be, remains in place. And while many Japanese people themselves may find the system difficult to rationalize, it should be remembered that its original purpose was to be a means by which the government could gather information about the population and, particularly in the past, use as a means of control.

---

125 *Wada, Ieseido no Haishi*, supra note 107, at 287-332.
126 See *Oppler*, supra note 97, at 11214.
127 *Wada, Ieseido no Haishi*, supra note 107, at 295.
128 *Koseikihō* [Family Register Act], Act No. 224 of 1947, art. 18.
129 *Minpō* [*Minpō*] [Civ. C.] art. 790. An unmarried woman would typically remain registered in her parents’ register until marriage. However if she has a child the Family Register Act requires a new register to be prepared for her and the child, as in accordance with the occupation-era objections to a system allowing for registrations spanning three generations. See *Koseikihō* [Family Register Act], Act No. 224 of 1947, art. 17. A child born out of wedlock may only take the father’s surname through the intervention of a family court. *Minpō* [*Minpō*] [Civ. C.] art. 791, para. 1.
130 Needless to say, the registration system only works if events are registered. For those events that are voluntarily, registration is fostered by registration being a prerequisite to legal effect. Thus a marriage or divorce only takes legal effect upon registration. *Minpō* [*Minpō*] [Civ. C.] art. 739, para. 1. Similarly, the birth of a child must be registered within two weeks (or three months, in the case of children born to Japanese parents abroad). See *Koseikihō* [Family Register Act], Act No. 224 of 1947, art. 49. Note that among other things, the family registration
prosaically, the family register – usually in the form of official documentary extracts that can be obtained from the local government administering it – is a basic form of identification in Japan.\textsuperscript{131} Whereas westerners are likely to prove identity and family status through a combination of documents that confirm specific events (births, marriages, divorces, custody decrees, deaths), in Japan an extract of a person’s family register provides a current (and thus more accurate) snapshot of a person’s family status (the legally-significant aspects of it, at least).

This is the historical and legal context in which the Registration Case arose. While it may appear to be a dispute over a seemingly anachronistic and pointless documentary requirement in a government form, it actually goes to the heart of a system of family law in which marriage and legitimacy are central to the entire design of the system, a design which itself reflects the remnants of a very different set of family traditions.

\section*{v. The Facts of the Registration Case}

According to the recitation of the facts in the Supreme Court’s judgment, two of the appellants were a man and woman who began living together in 1999 in Tokyo.\textsuperscript{132} They were not legally married. In 2005, the woman gave birth to a child (also named as an appellant).\textsuperscript{133} The man had filed an acknowledgement of paternity before the birth.\textsuperscript{134} The case arose

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{131} Indeed, family registers are even proof of Japanese nationality, since only Japanese people have a family register. The treatment of a Japanese person who marries a foreign national is essentially the same as one who has a child out of wedlock; a new register is created for the Japanese person (unless they have already established their own register). \textit{See} KOSEKIHÔ [Family Register Act], Act No. 224 of 1947, art. 16, para. 3. As a result, in addition to discriminating based on legitimacy almost out of necessity, at a basic level the Japanese system of family law also discriminates based on nationality.
\item \textsuperscript{132} \textit{Registration Case, supra} note 3.
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\end{itemize}
\end{footnotesize}
when he tried to register the birth with the family register authorities. The form used to report births requires several items of information that seem both incongruous and invasive of privacy. One is whether the child was born in or out of wedlock.

The father of the child sought to register the birth as required by law without filling in the “in/out of wedlock” part of the form. The registry authority rejected the filing as defective. Without the household registry filing being accepted, the parents were also unable to create a residence registry for the child. The two sides spent a number of years in an impasse, until 2010 when the Ministry of Justice (MOJ) sent a directive to registry authorities around the nation essentially directing them to seek a compromise with parents in this situation by asking them to file a notice of birth that, while not filling in the “in/out-of wedlock” part of the form, would allow the authorities to register the necessary details. If the parents did not respond then the authorities could confirm the necessary details themselves, since the marital status of the parents would already be apparent from their household registers.

G. The Case

---

135 See Registration Case, supra note 3. Although not mentioned in the case, another way in which the Family Register Act discriminates based on legitimacy is by requiring that notifications of births of children born out of wedlock be filed by the mother unless she is unable to do so, in which case the filing can be made by a cohabitant, attending doctor or midwife, or legal representative. See Kosekiho [Family Register Act], Act No. 224 of 1947, art. 52. Notifications of birth to a married couple may be filed by either the father or mother. See id. Accordingly, the father in the Registration Case was presumably able to file because he was cohabitating with the mother.

136 Registration Case, supra note 3; Kosekiho [Family Register Act], Act No. 224 of 1947, art. 49(2)(i).

137 Registration Case, supra note 3.

138 Id.

139 Id.

140 Id. One of the interesting things about Japanese family law is that a certain part of it is shaped not by court rulings, but by MOJ guidance and directives addressed to local registry authorities as to how to deal with the registration in situations where the law is unclear or special circumstances apply. This is authorized by provisions of the Family Registry Act. See Kosekiho [Family Register Act], Act No. 224 of 1947, art. 3. These provisions of the Family Register Act are also noteworthy because they essentially subjugate the democratically-elected heads of local governments to the instructions of unelected Ministry of Justice bureaucrats with respect to administration of the family register.
The parents brought suit in 2011 asserting two claims for damages under Article 1(1) of the State Redress Act.\(^\text{141}\) One was based on the alleged tortious legislative nonfeasance on the part of the national government for failing to eliminate the discriminatory provision of the Household Registration Act.\(^\text{142}\) The other asserted administrative nonfeasance on the part of the authorities administering the residence registration for failing to register the child in the residence registry.\(^\text{143}\) Both claims were based on the argument that requiring a notation as to legitimacy was a form of unreasonable discrimination in violation of Article 14(1).\(^\text{144}\) Other relief had also been sought in the lower court proceedings (including a declaratory judgment to the effect that the municipal authorities were obligated to register the child in the residence

\(^{141}\) Registration Case, supra note 3. The State Redress Act implements Article 17 of the Japanese Constitution under which the people are entitled to sue the state for redress. See KOKKA BAISHÔ HÔ [State Redress Act], Act No. 125 of 1947. Article 1(1) of the Act reads: “When a public officer who exercises the public authority of the State or of a public entity has, in the course of his/her duties, unlawfully inflicted damage on another person intentionally or negligently, the State or public entity shall assume the responsibility to compensate therefor.” Id. art. 1, para 1.

\(^{142}\) Registration Case, supra note 3. Although the Court did not directly address the claim, a brief explanation of “legislative nonfeasance” is probably necessary, since it is a claim that is not used as a basis for constitutional claims in the United States. As the term suggests, a claim based on legislative nonfeasance involves an assertion that the legislature has a constitutional obligation to enact or amend laws necessary to address a constitutional deficiency in an existing program or give effect to one or more provisions of the Constitution (some of which, such as the Article 13 right to the pursuit of happiness or the Article 25 right to a minimum standard of cultured living, are considered to be so abstract as to be non-justiciable without further legislative definition). Since the Supreme Court defers greatly to the discretion of the Diet such claims are rarely successful. However, the concept of legislative nonfeasance did play a role in the reasoning of the Court in the 2005 Overseas Voting Case, in which the Grand Bench found that the failure of the Diet to make adequate provisions enabling equal participation by overseas voters in Diet elections was unconstitutional. Saikô Saibansho [Sup. Ct.] (Grand Bench) Sep. 14, 2005, 2001 (Gyo tsu) no. 82, 59 SAIBANSHO MINJI HANREISHÜ [MINSHÜ] 2087, available at http://www.courts.go.jp/english/judgments/text/2005.09.14-2001.-Gyo-Tsu.-No..82%2C.2001.-Gyo-Hi.-No..76%2C.2001.-Gyo-Tsu.-No..83%2C.2001.-Gyo-Hi.-No..77.html (English translation).

\(^{143}\) Registration Case, supra note 3.

\(^{144}\) Id.
registry), but these had been retracted by the time of the appeal to the Supreme Court.\textsuperscript{145}

The Court rejected the Article 14 argument, noting that the registration of the birth and notation of legitimacy did not result in a legal distinction between children born in and out of wedlock; these were established by the Civil Code.\textsuperscript{146} The Court then explained how the family structures established by the Civil Code were founded in legal (registered) marriage, with children necessarily being treated differently depending upon whether their parents are married, including whose surname they bear,\textsuperscript{147} and how they are registered in the first place.\textsuperscript{148} Accordingly, it could not be said that the information requirements of the birth registration form alone resulted in discriminatory treatment of children born out of wedlock.

The Court acknowledged that the registration authorities could use the information already in their possession to confirm whether a child was born in or out of wedlock, but accepted that requiring parents to fill in the information nonetheless served the rational goal of furthering administrative convenience.\textsuperscript{149} As to any concerns about privacy, the Court asserted that the reported information about birth status was subject to strict privacy protections and could not be easily accessed by third parties, implying that birth status was unlikely to be a source of discrimination from other parties.\textsuperscript{150} Finally, the Court refused to entertain the argument that the notation “out of wedlock” (chakushutsu de nai ko) as used in the reporting document was itself discriminatory, since it was

\textsuperscript{145} Id. Among other things, after reminders from the authorities had no effect, the authorities made the necessary registrations without the cooperation of the parents, as was permitted under Articles 24 and 44 of the Family Register Act. Id.; see also KOSEKIHÔ [Family Register Act], Act No. 224 of 1947, arts. 24, 44.
\textsuperscript{146} Registration Case, supra note 3.
\textsuperscript{147} Id. Article 790 of the Civil Code states:
(1) A child in wedlock shall take the surname of his/her parents; provided that if the parents divorce before the child is born, the child shall take the surname of his/her parents at the time of divorce.
(2) A child out of wedlock shall take the surname of his/her mother.
MINPÔ [MINPÔ] [Civ. C.] art. 790.
\textsuperscript{148} Registration Case, supra note 3. See KOSEKIHÔ [Family Register Act], Act No. 224 of 1947, arts. 6, 18 (detailing how children are to be registered).
\textsuperscript{149} Registration Case, supra note 3.
\textsuperscript{150} Id.
used in the Civil Code, the Family Register Act and other laws and regulations.\textsuperscript{151}

This was the final claim addressed by the Court before it rejected the Article 14(1) argument. The Court found that Article 49(2) of the Family Register Act, which required notation of legitimacy in birth reports, did not establish unreasonable discrimination between legitimate and illegitimate children.\textsuperscript{152} The only part of the judgment that is underlined is the statement that “the Provision cannot be regarded as setting down discriminatory treatment against a child born out of wedlock as compared to a child born in wedlock and therefore it is not in violation of Article 14 paragraph (1) of the Constitution.”\textsuperscript{153} The Court declined to address the appellants’ other unspecified constitutional claims.\textsuperscript{154}

In a short concurring opinion, Justice Sakurai Ryūko agreed with the conclusions of the Court but made a point of criticizing a system that had allowed a Japanese child to go for over seven years without being recorded in either a family register or a residence register, thereby possibly suffering various disadvantages through no fault of his or her own.\textsuperscript{155} She questioned whether it was really necessary to impose such disadvantages on children, given that the registry officials could make the necessary notations relevant to legitimacy based on the information available without self-reporting by parents.\textsuperscript{156}

\textbf{H. So Much for Social Change}

Although the Registration Case was heard by a Petty Bench, all of the judges who participated had also been part of the same Grand Bench

\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} See \textit{id.} (Sakurai, J. concurring). One of the disappointing aspects of both the Inheritance Case and the Registration Case is how little the interests of children – as opposed to the doctrinal purity of Japan’s marriage-centric system of law – seem to factor into the respective conclusions. As already noted, Japan is a party to the UN Convention on the Rights of the Child, Article 3 of which mandates that \textit{inter alia} that “best interests of the child shall be a primary consideration” in “all actions concerning children” by courts and other government institutions. UN Convention on the Rights of the Child, \textit{supra} note 48, art. 3. While the Inheritance Case references the UN Convention on the Rights of the Child, \textit{supra} note 48, art. 3. While the Inheritance Case references the UN Convention on the Rights of the Child, it seems to do so more as a source of ammunition to support its conclusion rather than as part of a reasoned consideration of how different conclusions would affect children in the real world.
\textsuperscript{156} \textit{Registration Case, supra} note 3.
that decided the Inheritance Case just three weeks previously. Had there been more time between the two cases, the language of the Inheritance Case would likely have featured in the appellant’s briefs in the Registration Case. And yet none of the social change, new attitudes about marriage, increasing family diversity, international treaties proscribing discrimination based on birth status, or legislative initiatives that had seemed so important to the Court in the Inheritance Case merited any comment whatsoever in the Registration Case. While the Inheritance Case was specifically about inheritance, there was nothing about the Court’s rationale that inherently limited it to that area of law. Indeed, the Court addressed the case primarily within the context of supposedly greatly changed attitudes about marriage and family.

V. SYNTHESIS AND CONCLUSION

How could the same court arrive at such seemingly incongruous results in the same month? Unlike the historic Inheritance Case, the holding in the Registration Case seems like business as usual for Japan’s “conservative” Supreme Court.\(^\text{157}\) Yet viewed from the standpoint of the Court acting in an institutionally rational manner in the exercise and development of the judicial power, the two cases may not be as inconsistent as they seem.

The Inheritance Case was based on a strong sentiment that existed within the Court regarding the discrimination in Article 900(iv), a sentiment already evident in the 1995 Decision through the five justices who dissented.\(^\text{158}\) This view was probably strengthened as much by criticism of constitutional scholars and subsequent concurrences and dissents as it was by “social change.” Furthermore, once the Court dealt with the implementation problem by limiting the scope of its ruling, it could naturally expect that lower courts hearing any new inheritance disputes between legitimate and illegitimate heirs would follow its interpretation in ignoring the discrimination in 900(iv), even if the Diet failed to amend the Civil Code in response to its ruling.

In contrast, if the Court had declared the legitimacy designation at issue in the Registration Case unconstitutional, the Court would by implication call into question the entire foundation of Japanese family law.

---

\(^{157}\) See Law, supra note 18, at 1375 (describing the Japanese Supreme Court’s jurisprudence as conservative).

\(^{158}\) 1995 Decision, supra note 13.
reflected in a number of provisions of the Civil Code, not just a discrete rule of inheritance.

Furthermore, if the Court had declared the registration requirement void, it would be interfering with a system administered by the Ministry of Justice, which might have been more significant than Article 900(iv).\textsuperscript{159} As noted in the Court’s discussion of legislative history, the MOJ had long been involved in unsuccessful efforts to amend the provision referenced in the Inheritance Case, meaning the ruling would not likely conflict with MOJ initiatives.

As for the registration requirement, it merits note that apparently spurred by the refutation of legitimacy-based discrimination in the Inheritance Case, on October 1, 2013 Akashi City in Hyogo introduced a birth report form that did not require parents to indicate such status.\textsuperscript{160} They were immediately struck down by both MOJ officials and Sadakazu Taniguchi, the Minister of Justice himself, who reportedly asserted that the law did not permit local governments to create their own forms.\textsuperscript{161} It would be the MOJ,\textsuperscript{162} not elected local governments or even the Supreme

\textsuperscript{159} Here it is worth bearing in mind just some of the countless institutional connections between the MOJ and the judiciary. Before the current Constitution was implemented, the entire judiciary was essentially subordinated to the MOJ, which exercised control over judicial personnel. Certain seats on the Supreme Court are informally reserved for former prosecutors, the elite members of the legal profession who control the MOJ. See Lawrence Repeta, \textit{Reserved Seats on Japan’s Supreme Court}, 88 Wash. U. L. Rev. 1713, 1724-25, 1743 (2011). The MOJ and the judiciary have personnel exchanges which see judges participating in administering the MOJ, particularly in areas relevant to civil law. \textit{Id.}

\textsuperscript{160} \textit{Hyōgoken Akashiishi ga chakushutsushi no kisai sakuo shussetodore de zenkoku hatsu \[Akashi city in Hyogo Prefecture is first in nation with birth report without indication of legitimacy\], KYOTO SHINBUN, (Oct. 1, 2013), http://www.kyoto-np.co.jp/country/article/20131001000146. Apparently, therefore, the “administrative convenience” referenced by the Registration Case Court in justifying its decision was not so great as to prevent local family register officials from trying to eliminate the requirement.

\textsuperscript{161} \textit{Chakushutsushi ran sakuo no shusse todoke, Akashi ga tōmen kōfu chūshi \[Akashi City to Suspend Issuance of Birth Reports without Legitimacy Column\], KOBE SHINBUN, (Oct. 4, 2013), http://www.kobe-np.co.jp/news/shakai/201310/0006394131.shtml.}

\textsuperscript{162} And the Diet, of course. At the same time amendments to the Civil Code to bring it into line with the Inheritance Case were passed in the Diet, a proposed amendment to eliminate the legitimacy designation in the Family Register was rejected. See \textit{Kongaishi kitei sakujo wo kaketsu shuin hōmuti kosekihō kaisei de ha irei no jikō bunretsu \[House of Representatives Legal Affairs Committee}
Court exercising the judicial power, that would decide how the family register system would be administered.

Given the context of the Inheritance Case, the Supreme Court’s expansion of the judicial power in that case would likely be acceptable to most stakeholders (including the general public). The Registration Case showed the same Court being equally pragmatic. Even if the Justices had secretly wished to invalidate the registration requirement, doing so would have only drawn attention to the discriminatory foundations of the nation’s family law but done nothing to remedy them. This would have also disrupted the governance of a nationwide registration system administered by a Ministry having a particularly complex relationship with the judiciary. The Court trumpeted social change and changing attitudes in the first case, while ignoring these considerations in the second. This suggests a certain cynicism involved in the resolution of both cases, although this conclusion could just be a reflection of the author’s own cynicism.

In any case, the Court’s use of the Inheritance Case to hone its power of constitutional review into a more precise tool may ultimately make it possible for the Court to turn to some of the other inequalities that remain deeply rooted in Japanese family law. That in turn would surely further enhance the Court’s own legitimacy in the eyes of the Japanese people.

