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Recommendations on Abolishing Detention Education System for Sex Workers and Their Clients in Mainland China.

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INTERNATIONAL HUMAN RIGHTS UPDATE

RECOMMENDATIONS ON ABOLISHING DETENTION EDUCATION SYSTEM FOR SEX WORKERS AND THEIR CLIENTS IN MAINLAND CHINA

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I. INTRODUCTION

Passed on November 12, 2013 at the end of the Third Plenum of the Eighteenth Central Committee of the Chinese Communist Party, the “The Decision on Major Issues Concerning Comprehensively Deepening Reforms” established that the system of reeducation through labor should be abolished, the law of punishing and correcting illegal and criminal behaviors should be improved, and the community correction system should be perfected.¹ Then, on December 28, 2013, the Sixth Session of the Standing Committee of the Twelfth National People’s Congress

1. Chinese Communist Party Center Committee, The Decision on Major Issues Concerning Comprehensively Deepening Reforms (adopted at the 18th Congress Third Plenary Meeting, November 15th, 2013), http://www.china.org.cn/china/third_plenary_session/2013-11/16/content_30620736.htm (China).

(NPC) adopted the decision to abolish legal provisions related to reeducation through labor.² Since these momentous occasions, the system of reeducation through labor has, supposedly, become just a new page in history.

However, what cannot be ignored is that detention education, analogous to reeducation through labor, still exists.³ As this report will show, detention education falls short of both a moral and legal basis in law and in juridical practice. In the historical course of carrying forward the rule of law, abolishing the detention education system follows the general trend in Chinese legal reform and appropriately reflects the sentiment of the will of the people.⁴ In order for this progress to be fully realized, the practice of imposing detention education—as both punishment and an attempt at reformation—must be abolished in practice as well as on the books.

II. THE ESTABLISHMENT OF DETENTION EDUCATION SYSTEM

After the founding of People's Republic of China, the country carried out comprehensive policies to ban prostitution, which basically resulted, as claimed, in the elimination of the sex trade.⁵ “The Decision About Reeducation Through Labor,” issued by the State of Council and approved by the Standing Committee of NPC in 1957,⁶ and the “Supple-

2. 全国人大常委会关于废止有关劳动教养法律规定的决定 [Decision of the Standing Committee of the National People's Congress on Repealing Legislation on Reeducation through Labor] December 28, 2013, the Standing Comm. of the Nat'l People's Cong., 12th Nat'l People's Cong. (China 2013).

3. See 杨涛 [Yang Tao], 收容遣送寿终了，收容教育为何还活着？ [Detention and deportation have been abolished, but why does detention education still exists?], ORIENTAL MORNING POST (Jan. 9, 2009, 9:10), <http://star.news.sohu.com/20090109/n261657416.shtml> (explaining history behind detention education and why it is still being used in China for penalty of prostitution).

4. See Frank Langfitt, *China Ends One Notorious Form Of Detention, But Keeps Others*, NPR (Feb. 5, 2014, 3:29 AM), <http://www.npr.org/blogs/parallels/2014/02/05/271412045/china-ends-one-notorious-form-of-detention-but-keeps-others> (asserting that most people in China disliked the reeducation through labor system because of its disregard for due process rights).

5. See 罗瑞卿一夜扫除北平妓女 (Luo Ruiqing eradicates Beijing's prostitutes in a single night); see also BOOKER.COM.CN (archived), <http://web.archive.org/web/20020514193047/http://www.booker.com.cn/gb/paper23/23/class002300006/hwz162063.htm> (last visited Dec. 30, 2014) (describing the shutdown of all 224 of Beijing's prostitution establishments and the arrests of 1286 prostitutes and 434 owners on November 21, 1949 during the Maoist Era).

6. GUOWUYUAN GUANYU LAODONG JIAOYANG WENTI DE JUEDING [Decision about Re-Education Through Labor] (1957) [hereinafter 1957 Decision].

mental Provisions about Reeducation through Labor,”⁷ contained no stipulations on prostitution. With the implementation of reform and opening-up policies and the development of socialist commodity economy, the phenomenon of sex trade revived. The “Ministry of Public Security Trial Measures for Implementation of Reeducation Through Labor,” developed by the Ministry of Public Security (MPS), stipulates that detention education can be implemented for those who refuse to abandon the behavior after repeated education.⁸ Article 30 of the “Regulations of the People’s Republic of China (PRC) on Administrative Penalties for Public Security,” developed by MPS in 1986, stipulates that “[p]rostitution, whoring, pandering or housing prostitution or whoring with a prostitute are strictly forbidden.”⁹ Whoever breaks this ban shall be detained for a maximum of fifteen days, given a warning, made to sign a statement of repentance or given re-education through labor according to regulations, and shall be concurrently imposed a fine with the maximum of CNY 5000.¹⁰ Criminal liability shall be prosecuted if the action constitutes a crime.¹¹ The rapid development of the economy, as well as widespread changes in people’s life-styles, psychological framework, and values, changed prostitution significantly over the next decades, as it has become more widespread and increasingly organized and industrialized. According to MPS statistics, 12,281 sex workers and their clients were prosecuted in 1984; the number soared to over 100,000 in 1989 and over 200,000 in 1991.¹² From 1984 to 1991, the total number of people investigated for prostitution reached 620,000.¹³

In order to strictly prohibit the growing practice, the Standing Committee of NPC promulgated the “Decision of the Standing Committee of the National People’s Congress on the Strict Prohibition Against Prostitution and Whoring” on September 4th, 1991, and it also authorized the State

7. GUOWUYUAN GUANYU LAODONG JIAOYANG DE BUCHONG JUEDING [Supplementary Decision of the State Council for Reeducation Through Labor] (1979).