Transitional Justice in South Korea:
One Country’s Restless Search for Truth and Reconciliation

Paul Hanley*†

Abstract

A recent Korean film, “National Security”, about a democracy activist and former Korean politician, Kim Geun-Tae, who was kidnapped and tortured into making a false confession by police in 1985, has renewed debate among South Koreans about the state of transitional justice in the country. From 1995 to 2010, South Korea took a number of steps to expose the political oppressions and human rights abuses of its past authoritarian governments and to assist individuals involved in the struggle for democracy to clear their names and restore their reputations. This article analyzes the relative success and failure of South Korea’s truth seeking process and the prospect for the realization of transitional justice in the country in the future.

I. INTRODUCTION

II. OVERVIEW OF MODERN KOREAN HISTORY

A. First Republic (1953 – 1960)
B. Second Republic (1960 - 1961)
D. Third Republic (1963 – 1972)
E. Fourth Republic (1972 – 1979)
F. Fifth Republic (1979 - 1987)
G. Sixth Republic (1987 - 1992) .................................................... 147

III. THE ROLE OF TRANSITIONAL JUSTICE IN SOUTH KOREA ........................................................................ 148
A. Special Act Regarding May 18 Democratization Movement (1995) ................................................................. 148
B. Presidential Truth Commission on Suspicious Deaths (2001) 151
   i. Whether Individuals Involved in Counter-Violence Should Be Acknowledged as Democracy Movement Involvers 155
D. The Basic Act for Coping with Past History for Truth and Reconciliation (2005) ...................................................... 156

IV. DEVELOPMENTS FROM 2005 TO THE PRESENT.............. 160

V. CONCLUSION ............................................................................. 162

Better to light one small candle than to curse the darkness.
- Chinese Proverb

A recent Korean film, “National Security” (Namyoung-dong 1985 in Korean), is based on the memoir by Kim Geun-Tae, a democracy activist and former Korean politician, who was kidnapped and tortured into making a false confession by police in 1985 during the Chun Doo-Hwan regime. The release of this film renewed debate among South Koreans about the state of transitional justice in the country. Despite

*Professor Paul Hanley is a graduate, magna cum laude, of the University of Notre Dame Law School. He is an international human rights attorney and advocate. Professor Hanley is currently the Chair of the Department of International Relations and Professor of International Human Rights Law at Keimyung University in Daegu, Korea.
† All English translations of Korean-language materials referenced in this article are by the author unless otherwise noted.

1 Author unknown.
claims by those opposed to investigating past crimes such as current President Park Geun-Hye (the daughter of former South Korean dictator Park Chun-Hee), who has referred to South Korea’s truth seeking process as a “worthless scam”, this article will show that many unresolved cases remain.

I. INTRODUCTION

Torture, forced disappearances, extra-judicial killings and mass executions occurred with disturbing regularity in Korea from the end of World War II until the election of Kim Young-Sam in 1993. Some estimate that as many as 100,000 people were executed by governmental authorities. Further, many South Koreans have been fighting to clear their names of political subversion charges from the military regimes of the 1960s and 1980s. With the election of President Park, South Korea has, in all likelihood, closed the book on its attempts at transitional justice. From 1995 to 2010, however, South Korea took a number of steps to expose the political oppressions and human rights abuses of its past authoritarian governments and to assist individuals involved in the struggle for democracy in order to clear their names and restore their reputations. In 2010, when the Truth and Reconciliation Commission was shut down, Commission President Lee Young-Jo stated: “Even if we

---

3 See Son Byung-Kwan, Addressed and Concluded by Law? Park Geun-Hye Should Apologise, OHMYNEWS NEWS AGENCY (Jan. 23, 2007) (translated from Korean by Jeong-Min Lee), http://www.ohmynews.com/NWS_Web/View/at_pg.aspx?CNTN_CD=A0000387883 (noting that on August 29, 2004 at a dinner party, Park Geun-Hye was requested to comment on her father’s rule of South Korea, she stated that these issues have “already been addressed and concluded by law. If these issues were to be readdressed, it should be done after thorough legal examination, and shouldn’t condemn politicians”).

4 See Choe Sang-Hun, In Seoul’s Red Scare, Redemption is Elusive For Accused Spies, An Agonizing Wait For Justice in a Still Divided Country, INTERNATIONAL HERALD TRIBUNE, Mar. 10, 2007 (describing the agony suffered by the Venerable Bong-Wang, a Buddhist monk who was tortured with electric shocks until he signed a confession that he was a communist spy and how in 1998, after 15 years in prison, he was released only to find his family had deserted him out of fear of being associated with a confessed communist).


6 Choe, supra note 4.
investigated more, there's not much more to be revealed.” This article analyzes the veracity of Mr. Lee’s statements within the context of the various attempts that South Korea has made in dealing with the human rights abuses of the regimes that ruled Korea since the end of the Korean War.

Part I of this paper provides a brief overview of modern history of Korea, including a description of the authoritative regimes that controlled South Korea from 1960 until 1993. Part II describes the various attempts by South Korea to address crimes committed by its former authoritative regimes and to restore the honor of those accused of crimes under those regime. Part III will discuss the degree to which South Korea’s attempts at transitional justice have been realized. This paper concludes with analysis of the relative success and failure of South Korea’s truth seeking process and the prospect for the realization of transitional justice in the country in the future.

II. OVERVIEW OF MODERN KOREAN HISTORY

Korea’s modern history begins with Japan’s defeat in World War II. In 1945, the United Nations divided Korea at the 38th Parallel in accordance with an agreement wherein the Soviet Union would administer the north and the United States the south. When the Soviets and the United States could not agree on the implementation of joint trusteeship

---


8 See INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, http://www.ictj.org/en/tj/ (The International Center for Transitional Justice provides that transitional justice “refers to a range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuse as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights”). Other commentators have stated that key elements of transitional justice are truth telling and accountability. See, e.g., Geoff Gentilucci, Truth-Telling and Accountability in Democratizing Nations: The Cases Against Chile’s Augusta Pinochet and South Korea’s Chun Doo-Hwan and Roh Tae-Woo, 5 CONN. PUB. INT. L.J. 80 (2005), available at http://cpilj.files.wordpress.com/2013/09/5-conn-pub-int-l-j-79.pdf.

9 See Bruce Cumings, KOREA: A PLACE IN THE SUN (W.W. Norton, 2th ed. 2005); see also KOREAN HISTORY PROJECT, http://www.koreanhistoryproject.org/Jta/Kr/KrGOV0.htm.
for the entire country, separate governments were established in 1948, with each claiming to be the legitimate government of all Korea.  

A. First Republic (1953 – 1960)

On August 15, 1948 the Republic of Korea (South Korea) was formally established and with the backing of the United States, Syng-Man Rhee was elected as the Republic’s first president. Rhee immediately began instituting a variety of reforms, including land reform, wherein the government confiscated and redistributed all land formerly held by the Japanese colonial government, Japanese companies, and individual Japanese colonists. The Rhee government also followed a policy of brutal repression of leftist activity and instituted harsh reprisals against any and all threats by groups with perceived leftist leanings such as labor unions and university student groups. Because the United States saw Rhee as ballast against the communist north, South Korea was the beneficiary of vast sums of American aid. In fact, in some years American aid to the south totaled the entire size of South Korea’s national budget.

On June 25, 1950, North Korean forces invaded South Korea. Led by the United States, a 16-member coalition undertook the first collective military action under the United Nations Command. Constantly changing battle lines inflicted high civilian casualties and wrought near total destruction on the entire peninsula. With China’s entry on behalf of North Korea in 1951, fighting came to a stalemate close to the original line of demarcation. Armistice negotiations, initiated in July 1951, finally

10 Id.
12 Id.
13 See id. (Government perception that labor unions and university student groups were sympathetic to North Korea and thus a threat to the rulers in the south continued through the 1980s); see also James F. Person, New East German and Soviet Evidence on North Korean Support to South Korean Political Parties and Labor Unions, WILSON CENTER, http://www.wilsoncenter.org/publication/new-east-german-and-soviet-evidence-north-korean-support-to-south-korean-political (discussing newly translated German and Russian documents from 1960 which indicate that North Korea provided political and material support to South Korean political parties, labor unions, and student groups) (last visited May 7, 2014).
14 Cumings, supra note 9, 255, 306.
concluded on July 27, 1953 at Panmunjom, now in the Demilitarized Zone (DMZ).  

Throughout his rule, Rhee went to great lengths to ensure that he would stay in power. Rhee pushed through constitutional amendments that made the presidency a directly elected position and promulgated an amendment, which exempted him from the constitutionally mandated eight-year term limit. However, in 1960, violent repressions of student demonstrations on the day of the presidential election touched off massive protesting and Rhee resigned amid widespread social strife.

B. Second Republic (1960 - 1961)

After the student revolution, power was briefly held by an interim administration until a new parliamentary election was held on July 29, 1960. The Democratic Party, which had been in opposition during the First Republic, gained power and established the Second Republic, which adopted a parliamentary system where the President took only a nominal role.

During the Second Republic there was a proliferation of political activity, which had been repressed under the Rhee regime. Much of this activity was from leftist and student groups, which had been instrumental

---

15 One sticking point to peace was the size of the flags at the negotiating table. Giving new meaning to the phrase “Napoleon complex”, each day when the opposing sides met, their accompanying flags were larger than the previous day. This gamesmanship continued until the flagpoles would no longer fit in the barracks where the negotiations were taking place. The issue was finally settled when both sides agreed to place their respective flagpoles outside the barracks. (An American soldier told me this anecdote during a visit to the DMZ in 1997). See also Brandon K. Gaulthier, What was It Like to Negotiate with North Koreans 60 Years Ago, The Atlantic (July 26, 2013), http://www.theatlantic.com/international/archive/2013/07/what-it-was-like-to-negotiate-with-north-koreans-60-years-ago/278130/ (discussing other North Korean tactics such as shortening the legs of his chairs to make its generals seem taller and noting that when a United Nations flag was on the conference table, a bigger North Korean flag appeared alongside it after a break in the negotiations).


17 Id.


19 Id.

20 Id.
in the overthrow of the First Republic.\textsuperscript{21} Union membership and political activity grew rapidly during the later months of 1960.\textsuperscript{22}

Under pressure from the left, the government carried out a series of purges of military and police officials who had been involved in anti-democratic activities or corruption.\textsuperscript{23} The government passed a Special Law to this effect on October 31, 1960, wherein 40,000 people were placed under investigation. Of those investigated, more than 2,200 government officials and 4,000 police officers were purged for their activities under the Rhee government.\textsuperscript{24}

\textbf{C. Military Rule (1961 – 1962)}

The Second Republic ended on May 16, 1961, when Major General Park Chung-Hee staged a \textit{coup d'état}.\textsuperscript{25} Under pressure from the Kennedy administration, Park promised a return to civilian rule.\textsuperscript{26} On December 2, 1962, the country held a referendum on returning to a presidential system of rule, which purportedly passed with a 78.8% majority.\textsuperscript{27} Despite Park’s pledge not to run for office in the next elections, Park ran anyway, narrowly winning the presidency in 1963.\textsuperscript{28}

\textbf{D. Third Republic (1963 – 1972)}

Park ran for president again in 1967, winning the presidency in a closely contested race.\textsuperscript{29} At the time, the presidency was constitutionally

\textsuperscript{21} Id.
\textsuperscript{22} See Yang, supra note 18, at 193—94 (approximating 2,000 demonstrations held during the eight months of the Second Republic).
\textsuperscript{23} Id.
\textsuperscript{24} See Andrew C. Nahm, KOREA: TRADITION & TRANSFORMATION 411 (Hollym International Corp., 2d ed. 1985) (There was also great economic unrest at the time. For example, Korea’s currency lost half of its value against the dollar between fall 1960 and spring 1961).
\textsuperscript{25} Seung-Mi Han, \textit{The New Community Movement: Park Chung-Hee and the Making of State Populism in Korea}, 77 PACIFIC AFFAIRS 69, 73 (2004).
\textsuperscript{26} See Apoorv Agarwal, \textit{Park Chung Hee: Another Dictator or a Saviour}, SIMPLY DECODED (March 20, 2013), http://www.simplydecoded.com/2013/03/20/park-chung-hee/ (discussing Park’s rise to power and 18-year dictatorial rule of South Korea).
\textsuperscript{27} See ANDREA M. SAVADA & WILLIAM SHAW, SOUTH KOREA: A COUNTRY STUDY (Library of Congress, 4th ed. 1992)
\textsuperscript{28} Id.
\textsuperscript{29} Id.
limited to two terms. Park, however, forced a constitutional amendment through the National Assembly in 1969, which allowed him to seek a third term.\(^{30}\) He was re-elected in the 1971 presidential election.\(^{31}\)

During the Third Republic, South Korea maintained close ties with and continued to receive a substantial amount of aid from the United States. A status of forces agreement adopted in 1965, clarified the legal situation of the U.S. forces stationed in the country.\(^{32}\) Soon thereafter, South Korea joined the Vietnam War, eventually sending a total of 300,000 soldiers to fight alongside U.S. and South Vietnamese troops.\(^{33}\)

The South Korean economy grew rapidly during this period. The Park regime used the influx of foreign aid to provide negative interest loans to export businesses.\(^{34}\) However, as the economy grew so did Park’s power. Park declared martial law on October 17, 1972, dissolving the

---

\(^{30}\) Nahm, *supra* note 24, at 423.

\(^{31}\) The leading opposition candidate at the time was Kim Dae-Jung, a political dissident and who was elected President of South Korea in 1997. The government made two attempts on Kim’s life. The first was a car accident allegedly staged by the KCIA, which left Kim with a permanent limp. The other incident occurred when the KCIA reportedly kidnapped Kim from a hotel in Japan and trundled him onto a fishing boat. Kim was later quoted as saying that a weight had been attached to his feet aboard the boat heading toward Korea, indicating that the kidnappers had intended to drown him by throwing him into the sea. They were, however, forced to abandon this plan, as the Japan Maritime Self-Defense Force began a pursuit of the kidnappers’ boat. Subsequently, Kim was released in the port city of Pusan. According to some reports the U.S. Ambassador at the time intervened with the South Korean government to save Kim’s life. *See* Carol Clark, *Kim Dae-Jung: From Prison to President*, CNN, available at http://archive.today/UYC6K; *see also* Kim Dae-Jung Biography, THE FAMOUS PEOPLE, http://www.thefamouspeople.com/profiles/kim-dae-jung-52.php


\(^{34}\) Although Park was without question a brutal dictator, he remains very popular because most South Koreans give Park credit for its miraculous economic development. *See* Donald Gregg, *Park Chung Hee*, TIME (Aug. 23 1999), http://www.time.com/time/asia/asia/magazine/1999/990823/park1.html.
National Assembly and announcing plans to eliminate the popular election of the president.  

E. Fourth Republic (1972 – 1979)

The Fourth Republic began with the adoption of the Yushin Constitution on November 21, 1972. The Yushin Constitution gave Park effective control over the parliament. In the face of continuing popular unrest, Park promulgated a series of emergency decrees in 1974 and 1975, which banned people from engaging in actions that challenged the Yushin Constitution and led to the prosecution and imprisonment of hundreds of dissidents.

Judges enforced the special decrees for President Park to perpetuate his rule and control the population. Under the law, citizens were punished just for criticizing the government while talking with friends in pubs, classrooms or on the streets. Recently, one of these former judges, surnamed Lee, expressed his feelings about his special decree rulings: “I always feel regret about the rulings I made under the Emergency Measures Act. But they were in inevitable. My heart aches when I think about the past, and I think we, including the government, are fully responsible for it.”

F. Fifth Republic (1979 - 1987)

---

36 The Yushin Constitution remained in effect until Park’s death at which time the country reverted to its “original” constitution, originally adopted on July 17, 1948. This constitution has been amended nine times and is in effect today. See DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], available at http://english.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf (S. Kor.).
37 There are many cases of individuals prosecuted under Park’s emergency decrees, many times for simply making an off-handed statement critical of Park. For example, a construction worker was sentenced to eight months in prison for drunkenly stating that Park “wants to be president forever.” Drunks Criticizing President Punished Under Park’s Rule, KOREA TIMES, Jan. 25, 2007, available at 2007 WLNR 3005044.
39 Id.
40 Id.
The head of the KCIA assassinated Park in 1979 while the two were having dinner.\textsuperscript{41} Park’s assassination led to a popular uprising, composed primarily of university students and labor unions. The protests reached a climax after Park’s second in command, General Chun Doo-Hwan, seized power and declared martial law.\textsuperscript{42} On May 18, 1980, a confrontation broke out in the city of Kwangju between students of Chonnam National University (protesting against the closure of their university) and the police.\textsuperscript{43} The confrontation turned into a citywide riot that lasted nine days.\textsuperscript{44} The government quelled the riot by sending in the army, including special-forces units that reportedly hunted down and executed the leaders of the protest, as well as innocent civilians.\textsuperscript{45} Estimates of the death toll, as a result of what is now referred to as the Kwangju Massacre, range as high as 2,000.\textsuperscript{46} Public outrage over the killings consolidated nationwide support for democracy, paving the road for the first democratic elections in 1987.\textsuperscript{47}

\textit{G. Sixth Republic (1987 - 1992)}

In 1987, Roh Tae-Woo, one of Chun’s military colleagues in the 1979 coup was elected to the president by the popular vote. In 1993, Kim Young-Sam was elected as South Korea’s first civilian president in 30

\textsuperscript{41} There were two previous attempts on Park’s life. On January 28, 1968, a 31-man detachment from North Korea crossed the DMZ with the purpose of killing Park. They made it within 800 meters of the Blue House (Korea’s version of the White House) dressed in ROK uniforms before they were discovered. In the ensuing firefight that occurred over the course of several days, 68 South Koreans and three Americans died. The second assassination attempt, launched again by North Korea, occurred when Park was delivering a speech during a ceremony celebrating South Korea’s liberation from Japanese rule. A North Korean agent fired shots from the front row of the audience. The bullets missed Park who had finished his speech but struck his wife, who died later from her wounds. See Donald Gregg, \textit{Park Chung Hee}, TIME (Aug. 23, 1999), http://www.time.com/time/asia/asia/magazine/1999/990823/park1.html.


\textsuperscript{44} Id.

\textsuperscript{45} Id.

\textsuperscript{46} Id.

\textsuperscript{47} Id.
years. South Korea’s commitment to democratize its political processes reached the end of a long bloody road in 1997 with the election of Kim Dae-Jung. Kim’s election represented the first peaceful transfer of government between parties in South Korea.

III. THE ROLE OF TRANSITIONAL JUSTICE IN SOUTH KOREA

For more than a decade, South Korea has taken a number of steps towards rectifying wrongs perpetrated by the authoritarian military regimes, which ruled the country since 1961. The following is a brief description of each piece of legislation and the legal and/or political challenges each faced.

A. Special Act Regarding May 18 Democratization Movement (1995)

In the early 1990’s there was a great deal of public demand for justice for the victims of the “democratization movement”. Although Kim Young-Sam strongly criticized the actions of former presidents Chun and Roh, he believed prosecution of the two might lead to political and social unrest. Kim argued against criminal prosecution of the former presidents stating: “truth should be reserved for historical judgment in the future.” From a legal perspective, there was concern that the prosecution of previous military dictators may be barred by the applicable statute of limitations. As debate raged amongst politicians and the public, the Seoul Prosecutor’s Office made the controversial decision to suspend the

49 Id. at 581. (Under President Kim Young-Sam many dissidents were “rehabilitated” insofar as they ascribed the status of “democratization movement involvers” who took part in the “democratization movement”, as opposed to communist sympathizers fomenting social unrest and engaged in criminality). See, e.g., Gwangju Minjuhwa Undong Gwanryeonja Bosang Deungye Gwanhan Beobbyul [Act for Compensation for the Victims in the Democratization Movement in Kwangju], Act No. 4266, Aug. 6, 1990 (S. Kor.).
50 Cho, supra note 48, at 581-82. (Kim entered the Blue House with the support of many high-ranking military leaders and thus, was reluctant to resort to criminal punishment for mutiny, insurrection and murder for the former military leaders).
51 Id. at 581.
52 Id. at 582.
prosecution of the military leaders.\textsuperscript{53} Although the Prosecutor’s Office determined the 1979 coup involved crimes of mutiny, insurrection and murder, and that the suppression of the 1980 Kwangju uprising constituted treason and murder, it found that prosecution of these crimes were barred by the statute of limitations.\textsuperscript{54}

The Korean Constitutional Court addressed this issue in 1995 when, in a majority decision, it declared that a prospective prosecution of the two former dictators was constitutional insofar as it did not violate the statute of limitations.\textsuperscript{55} The Court held that under Article 84 of the Constitution, statutes of limitations are stayed while a president is in office except for crimes of insurrection and treason.\textsuperscript{56} The Court determined, however, that it would not intervene in prosecutorial decisions, noting the conflict between “realizing justice” by punishing former military leaders and the danger of fomenting social confrontation that such prosecutions would create.\textsuperscript{57}

When the government and the legal system refused to push forth with prosecutions of Chun and Roh, South Korean citizens again took to the streets in 1995. As a result, the National Assembly passed the Special Act Concerning May 18 Democratization Movement (the “Act”).\textsuperscript{58} The Act suspended the statute of limitations for “crimes against constitutional order” that had been committed on or around December 12, 1979 and May 18, 1980, the dates relating to the coup and to the Kwangju massacre.\textsuperscript{59} The Act also provided for the right to re-trial for those deemed to have

\textsuperscript{53} Id. at 581.
\textsuperscript{54} Id. at 582.
\textsuperscript{55} Id. The KCC was established in September 1988 and is modeled on the European model, insofar as it is specialized court that determines constitutional laws, disputes between governmental entities, Constitution Complaints filed by individual, impeachments and dissolution of political parties. The justices are appointed by the president with the approval of the National Assembly and serve six-year renewable terms. Decisions rendered by the KCC are final and cannot be appealed. See CONSTITUTIONAL COURT OF KOREA, http://english.ecourt.go.kr.
\textsuperscript{56} DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 84 (S. Kor.) (“[t]he President cannot be charged with a criminal offense during his tenure of office except for insurrection or treason.”)
\textsuperscript{57} Cho, supra note 48, at 582.
\textsuperscript{58} Id. at 582—83. (The final straw was the revelation that both Chun and Roh had amassed huge sums of money in bribes received during their respective presidencies).
\textsuperscript{59} Minjuhwa Undong Deung E Gwanhan Teukbyeol Beop [Special Act Concerning May 18 Democratization Movement], Act. No. 5029, Dec. 21, 1995 (S. Kor.).
been punished because of their involvement in the democracy movement. As a result, the Seoul District Prosecutor’s Office initiated criminal proceedings for treason against Chun, Roh and other former high-ranking officials.

The defendants filed a motion with the KCC, challenging the constitutionality of the Act asserting: (1) it violated equal protection principles, as it was directed only to punish a specific group of individuals; and (2) constituted retrospective punishment and thus, violated *ex post facto* principles. The Court, however, upheld the constitutionality of the Act, determining that despite the fact that the Act was created to prosecute a narrow set of individuals, it was not *per se* unconstitutional. Relying heavily on public policy as the foundation of its decision, the Court determined that the Act was founded upon a national demand to rectify past wrongs and establish “legitimate” constitutionalism in South Korea.

On the *ex post facto* issue, the Court held that because the Supreme Court at that time had not decided the issue of whether the statute of limitations expired when the Act was passed, the court found that it would not be unconstitutional to extend the statute of limitations. Importantly, the justices failed to agree whether the statute of limitations had already expired, with four justices holding the Act was constitutional

60 Id.
62 Constitutional Court [Const. Ct.], 96 HunKa 2, Feb. 16, 1996, (8-1 KCCR, 51) (S. Kor.) (noting that *ex post facto* criminal punishment is prohibited by the Korean Constitution under the Article 12 (1) (enshrining the principle of due process) and Article 13 (1) (specifically prohibiting prosecutions acts that do not constitute crimes under the law in force when the act is committed). For background on the role of the Constitutional Court in South Korea, see *Jurisdiction, CONSTITUTIONAL COURT OF KOREA*, http://english.ccourt.go.kr/home/english/jurisdiction/faq.jsp (last visited Apr. 17, 2014) (the Korean Constitutional Court was established in September 1988 and is based on the European model insofar as it is a specialized court that determines constitutional laws, disputes between governmental entities, constitution complaints filed by individuals, impeachments and dissolution of political parties. The Court’s justices are appointed by the president with the approval of the National Assembly and serve six-year renewable terms. Decisions rendered by the KCC are final and cannot be appealed.).
63 Constitutional Court [Const. Ct.], 96 HunKa 2, Feb. 16, 1996, (8-1 KCCR, 51) (S. Kor.).
64 Id.
65 Id.
and five finding in favor of unconstitutionality.\textsuperscript{66} Under Korean law a finding of unconstitutionality requires a vote of six or more justices and therefore, the five-justice dissent did not meet the threshold for a determination that the Act was unconstitutional.\textsuperscript{67}

The Supreme Court affirmed the defendants’ convictions for treason and killing for the purpose of treason, holding:

\begin{quote}

The defendants grasped political power after they stopped the exercise of the authority constitutional state institutions by mutiny and rebellion. Even if they had arguably ruled the State based on the constitution, which was revised by popular referendum, it should not be overlooked that a new legal order was established by mutiny and rebellion. It cannot be tolerated under any circumstances under our constitutional order to stop the exercise of the authority of constitutional state institutions and grasp political power by violence, not following democratic procedure. Therefore, the mutiny and rebellion can be punishable.\textsuperscript{68}
\end{quote}

The Supreme Court affirmed Chun’s conviction and sentence to life in prison and Roh’s conviction and sentence of 17 years in prison, as well as upholding the convictions and sentences of 23 of their subordinates.\textsuperscript{69} In 1997, all those convicted under the Act received presidential pardons and were released from prison.\textsuperscript{70} No other soldiers or government officials were punished.

\textit{B. Presidential Truth Commission on Suspicious Deaths (2001)}

\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Cho, \textit{supra} note 48, at 584.
\textsuperscript{69} Id. The Supreme Court only examined issues related to the defendants’ convictions and sentences for treason and killing for the purpose of treason and not constitutional issues, which were resolved by the KCC in its Decision of February 16, 1996, 96 HunKa 2. See \textit{e.g.}, Constitutional Court, \textit{supra} note 62.
In 2001, the National Assembly established a commission to investigate deaths of individuals who were involved in South Korea’s pro-democracy movement and who died under suspicious circumstances. The Commission was, however, hampered by the fact that most of the deaths it was investigating occurred many years ago, usually long after the expiration of the applicable statute of limitations. As a result, most of the individuals who tortured, murdered and gave false testimony to convict innocent citizens remain unpunished due to the legal impediment of statutes of limitations for these crimes. Again, civil and human rights groups strongly argued in favor of legislation, which would allow for prosecutions of those involved in past crimes by extending statutes of limitations. However, two bills that would allow for circumvention of various statues of limitations for those accused of perpetrating crimes against those involved in the democracy movement failed to pass the National Assembly.


In 2000, the government passed legislation (hereinafter the “Democracy Act”) the purpose of which was to recognize the sacrifice, and in some cases, provide compensation for those determined to have been involved in South Korea’s “democracy movement”. The Democracy Act established the right of resistance against South Korea’s illegitimate regimes. The Democracy Act established a Review Commission (the “Commission”) to review applications made by individuals who asserted they were involved in the democracy movement.

71 See Cho, supra note 48, at 585 (Under Korea’s Criminal Procedure Code, crimes such as murder are subject to a 15 year statute of limitations).
73 Id.
74 This term is defined as “activities that contributed to establishing democratic constitutional order and resurrecting and enhancing freedoms and rights of people by resisting authoritative rule that had disturbed free democratic basic order and violated people’s fundamental rights guaranteed by the Constitution…” Act for the Honor Restoration of and Compensation to Persons Related to Democratization Movements, Statutes of South. Korea, Act. No. 6123, Jan. 12, 2000 (S. Kor.).
75 Id.
and were persecuted as a result. Although the Commission had no investigative or judicial authority, it had the power to recommend pardons or expungement of an applicant’s conviction. Importantly, it also had the power to make recommendations to state or local governments and/or private companies to rehire individuals involved in the democracy movement. Further, the Commission has made recommendations to schools to abolish disciplinary records and bestow honorary degrees upon those punished for their involvement in the democracy movement and suffered some detriment as a result. In addition to this so-called “honor restoration”, the Commission could recommend financial compensation to qualified applicants.

In its most high profile matter, the Commission reviewed the case of eight college students who, under extreme torture by the KCIA, admitted to being North Korean spies. They were convicted and executed one day after the Supreme Court confirmed their convictions and death sentences. On December 27, 2005, after a recommendation from the Commission, the Seoul Central District Court re-examined the case and overturned the convictions.

The Commission also examined a number of cases involving a concentration camp called the Samchung Re-education Camp, set up by the military. Take, for example, the case of Jean Jeong-Bae. The Commission found that Mr. Jean was shot on June 20, 1981 by a Samchung guard for protesting his arrest, detention and demand for a

76 Cho, supra note 48, at 590—92 (describing the Democracy Act and the Review Commission that examines applications by those claiming to be “democratization movement involvers”).
77 Id.
78 Id.
79 Id. According to Cho, as of December 28, 2006, “democratization movement involvers” were given $28,700,000 on compensation. Id. at 592 (citing Dong Jung-Min, Recognizing 46 Illegal Labor Activists as Democratic Activists, DONG-A ILBO, Dec. 18, 2006).
80 Id. at 592; see also Ju Jin-Woo, The People’s Revolutionary Party, Homicide Committed in the Name of the Law, JU JIN-WOO’S KOREAN MODERN HISTORY PODCAST (SEP. 12, 2012), http://blog.naver.com/srcchu?Redirect=Log&logNo=30142229623, (describing how one defendant, Ha Jae-Wan, was caught recording North Korean radio and sharing with others, a crime under South Korean law and how the government at the time was under a lot of stress due to protests of students against Park Chung-Hee).
81 Choe Young-Yoon, Sentence of Innocence to the People’s Revolution Party Case After 32 Years, HANKOOK ILBO (JAN. 24, 2007).
formal trial. Another case involved a claim by a former inmate of the Samchung Camp occurred in 2001, when a man, surnamed Lee, submitted a petition to the Commission, calling for compensation for pain and suffering as a result of his incarceration at the Camp. The commission rejected his claim finding Mr. Lee was not a pro-democracy activist and was, therefore, not eligible for compensation from the government. Mr. Lee then brought his case to an administrative court, and in 2013 that court recognized Mr. Lee’s claim and ordered the government to compensate him. The Court stated that the 74-year-old Lee: “fought for democracy in the face of repression by the authorities . . . was injured due to his campaigning for freedom and basic rights … [and] should be regarded as a democracy fighter.” It was the first time that a court recognized a surviving victim of the camp as a democracy fighter.

Another Commission case that garnered a lot of attention concerned the mysterious death of Tsche Chong-Kil, a law professor at Seoul National University, whose body was found at the bottom of a fire escape outside the KCIA building. The KCIA announced that Professor Tsche had committed suicide by throwing himself out of the building after

82 Cho, supra note 48, at 600; Lee Ju-Young, Presidential Truth Commission on Suspicious Deaths: Obligation and Compensation Regarding Samchung Re-education Camp, OHMYNEWS NEWS AGENCY (OCT. 1, 2002), http://www.ohmynews.com/NWS_Web/View/at_pg.aspx?CNTN_CD=A0000089478; see also National Human Rights Commission of Korea Recommended Equal Compensations for Foreign Victims of Samchung Re-education Camp, ASIAN PACIFIC HUMAN RIGHTS INFORMATION CENTER (SEP. 5, 2006), http://www.hurights.or.jp/archives/newsinbrief-en/section1/2006/09/national-human-rights-commission-of-korea-recommended-equal-compensations-for-foreign-victims-of-sam.html (The Camp was set up under President Chun Doo-Hwan. Detained individuals were subjected to organized violence under the name of “social cleansing,” which aimed at the elimination of social vices, such as violence, smuggling and drug use. Some 42,000 individuals were arrested without proper warrants and subjected “purification education” through violence and hard labor).


84 Id.

85 Id.

86 Id.

confessing that he was a North Korean spy. The Commission found that the KCIA had tortured Professor Tsche and that there was a “high probability” that he was killed and his body thrown out a window of the KCIA building. The Commission based its decision, in part, on the testimony of a former KCIA agent who stated: “[t]he official announcement that Professor Tsche had confessed to being a spy and jumped to his death was a fabrication … when he lost consciousness while being tortured, investigators mistook him for dead and pushed him off the fire exit” in order to cover up the death. In February 2006, the Seoul High Court awarded Professor Tsche’s family 1.8 billion KRW (approximately $1.9 million) in compensation.

The Commission was dissolved in 2004, with a number of unresolved cases before it. The most high profile cases were those of Chang Joon-Ha, a leading activist against the Park regime found dead on a mountain in 1974 and Lee Chul-Kyu and Lee Rae-Chang, both activists, whose bodies were found in isolated places (a reservoir and beach respectively). Prior to its dissolution, the Commission recommended that the National Assembly establish a new commission with greater investigative powers, including the authority to punish those who refuse to give evidence or commit perjury before it. The Commission also recommended passage of a law barring the application of the statutes of limitations for state crimes against human rights.

i. Whether Individuals Involved in Counter-Violence Should Be Acknowledged as Democracy Movement Involvers

As South Korea struggled to come to terms with its past, an important issue arose with regard to whether individuals who engaged in violent opposition to past authoritative regimes should be eligible for relief under the Democracy Act. One case involved a group of Dong-Eui University students who staged a sit-in to protest what they considered to

---

88 See id.; see also History of Harm, TIME (June 9, 2003), http://www.time.com/time/magazine/article/0,9171,457405,00.html (detailing incidences of violence within South Korea).
89 Id.
91 Cho, supra note 48, at 601.
92 Id. at 602.
93 Id.
94 Id.
be corrupt university entrance exam procedures. When the police broke into the library to break-up the demonstration some students threw Molotov cocktails at the police. In the ensuing fire, seven police officers were burned alive and the students were convicted of the crime of murder by arson.

In 2002, the Commission determined that the forty-six students involved in the demonstration were, in fact, part of the democracy movement and should thus be absolved of their criminal liability for the deaths of the police officers. The family members of the dead officers filed a complaint with the Constitutional Court arguing that the decision of the Commission violated their constitutional rights and tarnished the reputations of the dead. The Court held that the family members lacked standing and that the Committee’s decision did not cast the officers in a negative light. The police, conservative politicians and certain members of the media, criticized this decision asserting that the de-facto result of the decision was to transform cop killers into activists. The final decision of the Commission was a compromise by the court; the students were determined to be “democratization movement involvers” and the dead policemen, “officers of merit.”