8. Ministry of Public Security Trial Measures for Implementation of Reeducation Through Labor (promulgated by Ministry of Public Security, Jan. 21, 1982), <http://www.hrichina.org/en/trial-measures/ministry-public-security-trial-measures-implementation-re-education-through-labor> (China).

9. 中华人民共和国治安管理处罚条例 (1994修正) [失效][失效] [Regulations of the People’s Republic of China (PRC) on Administrative Penalties for Public Security] (promulgated by Ministry of Public Security, Sept. 5, 1986), <http://www.china.org.cn/english/government/207301.htm> (China).

10. *Id.*

11. *Id.*

12. 中顾法律网 [Law Network], 对卖淫现象的思考 [Reflection on the phenomenon of prostitution], 9ASK.CN (Jan. 22, 2010, 5:13), <http://news.9ask.cn/falvlunwen/xflw/201001/302173.html>.

13. *Id.*

Council to formulate relevant regulations accordingly.¹⁴ On September 4th, 1993, the Council issued “Measures for Detention for Education of Prostitutes and Clients of Prostitutes,” marking the first step to establish the system of detention education.¹⁵

The Decision and Regulations mentioned above have served as the legal grounds for the punishment imposed on sex workers and their clients.¹⁶ Experts estimate that about 18,000 to 28,000 female sex workers are sent to the estimated 200¹⁷ detention education centers per year.¹⁸ From 1987 to 2000 the number of people receiving detention education accumulated to more than 300,000.¹⁹ However, some scholars point out that the number was underestimated and the data from the police department might constitute only twenty five to thirty percent of the real number.²⁰

III. DETENTION EDUCATION IS IN SERIOUS CONFLICT WITH THE CURRENT LEGAL SYSTEM IN CHINA

A. *Detention Education is in Conflict With the “The Constitution of the People’s Republic of China”*

Article 37 of the Constitution stipulates that

14. 全国人大常委会关于严禁卖淫嫖娼的决定 [Decision of the Standing Committee of the National People’s Congress on the Strict Prohibition Against Prostitution and Whoring] (promulgated by the Standing Comm. People’s Cong. Beijing Municipality, Sept. 4, 1991, effective Sept. 4, 1991) (ASIAN LEGAL INFORMATION INSTITUTE) (China), available at <http://www.asianlii.org/cn/legis/cen/laws/dotscotnpeotspapaw1208>.

15. MAIYIN P’IAOCH’ANG JENYÜEN SHOUJUNG CHIAOYÜ PANFA [Measures for Detention for Education of Prostitutes and Clients of Prostitutes], (promulgated by the State Council, Sept. 4, 1993) (China).

16. See Margaret L. Boittin, *New Perspectives from the Oldest Profession: Abuse and the Legal Consciousness of Sex Workers in China*, 47 LAW & SOC’Y REV. 245, 252 (2013) (detailing the array of punishments and sanctions available for violating the prohibition against prostitution).

17. Xing Jing: A Study in Detaining Education Procedures—the Perspective of Due Procedure, a thesis for the degree of Master at Zhengzhou University, 2010. See also Xin Ren (1999) Prostitution and Economic Modernization of China, *Violence Against Women* 5. pp. 1411–1414. The paper points out that from 1989 to 1990, about 243,183 persons involved in prostitution were detained.

18. 收容教育制度下，中国性工作者权利失去保障 [Under the Asylum Education System, China Lost the Right to Protect Sex Workers, cite from New York Times, by Andrew Jacobs], 网易 [NETEASE] (Jan. 8, 2014, 1:48 PM), <http://lady.163.com/14/0108/13/9I2QM0EA00264NDR.html>.

19. Asia Catalyst, “CUSTODY AND DETENTION”: THE ARBITRARY DETENTION FOR CHINESE SEX WORKERS IN CHINA, 19, available at http://asiacatalyst.org/blog/AsiaCatalyst_CustodyEducation2013-12-EN.pdf (last visited Oct. 4, 2014).

20. Zhang Ping (1993). Social diseases in contemporary China. *Jindun* 12: 27.

The personal liberty of citizens of the People's Republic of China shall not be infringed upon. No citizen shall be arrested except with approval or decision of the people's procuratorate or by the decision of people's court, and carried out by the public security administration. Unlawful deprivation or restriction of citizen's personal liberty by detention or other means shall be prohibited; and unlawful search of citizen's body shall be prohibited.²¹

Under the current institutional arrangements, the responsible authority for detention education is the Ministry of Public Security and the approving authority is the county public security administrations.²² Those who refuse to accept the decision of detention education made by the county public security administration can apply for reconsideration by the Public Security Administration, and those who refuse to accept the reconsideration can appeal to the People's Court in accordance with the regulations.²³ Thus, detention education and reeducation through labor are similar in that they both deprive citizens of personal liberty granted by the law in the name of administration and by administrative procedures. The Public Security Administration serves both as the decision-making authority and the law enforcement agency of detention education; with the Public Security Administration acting as not only the referee but also the athlete, it is difficult to keep the procedures in which they make decisions open and transparent in the absence of independent judicial adjudication and the involvement of the procuratorate or court.