D. The Basic Act for Coping with Past History for Truth and Reconciliation (2005)

Based on the outgoing Commission’s statements concerning the need for a new truth finding body and the overwhelming support of the public, the National Assembly enacted The Basic Act for Coping with Past History for Truth and Reconciliation in 2005. The Act established

---

95 Id. at 593—94; see also Stephen R. Weisman, Korea Addresses Abuses of Its Past, N.Y. TIMES (May 24, 1989), available at http://query.nytimes.com/gst/fullpage.html?res=950DE5D91E3FF937A15756C0A96F948260&sec=&spon=&pagewanted=all (describing the violent escalation of the demonstrations by Dong-Eui University students as atypical for the time).
96 Cho, supra note 48, at 593—94.
97 Id.
98 Id.
99 Id.
100 Cho, supra note 48, at 594 (citing Decision of October 27, 2005, 2002 HunMa 425 (Korean Constitutional Court).
101 Id.
102 Id.
103 See TRUTH AND RECONCILIATION COMMISSION, REPUBLIC OF KOREA, http://www.jinsil.go.kr/English/Commission/outline.asp (last visited Apr. 6,
the Truth and Reconciliation Commission ("TRC") as an independent organization that was given a four-year mandate to initiate investigations on suspicious deaths by petition or by its own volition.\footnote{104} The TRC was made up of 15 members, eight recommended by the National Assembly, four appointed by the President and three nominated by the Supreme Court.\footnote{105} The TRC had an expansive mandate. In addition to abuses under past regimes, the TRC was also empowered to investigate crimes committed during the Japanese occupation\footnote{106} and the Korean War.\footnote{107} The first President of the TRC, Father Song Gi-Im, described the purpose and mandate of the TRC was: "to investigate and find out the truth and take necessary measures to bring about reconciliation in case relating to the anti-Japanese independence movement, mass victimization of civilians before and during the Korean war, human rights violations and politically fabricated trials during authoritarian rule, and the like."\footnote{108}

Importantly, the TRC had the power to request relevant individuals to submit affidavits, appear for inquiry and submit evidence pertinent to its particular investigation.\footnote{109} Unlike the Commission on Suspicious Deaths, the TRC had limited subpoena power to compel the
appearance of individuals who refuse to appear more than three times without just cause. In addition, it had the power to impose administrative fines on those who made false statements, submitted false information, refused or evaded the TRC’s investigation or subpoena. Part of the mandate of the TRC was to recommend reconciliation between offenders and victims or their families based on an offenders’ repentance and the victims’ or families’ forgiveness.

One of the most controversial decisions made by the TRC was its determination to publish the names of 492 justices who had rendered decisions in as many as 1,412 cases involving violations of emergency decrees under the Park regime. The Korean Bar Association sharply criticized the Commission for its decision stating that identifying the justices would serve only to aggravate public distrust of the judiciary. Others argued that it was unfair to place all responsibility on the judges because they had no choice but to enforce the Park’s emergency decrees, as at that time, it was the law. Further, critics asserted that police and prosecutors, who arrested, indicted and forced violators of Park’s emergency decrees to stand trial, remained unnamed and unpunished. Supporters of the Commission’s decision to publish the names have called for the removal of those justices who remain on the bench but to date, no

---

110 Id.
111 Id. at 609.
112 Id.
114 See id.; see also Kim Rahn, Past Wrongdoing Probe Embarrasses Park, KOREA TIMES (Jan. 31, 2007), available at Westlaw at 1/31/07 KORTIMES (discussing the assertion of Park Geun-Hye, daughter of the late dictator Park Chun-He and chairwoman of the Grand National Party, that the sole purpose of disclosing of the names of judges, was to embarrass her and her party in the lead-up to the 2007 election).
116 Id.
such action has been taken. To the contrary, subsequent to being named by the TRC, most of the judges continued with their careers as judges, lawyers and academics, with some even serving on the Korean Constitutional Court and the Korean Supreme Court. It should be noted, however, that not all judges toed the party line; some judges followed their conscience and refused to enforce what they considered to be unjust decrees. One case is that of Lee Young-Gu who, in 1976, was the chief judge of Seoul Yeongdeungpo-gu district court and handed down a not guilty verdict to a teacher who was accused of criticizing the government in violation of both the Anti-Communist Law and the Emergency Decree No. 9. Another man, Yang Young-Tae, who was a High Court judge of Gwang-ju in 1975, dismissed a guilty verdict against a farmer who had received 3 years imprisonment and 5 years probation during his trial for criticizing president Park Jung-Hee. Both judges were punished for their decisions. Within a month, Judge Lee was demoted and voluntarily left the judiciary. Judge Yang, remained as a low level judge while his compliant colleagues on the bench advanced to


118 For example, Lee Kang-Kuk was named by the TRC and served as the head of the Korean Constitutional Court from 2007 to 2013. Biography of Lee Kang-Kuk, NAVER, http://people.search.naver.com/search.naver?where=nexearch&query=%EC%9D%B4%EA%B0%95%EA%B5%AD&sm=tab_txc&ie=utf8&key=PeopleService&os=112327 (trans. Jeong-Min Lee); see also Seong Hye-Mi, Over Ten Current High-ranking Judges Including the Head of Constitutional Court and Supreme Court Justices, YONHAP NEWS AGENCY (Jan. 31, 2007, 10:34 PM), available at http://bemil.chosun.com/nbrd/bbs/view.html?b_bbs_id=10038&num=13831 (reporting on the naming of judges by the TRC) (trans. Jeong-Min Lee).


120 Id.

121 Id.

122 Id.
high judicial positions. These brave men stand out as exceptions to the 492 justices who had enforced the emergency decrees who defended themselves with self-serving claims that they were only applying the positive law of the time and the all too familiar defense heard at Nuremburg that they were only following orders.

IV. DEVELOPMENTS FROM 2005 TO THE PRESENT

The TRC was dissolved in June 2010 amidst a sea of criticism from both its opponents and advocates. The TRC heard a total of 11,175 petitions reaching final conclusion in 8,450 cases (85.6%), leaving 510 cases (4.7%) unsolved and declined to hear 1,729 cases (15.5%).

The most publicized reports issued by the Commission focused on mass executions by South Korean authorities before and during the 1950 – 1953 Korean War and on the killing of innocent civilians by US forces. Research also focused on the suppression of leftist civilians and soldiers in that era and of suspected communists after North Korean forces invaded the south in June 1950. The commission also investigated killings by US forces, who fired on refugees streaming south following the North Korean invasion. Conservative opponents of the truth seeking process have criticized the reports documenting these killings, as “leftist.”

123 Id. (Judge Yang was finally promoted to a judicial scholar of the Supreme Court).
124 Id.
125 Don Kirk, South Korea’s TRC to Fold, RADIO NETHERLANDS WORLDWIDE (Mar. 24, 2010), available at http://www.rnw.nl/international-justice/article/south-korea%E2%80%99s-trc-fold See also Ryu In-Ha, The Truth and Reconciliation Committee Ends as the Truth of the Victims Remain Undisclosed, THE KYUNGHYANG NEWSPAPER (Dec. 27, 2010), available at http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201012272137245&code=940100 (describing the reaction of the National Association of the Bereaved Families of the Korean War Victims to the TRC report who asserted that the TRC had produced its report in secret but also at the last moment).
127 Id.
128 Id.
129 Id.
130 Id.
After assuming office in February 2008, conservative President Lee Myung-Bak replaced the liberal head of the TRC appointed by Roh Moo-Hyun with the conservative, Lee Young-Jo, as head of the commission. The TRC soon found itself fighting budget cuts and restrictions on its investigative powers, which some believed was due to the fact that President Lee Myung-bak and his ruling conservative party were uncomfortable with the scrutiny of the country’s past. Advocates further asserted that the Lee government had reluctantly inherited the TRC and would like to see it shut down. The commission’s new president stated that, having spent 20 billion KRW ($17.79 million), the TRC had not been cost effective and that it should cease its work without extension. The TRC was shut down in June 2010. The term period of the TRC was until April 2010 and although it could have been extended for an additional two years, until April 2012, it was only extended for an additional two months.

When Park Geun Hye ascended to the presidency in 2013, she discussed forming a commission to deal with reconciliation issues, especially those that took place during her father’s presidency but no action has been taken to date. The progressive former head of the TRC doubts that Park would enact such a plan, asserting that Park’s true purpose is the exoneration of her father’s name.

---

133 Id.
134 Id.
135 Ryu In-Ha, The TRC Ends Without Unveiling the Truth About Civilian Victims, THE KYUNGHYANG SHINMUN (Dec. 27, 2010),
137 Id.
Many South Koreans are, however, demanding that further action be taken regarding past crimes. One example is that of politician Lee Jae-Ho, a member of the Saenuri party, recently announced that he has put forth the “basic law for coping with past history for truth and reconciliation”, which is to reactivate the Truth and Reconciliation Committee. The proposed law would allow the Commission to work on their investigation for a maximum of five more years, three years for an initial investigation, with a possible two-year extension. Mr. Lee stated the reason for his proposal was: “because of [the TRC’s] time limit for petitions, many victims did not receive an official accounting of the truth nor recover their tarnished reputations and even subsequent remedies were unsatisfying.” Thus, a troubled cloud hangs over the state of transitional justice in South Korea to this day.

V. CONCLUSION

Contrary to the claims by opponents of Korea’s truth seeking process, South Korea continues its struggle to free itself from the jackboot of its past. This is due in large part to the fact that Korean truth commissions can, with a few exceptions, also be characterized as essentially victim-centered. They have rarely punished or recommended punishment for offenders. In fact, in most cases Korean truth commissions have refrained from publicizing the names of perpetrators. Nor have they been greatly involved in making recommendations for institutional reforms. Rather, the focus has been on the victims, and especially on revealing the truth surrounding their victimization and rehabilitating their reputations, phrased as “restoring their honor” in the preferred formulation.

140 Id.
141 Id.
142 See Wolman, supra note 136 at 52.
The first question is whether there has been complete truth telling with regard to past crimes.143 Tragically, the answer to this question is a resounding no. The first Presidential Truth Commission on Suspicious Deaths of 2001 was hampered by the lack of power to compel testimony and production of information, and by the impediment of the statute of limitations that prevented prosecution of potential suspects. South Korea is a state party to the Rome Statute, which allows for the tolling of statutes of limitations in cases of grave violations of human rights such as crimes against humanity.144

The Democracy Act of 2000 made great strides towards reconciliation insofar as it resulted in the rehabilitation of the reputations of many of those involved in the democracy movement, as well providing financial compensation to victims and their families. The Commission was, however, dissolved with a number of uninvestigated and unresolved petitions before it. The expectation was, however, that the TRC (with its expansive investigative powers) would pick up where the Commission left off and resolve these cases. Unfortunately, the great promise with which the TRC began was never realized.

With regard to the issue of accountability for the wrongdoers, one could argue that this was achieved to a degree, given that two former presidents were prosecuted, convicted and jailed for their crimes against the Korean people. While it is true that the trials of Chun, Roh and their subordinates did provide South Koreans with a sense that some justice had been done, their subsequent pardons after a mere two years justifiably created a great deal of cynicism towards the concept of transitional justice.145 Moreover, no other officials, or other individuals acting under color of law, were brought to account for crimes committed during authoritative rule.146

143 See, e.g., Gentilucci, supra note 8, at 85 (stating the premise that transitional justice requires both truth telling and accountability; describing the latter as necessary for “retribution”, which he describes as blame-laying and punishment for wrong doers).
The TRC was important in that it had much greater investigative authority than the 2001 Commission. Further, because part of its mandate was to bring about reconciliation between offenders and victims, the TRC had a greater chance to achieve a national “healing” than South Korea’s previous attempts. The TRC’s promise was, however, never realized. Considering the recent election of President Park, it likely that they will remain so. Reconciliation and societal harmony can never be realized while these individuals remain free, safely ensconced in the bosom of the statutes of limitations that protect them from prosecution for their crimes. The solution to this is one that has been proposed a number of times to the National Assembly, abolish the statute of limitations for crimes against the Korean people and allow the perpetrators to be brought to justice.147 The people of South Korea are strongly in favor of such legislation and the KCC clearly opened the door when it found that suspending the statute of limitations for certain crimes was constitutional under Korean law.148

Regarding crimes committed prior to and during the Korean War, many of these cases have either been under investigated or not investigated at all. This is very troubling given that a cable released by Wikileaks dated October 20, 2009, indicates that there may be as many as eight potential cases involving the deaths of Korean citizens at the hands of US forces during the Korean War.149

146 (describing Korean truth commissions as essentially victim-centered, focused on honor restoration and where offenders are rarely named or punished, nor recommendations for institutional reforms made).
147 See Lee Deok-Woo, Esquire, Abolish Statutes of Limitations for Human Rights Violators, available at http://english.hani.co.kr/arti/english_edition/e_opinion/218159.html, (describing, inter alia, the Special Law Regarding the Statute of Limitations for State Crimes Against Human Rights that was proposed to the National Assembly in 2005 but which has yet to be debated much less voted on).
148 Ryu Kyung-Wan, Park Geun-Hye Government Should Stop Ignoring the Civilian Victims of Massacres!, TONGIL NEWS AGENCY (Nov. 21, 2013), http://www.tongilnews.com/news/articleView.html?idxno=105032 (citing a representative of human rights organization: “Even after 60 years of the most tragic civilian massacres, our government is evading its responsibility by being indifferent and by concealing the crime … President Park Geun-Hye should, at least, address what her father did 52 years ago and after thorough investigation, should sincerely apologize in order to build a framework of reconciliation and harmony.”) (trans. Jeong-Min Lee).
South Korea has consistently criticized Japan for its refusal to acknowledge its past. President Park herself has stated that a lack of trust exists between Seoul and Tokyo due to Japan’s failure to properly address issues of “historical variety” such as the Korean women pressed into sexual slavery during Japan’s occupation of Japan during World War II. South Korea’s stance is, however, weakened by the fact that the nation itself has failed to properly address its own issues regarding the past, including properly examining the issue of Korean collaboration with colonial era Japan. Until it cleanses its own closet of skeletons, South Korean accusations that Japan is failing to address its past, carry little weight.

South Korean society is highly influenced by the Confucian values of societal unity and harmony. There can be no harmony in a society where untold numbers had their lives torn asunder without official recognition, where there is no accountability for those who visited egregious injustice upon the innocent and where unexcavated mass graves dot the landscape. As director Chung Ji-Young poignantly stated upon

regarding these claims against US forces will depend upon the final report of the TRC and public opinion).


151 *Id.*


153 Choe Sang-Hun, *Korea Investigates Atrocities in Race Against Time*, N.Y. TIMES, Sept. 4, 2009, http://www.nytimes.com/2009/09/04/world/asia/04truth.html?fta=y. (detailing the TRC’s confirmation of more than 50 mass killings of civilians during the Korean War and the location of 168 mass graves, which due to budget constraints and a lack of political support from Lee’s administration, only 13 were expected to be excavated before the expiration of the TRC’s term).
the release of National Security: “If we triumph over the past, we can move forward with unity and reconciliation.”

The New Drug Detoxification System in China: A Misused Tool for Drug Rehabilitation

Enshen Li*

Abstract

Since 2008, China has established a new drug detoxification system to supersede the old mechanism that relied on administrative custodial measures for drug treatment. The new system introduces a three-tiered mechanism of voluntary, community and coercive drug detoxification, which aims at the physical, psychological and social aspects of drug-dependence treatment of addicts. However, although the new drug detoxification system seems to serve as a scientific and human-centered drug treatment tool, its practices appear to be rather different from the official rationales. Through three case studies in Guangzhou, Shanghai and Kunming, this article focuses on the legal deficiencies, theoretical inconsistencies and practical problems of this freshly-established system. This article also focuses on the uniqueness of the social conditions upon which the three detoxification programs are implemented. The article thus uncovers the genuine intention of the Chinese authorities in hastily introducing this system lies in the government’s endeavor to ensure the maintenance of social order and public safety. As such, the new drug detoxification system functions primarily as a risk-control measure, rather than a rehabilitative instrument, administering actuarial justice by identifying, classifying and managing drug addicts.
I. INTRODUCTION ................................................................. 169
II. DRUG DETOXIFICATION SYSTEM IN THE LEGISLATIVE CONTEXT 172
III. THE NEW DRUG DETOXIFICATION SYSTEM: AN EFFECTIVE TOOL FOR DRUG REHABILITATION? ................................................................. 175
   A. Addicts’ Misuse of Voluntary Detoxification ............................ 175
      i. 3.1.1. Legal Deficiencies of Voluntary Detoxification ........... 175
      ii. The Practice of Voluntary Detoxification ..................... 178
   B. Community Drug Detoxification: A People-Oriented Program? ................................................................. 183
      i. The Coercive Nature of Community Detoxification ....... 184
   C. Coercive Isolated Detoxification: A Punitive Instrument for Drug Abusers ................................................................. 201
      iii. The Prison-like Management of Coercive Detoxification Centers ................................................................. 202
IV. THE NEW DRUG DETOXIFICATION SYSTEM: A PRACTICE OF ACTUARIAL JUSTICE? ................................................................. 206
   A. Drug Abuse is Normal ........................................................ 208
   B. Drug Addicts are Risk Objects ............................................. 209
   C. Managerialism rather than Providing a Cure ....................... 210
V. CONCLUSION ................................................................. 212

I. INTRODUCTION

Drug abuse has become an increasing public health issue and social concern in the last decade in China. Although the Chinese government created a so-called “drug-free” nation by deploying nationwide anti-drug campaigns from the 1950s-1980s, drug abuse re-

*The author is an attorney in China, holds an SJD from La Trobe University, and is Ph.D. Candidate in Criminology at the University of Queensland.

1 Clyde B. McCoy, H. Virginia McCoy, Shenghan Lai, Zhinuan Yu, Xue-ren Wang & Jie Meng, Reawakening the Dragon: Changing Patterns of Opiate Use in Asia, with Particular Emphasis on China’s Yunnan Province, 36 SUBSTANCE USE & MISUSE 49, 54 (2001); Ingo I. Michels, Min Zhao & Lin Lu, Drug Abuse and Its Treatment in China, 53 SUCHT - ZEITSCHRIFT FÜR WISSENSCHAFT UND
emerged and spread quickly following the initiation of the economic reforms in the late 1970s. Statistical studies show that the number of illicit drug users in China grew from 70,000 in 1990 to 1.14 million by the end of 2004, a rate of increase of over 100% per year. However the actual number remains undisclosed because many more drug users are underground and unregistered. Numerous physiological and sociological studies demonstrate that drug abuse causes many problems both to individuals and to societies, including transmission of contagious diseases, crime, deterioration of social order, loss of productivity and excessive health care expenditures.

In response to the worsening situation, a number of laws and regulations were promulgated by the Chinese government in the 1990s to address the wide spread of drug addiction and to reinvigorate the strategies of handling drug abusers. The codification produced a three-tiered drug detoxification system in which a range of administrative compulsory penalties were heavily relied on to deal with drug users. The official aims of this mechanism were to educate, rescue and reform drug addicts.