This absence of transparency is in conflict with the spirit of the Constitution. In addition, the Public Security Administration also dominates the procedures of reconsideration and bear the functions of managing detention education centers.²⁴ In some cases, lacking effective oversight,²⁵ public security officers have infringed upon the basic human

21. XINFA art. 37 (1982) (China), available at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm.

22. MAIYIN P'IAOCH'ANG JĒNYÜEN SHOUJUNG CHIAOYÜ PANFA [Measures for Detention for Education of Prostitutes and Clients of Prostitutes], *supra* note 15. See Asia Catalyst, *supra* note 19 (stating that The Ministry of Public Security manages the Custody & Educations centers).

23. MAIYIN P'IAOCH'ANG JĒNYÜEN SHOUJUNG CHIAOYÜ PANFA [Measures for Detention for Education of Prostitutes and Clients of Prostitutes], *supra* note 15.

24. See Asia Catalyst, *supra* note 19 (reporting on the public security organs' control over investigations, judgment and appeal of Custody & Education (C&E) related cases while also managing the actual C&E centers).

25. *Id.* ("The regulations governing C&E are vague and deficient, granting the police enormous power over personal freedom.").

rights of inmates and violated the stipulations of respecting and protecting human rights as articulated in the Constitution.²⁶

B. *Detention Education is in Conflict With the “Law of the People’s Republic of China on Administrative Penalties” and the “Legislation Law of the People’s Republic of China”*

The “Decision on the Strict Prohibition against Prostitution and Whoring,”²⁷ approved by the Council of National People’s Congress, is in conflict with the stipulations in the “Law of the People’s Republic of China on Administrative Penalties”²⁸ and the “Legislation Law of the People’s Republic of China.”²⁹ Furthermore, “The Measures of Detention Education for Prostitution and Whoring Goers,” promulgated by the Council, has no power to prescribe compulsory measures and punishments imposing restrictions on personal liberty because of the limit of its legislating level.³⁰

26. See *id.* (revealing incidents obtained from interviewing 30 female sex workers of routine physical abuse by police, bribery, uncompensated labor, and STD testing without the arrested women’s consent); see also *收容教育制度下，中国性工作权利失去保障* [Under the Asylum Education System, China Lost the Right to Protect Sex Workers, cite from New York Times, by Andrew Jacobs], *supra* note 18 (illustrating the conditions women face in Custody & Education centers including having to bring one’s own food, bedding, and sanitary napkins, performing hard labor without pay, and paying for living expenses and visitation rights).

27. See 全国人大常委会关于严禁卖淫嫖娼的决定 [Decision of the Standing Committee of the National People’s Congress on the Strict Prohibition Against Prostitution and Whoring] (promulgated by the Standing Comm. People’s Cong. Beijing Municipality, Sept. 4, 1991, effective Sept. 4, 1991) (ASIAN LEGAL INFORMATION INSTITUTE) (China), available at <http://www.asianlii.org/cn/legis/cen/laws/dotscotnpscotspapaw1208> (amending the Criminal Law to strictly prohibit prostitution and whoring and punish those who organize, force or lure persons to engage in such conduct for the purpose of maintaining public security and “good social morale”).

28. 中华人民共和国行政处罚法 已被修订 [Law of the People’s Republic of China on Administrative Penalty] (promulgated by the Order No. 63 of the President of the People’s Republic of China, Mar. 17, 1996, effective Oct. 1, 1996) 1996 P.R.C. LAWS art. 9, (revised Aug. 27, 2009) (China), available at <http://en.pkulaw.cn.skell.idm.oclc.org/display.aspx?id=1148&lib=law&SearchKeyword=&SearchCKeyword=#> (“[T]his Law is enacted for the purpose of standardizing creation and imposition of administrative penalty, ensuring and supervising the effective exercise of administration by administrative organs, safeguarding public interests and public order, and protecting the lawful rights and interests of citizens, legal persons and other organizations.”).

29. 中华人民共和国立法法 (The Legislation Law of the People’s Republic of China) [] (adopted by 3rd Session of the Ninth Nat’l People’s Cong., Mar. 15, 2000), available at <http://www.wipo.int/wipolex/en/details.jsp?id=7983>.

30. MAIYIN P’IAOCH’ANG JENYÜEN SHOUJUNG CHIAOYÜ PANFA [Measures for Detention for Education of Prostitutes and Clients of Prostitutes], *supra* note 15.

As explicitly stated in the “Law of the People’s Republic of China on Administrative Penalties”³¹ and the “Legislation Law of the People’s Republic of China,”³² compulsory measures and punishments which impose restriction on personal liberty can only be expressly specified by law.³³ Article 9 of the “Legislation Law of the People’s Republic of China” further explicitly states that the Standing Committee of the National People’s Congress does not have the power to make the decision to authorize the State Council to formulate administrative regulations or judiciary system on the affairs concerning compulsory measures and punishments imposing restrictions on personal liberty, and the judicial system.³⁴

According to the regulations mentioned above, the legitimacy of detention education is questionable. “Decision on the Strict Prohibition against Prostitution and Whoring” is a “decision” made by the Council of the NPC, which also falls into the category of law and has the same power as law,³⁵ but it is not the “Law” in the strict sense as stated in Article 8 and Article 9 of “Legislation Law.”³⁶ “The Measures of Detention Education for Prostitution and Whoring Goers” formulated by the Council is administrative regulation, which is not a law that is promulgated by the legislature.³⁷

31. 中华人民共和国行政处罚法 已被修订 [Law of the People’s Republic of China on Administrative Penalty] (promulgated by the Order No. 63 of the President of the People’s Republic of China, Mar. 17, 1996, effective Oct. 1, 1996) 1996 P.R.C. LAWS art. 9, (revised Aug. 27, 2009) (China), available at <http://en.pkulaw.cn.skell.idm.oclc.org/display.aspx?id=1148&lib=law&SearchKeyword=&SearchCKeyword=#>.

32. 中华人民共和国立法法 (The Legislation Law of the People’s Republic of China) (promulgated by 3rd Session of the Ninth Nat’l People’s Cong., Mar. 15, 2000) art. 9, <http://www.wipo.int/wipolex/en/details.jsp?id=7983>.

33. *Id.*

34. *Id.*

35. See 全国人大常委会关于严禁卖淫嫖娼的决定 [Decision of the Standing Committee of the National People’s Congress on the Strict Prohibition Against Prostitution and Whoring] (promulgated by the Standing Comm. People’s Cong. Beijing Municipality, Sept. 4, 1991, effective Sept. 4, 1991) (ASIAN LEGAL INFORMATION INSTITUTE) (China), available at <http://www.asianlii.org/cn/legis/cen/laws/dotscotnpcotspapaw1208> (authorizing reeducation through labor and punishment by the public security organs for acts of prostitution).

36. See 中华人民共和国立法法 [The Legislation Law of the People’s Republic of China] (promulgated by 3rd Session of the Ninth Nat’l People’s Cong., Mar. 15, 2000), <http://www.wipo.int/wipolex/en/details.jsp?id=7983> (according to Article 7, “[t]he Standing Committee of National People’s Congress enacts and amends laws other than those to be enacted by the National People’s Congress . . .”) (emphasis added).

37. MAIYIN P’IAOCH’ANG JĒNYUEN SHOUJUNG CHIAOYU PANFA [Measures for Detention for Education of Prostitutes and Clients of Prostitutes], *supra* note 15.

C. *In the “Law of the PRC on Penalties in Public Security Administration”, the Provision About Detention Education Has Been Cancelled and There is No Longer a Legal Basis for its Implementation*

On March 1, 2006, at the 17th Session of SC of the 10th NPC adopted the “Law of the People’s Republic of China on Penalties for Public Security Administration,” of which Article 30 stipulates that “a prostitute or a whoring goer shall be detained for more than 10 days but less than 15 days and may, in addition, be fined less than CNY 5,000; if the case is relatively minor, she or he shall be detained less than 5 days or be fined less than CNY 500.”³⁸

This article of law stipulates administrative penalties for sex workers and their clients and the punitive measures are limited to detention and penalty without mentioning detention education.³⁹ Thus, detention education actually has no legal basis.

IV. DRAWBACKS OF DETENTION EDUCATION

A. *Detention Education is Actually an Administrative Penalty in the Name of Administrative Compulsory Measures*

Article 2 of “The Measures of Detention Education for Prostitution and Whoring Goers” stipulates that “the measures of detention education refer to the administrative compulsory measures which assemble prostitutions and whoring goers for legal and moral education, productive labor, and venereal disease testing and treatment.”⁴⁰ “The Measures of Detention Education for Prostitution and Whoring Goers” identifies detention education as an administratively compulsory measure, but as for the legal nature of detention education; it should be identified as a form of administrative penalty.⁴¹

First, in comparison with reeducation through labor, detention education basically has the same pattern. They have greatly similar pattern

38. [Law of the People’s Republic of China on Penalties for Administration of Public Security] (promulgated by Standing Committee of the National People’s Congress, Aug. 28, 2005, effective Mar. 1, 2006) http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384114.htm (China).

39. 中华人民共和国治安管理处罚条例 (*Regulations of the People’s Republic of China on Administrative Penalties for Public Security*) [] (adopted by Standing Committee of the National People’s Congress, May 12, 1994), available at <http://en.pkulaw.cn/Print/Print.aspx?Lib=law&Cgid=9004&Id=147&SearchKeyword=&SearchCKeyword=&paycode=&LookType=>.

40. MAIYIN P’IAOCH’ANG JÉNYÜEN SHOUJUNG CHIAOYÜ PANFA [Measures for Detention for Education of Prostitutes and Clients of Prostitutes], *supra* note 15.

41. *Id.*

both in detention and management. Reeducation through labor is explicitly identified as an administrative penalty. In that way, detention education is certainly extremely severe; the seriousness is only just surpassed by reeducation through labor.⁴²

Secondly, two of the most important features of administrative compulsory measures such as detainment are its temporality and its non-penal features.⁴³ However, detention education, which deprives citizens of their personal liberty for periods from six months to two years, is neither temporary nor non-penal.⁴⁴

The nature of administrative penalty is to cause loss of the offender's rights and interests in a legal manner, with the direct purpose of causing damage to their economic and mental interests and/or limitation of their freedom through punishment, in order to urge them to correct their behavior.⁴⁵ Thus, the purpose and measures of detention education are completely in accordance with the nature of administrative penalty.⁴⁶

B. *The Punishment of Detention Education is Too Severe and Violates the Principle of Proportionate Penalty to Crime in the Rule of Law*

The punishment of detention education is too severe—even more severe than penalties found in criminal law, such as fining, confiscation of property, and deprivation of political rights.⁴⁷ Detention education may deprive individual liberty for a maximum of two years, which extends beyond similar penalties in the criminal law.⁴⁸ Under criminal law, the period imposed for similarly scaled infractions is no less than three months and no more than two years, and the control only limits movement and does not deprive personal liberty. The time limit for periods of detention is no less than one month and no more than six months. The time limit for fixed term imprisonment is no less than six months and no more than fifteen years.