---

6 The three-level drug detoxification system consists of three administrative compulsory measures: public order detention (治安拘留), coercive drug rehabilitation (强制戒毒) and re-education through labor (劳动教养). Yao Jianlong, The Rethinking and Reconstruction of China’s Drug Detoxification System (对我国现行戒毒体系的反思与重构), 6 JUV. DELINQ. RES. (青少年违法 犯罪研究) 8, 8-9 (2002).
However, in actuality, handling drug abusers under administrative custodial measures served punitive and deterrent functions, and seldom served as an effective tool in detoxifying and rehabilitating addicts. The failure of this detoxification system urged the Chinese government to reconsider the effectiveness of administrative detentions on addicted individuals who are physically and psychologically disordered.

Having been aware of the limitations of compulsory administrative measures on reducing drug use, the government, since the 2000s, has committed to moving away from previous conventional approaches and tended to adopt more scientific and effective detoxification programs. In this context, the first national anti-drug law, the Anti-Drug Law, was passed and implemented in 2008 to replace the obsolete drug regulations. As the first state legislation on narcotics control, the Anti-Drug Law covers a wide range of drug-related issues, from criminal penalties on drug trafficking to drug rehabilitation in the community. The highlight of this law is the introduction of a new detoxification system that underlines China’s changed attitudes toward drug use and abusers. By re-defining drug users as not only administrative offenders but also patients and victims who need medical and psychological assistances, the law reveals a “people-oriented” rhetoric and tends to reform the mechanism of drug treatment and rehabilitation in accordance with the human-centered principle.

Based on the Anti-Drug Law, China enacted a supplemental directive on June 26, 2011: the Drug Treatment Regulation. The

---

7 For a detailed discussion on the punitive nature of administrative detentions, see Li Enshen, *Prisonization or Socialization? Social Factors Associated with Chinese Administrative Offenders*, 27 UCLA PAC. BASIN L.J., 213, 213 (2010).
10 Id.
11 Jiedu Tiaoli ([Drug Treatment Regulation] (promulgated by the St. Council, June 22, 2011, effective July 10, 2011), available at
Regulation defines a clear leadership system, and a detailed working mechanism and corresponding social supporting system for drug detoxification.\textsuperscript{12} As the regulation was designated mainly to provide the legal grounds for the new detoxification system, it focuses on the elaboration of the operational guides of the newly-established detoxification models. Accordingly, a brand-new three-layered scheme that aims mainly at the psychological and social aspects of drug-dependence treatment has been established. The new system consists of three rehabilitation pathways, namely voluntary detoxification (自愿戒毒), community drug treatment (社区戒毒) and coercive isolated detoxification (强制隔离戒毒).

However, despite the legislative effort, it is questionable whether this new three-tiered scheme has had any marked impact on the restraint of drug abuse. This article focuses on the exploration of the real rationales of this drug detoxification system. It highlights the specific practices and rhetoric of each program to demonstrate their ineffectiveness in reducing drug addiction. In particular, this article argues that although China seems to construct a humane drug detoxification system centered on treatment and rehabilitation, its actual implementation enables this new mechanism to be employed as an effective tool for managing risk and controlling a socially dangerous population (drug addicts) for the sake of public safety.

II. DRUG DETOXIFICATION SYSTEM IN THE LEGISLATIVE CONTEXT

Having long existed as an unofficial drug treatment in the history of China’s narcotics control, voluntary detoxification was not formally acknowledged until the promulgation of the Anti-Drug Law in 2008. Article 36 of the new law explicitly states that drug users may voluntarily receive detoxification treatment at the licensed medical clinics.\textsuperscript{13} Furthermore, Article 9 of the Drug Treatment Regulation articulates that the government encourages drug addicts to voluntarily detoxify, and addicts may choose to receive voluntary detoxification programs at medical and therapeutic institutions.\textsuperscript{14} In addition, Article 10 sets out that

\texttt{http://www.gov.cn/zwgk/2011-06/26/content_1892716.htm [hereinafter Drug Treatment Regulation].}
\textsuperscript{12} Id.
\textsuperscript{13} Anti-Drug Law, supra note 9, art. 36.
\textsuperscript{14} Drug Treatment Regulation, supra note 11, art. 9.
the medical and therapeutic institutions shall sign the voluntary detoxification agreement with addicts or their guardian agreeing on the detoxification methods, length of treatment and confidentiality of personal information of drug addicts. However, according to Article 12, the private information of addicts receiving methadone needs to be directly reported to and registered with the local public security institutions.

Introduced as a new form of detoxification program, community drug treatment is, in theory, established to help addicted individuals overcome drug addiction by relying on the use of social resources and community forces. Article 33 of the Anti-Drug Law articulates that the police may order drug addicts to receive community detoxification; the period of detoxification is three years. The actual detoxification work in the community is carried out by the sub-district administrative offices and the people’s governments of towns and villages.

According to Article 34, their duties are to reach detoxification agreements with drug addicts and implement personalized therapeutic programs in light of each addict’s physical and mental conditions. During community detoxification, drug addicts are required to comply with the legal and rehabilitative policies set out in the agreement under the supervision of the relevant authorities. The implementing guidelines of community detoxification are detailed in the Drug Treatment Regulation. Article 18 of the Regulation provides that the infrastructural offices and staff in the neighborhood should provide the following to assist the detoxification of drug addicts: (1) knowledge of drug treatment; (2) education and persuasion; (3) occupational skill training, occupational guidance, aid for study, employment, and hospitalization; (4) other measures that help drug addicts detoxify.

---

15 *Id.* art. 10.
16 *Id.* art. 12.
18 *Anti-Drug Law, supra* note 9, art. 33.
19 *Id.* art. 34.
20 *Id.*
21 *Id.* art. 35.
22 *Drug Treatment Regulation, supra* note 11, art. 18.
Although community drug treatment is expected to form the bedrock of the new detoxification mechanism, the Anti-Drug Law specifies that the failure of drug detoxification in the community will trigger the imposition of coercive isolated detoxification—a new type of compulsory drug measure that combines coercive drug rehabilitation and re-education through labor.\(^{23}\) In addition, Article 38 of the Anti-Drug Law metes out that coercive isolated detoxification should not be imposed unless the addict is: (1) refusing to accept community detoxification; (2) using drugs during community detoxification; (3) seriously violating the community detoxification agreement; or (4) using drugs after community and coercive detoxification treatments.\(^{24}\) Article 25 of the Drug Treatment Regulation provides that the imposition of coercive isolated detoxification is solely at the discretion of the local police.\(^{25}\) The total length of coercive isolated detoxification is two years, during which time drug addicts will be first compulsorily treated at the police’s drug treatment centers for three to six months, and then transferred to the coercive drug detoxification institutions governed by the judicial administrative organs for continuing treatment.\(^{26}\)

To facilitate the post-detoxification recovery of drug addicts, the Anti-Drug Law prescribes community drug rehabilitation as the follow-up program after coercive isolated detoxification.\(^{27}\) Article 37 of the Drug Treatment Regulation stipulates that the powers that order coercive isolated detoxification may order drug addicts to receive community rehabilitation after their release for up to three years.\(^{28}\) Community rehabilitation, in turn, will be carried out by sub-district administrative offices and the people’s governments of towns and villages, who are responsible for psychological treatment and counseling, occupational skill training, and help with schooling, employment and medication.\(^{29}\) Article 38 of the Drug Treatment Regulation further states that those who are ordered to serve community rehabilitation will be sent to coercive isolated

\(^{23}\) See Anti-Drug Law, supra note 9, art. 38, 43. In the Chinese administrative detention system, coercive drug rehabilitation was used to target drug addicts and re-education through labor handled more serious and repeat minor offenders.

\(^{24}\) Anti-Drug Law, supra note 9, art. 38.

\(^{25}\) Drug Treatment Regulation, supra note 11, art. 25.

\(^{26}\) Drug Treatment Regulation, supra note 11, art. 27.

\(^{27}\) Id. art. 48.

\(^{28}\) Drug Treatment Regulation, supra note 11, art. 37; see also Anti-Drug Law, supra note 9, art. 48.

\(^{29}\) Drug Treatment Regulation, supra note 11, art. 39.
detoxification if they (1) refuse to accept community rehabilitation; or (2) breach the rehabilitation agreement; and (3) reuse and re-inject drugs during the rehabilitative process.\textsuperscript{30}

III. THE NEW DRUG DETOXIFICATION SYSTEM: AN EFFECTIVE TOOL FOR DRUG REHABILITATION?

It is true that the Chinese government seeks to construct and rely on a more caring and systematic drug detoxification system to comprehensively solve the worsening issue of drug addiction. Although legal justification and widespread propagation of this framework have enabled it to play an increasingly important role, the framework’s rationalization and efficacy remain largely uncertain. More precisely, the extent to which the new system is able to exert a more positive effect on the control of drug abuse is dubious given the current social conditions and community culture in contemporary China. A wide range of legal and social realities in the practice of detoxification programs indicate that the adoption of the new drug detoxification system is a rushed decision by the Chinese authorities, who have misjudged the strengths of social and legal forces upon which this mechanism can be effectively operated.

A. Addicts’ Misuse of Voluntary Detoxification

As the most accessible and flexible drug-dependence program in the detoxification system, voluntary detoxification is expected to be the most popular detoxification measure for drug addicts to receive professional drug treatment. Addicts are encouraged to admit themselves to the detoxification institutions, and those who receive voluntary detoxification will not be administratively punished \textsuperscript{31} nor sent to community and coercive detoxification programs. During treatment in the medical clinics, the management of addicts is in the hands of professional medical staff, who view drug addicts as normal patients with physical and mental disorders rather than minor offenders whose behavior endangers the social order. It is these arrangements and processes that lead to the misuse of voluntary detoxification, hence creating a practical conflict with other detoxification models (as will be explained below).

i. 3.1.1. Legal Deficiencies of Voluntary Detoxification

\textsuperscript{30} Id. art 38.

\textsuperscript{31} See id. art. 9.
The legal settings of voluntary detoxification allow this instrument to be used as a shelter for addicted individuals in an attempt to avoid the administrative penalties that may be otherwise imposed on them. Article 9 of the Drug Treatment Regulation states that those who have received voluntary detoxification shall not be punished by the public security organs. The purpose of this provision is to urge drug users to freely participate in voluntary detoxification without being fearful of arrest by the police. However, many drug addicts often use this as a justifiable protection to escape from legal punishments. For example, it is observed that the Chinese authorities are fond of launching a “Hard Strike” on offenders ahead of sensitive dates on the Chinese government’s calendar, such as the run-up to the Olympic Games in Beijing, to maintain social order and stability. Having been granted a waiver from many administrative punishments (mostly public order fines or detention), many pawkish drug users frequently choose to register themselves with drug detoxification clinics in advance as a convenient means to circumvent the attention of the police. By staying in the clinics at these very moments, they are most likely able to avoid being caught by the police.

In addition to dodging potential administrative penalties, subscribing to a detoxification institution may also help drug abusers escape from drug treatment under community and coercive detoxification. Although the Anti-Drug Law and its regulation authorize the police to send drug addicts to community detoxification when they think fit, the law does not describe the medical and legal standards upon which addicts ought to be subjected to this neighborhood-based drug treatment. Nor does it clarify whether or not those who have already registered with or choose to go with voluntary detoxification should be assigned to community

---

33 Drug Treatment Regulation, supra note 11, art. 9.
34 See Human Rights Watch, Where Darkness Knows No Limits: Incarceration, Ill-Treatment and Forced Labor As Drug Rehabilitation in China 12, 23 (Jan. 2010). Hard Strikes were also implemented in the days preceding the International Day against Drug Abuse and Illicit Trafficking and the 60th anniversary of the founding of the People’s Republic of China in October 2009. Id.
35 Yao, supra note 6, at 9.
detoxification. In fact, because community drug detoxification is not legally defined as a compulsory measure, its imposition by the police almost always lacks sufficient legitimate and reasonable grounds whereas voluntary detoxification is accessible to most addicted individuals. For example, although Article 33 of the Anti-Drug Law stipulates that the public security organs are empowered to send drug addicts to receive community detoxification, the law does not specify the level of the police institutions which are responsible and the legal procedure through which the police may impose this order.36

Moreover, Article 38 of the Anti-Drug Law describes four conditions based upon which coercive isolated detoxification should be imposed.37 According to this provision, the law specifies the failure of community detoxification as the prerequisite of initiating coercive detoxification treatment. This means that the police are not supposed to place in coercive isolated detoxification those who have not yet undergone the programs under community detoxification.38 Whereas a transitional mechanism of community and coercive detoxification has been established, the operational relationship between voluntary and coercive detoxification remains legally unclear. Article 37 of the Anti-Drug Law and Article 12 of the Drug Treatment Regulation provide that voluntary detoxification institutions are obligated to report to the police regarding addicts’ personal information39 and their reuse of drugs during the therapeutic programs.40 However, while the recording of information may help the authorities identify the history of individuals’ drug use and the level of their addiction for future coercive treatment, the expected legal consequence of failing voluntary detoxification—triggering of coercive detoxification—is not prescribed in the law. It thus leads to a legal and practical vacuum between the enforcement of voluntary and coercive detoxification. In this context, many addicts repeatedly go to voluntary

36 Hu Peng, The study on Community Detoxification Work from the Perspective of the Anti-Drug Law (禁毒法视角下的社区戒毒工作研究), 6 JUV. DELINQ. RES. (青少年违法犯罪研究) 36, 37 (2008)
37 Anti-Drug Law, supra note 9, art. 38; see also Drug Treatment Regulation, supra note 11, art. 25.
38 But see Drug Treatment Regulation, supra note 11, art. 25 (noting exceptions for addicts suffering serious addiction, and those voluntarily accepting coercive isolated detoxification.).
39 Drug Treatment Regulation, supra note 11, art. 12 (requiring reporting of personal information for drug addicts registering for methadone treatment).
40 Anti-Drug Law, supra note 9, art. 37.
detoxification institutions not for seeking drug treatment, but mainly for the circumvention of potential custody in compulsory detention centers.\textsuperscript{41}

ii. The Practice of Voluntary Detoxification

While legal uncertainties produce a twist to the original intent of voluntary detoxification, the practical effectiveness of this approach is more appalling. A spate of statistical reports illustrate that the relapse rate of drug addicts discharged from voluntary detoxification clinics is extremely high. For instance, a statistical study on drug relapse was undertaken in 1996 based on the data from fifteen voluntary detoxification clinics in Guangzhou.\textsuperscript{42} It observed that the recidivism rate of drug abusers was close to 100\% after an ordinary fifteen-day period of treatment.\textsuperscript{43} Likewise, Guangdong authorities reported that of 373 drug addicts, 93.6\% relapsed after completing their medical therapy at the clinics.\textsuperscript{44} A more clinically-researched survey in Wenzhou, Zhejiang Province, affirmed this disturbing finding of high relapse rates.\textsuperscript{45} It collected the relevant empirical information from 651 patients of drug addiction and discovered that drug relapses three days, one month, six months and one year were 21.79\%, 52.36\%, 93.50\% and 97.89\% respectively.\textsuperscript{46} To understand why the research outcomes were disappointing, a brief examination of the Guangzhou Baiyun Detoxification Center will shed some light on the general plight of voluntary detoxification in contemporary China.

Established by the Department of Public Health of Guangdong Province and Guangdong Anti-Drug Committee in the late 1990s, Guangzhou Baiyun Detoxification Center has exalted and implemented the “person-centered” and “people-are-correctable” principles in the exercise of drug treatment.\textsuperscript{47} Accordingly, twelve professional clinicians and psychological therapists seek to promote the self-growth and self-initiative of drug abusers, encouraging them to play an active role in the process of treatment and to shape a cooperative attitude towards the use of

\textsuperscript{41} Yao, \textit{supra} note 6, at 41.
\textsuperscript{42} \textit{Id.} at 8-9.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.}
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} Zheng et al., \textit{supra} note 322, at 107.
specialized programs.\textsuperscript{48} A course of treatment in the Baiyun Detoxification Center is fifteen days and may be repeated multiple times. The cost of treatment, however, is expensive. The average fee for a fifteen-day treatment is 13,400 RMB per person in 2010.\textsuperscript{49} Characterized as patients, hospitalized drug addicts are provided with a variety of detoxification measures targeting the roots of drug use as well as the pathological, psychological and personal characteristics of addicted individuals. The contrapuntal treatments are specific and wide-ranging, including Chinese herbal therapy, acupuncture and moxibustion therapy, musical therapy and brain-biofeedback therapy.\textsuperscript{50}

Table 1: Guangzhou Baiyun Detoxification Center\textsuperscript{51}

<table>
<thead>
<tr>
<th>The Characterization of Drug Abusers</th>
<th>Patients</th>
</tr>
</thead>
<tbody>
<tr>
<td>Operational Philosophy</td>
<td>Person-Centered Principle</td>
</tr>
<tr>
<td>Target</td>
<td>Drug Abusers with Sound Financial Ability</td>
</tr>
<tr>
<td>Detoxification Measures</td>
<td>Chinese Herbal Detoxification/Psychological Counseling and Therapy/Physical Treatment/Fitness Rehabilitation/Random Family Visit</td>
</tr>
<tr>
<td>Treatment Period</td>
<td>15 Days/Course</td>
</tr>
<tr>
<td>Treatment Cost</td>
<td>10,000 RMB+/Course</td>
</tr>
</tbody>
</table>

Although the Baiyun Detoxification Center offers a comprehensive array of therapeutic programs, the actual practices have limited impact on the effectiveness of long-run detoxification.\textsuperscript{52} It has been widely evidenced that drug treatment is a lengthy and complicated procedure.