42. 收容教育 [Asylum Education], Baidu, http://baike.baidu.com/link?url=wX_M-QN9gm3087jVTL7FXd2HINsubWdwwWjOFvMJcOcADtOpzflLrQ4KRB2NDC9fdilbrT_bQvmtj3k1KZZxl_ (last updated Aug. 24, 2014).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. ORIENTAL MORNING POST, *supra* note 3.

48. *See generally id.* (arguing that detention education inhibits individual freedoms disproportionately as compared to other criminal offenses).

It may be considered that both whoring and prostitution violate current Chinese law, which stipulates punishments for these violations.⁴⁹ However, this behavior, after all, is an “offense without a victim,” having no direct and significant negative impact on others and the society.⁵⁰ Punishing them with detention education, which deprives them of personal freedom for six months to two years, is disproportional to their offense and is obviously too heavy a punishment.⁵¹

C. *Detention Education Has No Legal Basis and its Applicable Procedures Lack Explicit Specifications, Which in Turn Produces Arbitrary and Selective Law Enforcement by Public Security Administrations*

“Regulations of the PRC on Penalty in Public Security Administration”⁵² has been abolished, and the revised “Public Security Administration Punishments Law of The People’s Republic of China” was put into force on January 1, 2013.⁵³ Article 66 of the Law has no provision on punishing prostitutions and whoring goers with detention education.⁵⁴ However, at present no government department declares that “Decision on the Severe Prohibition against Prostitution and Whoring” and “The Measures on Detention Education for Prostitution and Whoring Goers” have expired or been abolished.⁵⁵

49. [Regulations of the People’s Republic of China on Administrative Penal Ties for Public Security] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 5, 1986, revised on May 12, 1994 (China).

50. ORIENTAL MORNING POST, *supra* note 3.

51. *Id.*

52. 中华人民共和国治安管理处罚条例(1994修正) [失效][失效] Regulations of the People’s Republic of China (PRC) on Administrative Penalties for Public Security] (promulgated by Ministry of Public Security, Sept. 5, 1986), <http://www.china.org.cn/english/government/207301.htm> (China).

53. 中华人民共和国行政处罚法 [Public Security Administration Punishments Law of The People’s Republic of China] (promulgated by the Order No. 38 of the President of the People’s Republic of China, Aug. 28, 2005, effective Jan. 1, 2013) <http://www.lawinfochina.com/display.aspx?lib=law&id=4549&CGid=> (China).

54. *Id.*

55. *See generally* UN Joint Statement, Compulsory drug detention and rehabilitation centres, (Mar. 9, 2012), http://www.unodc.org/documents/southeastasiaandpacific/2012/03/drug-detention-centre/JC2310_Joint_Statement6March12FINAL_En.pdf (calling on nations operating compulsory detention and rehabilitation centers to close them based on the human rights violations lack of evidence that the centers “represent a favorable or effective environment for the . . . ‘rehabilitation’ of individuals who have engaged in sex work”). *Cf.* MPS: *China has 116 Custody and Education Centers Nationwide*, DUI HUA HUMAN RIGHTS JOURNAL (Sept. 4, 2014), <http://www.duihuahrjournal.org/2014/09/mps-china-has-116-custody-and-education.html> (revealing a discrepancy in the number of C&E centers still open nationwide because they have not been formally abolished).

It is frequently the case that a sex worker or client is detained for 15 days according to the “Law of the PRC on Penalty in Public Security Administration,”⁵⁶ and then detained and educated again for six months to two years according to “The Measures of Detention Education for Prostitutes and Whoring Goers.”⁵⁷ The public security administration argues that detention and detention education are different administrative actions, and that detention education has not been abolished.⁵⁸ In practice, the cases collected by some non-governmental organizations show that those sex workers and prostitutes will not face detention if they have a good relationship with the public security officers; if they do not, they will be detained.⁵⁹ Arbitrary and selective law enforcement of public security administration regulations causes judicial corruption, greatly undermines the seriousness of law and unity of the legal system, violates the fairness of law enforcement, and further damages the credibility of state justice.⁶⁰

D. *Detention Education is Ineffective for Educating or Redeeming Sex Workers and their Clients*

Although the government has consistently been severely punishing sex workers and their clients, the number of people involved has nevertheless

56. 中华人民共和国行政处罚法 [Public Security Administration Punishments Law of The People's Republic of China] (promulgated by the Order No. 38 of the President of the People's Republic of China, August 28, 2005, effective Jan. 1, 2013) <http://www.lawinfochina.com/display.aspx?lib=law&id=4549&CGid=> (China).

57. Elizabeth Lynch, *Beijing News Interviews Tian Wenchang on Custody & Education*, CHINA LAW & POLICY (June 25, 2014), <http://chinalawandpolicy.com/tag/administrative-detention/>. Tian Wenchang, Director of the Criminal Law Committee of the All-China Lawyers' Association, stated in the interview that sex workers and their clients are subject to a C&E sentence at the discretion of the public security bureaus after undergoing administrative punishment under the Public Security Administrative Punishment law. *Id.*

58. See 收容教育 [Asylum Education], *supra* note 42 (last updated Aug. 24, 2014) (stating that detention education is an administrative measure based on a different legal basis and goal—reformation of the person detained—than detention).

59. See Asia Catalyst, *supra* note 19 (reporting examples of sex workers who used their connections to discover where they would be detained and to borrow enough money to pay police bribes).

60. See *id.* (arguing that custody and education not only deprives detainees of due process and their personal liberty but the program is built on “an extremely fragile legal foundation . . . based not on laws but regulations” See also 收容教育制度下，中国性工作者权利失去保障 [Under the Asylum Education System, China Lost the Right to Protect Sex Workers, cite from New York Times, by Andrew Jacobs], *supra* note 18 (quoting the Human Rights Watch's report on asylum education as saying the system was “another branch of the Chinese legal system [that] is corrupt and should be abolished”).

continued to steadily increase.⁶¹ The current detention education system has no positive effect and does not successfully educate or redeem sex workers and their clients.⁶²

Reeducation centers claim that the purpose of establishing detention education is to provide sex workers with a benign living environment for education and treatment to enhance their ability to find employment, supposedly by developing self-determination and teaching them how to live as law-abiding citizens.⁶³ However, some studies show that inmates in reeducation centers are mainly forced to perform unskilled jobs, and they gain no remuneration for their work.⁶⁴ On the contrary, the expensive cost for living and treatment in the reeducation centers has further aggravated their economic burdens, meaning that sex workers return to the sex trade after leaving the centers in order to make up for their economic losses and debts incurred in detainment.⁶⁵

Public security administrations have tracked more than 833,000 prostitution cases nationwide from 2002 to 2006, and the total number of people involved reached 1.82 million.⁶⁶ According to the data recorded since 2009, it is estimated that the total number of clients has reached about

61. See Asia Catalyst, *supra* note 19 (stating that harsh punishments do not deter people from getting involved in sex trade); see also 收容教育制度下，中国性工作者权利失去保障 [Under the Asylum Education System, China Lost the Right to Protect Sex Workers, cite from New York Times, by Andrew Jacobs], *supra* note 18 (according to a UN report, 600 million women are working in the sex industry despite reforms).

62. Asia Catalyst, *supra* note 19 (“Detainees are not given the opportunity to learn labor skills that might change their fates and typically spend their day doing manual labor that generates profit for the C&E centers.”).

63. See generally *id.* (noting that cities established C&E centers for implementing STD treatment and education for sex workers as a way of “eradicating prostitution”).

64. See, e.g., 收容教育制度下，中国性工作者权利失去保障 [Under the Asylum Education System, China Lost the Right to Protect Sex Workers, cite from New York Times, by Andrew Jacobs], *supra* note 18 (defining “custody and education” as a punishment system that detains women and requires them to do hard labor for free).

65. See Asia Catalyst, *supra* note 19 (last visited Oct. 4, 2014) (explaining that the financial burden placed on detainees to cover the cost of their incarceration and the excessive living charges forces them to return to sex trade); see also 收容教育制度下，中国性工作者权利失去保障 [Under the Asylum Education System, China Lost the Right to Protect Sex Workers, cite from New York Times, by Andrew Jacobs], *supra* note 18 (discussing the “substantial revenues” the detention shelters can make as women must pay for their own food, personal hygiene, and household good, adding up \$200 fees in some shelters).

66. 新华社 [The Xinhua News Agency], 公安机关5年来查获卖淫嫖娼案 83 万余起 [Public Security Administrations Have Seized More Than 830,000 Cases of Prostitution and Whoring in Five Years], CRI ONLINE (Mar. 29, 2007, 10:43 PM), <http://gb.cri.cn/14714/2007/03/29/107@1521832.htm> (describing how the authorities reduced criminal activity by focusing prostitution gangs and gambling).

26.5 million (estimates range between 17.3 to 35.8 million).⁶⁷ According to a United Nation's report, approximately 600 million women have worked in the sex industry since 1980,⁶⁸ and the sex industry has constituted a considerable sector of the Chinese economy.⁶⁹ Researchers estimate that in 2002, the sex industry employed approximately ten million Chinese people, and the annual amount of consumption amounts to one trillion CNY.

The increasing number of overseas Chinese female sex workers has attracted the attention of international community and the media.⁷⁰ The Chinese sex trade has even reached foreign lands. Some studies estimate that of the 20,000–40,000 prostitutes in Paris, ninety percent are women abducted from only three countries, one of which is China.⁷¹

It should be noted that the severely enforced punitive measures do not restrain and effectively deter prostitution; rather, they only drive the sex trade underground and subject it to the control of organized crime. This endangers the lives of unlicensed prostitutes, allowing a great deal of human rights violations by police to occur, infectious disease transmission to increase, and the nation's public health burden to become more grave.⁷²

67. Sharing Air in Love (SAIL), *中国艾滋病形势与应对* [China's Epidemic and Response], CHENGDU MELTING LOVE SKY (July 16, 2012, 10:55 PM), http://blog.sina.com.cn/s/blog_62e772f501017b2q.html (examining risk factors that are contributing to the HIV epidemic in China, noting that 46% of the clients of female sex workers have HIV). *Id.*

68. *收容教育制度下，中国性工作者权利失去保障* [Under the Asylum Education System, China Lost the Right to Protect Sex Workers, cite from New York Times, by Andrew Jacobs], *supra* note 18.

69. See 钟伟 [Zhong Wei], *透视中国的性产业* [A Close Look at China's Sex Industry], (Oct. 2, 2000), <http://web.archive.org/web/20020421054050/http://www.usembassy-china.org.cn/sandt/sex-industry.html> (accessed by searching for <http://www.usembassy-china.org.cn/sandt/sex-industry.html> in the Internet Archive index) (stating that half of a prostitute's income goes directly to consumption representing 250 billion RMB, the official currency of the People's Republic of China).