\textsuperscript{48} Id.
\textsuperscript{49} Id. at 109. This amount is approximately 2,000 USD.
\textsuperscript{50} Zheng et al., supra note 32, at 108; see also GUANGZHOU BAIYUN DETOXIFICATION CENTER (Mar. 4, 2014), http://www.byjd.com/ (providing detailed information of clinical therapies used in the center).
\textsuperscript{51} The table is modified by the author for clearer manifestation. Zheng et al., supra note 32, at 107.
\textsuperscript{52} See Zheng et al., supra note 32, at 109 (noting that relapse rates are still high).
process, comprising three necessary stages: (1) physical detoxification; (2) mental rehabilitation; and (3) social integration. While physical detoxification may be medically achieved within a short period, addicts’ mental rehabilitation and reintegration into society require several years to complete. Although the Baiyun Detoxification Center has designed a number of psychological rehabilitative programs and personalized correctional schemes for in-depth treatment, not every patient is able to receive such therapies after the first course of treatment. It is because the high-price of treatment impedes the willingness of most drug abusers from continuing their therapy in the facilities. For example, the average fee for one complete drug treatment therapy in Guangzhou is 13,400 RMB on a per capita basis. For a program that lasts only fifteen days as a general period, this rate of charge in essence places a heavy burden on those who have limited financial capability due to previous expenses on drug abuse.

The expensiveness of drug treatment in voluntary detoxification institutions is due largely to the lack of government funding. Although the Anti-Drug Law explicitly stipulates that the detoxification clinics should not be established for commercial purpose, most detoxification clinics in China are privately run, hence they must focus on profits in order to survive and develop their services. As there are no statutory stipulations on charging standards, drug abusers are normally required to

---

53 See Mo Guanyao & Gu Kefei, The Situations Faced by Drug Detoxification Work in the Wake of the Promulgation of Anti-Drug Law (禁毒法实施以来戒毒工作面临的境遇), 10 J. KUNMING U. SCI. & TECH. (昆明理工大学学报), no. 6, Dec. 2010, at 3 (noting that the new drug rehabilitation model focuses on physiological detoxification, physical and mental health rehabilitation, and social reintegration); see also HUMAN RIGHTS WATCH, supra note 34, at 3 (quoting the Office of China National Narcotics Control Commission).

54 Zou Lian, Exploring and Discussing the Rehabilitative Measure of Re-education through Labor (探讨戒毒劳动的康复措施), 16 CHINESE J. DRUG DEPENDENCE (中国药物滥用防治杂志) 315, 315 (2007).


56 Id.

57 Id.


59 Anti-Drug Law, supra note 9, art. 36.

60 Zheng et al., supra note 32, at 109.
pay a large amount of fees for daily treatment and necessary accommodation and food. As a result, many addicts find it difficult to afford the entire therapeutic programs and have to choose the short-term medical therapy for only physical detoxification.61 More significantly, the emphasis on economic pursuit in general has negatively affected the internal operation of many detoxification clinics. It has been reported that some clinics allow financially-troubled drug users to quit therapeutic programs over the course of treatment in order to save the limited resources for prospective patients. 62 Moreover, some ill-equipped institutions in the undeveloped areas even sell substitute drugs to patients as an underground resource of revenue and acquiesce in drug trades between patients in the institutions.63

In actuality, due to the insufficiency of nursing facilities and medical resources, the overwhelming majority of detoxification clinics in China can only offer a therapeutic period ranging from seven days to three weeks.64 Unlike the Baiyun Detoxification Center that has gained great support from the local authorities on developing the follow-up programs, most clinics are unable to address the psychological, social and behavioral problems associated with addiction.65 While drug users are provided with only physical detoxification treatment, little psychosocial and after-care services are available in the detoxification institutions.66 In addition, a lack of skilled personnel is a major barrier to undertaking high-level psychological and socialization-related schemes. According to a survey conducted to assess attitudes, knowledge, and perceptions of Chinese doctors who worked with drug abusers in the detoxification facilities, only 16.6% were psychiatrists; the remaining physicians had very little experience or training in treatment of mental illness.67 Therefore, many

63 Du, supra note 61, at 393; Yao, supra note 6, at 9.
65 Michels et. al, supra note 1, at 231.
66 Id.
Chinese clinicians express concern that voluntary detoxification might allow drug addicts to temporarily eliminate their physical addiction, and yet is unable to exert any impact on subsequent rehabilitation to guarantee addict’s successful reentry into society.⁶⁸

The ineffectiveness of voluntary detoxification is also attributed to the loose and open management of drug users in the detoxification centers. In comparison with coercive detoxification centers that adopt the compulsory measures and stringent policies to enforce drug treatment, most voluntary detoxification clinics are unlikely to create an isolated and rigid environment for the safety and efficacy of the therapy. For instance, the Baiyun Detoxification Center employs a closed-off management system for the regulation of patients.⁶⁹ The approaches include twenty-four-hour security surveillance, routine general checkup and disallowance of relatives’ entry into medical wards.⁷⁰ Whilst these measures are implemented to make the facility more prison-like at the external level, the internal administration can barely impose coercive rules on drug users. The reasons are two-folded.

Legally, characterized as medical institutions, detoxification clinics are not afforded power to limit the freedom of drug addicts for the practice of detoxification programs. Pursuant to the Anti-Drug Law, the detoxification clinics may temporarily adopt restrictive and preventive measures only when there is a possibility of personal danger during the treatment.⁷¹ Likewise, the clinics have no discretion to take any compulsory or punitive actions on drug addicts for their reuse or injection of drugs, though reporting such matter to the public security organs is required.⁷² From the medical perspective, the new drug detoxification system re-conceptualizes drug addicts as patients suffering from physical and psychological problems.⁷³

⁶⁸ See, e.g., Wang & Liu, supra note 58.
⁶⁹ Zheng et al., supra note 32, at 108.
⁷⁰ Id.
⁷¹ Anti-Drug Law, supra note 9, art. 37.
⁷² Id.
Therefore, while the clinical staff focuses on treatment to avoid the symptoms of physical withdrawal to drugs, they are less inclined to intervene in addicts’ personal lives or to restrict addict’s mobility in the clinics. For example, the patients in the Baiyun Detoxification Center are provided a rather relaxed environment and comfortable living surroundings. At the Center, each ward is furnished with a TV and computer and patients are not required to comply with standard daily schedules. Patients may act freely in the clinic without disturbance insofar as they follow the medical instructions. As such, many patients are often found watching TV and surfing the Internet on computers at night and having insomnia due to the disruption of their biological clock. It is not uncommon that some addicts in the institutions still have easy access to drug sources and continue to use drugs while being treated. The laissez-faire management style leads to the drug-induced behaviors being hardly addressed, let alone corrected. Addicted individuals are likely to maintain and even extend their unhealthy habits, thereby becoming unengaged with and resistant to the therapeutic programs.

B. Community Drug Detoxification: A People-Oriented Program?

In the new drug detoxification system, community drug treatment is perceived as the primary tool to help addicts eliminate drug addiction with full support from the state and society. The government is attempting to utilize community drug treatment as the effective measure to break down the “unbreakable cycle” of drug addicts struggling endlessly with addiction, incarceration, discrimination and hopelessness. In particular, community drug treatment seeks to target the high rate of recidivism as a result of traditional anti-drug means by maximizing addicts’ social capital and by mustering community support. However, despite these stated purposes, community drug treatment rarely serves as a neighborhood-
based therapeutic and rehabilitative program. Rather, it is largely employed as a semi-coercive measure, imposing restrictions on addicts during their drug treatment process. Its practices are almost identical to law enforcement measures for certain criminal and administrative compulsory approaches in the Chinese justice system (as will be explained below).

i. The Coercive Nature of Community Detoxification

The coercive nature of community drug treatment is first reflected in the unlimited power of the public security organs (the police) in the practice of community detoxification. Akin to administrative detentions (e.g., re-education through labor) where the police are granted the discretionary latitude to handle administrative offenders in a speedy and simplified manner, the powers to (1) determine the nature of the “addiction,” (2) send addicts to community detoxification/rehabilitation and to (3) regulate them during the community-based treatments is concentrated in the hands of the police.

Article 33 of the Anti-Drug Law and Article 13 of the Drug Treatment Regulation empower the police to send drug addicts to community detoxification for up to three years based on the results of addicts’ drug tests. It is true that the law purports to adopt the scientific evidence (drug tests) as the legal basis to impose community detoxification on addicted individuals. This raises the question whether the determining procedure can be performed in a legal and fair manner. Although Article 31 of the Anti-Drug Law prescribes that the methods on judging the severity of drug addiction in light of drug tests should be regulated by the Ministry of Public Health, the Departments of Drug

---

80 For detailed discussions of Chinese administrative detentions and their legal and social characteristics, see Randall Peerenboom, Out of the Pan and Into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detention in China, 98 NW. U. L. REV. 991, 991-1104 (2004); Sarah Biddulph, Legal Reform and Administrative Detention Powers in China (2007).

81 Anti-Drug Law, supra note 9, art. 32; Drug Treatment Regulation, supra note 11, art. 4.

82 Anti-Drug Law, supra note 9, art. 33; Drug Treatment Regulation, supra note 11, art. 13.

83 Anti-Drug Law, supra note 9, art. 32.
Administration, and the Departments of Public Security, it is unclear from the wording what these methods really are and what the medical standards to be followed are to identify drug addiction. In addition, neither the Anti-Drug Law nor the Drug Treatment Regulation involves other authorities, such as the medical professionals and judiciary, in the decision-making processes of both determining the drug addiction and imposing community detoxification. In essence, the police are the sole arbitrators to decide whether tested individuals are addicted to drugs and hence need to be sent to community detoxification, with little regard to clinical and judicial opinions.

The more problematic issue is that the police are able to freely exercise their far-reaching power during the actual implementation of community drug treatment. Indeed, the law provides that community detoxification programs should be carried out by social workers, security personnel, medical staff, family members of addicts and volunteers under the supervision of the sub-district administrative offices and the people’s governments of towns and villages. However, Article 4 of the Drug Treatment Regulation illuminates that: “the public security organs above the county level are responsible for the registration and dynamic management (动态控制) of drug addicts, are responsible for the management of the facilities of community drug treatment and are responsible for providing guidance and assistances of community rehabilitative work.”

This provision clearly indicates that even though the police are not engaged as the direct enforcer of community drug treatment, it is legitimate for them to intervene in the practical operation of this measure. For example, Article 35 of the Anti-Drug Law and Article 19 of the Drug Treatment Regulation stipulate that drug addicts should routinely undergo drug tests organized by the police over the course of detoxification activities. In addition, the police are solely authorized to handle the disciplinary issues of drug addicts raised during community drug treatment. Specifically, Article 35 of the Anti-Drug Law requires that social detoxification workers must report to the public security organs

84 Id. art. 31.
85 Drug Treatment Regulation, supra note 11, art. 17.
86 Id. art. 4.
87 Anti-Drug Law, supra note 9, art. 35; Drug Treatment Regulation, supra note 11, art. 19.
when (1) addicts re-use drugs during the treatments; and (2) addicts seriously violate the community detoxification agreement. 88 Whereas the law provides no discretion for the concerned community to deal with addicts’ misconduct, Article 38 of the Anti-Drug Law empowers the police to immediately remand the wrongdoers to coercive isolated detoxification. 89 Likewise, for those who do not comply with the requirements of community rehabilitation, Articles 25 and 38 of the Drug Treatment Regulation articulate that they should be returned to coercive detoxification centers without potential for early release.

More significantly, the completion of community drug treatment is subject to the approval of the police. Although the law provides a timeframe after which the imposition of community detoxification and rehabilitation should be removed, the official release of addicts is only effective upon the written announcement by the police. 90 Ironically, though community drug treatment is defined as a medical and therapeutic program in law, the clinical conditions of addicts are ruled out as a deciding criterion for the police to make the release order. Rather, the police are only required to rely on the fact that addicts have successful fulfilled the mandated duration of community drug treatment in the assessment of the addicts’ eligibility of being released. 91 This regulatory setting creates an incoherent legal vacuum that facilitates the continuation of the police’s abuse of their power in the handling of drug addicts. Article 38 of the Anti-Drug Law lays out that: “With respect to a person who is seriously addicted to narcotic drugs and is difficult to be cured of such addiction through treatment in the community, the public security organ may directly make a decision on his compulsory isolation for drug treatment.” 92

To abide with these stipulations, the police are given broad authority to subject released drug addicts to urine or other drug tests without a reasonable suspicion of their reuse of drugs. 93 Those who fail a test are most likely detained instantly by the police for coercive isolated detoxification.

---

88 Anti-Drug Law, supra note 9, art. 35.
89 Id. art. 38.
90 See Drug Treatment Regulation, supra note 11, art. 23, 40.
91 Drug Treatment Regulation, supra note 11, art. 23.
92 Anti-Drug Law, supra note 9, art. 38; see also Drug Treatment Regulation, supra note 11, art. 25 (containing a nearly identical provision).
93 See HUMAN RIGHTS WATCH, supra note 34, at 2-3, 13, 23-25.
In its report, Human Rights Watch interviewed a large number of current and past drug users and discovered that “people are frequently taken off the street and forced to do a urine test because they ‘look’ like drug users.” One of the drug users even claim that “[f]or the police, arresting drug users is a task that must be done to fill up the [drug detoxification] centers.” Whereas the police are provided the latitude to incarcerate drug re-users discharged from community-based drug treatment, the procedural and substantive requirements that ought to be obeyed to formulate the use of this power and restrain its misuse are not provided in law. It is argued that the current effectiveness of community drug treatment is rather disappointing, the majority of drug addicts are in actuality freed without the complete success of eradication of drug addiction. Therefore, it is not uncommon that many public security law enforcers are inclined to restore the old order of curing them in a compulsory and disciplinary manner. In doing so, the police are enabled to initiate a “streamlined system” in which they may, on the one hand, release unhealed addicts from community drug treatment, and on the other hand, arbitrarily remand them in coercive isolated detoxification for mandatory treatment without the due process.

In addition to the dominant and overpowering role of the police, the coercive character of community drug treatment is demonstrated by the deprivation of addicts’ liberty during the exercises of community drug detoxification. Community drug treatment is a program administered in the open neighborhood by the local administrative organs, indicating greater emphasis on the preservation of addicts’ social linkages. The actual practices, however, require addicted individuals to be subject to a variety of restrictive rules which literally control their mobility in the community.

To highlight the compulsoriness of community drug treatment, Article 14 of the Drug Treatment Regulation first states that: “Drug addicts must report to the sub-district administrative offices and the people’s governments of towns and villages within fifteen days of being

---

94 See id. at 23-25.
95 Id. at 23.
96 Id.
97 Yao, supra note 6, at 40.
98 See HUMAN RIGHTS WATCH, supra note 34, at 13.
issued the notice on receiving community detoxification.” Failure to report without the proper reasons is considered refusal of receiving community detoxification.  

Similarly, Articles 37 and 38 of the Drug Treatment Regulation stipulates that drug addicts released from coercive isolated detoxification must report to the sub-district administrative offices and the people’s governments of towns and villages within fifteen days of being issued the notice on receiving community rehabilitation and ought to sign the rehabilitation agreement.  

While setting up a mandatory deadline for drug addicts to commence their community drug treatment, the legislation establishes a number of obligatory policies imposed on drug addicts in an attempt to ensure their confinement in the community. Article 19 of the Drug Treatment Regulation shows that in the process of detoxification programs, drug addicts should obey the following rules: (1) discharging community detoxification agreements; (2) periodically receiving medical tests upon the request of the police; (3) submitting written reports if leaving cities or towns where community detoxification is enforced for more than three days.  

In light of these stipulations, many Chinese communities are keen to carry out community drug treatment in a way that follows the practices of some semi-coercive criminal and administrative measures. Residential surveillance (监视居住) and bail (取保候审) that are employed by the police to target minor criminal suspects in the pre-trial process serve largely as the operational models of community drug treatment. Unlike Arrest (逮捕) and Criminal Detention (拘留) where suspects are fully incarcerated to guarantee the smoothness of investigation and prosecution, residential surveillance and bail are compulsory measures with a lesser degree of coercion. They are deployed to partially restrain

---

99 Drug Treatment Regulation, supra note 11, art. 14.  
100 Id.  
101 Drug Treatment Regulation, supra note 11, art. 37, 38.  
102 Id. art 19.  
suspects’ freedom; mainly to prevent the escape of minor offenders from criminal proceedings and interferences in the administration of criminal justice.\textsuperscript{104} Therefore, a limited scope of activity is usually designated for engaged suspects and a series of rules prohibiting their free mobility are imposed. For example, residential surveillance often requires the suspects’ mobility to be limited within a specific area – e.g., an appointed residential place.\textsuperscript{105} The purpose is to evaluate whether suspects have left their designated areas and ensure their conduct is appropriate in the context of their legal commitments.\textsuperscript{106} Similarly, suspects under bail are required to report to the responsible enforcement organs (police, procuratorates and courts) upon request,\textsuperscript{107} though security or guarantor is usually attached to ensure their compliance with the regulatory requirements.\textsuperscript{108}

The analogousness of legal prescriptions leads to similar practices between the above-mentioned criminal approaches and community detoxification. Although the compulsory reporting system is not in use in the operation of neighborhood-based drug treatment, drug abusers are in actuality subjected to frequent requests for drug tests by the police.\textsuperscript{109} It is observed that drug treatment communities usually carry out at least twenty-eight urine tests during the three-year detoxification treatment.\textsuperscript{110} While the first twelve are mandatorily undertaken in the first year, the remainder of the tests are randomly performed by the police in the second and third year respectively.\textsuperscript{111} During the first year of treatment, drug addicts are obligated to take urine tests every two months to assess their progress under community therapeutic programs.\textsuperscript{112} The interval between

\textit{Borrowing the Experiences from Canadian Bail System (我国取保候审制度之完善—以加拿大的保释制度为借鉴) 5 LAW REVIEW (法学评论) 107, 107 (2007).}
\textsuperscript{104} Ma Jinghua & Lu Feng, \textit{supra note} 103, at 53; Song Yinhui & He Ting, \textit{supra note} 103.

\textsuperscript{105} Ma Jinghua & Lu Feng, \textit{supra note} 103, at 55.

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} The Chinese Criminal Procedural Law 2012 (中华人民共和国刑事诉讼法) art. 69 (3), \textit{available at} http://www.gov.cn/flfg/2012-03/17/content_2094354.htm.