70. See generally Nicholas Vinocur & Emile Picy, REUTERS (Dec 4, 2013 4:50 PM), <http://uk.reuters.com/article/2013/12/04/uk-france-prostitution-idUKBRE9B30R220131204> (reporting a reform on prostitution law that passed in France in response to the influx of foreign prostitutes within its borders).

71. See *id.* (showing an increase from a decade ago when only one in five prostitutes were foreign).

72. See 钟伟 [Zhong Wei], *透视中国的性产业* [A Close Look at China's Sex Industry], *supra* note 69.

E. *Detention education has adverse impact on prevention and control of venereal disease and HIV/AIDS*

The current detention education system has no positive effect on prevention and control of venereal disease and HIV/AIDS.⁷³ According to data collected in the past 10 years, sexual transmission has been the main route of HIV transmission in China, and among the new reported cases of HIV positive and AIDS patients in 2012, 56,073 cases (sixty-eight percent) contain heterosexual transmission and 15,768 cases (roughly nineteen percent) involve homosexual transmission.⁷⁴ There is no evidence showing that reeducation centers provide sex workers with a favorable or effective environment for rehabilitation.⁷⁵ On the contrary, the risks of being detained and punished have forced sex workers to hide their true identity, making it difficult for them to access necessary testing, counseling, prevention, treatment, and care in response to these diseases.⁷⁶ Another problem remains that sex workers decline to use condoms, because police take the use of a contraceptive as evidence of prostitution.⁷⁷ Because these same police often accept money as a bribe,

73. *Joint Statement Compulsory Drug Detention and Rehabilitation Centres*, UNAIDS at 1 (Mar. 8, 2012), http://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/JC2310_Joint%20Statement6March12FINAL_en.pdf.

74. National Center for AIDS/STD Prevention and Control, China CDC: Updates on the AIDS/STD epidemic in China and main response in control and prevention in September 2012, *Chinese Journal of AIDS & STD*. 2013 19 (2) 85.

75. UNAIDS, *supra* note 73, at 1. The evidence that exists points to extensive abuse (sexual and physical), forced labor, and substandard conditions for adequate human existence. *Id.*

76. 王颖馨 [Wang Yingxin], 《山东省低档场所女性性工作者艾滋病知识、态度行为变化及干预效果分析》 [*An Analysis of AIDS-related KABP Behaviors and Effectiveness of Intervention Among Low Graded Female Sexual Workers in Shandong Province*], available at <http://www.doc88.com/p-6703976745989.html>, (last visited Oct. 4, 2014) (explaining that an environment with no discrimination may attract more female sex workers to participate in face-to-face health consultation and regular physical examination and laboratory tests).

77. ASIA CATALYST, *supra* note 19. *See Also* 梁芸 [Liang Yun], 南宁市低档场所性工作者艾滋病/性病相关知、信、行的调查分析 [*Knowledge, beliefs and behaviors concerning STD/ HIV/AIDS among low-graded sex workers in Nanning*], (June 2010) (Guangxi Medical University M.A. degree paper), available at <http://www.doc88.com/p-4199995980709.html> (reporting that the subjects of this study are low-graded sex workers chosen by a method of quota sampling, namely 2-3 sex workers are chosen in each divided area to interview by chance, totaling 243; with respect to promoting condom usage rate, the percentage of the most needed support among their responses is: bosses' support 16.5%; public security administrations no longer using condom as evidence of illegal behavior 20.2%; and customers' support 10.7%).

sex workers unfortunately need to work even more under these terrible conditions to pay the bribes and make up for their loss.⁷⁸

V. RECOMMENDATIONS

We suggest that the Chinese government should severely crack down on the organized crime of sex industry, and at the same time abolish detention education. The “Law of the PRC on Penalty in Public Security Administration” can be implemented for the time being, but it must be revised. Finally, great efforts should be made for preventing and reducing social discrimination, ensuring legitimate rights and interest of vulnerable groups, and providing more job opportunities for those involved.

A. *Take More Severe Measures to Crack Down on Organized Crimes in the Sex Industry*

The real problem of the sex industry is not the actual sex workers and their clients *per se*, but organized criminal activity.⁷⁹ In recent years, the sex industry has become increasingly organized, specialized and intertwined with gang elements. These networks are well organized, are thoroughly planned, and have certain stability. The measures they take, however, are cruel and odious, making victims suffer from direct and colossal physical and mental harms that make resistance futile. Cases like these occur frequently and significantly impact the larger society. The victims of these organized criminal elements are often from vulnerable groups, such as rural women and teenagers.

Organized crimes often tend to be associated with corruption and abuse of power by law enforcement. In turn these cause serious threat to citizens' personal safety, and encourage illegal behaviors such as sexual assault, rape, personal injury, money laundering, bribery, illegal restriction of personal freedom, abducting and trafficking of women and children, including cross border transactions. Furthermore, the formation of these gangs and criminal organizations threaten the stability of the nation and society. Criminalization of the prostitution industry in China has many ill effects for those involved; they must attempt to hide their true

78. See ASIA CATALYST, *supra* note 19, at 25 (noting that sex workers feel obligated to pay large bribes in an attempt to avoid detention, this imposes a heavy financial burden on sex workers and their families).

79. 买世蕊 [Mai Shirui], 对组织卖淫有关犯罪量刑一定要重判 [The Criminal Penalties for Prostitution Organizers Must be Heavy], PEOPLE NET Tianjin Window (Dec. 22, 2010), <http://www.022net.com/2010/12-22/406559323312378.html>. See generally 钟伟 [Zhong Wei], 透视中国的性产业 [A Close Look at China's Sex Industry], *supra* note 69 (stating that in several parts of China, organized crime plays a large role in facilitating the crime of prostitution).

identity, which often leaves them unable to protect their personal and property rights, and they risk exploitation by criminal organizations who seek to grow the underground sex industry. The harsh penalties against sex workers and the criminalization of sex work make the group dare not to expose their identity; instead, they cannot protect themselves and actually become a significantly more vulnerable and marginalized group. This viscous cycle enables the sex workers to be increasingly controlled by criminal organizations, and it also facilitates the rampancy of an increasingly violent underground sex industry.⁸⁰

Judicial authorities should severely crack down on such criminal activities and fight against systematic gang crimes and other organized crimes of the sex industry.⁸¹ Those who organize, force, tempt, accommodate others to prostitute, or have commercial sex with teenagers should be legally sanctioned in order to contain the rampant spread of such crimes. These laws are already in place and should be enforced. However, the very next place to initiate effective reform and curb the unwanted, detrimental effects of the underground sex industry is to abolish detention education.

B. Abolish Detention Education, and Modify the Punitive Measures Stipulated in “Law of the PRC on Penalty in Public Security Administration”

As a kind of ex-judiciary system, detention education should be abolished by the law.⁸² The “Decision on the Severe Prohibition against Prostitution and Whoring” and “Law of the PRC on Penalty in Public Security Administration” currently share the same status of legal validity,

80. See generally 法律網絡營銷網絡 [Law Network], 反思賣淫·憲法論文的現象 [Reflection on the phenomenon of prostitution, Constitutional papers], 9ASK.CN (Jan. 22, 2010, 5:13), <http://news.9ask.cn/falvlunwen/xflw/201001/302173.html> (emphasizing that the fines that are required for sex workers to pay makes them extremely vulnerable and easier to manipulate by those who would do so). See generally Mimi Lau, *China’s Sex Industry Flourishing Despite Dangerous Conditions and Corrupt Police*, SOUTH CHINA MORNING POST (Mar. 3, 2014, 9:30 PM), <http://www.scmp.com/news/china/article/1439543/chinas-sex-industry-flourishing-despite-dangerous-conditions-and-corrupt> (describing conditions under which the illegal prostitution industry in China has continued to thrive despite government intervention).

81. See generally 麥施蕊 [Mai Shirui], 刑事處罰賣淫組織者必須是重 [The Criminal Penalties for Prostitution Organizers Must be Heavy], PEOPLE NET, <http://pc.people.com.cn/GB/13546241.html>.

82. 全國人大委會關於廢止有關勞動教養法律規定的決定 [Decision of the Standing Committee of the National People’s Congress on Repealing Legislation on Reeducation through Labor] December 28, 2013, the Standing Comm. of the Nat’l People’s Cong., 12th Nat’l People’s Cong. (China 2013).

with both sharing the objective of punishment.⁸³ Accordingly, based on the fundamental legal principle of *lex posterior derogat priori*, the punishment for sex workers and their clients should be constructed by the provisions in the “Law of the PRC on Penalty in Public Security Administration.”⁸⁴ This means that punishment can only be detention and fining, and, consequently, the longer penalty of detention education should be abolished in practice.

Although the “Law of the PRC on Penalty in Public Security Administration” stipulates that punitive measures, such as detention or fine can be taken to sex workers and their clients, significant practical problems still exist. For example, most clients are able to pay the fine, while most sex workers with low income are unable.⁸⁵ Given that one of the main reasons that sex workers sell their bodies is poverty, fining simply drives them to find more clients. The consequences of this and other punitive measures like detention run counter to the real intention of reducing or even ending prostitution.⁸⁶ Therefore, it is necessary to revise the punitive measures targeted at sex workers in the “Law of the PRC on Penalty in Public Security Administration.” The first place to start is abolishing detention education for sex workers in the regulations and in practice, as it has already been abolished by law.

83. *Compare* 全国人大常委会关于严禁卖淫嫖娼的决定 [Decision of the Standing Committee of the National People's Congress on the Strict Prohibition Against Prostitution and Whoring] (promulgated by the Standing Comm. People's Cong. Beijing Municipality, Sept. 4, 1991, effective Sept. 4, 1991) (ASIAN LEGAL INFORMATION INSTITUTE) (China), available at <http://www.asianlii.org/cn/legis/cen/laws/dotscotnpcotspapaw1208> (noting that China holds a strict stance on stopping prostitution and all of the people that are complicit in allowing prostitution to flourish) *with* 中华人民共和国行政处罚法 [Public Security Administration Punishments Law of The People's Republic of China] (promulgated by the Order No. 38 of the President of the People's Republic of China, Aug. 28, 2005, effective Jan. 1, 2013). <http://www.lawinfochina.com/display.aspx?lib=law&id=4549&CGid=> (China) (stating that the public order demands that punishments of crimes pertaining to prostitution and soliciting prostitutes should be proportional to the acts themselves).

84. See Black's Law Dictionary (7th Ed. 2006) (translating the phrase to mean that new law should be interpreted over prior inconsistent law).

85. See 中顾法律网 [Law Network], 对卖淫现象的思考 [Reflection on the phenomenon of prostitution, *Constitutional papers*], *supra* note 12 (emphasizing that the punishment of fines tends to only make people more desperate, resulting in continued violations of the law in order to pay these fines in addition to the costs of daily living).

86. See *id.* (stating that because unemployment is the most terrible problem for people in a market-oriented economy, the fines in place to punish prostitution are counter-productive because it compels most people involved in the sex industry to remain in order to pay the fines).