\textsuperscript{108} Yinhui & Ting, \textit{supra note} 103, at 109.

\textsuperscript{109} Zhang Kai, Jiang Zuzhen & Zhang Xiaomin, \textit{The Study on Community Detoxification Model and Its Operational Mechanism (社区戒毒模式及其运作机制研究), 7 J. HENAN JUD. POLICE VOCATIONAL C. (河南司法警官职业学院报) 34, 34 (2009).}

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{Id. at} 34.

\textsuperscript{112} \textit{Id.}
two urine tests in the next two years is every three and six months respectively. 113 Those who refuse to accept the test or intentionally delay it are forced to undergo urine tests by the public security organs, who may remand them to coercive isolated detoxification if the situations are severe. 114 Meanwhile, drug addicts must routinely update their detoxification progress with the drug detoxification enforcers in the form of written reports. The reports are expected to comprise the detailed descriptions of addicts’ daily activities and their feedbacks on detoxification therapies. Moreover, as leaving the community entails the formal and express permission from the police, the unapproved leave of drug addicts may constitute a major breach of the drug treatment agreement and will be directly handled by the police. Article 20 of the Drug Treatment Regulation clearly illustrates that drug addicts are not allowed to leave the designated detoxification community without the authorities’ permission for more than three times or thirty days accumulatively. 115 If addicts breach these rules, the police are empowered to exclusively decide the gravity of the breach and subject drug addicts to coercive isolated detoxification. 116

ii. Community Drug Detoxification: A Hasty Social Project?

Indeed, notwithstanding the fact that community drug treatment is employed as a semi-coercive measure, the establishment of this tool as a prioritized detoxification measure indicates China’s improved perception of drug addiction as a normal social phenomenon and its attempt to mobilize social forces to control it. However, despite its true nature, the actual implementation of this program gives rise to some fundamental problems. In particular, concerns are often raised that most Chinese communities have practical difficulties providing standardized and systematic drug detoxification/rehabilitation as stated in the laws. By examining the exercise of community drug treatment in Shanghai, one of the reportedly laudable models that is worthy of spreading in China, a better understanding of the general obstacles impeding community drug treatment from being a genuinely community-based correctional instrument in contemporary China may be gained.

113 Id.
114 Id.
115 Drug Treatment Regulation, supra note 11, art. 20.
116 Anti-Drug Law, supra note 9, art. 38.
Since 2003, Shanghai has begun to introduce the concept and principle of social work and to engage it in the action against drug addiction.\(^{117}\) The practice of community drug treatment in Shanghai is unique due to its distinctive institutional and enforcement settings. Above all, the principle of community drug treatment is interpreted as “the government directs, the community organization implements and the society participates.”\(^{118}\) Therefore, instead of straightforwardly enforcing drug detoxification/rehabilitation in the community, the Shanghai government has established a non-incorporated organization named Shanghai Self-determination Service Organization (上海自强服务总社) at the municipal level to carry out the administration of community drug treatment.\(^{119}\) Financed by the government, Shanghai Self-determination Service Organization is a semi-commercial body that has a considerable number of well-trained social workers who actively undertake drug detoxification/rehabilitation by offering their professional and specialized services.\(^{120}\) With their services being purchased by the government,\(^{121}\) social workers are assigned to take charge of daily regulation, guidance and assessment of community drug treatment in collaboration with different social and legal actors such as community police, legal officials and addicts’ relatives.\(^{122}\) Over time, three working models have been developed and often employed in practice:

1. Social Casework: Social workers take on the cases of individual drug addicts and provide them with advocacy, information and other related services. In this scheme, social


\(^{118}\) *Id.*

\(^{119}\) *Id.* at 153.

\(^{120}\) Xue Liyan et al., *The Analysis on Drug Rehabilitation in the Community of Shanghai* (上海市社区戒毒康复现状分析), 11 (3) CHINESE J. DRUG ABUSE PREVENTION & TREATMENT (中国药物滥用防治杂志) 155, 157 (2005).

\(^{121}\) In November 2003, the Shanghai government signed the “Agreement of Purchasing Government Services” with Shanghai Self-determination Service Organization. According the Agreement, the government purchased the services provided by social workers at the rate of 40,000RMB/person. Fan Zhihai, Lu Wei & Yu Jinxi, *supra* note 117, at 153.

\(^{122}\) Xue Liyan et al., *supra* note 120, at 157; Fan Zhihai, Lu Wei & Yu Jinxi, *supra* note 117, at 153.
workers communicate with addicts in a face-to-face manner to help them solve living problems and reach mental detoxification and social integration by providing them financial assistance and spiritual support. Unlike other community-based correctional programs in China, social workers of drug treatment need to look for cases by themselves based on the information provided by the police. They ought to build a trusting relationship with the located addicts and begin to design the service plans to target the addicts’ personal problems. One social worker is expected to be in charge of fifty drug addicts (1:50) to seek those who need drug treatment help according to police-registered records.

2. Social Group Work: A group of drug addicts with similar backgrounds is macro-managed by social workers to achieve the goals of education and treatment through setting up group scenarios and active interaction by group members. The typical examples are the “peer education group” in Jing’an District, “female drug detoxification salon” in Jiading District, and “family reunion group” in Minhang District. Peer education group, for example, is freely organized and run by past and current drug abusers. Chaired usually by a successfully detoxified person, the group operates a variety of activities such as making speeches, playing games, telling stories, and sharing testimonies in order to strengthen the resoluteness of abusers to eradicate drug addiction. Given peer education group is defined as a self-help assembly, social workers normally play a passive role in the course of the running of the group while drug addicts have the discretion to plan the relevant programs.

3. Social Community Work: Social community work is considered the basis of and supplement to the abovementioned measures. It mainly refers to care by the community (社区照管), in which social workers take advantage of usable resources and capacity of the community to help addicts

---

123 Fan Zhihai, Lu Wei & Yu Jinxi, supra note 117, at 153-54.
124 Id. at 153.
125 Id. at 154.
126 Id. at 154.
access more easily to necessary social resources for the sake of drug detoxification. It is aimed to provide professional services on addicts’ psychological tutorials and social restoration, building the informal supportive social network for addicts’ reintegration.\textsuperscript{127}

An institutionalized streamlined process of implementing drug treatment in Shanghai can be summarized in the following flowchart.
Figure 1: The Operational Process of Community Drug Treatment in Shanghai

This flowchart has been modified by the author for clearer manifestation. See Xue Liyan et al., supra note 120, at 156.
It is clear that Shanghai, on paper, has developed a systematic mechanism of exercising community drug treatment in the context of its particular social conditions. However, the actual practices manifest that Shanghai community drug treatment is neither an operative detoxification program, nor a successful community-based correctional scheme. To be specific, the community capacity and culture in contemporary China is barely able to bolster the proper and effective administration of this well-conceptualized system. Rather, a rushed transplant of community drug treatment, without a matching regulatory and ideological community environment, is likely to impede the effect of rehabilitating drug addicts both mentally and socially. A close examination of the plight of Shanghai practice may serve as a general demonstration of this argument.

a. The Limitedness of Social Resources

The Shanghai model tends to focus more on the annihilation of mental and social dependence of drug addicts, in the form of creating them a facilitating environment for detoxification by solving addicts’ individual problems. These problems are usually personal and concrete, including employment, study, residential status (户口), skill training, hospitalization and finance. This emphasis means that the Shanghai community has realized the importance of the social capital of drug addicts and that the increase of this social capital will make a positive impact on addicts’ drug detoxification.

Social capital has various definitions. But it is generally defined as resources existing in a social structure and relationships that facilitate social action. In the legal sphere, this theory was first applied by criminologists to analyze prisonReleased individuals’ recidivism issues. 

\[129\] Xue Liyan et al., supra note 120, at 157.
\[130\] David Knoke, Organizational Networks and Corporate Social Capital, in CORPORATE SOCIAL CAPITAL AND LIABILITY 17, 19 (Roger Th. A. J. Leenders & Shaul M. Gabbay eds., 1999).
In analytical models, two levels of social capital can be identified from explanations of the concept: the resources that exist in interpersonal relationships and the social resources that exist in a community in general. According to this categorization, having high levels of social capital results in many diverse outcomes. They include mentoring, job networking, marriage, and mutual support, which is associated with self-reliant economic development without the need for government interference.\footnote{132} This theory can be applied to administrative offenders as well, especially drug addicts, in terms of the reduction of their drug use.

For example, factors such as the employment status and educational background of drug addicts correlates with the extent of their drug abuse. One study shows that the vast majority of surveyed drug abusers remain jobless for a lengthy period while they are abusing drugs.\footnote{133} Furthermore, one can assume that lengthy unemployment makes their detoxification life vacuous and lonely. This confusing status discourages them from starting a normal life, which in turn tempts them to continue using drugs due the sense of boredom.\footnote{134} Also, the educational status of offenders determines the likelihood of drug use. Different evaluations have shown an identical finding that in general most drug addicts in China are preliminary and middle school graduates.\footnote{135} Prior to being addicted to narcotics, many addicts were never educated with respect to the dangerousness of drugs, nor have they been guided to learn how to avoid possible drug interactions.

To strengthen the relevant social capital of drug addicts has thus been the main task of social casework in the Shanghai community. This type of working method requires social workers to accomplish a seven-step process to help addicts detoxify: (1) looking for cases; (2)
categorizing targets; (3) building trust relationships; (4) mobilizing community resources to solve targets’ practical problems; (5) employing different social work models in light of targets’ characteristics; (6) exploring professional measures of detoxification and rehabilitation; and (7) completion of cases. Of these seven steps, assisting addicts to solve practical problems is considered vital to gain trust from addicts, hence allowing addicts to concentrate on drug treatment without being distracted. However, although social workers are defined as non-governmental personnel who provide addicts care, help, guidance, and consultation, many social workers express concern that many required tasks are beyond their capability and authority, which is largely unable to satisfy the needs of addicts to improve their living situations.

Yuan Zhen, one of the social workers in Pudong District, conceded during a newspaper interview that in most occasions, social workers are unable to secure employment or study opportunities for addicts due to their vulnerable stature in mobilizing and distributing community recourse. According to her, social workers’ efforts to find a job for addicts or help them learn a new skill is often compromised by the uncooperative attitude of employers and schools. She further pointed out that social workers in fact play a minimal role in helping addicts with their practical difficulties without the support of relevant governmental agencies.

This dilemma is reaffirmed by the experience of Wang Ping, who has long been working as an anti-drug social worker in Jin’an District. She said she once went to an automobile repair shop that advertised it was looking for mechanics. She talked to the manager about the possibility of hiring one of the drug addicts and offered him a cigarette. After half an hour of conversation, he refused to provide this job opportunity and she

---

138 Id.
140 Id.
141 Id.
overheard him say, “I don’t dare to smoke her cigarette, she’s with drug addicts all the time!”\footnote{142}

Accordingly, Zhang Li, one of the social worker experts in Shanghai, concluded that unlike the old times when employers could be persuaded to offer positions for drug addicts, it is now nearly impossible for social workers to carry on employment placement service in the context of marketization.\footnote{143} During the earlier period of reform China (1980s-1990s), the social control system that aimed at rehabilitation and education of offenders enabled the society to “assist[] criminals and delinquents in their return to normal life by helping them to get jobs or schooling”.\footnote{144} However, with China becoming more money-oriented aspiring to “material betterment” in the recent decades,\footnote{145} employers are less willing to provide jobs to addicts who do not possess required skills and experience in work because the pursuit of economic profits has now become the core culture of modern entrepreneurs.

However, while a small number of experienced social workers discern the significance of solving addicts’ practical problems for the ultimate purpose of drug detoxification, the majority of social workers are unfamiliar, if not incompetent, with the current operational models. The sources of Shanghai social workers are diverse, comprised mainly of three groups: people from society, police departments and prisons.\footnote{146} While those recruited from society are prone to absorb novel concepts and rationales of social work in their practices because of their professional and educational backgrounds, social workers drafted from retired police officers and prison personnel are more inclined to continue using their

\footnote{142}Shanghai Has Lost 15% of Its Anti-Drug Social Workers over One Year (关注“6·26”国际禁毒日上海禁毒社工一年流失15%) Shanghai News (June 24, 2005), http://www.shanghai.gov.cn/shanghai/node2314/node2315/node4411/userobject21ai109159.html.


\footnote{146}Fan & Lu, supra note 137, at 388.
familiar management languages and measures on drug addicts in the community. As they are accustomed to managing in a way that focuses on the objectives of retribution and control, it is understandable that these groups of social workers have struggled to quickly adjust their role from administrators to service providers in line with the central guideline of community drug treatment. Not surprisingly, some former police officers still retain their concept of drug addicts as administrative offenders that pose a threat to the safety of society, hence treating them in a rough and commanding manner instead of creating a positive environment for drug detoxification.

b. Social Denial and Discrimination

Another salient obstacle of implementing community drug treatment lies in the rejection, discrimination, and fear of the general public against socially and morally harmful behaviors. In contemporary China, the public attitude towards drug use is discriminatory and hostile. For example, some analysts believe that “[d]rug abusers are often deserted by their families and friends. Even after ending their drug use, they are still rejected and looked down upon by the community: a situation that might lead to relapse.”

Abusing drugs, from the perspective of the public, is an unethical form of behavior that contradicts social values and morality. Rather than gaining sympathy, drug addicts more frequently face great hostility from the community and even their own families and friends. A research survey was conducted in 2006 to observe the general attitude of Shanghai community residents towards drug addicts. The statistics collected from 9,400 people show that more than 98% of residents are aware of the dangerousness and addiction of drugs. Among these interviewed residents, 32% despise drug addicts and 13% are fearful of drug addicts.

147 Fan Zhihai, Lu Wei & Yu Jinxi, supra note 117, at 75.
148 See Zhang, supra note 79, at 64.
150 Zhang Li, supra note 143, at 65.
152 Id.
This phenomenon is not unique in China. One study conducted in Gansu Province shows 92% of residents feel very unsafe around drug addicts and are unwilling to make contact with them due to the fear of potential risk of contracting HIV/AIDS-related illnesses. The Gansu-based study reveals that almost 100% of community residents are reluctant to build deep and long-term relationships with drug abusers, such as loaning them money, creating romantic relationships, or getting married to them.

Clearly, social denial and discrimination contributes greatly to the ineffectiveness of community drug treatment in the Chinese society. Social worker in the Shanghai communities often encounters a great deal of resistance from addicts while offering help. Drug addicts are usually unwilling or worried to accept social workers’ assistance due to their fear of being exposed as drug users, thus feeling publicly stigmatized through direct discrimination. Also, many families show skeptical and unfriendly attitudes toward social workers and their requests for cooperation. This is in part because most families have long abandoned drug addicts due to intolerance of their behavior; but mainly other family members are afraid of being involved in the matter of drug abuse, hence tarnishing the families’ reputation.

For example, Qi Linde, the head of the social worker station in Shanggang Sub-district, Pudong District (Shanghai), said that drug addicts tend to be distant with social workers in order to keep their privacy. They usually leave their houses very early and come back very late to avoid contact with social workers. Qi stated it is pretty common that social workers have to pay seven or eight visits to see their targets just once. In order to understand their habits, Qi said, social workers have to constantly visit their street committees and neighbors to acquire relevant information.

Yuan Zheng, one of Qi’s colleagues, has had her offer of help

---

154 Id. at 92-93.
155 See He Lidan, supra note 139.
156 Zhang, supra note 79, at 31.
157 He, supra note 155.
158 Id.
159 Id.
160 Id.
refused multiple times by addicts. He said:

Once I went to one addict’s house and asked him what he had been doing. The simply told me that he went out for work. I knew that person did not have a job at the moment. Eventually, I found out that at that day the addict stole his mother’s money to purchase drugs. They never tell you the truth!\textsuperscript{161}

\textbf{C. Coercive Isolated Detoxification: A Punitive Instrument for Drug Abusers}

When voluntary and community detoxification fail their purposes, coercive isolated detoxification becomes the last resort in the new drug detoxification system. This compulsory program aims mainly at those who are: (1) drug addicts refusing to receive community detoxification; (2) addicts re-using drugs during the community treatments; (3) addicts seriously violating the community detoxification agreement; and (4) addicts re-using or re-injecting drugs after community and coercive detoxification.\textsuperscript{162}

The Chinese government uses coercive isolated detoxification as a replacement for coercive drug rehabilitation and re-education through labor. By incorporating their practical characteristics, coercive isolated detoxification serves as a new coercive drug treatment approach. Although the legal nature of coercive isolated detoxification remains unclear, many legal scholars are likely to characterize it as a newly-formed administrative detention due to its inheritance of practices from coercive drug rehabilitation and re-education through labor.\textsuperscript{163} To regulate the implementation of coercive drug treatment in the detoxification centers, the Bureau of Public Security and Bureau of Justice enacted the \textit{Regulation on the Management of Coercive Isolated Detoxification Centers by the Police} (hereinafter the \textit{Regulation on Police}) and the \textit{Regulation on the Work of Coercive Isolated Detoxification by the Judicial Administrative Organs} (hereinafter the \textit{Regulation on Judicial Administrative Organs}) in 2011 and 2013 respectively. The regulations expressly illustrate the chief aims and purposes of coercive isolated detoxification by providing that the practice of coercive detoxification

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item \textit{Anti-Drug Law}, supra note 9, art. 38.
\item Xu Dadong, Zhang Pengpeng & Zhu Chenge, \textit{supra} note 8, at 405.
\end{enumerate}
\end{footnotesize}
should be human-centered on the basis of scientific detoxification, comprehensive treatment and should help to educate and rescue drug addicts. However, while coercive isolated detoxification is theoretically concerned with rehabilitating drug addicts through clinical treatment and mental healing, its general management and daily practice reveal that this instrument is in essence punitively conditioned, functioning mainly as a harsh sanction of imprisonment as opposed to a therapeutic program.

iii. The Prison-like Management of Coercive Detoxification Centers

Both the Regulation on Police and the Regulation on Judicial Administrative Organs specify that coercive detoxification centers are managed in an isolated and stringent manner. More specifically, the regulation of the centers share a considerable affinity with that of the prions in China. The operation of the detoxification centers, according to Article 17 of the Regulation on Judicial Administrative Organs, is in the hands of the police, who cannot be replaced by any other law enforcement institutions or groups. The handling of addicts in the detoxification centers follows the way in which inmates are regulated in prison. Article 16 of the Regulation on Judicial Administrative Organs stipulates that drug addicts should be dealt with differently in light of their age, sex and level of addiction. Mail and packages sent to detained addicts are strictly checked in case of illegal items and drugs. Drug addicts are not allowed to have mobile phones or other communication devices. Visitors are rigorously examined and limited to only addicts’ families and staff from their previous working units or schools.

---


166 Regulation on the Judicial Administrative Organs, supra note 164, art. 16.

167 Id. art. 20.

168 Id. art. 21.

169 Id. art. 22.
are not permitted to apply for short leave unless their spouses or family members are critically ill, there is a death in their family, or their families are going through significant changes. The above-mentioned situations however require formal proof from hospitals and public security organs of addicts’ residential localities, and the grant of application is solely decided by the police of detoxification centers.

Akin to the sanctioning of inmates in prison, the breach of detoxification rules by addicts is internally punished by the police in the detoxification centers. Article 28 of the Regulation on Judicial Administrative Organs provides that the police have the discretionary power to remand addicts under special management (单独管理) if they (1) seriously disturb the order in the centers; (2) secretly possess, use or inject drugs; (3) plot or commit escape, suicide, self-injury or physical assault; or (4) commit a crime that ought to be handled by the judicial institutions. Special management can last as long as 25 days, and can be called under emergency circumstances without approval by the chief of the detoxification centers.

The punitive nature of coercive isolated detoxification is also reflected in the detoxification process. During the drug treatment, addicts are mandated to receive the individualized therapies and training for their biological, physical and mental rehabilitation (as discussed throughout this article). However, the Anti-Drug Law allows the detoxification institutions to arrange certain amounts of labor work for addicts as part of the rehabilitative program. As such, both the Regulation on Police and the Regulation on Judicial Administrative Organs empower the police to organize productive labor of addicts in accordance with the needs of the detoxification centers. This practice bears a great similarity with the rationale of Reform through Labor (劳改) in the Chinese prison system.

---

170 Id. art. 24.
171 Id.
172 Id. art 28.
173 Id.
174 Anti-Drug Law, supra note 9, art. 43.
175 Regulation on Judicial Administrative Organs, supra note 164, art. 43; Regulation on Police, supra note 165, art. 59.
176 For comprehensive accounts of ideology and practice of “Reform through Labor” in the Chinese Prison System, see Jonathan Cowen, One Nation’s “Gulag” is Another Nation’s “Factory within An Fence”: Prison-Labour in the
Since the establishment of the penal system in 1950s, the Chinese authorities have believed that through manual labor, offenders “can gradually establish a sense of self-reliance through work, learn necessary skills to become productive citizens after leaving prison, and forsake the selfish, parasitic habit of reaping without sowing.” This perception has developed China’s far-reaching rhetoric of using productive labor as a primary means to correct and remold offenders during imprisonment.

Many Chinese legal and medical experts view labor work as essential to facilitate drug rehabilitation. Liu Zhimin, a clinical professional from Peking University, asserts that exercising drug rehabilitation through labor may effectively serve the following purposes for addicts: (1) reinforce their physical detoxification and prepare for mental rehabilitation, and (2) acquire a certain level of capacity to work for their smooth reintegration into society. More significantly, Liu suggests that organized labor work by addicts can produce economic gains for coercive detoxification centers for their accommodation and treatment of drug abusers.

As can be seen from above, Chinese authorities have treated drug addicts the same way as they have treated other criminals, namely by demanding forced labor as a means to make inspire change or retribution. There is little doubt that by assigning drug addicts labor work under coercive detoxification, the Chinese authorities reveal their true attitude toward drug addicts. Namely, Chinese authorities still regard addicts as delinquents needing to be confined and punished in a coercive fashion as opposed to addicted patients.

The prison-style management of coercive detoxification can be exemplified by the study on the operation of the Kunming (Yunnan

---


179 Id.
Province) detoxification center. As the first police-regulated coercive detoxification institution in China, Kunming detoxification center has been heralded as the most advanced and well-run organization for coercive drug treatment. Its methods, which have been widely spread across the country, cover four prominent working models:

1. The establishment of the first base for rehabilitative labor. The base is self-industrialized and self-sufficient through the organization of labor work by addicts. The aims are to make financial profits, reduce monetary burden and maintain the daily running of the center.

2. The construction of an occupational training center. The center teaches drug addicts labor techniques to better conduct productive work in the institution and prepare them for reintegration of society upon release.

3. The employment of an information management system. The center designs a computerized information-collection mechanism where the personal files of treated addicts are stored up for individualized treatment and policing.

Apparently, although the Kunming coercive detoxification center is renowned for its marked impact on helping addicts eradicate drug dependence, its practice appears to be similar to that of older forms of punishment, i.e. pursuing the purposes of retribution and crime control. Among the aforementioned models, labor work of addicts is particularly highlighted to serve as an important component of treatment. Justified as an educational opportunity, addicts in the Kunming center are required to learn skills and undertake work on the daily basis. However, the extent to which the arrangement of productive work is justified on the ground of rehabilitative aims remains questionable. Given that the Kunming center has developed a comprehensive industrial chain comprised of planting,

---

181 Id. at 47-48.
182 Id. at 47.
183 Id.
breeding, manufacturing and selling agricultural goods,\(^{184}\) seeking financial profits has become one of the primary goals for the institution to reduce government expenses and ensure sustainable development.\(^{185}\) As such, addicts are in essence deployed and organized as the labor force to carry out the production process.

A research survey on the problems and challenges faced by the Kunming center illustrates that most drug addicts are unsatisfied with labor intensity and effectiveness of rehabilitative programs. The statistics show that more than 40% of addicts are unhappy about the overuse of labor work in the treatment process.\(^{186}\) While more than 25% of addicts complain about the way occupational training is assumed and the condition of psychological rehabilitation, more than 20% of addicts are discontent with the management style in the institution.\(^{187}\) Drug addicts are often concerned that long-term incarceration in a prison-like environment will insulate them from the rapid social changes, making it difficult for them to keep up with and reintegrate into mainstream society.\(^{188}\) Due to the over-emphasis on labor, addicts are worried that their physical and mental disorders are in fact not properly treated, which often leads to more abusive behaviors among addicts and all sorts of relevant diseases across the institution.\(^{189}\)

IV. THE NEW DRUG DETOXIFICATION SYSTEM: A PRACTICE OF ACTUARIAL JUSTICE?

The new drug detoxification system is not a well-regulated mechanism with solid legal and theoretical basis. Nor is it a properly institutionalized system that constitutes an efficient and convenient instrument to control and reduce drug abuse. A crooked regulatory framework, a source-limited society and a long-standing penal discourse focusing on retribution (especially through the imposition of labor requirements) all contribute to the impracticality of this freshly-established system. This thus raises a question as to why the Chinese government is so eager to put forth the new drug detoxification

\(^{184}\) Id.
\(^{185}\) Id.
\(^{186}\) Id. at 49.
\(^{187}\) Id.
\(^{188}\) Id. at 48.
\(^{189}\) Id.
mechanism at this very inopportune moment. On the surface, the fierce accusations against the old drug detoxification measures (coercive drug rehabilitation and re-education through labor) regarding their unreasonableness and ineffectiveness have boosted the advocacy of establishing a more scientific system for drug treatment. China claims to employ a “human-centered” system to shift the focus on handling drug addicts from incarcerative punishment to medical treatment. However, the underlying reason is China’s endeavor to maintain social order and safety in the context of the Government’s priority of constructing a “harmonious society” since the mid-2000s. In practice, the new drug detoxification system is deployed as an effective means to control risk and prevent crime by identifying, managing and organizing drug addicts.

In the 1990s, Malcolm Feeley and Jonathan Simon developed a sociological theory to focus on the new functions of penological practices which are performed in contemporary Western societies. According to Feeley and Simon, this “new penology,” referred to as “actuarial justice,” which began to emerge in the late 20th century, “is concerned with techniques for identifying, classifying and managing groups assorted by levels of dangerousness.” As such, they attribute the emergence of this perspective to the most relevant factor: the advent of a concern for managing risks. In comparison with the old penology, the new approach “seeks to sort and classify, to separate the less from the more dangerous,” to regulate groups as part of a strategy of managing danger, and “to deploy control strategies rationally” for serving “actuarial justice.” Therefore, a number of criminal justice practices are largely carried out to serve the

---

190 In the early 2000s, Hu Jintao, the former Chinese president, introduced a concept of “Harmonious Society” as a vision for the country’s future social development. Kin-man Chan, Harmonious Society, in INTERNATIONAL ENCYCLOPEDIA OF CIVIL SOCIETY 821 (Helmut K. Anheier et al. eds. 2010). Hu’s perception of a socialist 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.” Id. (internal quotations omitted).
192 Id. at 450.
193 Id. at 452, 455-56.
new ideology of actuarial justice. These techniques, for example, include the increased use of “incapacitation, preventive detention and drug test.” According to Feeley and Simon, these strategies are aimed largely at rearranging the distribution of offenders in society by identifying high-risk offenders and maintaining long-term control over them.

The actual implementation of China’s new drug detoxification system, though theorized by different legal and political discourses, mirrors these actuarial concerns. Their practices of three drug treatment programs in essence embrace increased reliance on imprisonment and merge concerns for surveillance and custody. Their characteristics bear a strong resemblance to the characteristics of actuarial justice, which reveals the true nature of this new system as a managerial approach as opposed to a drug treatment tool. More specifically, voluntary, community and coercive programs of drug treatment are aimed to target varying degrees of drug addicts, i.e. lesser risk individuals are allowed to voluntarily opt-in while riskier individuals are put in detention. The development and employment of this three-tiered system represent the authorities’ imposition of actuarial justice on addicts by treating them differently according to different levels of risk they are likely to pose. The following comparative accounts provide the manifestation of their ideological and practical parallels.

A. Drug Abuse is Normal

The emergence of actuarial justice occurred when Western society perceived crime as an inevitable social fact. By acknowledging that it cannot be eliminated, the democratic states shifted focus to preventing crime and minimizing its consequences. Similarly, since the resurgence of illicit drugs in the late 1970s, the Chinese government has witnessed a significant rise of drug abuse and gradually recognized it as a persistent

---

194 Actuarial justice seeks to reduce the number and severity of crimes. The target of this “new penology” shifts from the discipline of individual bodies, to the control of whole categories of presumptively high-risk individuals through incapacitative custody. See id. at 458, 466.
195 See Feeley & Simon, supra note 191, at 457-458, 460.
196 Id. at 458.
197 See Feeley & Simon, supra note 191, at 455 (describing the new penology as taking crime for granted and accepting deviance as normal).
problem in the process of social transformation. Having experienced the failure of using coercive measures in drug dependence treatment, the state now constructs and relies on a rehabilitation-based and reintegration-oriented drug detoxification system to control and reduce drug abuse in lieu of exterminating it.

**B. Drug Addicts are Risk Objects**

Actuarial justice reconstructs offenders as risk objects based on the concept of risk. It places special emphasis on identifying and managing unruly groups for the sake of public safety. From the late 1970s onwards, China has characterized drug use and addiction as unlawful behavior, causing enormous social impact. Related crimes (such as smuggling and the drug trade in general) have drawn the authorities’ attention to the harm drug abuse causes to the state. Although the official rationale of the new detoxification system re-conceptualizes drug abuse as a medical disease, the new practices are markedly less concerned with diagnosis, treatment and rehabilitation of drug addicts. Rather, they are more concerned with techniques to identify, classify, manage and incapacitate addicts sorted by their level of addiction and dangerousness. In other words, while the Government claims that the program is supposed to treat the illness of drug addiction, in fact, they are more concerned with maintaining social stability through intense management of addicted individuals.

For example, in the new detoxification system, the addicts’ personal profiles are collected to assess the level of dangerousness addicts may represent, hence deciding the imposition of the suitable detoxification program on individuals. The government urges drug abusers to go to voluntary treatment in exchange for a waiver of administrative punishment. As the least coercive drug-dependence program, voluntary detoxification requires addicts to provide their personal information, which then are transferred from the medical clinics to the police for registration. This

---

199 Feely & Simon, supra note 191, at 455.
200 BIDDULPH, supra note 80, at 177.
201 Drug Treatment Regulation, supra note 11, sec. 12.
recording system provides the local security organs first-hand information of drug addicts who currently reside in their jurisdictions.

The grasp of addicts’ information allows the police to target drug addicts as the risk that may endanger social order and stability. Evidence shows that many addicts are arbitrarily sent to community or coercive drug treatment while still receiving treatment in voluntary clinics.\textsuperscript{202} Some even reported their experiences of being unreasonably stopped for checks and investigations as their personal identities are under police’s strict surveillance.\textsuperscript{203} It is not surprising that the police now are more concerned about the potential threat that may be exerted by freely mobile addicts in the context of building a “harmonious society”. This is particularly reflected by the times when the important social or political events are approaching, the police are more frequently arresting drug addicts who are accessing voluntary clinics to meet “arrest quota target”.\textsuperscript{204} To this end, sending drug addicts to either community detoxification (semi-coercive measure) or coercive detoxification (incarcerative punishment) is an efficient means to control the perceived risk by segregating drug addicts from the society.

\textbf{C. Managerialism rather than Providing a Cure}

Consistent with actuarial justice, transforming offenders into law-abiding citizens through treatment or correctional interventions is no longer at the heart of the criminal justice system.\textsuperscript{205} The objective shifts to managing the risks that offenders present. Accordingly, a number of new techniques are employed to serve the identification, classification and organization of offenders. Among the new penological forms, selective incapacitation, according to Feely and Simon, intensifies the aggregate effects on crime reduction.\textsuperscript{206} Selective incapacitation “proposes a sentencing scheme in which lengths of sentence depend not upon the nature of the criminal offence or the character of the offender, but upon

\footnotesize
\begin{itemize}
\item \textsuperscript{202} \textit{Human Rights Watch}, supra note 34, at 23.
\item \textsuperscript{203} \textit{Id.} at 12.
\item \textsuperscript{204} \textit{Id.}
\item \textsuperscript{205} \textit{See Feeley & Simon}, supra note 191, at 455.
\item \textsuperscript{206} \textit{Id.} at 458.
\end{itemize}
risk profiles. *207 Its aims are to impose long-term control over high-risk offenders “while investing in shorter terms and less intrusive control over lower risk offenders.”*208

These rationales constitute the theoretical basis upon which the new drug detoxification system is practiced. While voluntary detoxification functions as a generalized drug treatment instrument open to all addicts, imposing the least coercive measures, community and coercive detoxification serve as mechanisms to maintain control, often through frequent drug testing and custody. In practice, community detoxification is imposed on addicted individuals whose level of addiction and dangerousness is relatively low.

As discussed above, community detoxification is a semi-coercive measure with addicts being controlled in terms of their mobility and activities. Specifically, the frequent drug tests require addicts to be present in designated locations on the regular basis. Meanwhile, the submission of weekly written reports provides the police a channel through which addicts’ daily action can be closely monitored. In Shanghai, every fifty addicts in the community are assigned to an anti-drug social worker, who is responsible for arranging addicts’ drug treatment and social and living issues.209 Those social workers in fact act in dual roles—one being the addicts’ helpers in life and the other being their supervisors under the guidance of the police.

While a less compulsory measure applies to these lower risk groups, coercive isolated detoxification appears to target those who repeatedly use illicit drugs and who have in the past or are likely to commit drug-related offences. Although the length of coercive detoxification is shorter than community detoxification, its managerial measures are more intrusive and controlling, in the hopes of addressing a societal harm, as opposed to curing the addicts. The actuarial logic of the coercive detoxification dictates an expansion of the continuum of control for more efficient risk management. Full control over individuals’ freedom is exercised in the facilities, in order to minimize the drug

207 Id.; see also C.D. Webster, Comment on Thomas Mathiesen’s Selective Incapacitation Revisited, 22 L. & HUM. BEHAV. 417, 471-76 (1998) (critiquing selective incapacitation).
208 Feeley & Simon, supra note 191, at 458.
209 Fan Zhihai, Lu Wei & Yu Jinxin, supra note 117, at 154.
addicts’ contact with the outside world. Effectively inmates, these “patients” were also controlled by making them work participate in hard industrial labor. The Chinese Government assumed that forced labor would inculcate the discipline and sense of collectivism required of post-detoxification life in offenders. More noticeably, addicts may be further controlled under community rehabilitation upon release. Analogous to the practice of community detoxification, community rehabilitation is portrayed as a follow-up neighborhood-based management measure to fill in the gaps between the release of addicts and their reintegrat into society.

V. CONCLUSION

Indeed, the establishment of a new detoxification drug system reflects the authorities’ re-evaluation of over-reliance on compulsory administrative measures that emphasize the purposes of punishment and deterrence. In particular, the altered perception of drug addicts as physically and mentally ill patients, as opposed to minor offenders, reflects China’s increased emphasis on human rights protection and rationalization of drug treatment. Or at least, a shift in their viewpoints regarding drug treatment. However, this change in viewpoint does not necessarily produce comprehensive regulatory frameworks and practices. This article highlights the legal and theoretical deficiencies and inconsistencies of the three main detoxification tools, as well as the uniqueness of social conditions upon which these programs are implemented. Through three case studies in Guangzhou, Shanghai and Kunming, this article identifies a wide range of the practical problems of voluntary, community and coercive detoxification, which are unable to be resolved overnight given the current legal and social culture in contemporary China. Thus this the genuine intention of Chinese authorities to hastily introduce this system lies in the government’s endeavor to ensure the maintenance of social order and public safety as opposed to rehabilitation. As such, the new drug detoxification system can be expected to function as a risk-control instrument, administering actuarial justice by managing drug addicts. The detoxification programs focus more on surveillance and custody than on treatment and rehabilitation.